

Horn v Manhattan Embassy Co.

2010 NY Slip Op 30180(U)

January 21, 2010

Supreme Court, New York County

Docket Number: 117878/06

Judge: Joan M. Kenney

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JOAN M. KENNEY
J.S.C. Justice

PART 8

Lawrence Horn and Judith Miller,

INDEX NO. 117878/06

- v -

Manhattan Embassy Co., et al.,

MOTION DATE 9/9/09

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1-23

Answering Affidavits — Exhibits _____

24-29

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

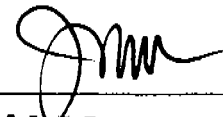
**MOTION IS DECIDED IN ACCORDANCE
WITH THE ATTACHED MEMORANDUM DECISION.**

FILED

JAN 27 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: January 21 2010



JOAN M. KENNEY J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 8

-----x
LAWRENCE HORN and JUDITH MILLER,
Plaintiffs,

Index No.: 117878/06

-against-

DECISION & ORDER

MANHATTAN EMBASSY CO., A LIMITED
PARTNERSHIP, HELMSLEY-SPEAR, INC.,
and QUALITY CLEANING CORP.,

Defendants

FILED

JAN 27 2010

NEW YORK
COUNTY CLERK'S OFFICE

-----x
JOAN KENNEY, J.:

Defendant Quality Cleaning Corp. (Quality) moves, pursuant to CPLR 2221, for an order vacating the orders of this court dated May 6, 2009 and June 3, 2009, and for an order sanctioning plaintiffs for intentionally misrepresenting issues to the court and engaging in frivolous conduct with no basis in law.

FACTUAL BACKGROUND

The underlying action involves a slip and fall injury at premises owned and operated by Quality's co-defendants. Quality was retained to provide certain maintenance services to the premises' terrazzo floors.

The court's order of May 6, 2009, following a compliance conference, required, among other things not subject to the instant motion, Quality to provide various documents requested at the examination before trial (EBT) of Aaron Auster (Auster), allegedly the managing director and executive vice-president of Quality until the March, 2007, sale of Quality to another company. This order stated that:

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"If Quality Cleaning fails to comply in full with the above order, it shall be precluded from introducing any evidence on summary judgment or at trial of this action." (See Motion Exhibit "C").

The court's order of June 3, 2009, following another compliance conference, ordered, among other things not relevant to the instant motion, that:

"D Quality Cleaning will be precluded, without further order and without further notice from introducing any evidence on summary judgment or at trial of this action, unless, on or before July 3, 2009, it does the following:
(A) produce all books and records regarding payments received from Manhattan Embassy Co. & Helmsley-Spear for work done at 301 East 47th Street, NY NY-if none-affidavits to that effect from Ralph and Edith Sheppard
(B) Produce all responsive docs and items in the possession, custody & control of Aaron Auster, with respect to P's 1-21-2009 letter demand for documents & items requested at p. 102 of 11-10-08 EBT of Mr. Auster. If Auster has no possession, custody or control of any item requested, he must submit sworn affidavit to that effect."
(See Motion Exhibit "D").

Quality argues that Auster is no longer employed by Quality, nor was he employed by Quality at the time of his EBT, and so is a nonparty who is not under Quality's control. As a consequence, Quality contends that plaintiffs have failed to follow requisite procedures to obtain documents from a nonparty, for which failure Quality should not be sanctioned. Further, Quality claims that, at the same compliance conferences, and within the same court orders, its co-defendants were ordered to produce various documents, but no preclusion sanctions were provided in the case of their potential non-compliance. It is noted that Quality has also argued about the relevance of the payment records demanded in the June 3, 2009,

order; however, in its opposition, plaintiffs state that Quality did produce items responsive to the request for payment records, rendering this argument moot.

Plaintiffs aver that they have not received any of the documents requested from Quality that are within the possession and control of Auster, and further maintain that Auster is, in fact, under the control of Quality. To support their contention, plaintiffs have provided a copy of a letter dated October 22, 2008, from Quality's attorneys, in which the attorneys advise plaintiffs that their client, Quality, is scheduled to be deposed at their offices on November 10, 2008 (see Opposition papers Exhibit "1"). On November 10, 2008, Quality produced Auster to be deposed on its behalf (see motion Exhibit "K"). On January 6, 2009, Quality's attorneys again wrote to plaintiffs counsel, requesting a "copy of the deposition transcript of our client Quality Cleaning Corp., by Mr. Paul [sic] Auster from the deposition held on November 10, 2008 ..." (See Opposition Exhibit "2").

On January 21, 2009, plaintiffs' counsel demanded that Quality produce the documents, items and information set forth in the transcript of Auster's EBT (see Opposition Exhibit "4"). On January 26, 2009, Quality's counsel confirmed receipt of the demands made at the deposition of the witness produced by Quality (see Opposition Exhibit "5").

According to plaintiffs, and not disputed by Quality,

plaintiffs did not specifically request the deposition of Auster, but Quality chose to produce Auster as its representative witness.

Auster testified that he was the managing director of Quality from 2000 or 2001 until 2006 or 2007, at which time Quality was sold (see EBT, at 63). Auster further testified that Quality continues to do business under the name "Royal Cleaning Contractors doing business as Quality Service Group or something like that," and that Quality still operates out of the same offices, and that he continues to work there as the executive vice-president (see EBT, at 58). Plaintiffs further point to several pages in the EBT transcript in which Quality's counsel instructed Auster to search for requested documents and objected to questions posed to Auster, stating that she (counsel) would not allow him to answer certain questions. EBT, at 18, 26, 37, 38, 72 and 75. These actions on the part of Quality's counsel, according to plaintiffs, indicate that Quality considered Auster to be its representative employee, and, therefore, cannot be considered to be a nonparty witness.

DISCUSSION

That portion of Quality's motion to vacate the earlier orders of this court, dated May 6, 2009, and June 3, 2009, is denied.

All of the cases cited by Quality in support of its argument that preclusion is an inappropriate sanction for failure to provide demanded discovery are based on the fact that the witness who is in possession and control of such information is a nonparty to the

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action (see *Velez v Hunts Point Multi-Service Center, Inc.*, 29 AD3d 104 [1st Dept 2006] (notice required for disclosure from a nonparty, pursuant to CPLR 3101); *Post v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 79 AD2d 558 [1st Dept 1980] (it is procedurally incorrect to seek discovery from a non-party without first seeking a court order, pursuant to CPLR 3101); *Tyrrell v Tyrrell*, 54 AD2d 931 [2d Dept 1976] (plaintiff must move for an order, pursuant to CPLR 3120, to have a nonparty produce documents)). In the instant matter, the court finds that, by its own admissions, Auster is a party to the action as Quality's representative witness.

All of the correspondence between counsel indicated above, as well as the fact that Quality produced Auster as its witness, and Auster's own testimony at his EBT, establish that both he and the documents sought are within the possession and control of Quality. Hence, plaintiffs need only follow the procedures mandated by CPLR 3126.

Pursuant to CPLR 3126, if a witness under the control of a party refuses to obey an order for disclosure, "the court may make such orders with regard to the failure or refusal as are just," which may include precluding the disobedient party from supporting or opposing claims or from producing evidence in motions or at trial.

"The nature and degree of the penalty to be imposed pursuant to CPLR 3126 against a party who has refused to obey an order or wilfully fails to disclose information is a matter within the discretion of the

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court Absent an improvident exercise of discretion, a determination to impose sanctions for conduct which frustrates the disclosure scheme of the CPLR should not be disturbed" (see *Jaffe v Hubbard*, 299 AD2d 395 [2d Dept 2002]).

Quality also argues that plaintiffs failed to make a motion for sanctions with proper notice, pursuant to CPLR 3124, thereby depriving Quality of its due process rights to challenge the imposition of sanctions. However, CPLR 3124 only states that a party may move to compel compliance, but does not mandate such a specific procedure.

Further, in the instant matter, Quality received proper demands for discovery, as evidenced by the letters submitted along with the opposition papers, and also received adequate notice of, and actively participated in, the compliance conferences at which the subject orders were issued. The subject orders detailed the sanctions that would be imposed if Quality failed to comply with its orders. These court orders afforded Quality sufficient notice of the sanctions that would be imposed for its failure to obey, so as to meet any presumptive notice requirements of the CPLR (see generally, *Warner v Houghton*, 43 AD3d 376 [1st Dept 2007], *affd* 10 NY3d 913 (2008) (preclusion order was made orally at compliance conference instead of on papers, which, because it was oral and the defendant was not present at the conference, was deemed insufficient notice)).

In situations similar to the one at bar, in which a party was precluded from offering evidence for failing to obey a compliance

conference order, courts have determined that there is no basis to disturb the preliminary conference preclusion order when the precluded party failed to take an appeal (see *Barber v Ford Motor Company*, 250 AD2d 552 [1st Dept 1998]).

Quality's other argument, that it was treated differently from its co-defendants, is also found to be unpersuasive.

Finally, that portion of Quality's motion seeking sanctions against plaintiffs, is also denied.

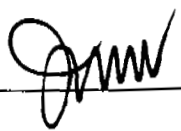
In order to impose the sanctions requested by Quality against plaintiffs, the actions complained of must be shown to have been undertaken to delay or prolong the litigation, or to consist of false statements (see 22 NYCRR 130-1.1 (c)). The record contains no evidence of such actions by plaintiffs, and Quality's argument for the imposition of sanctions against plaintiffs is founded on plaintiffs' repeated requests for the discovery which forms the basis of the subject preclusion orders and the within decision and order. Accordingly, it is

ORDERED, that defendant Quality Cleaning Corp.'s motion is denied, in its entirety; and it is further

ORDERED, that the parties appear for a conference on February 26, 2010 at 9:30 a.m., in Room 304 at 71 Thomas Street.

Dated: January 21, 2010

ENTER:



Joan Kenney, J.S.C.

FILED
JAN 27 2010
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