

Lee v 1610 Realty, LLC
2010 NY Slip Op 31081(U)
May 6, 2010
Supreme Court, New York County
Docket Number: 102744/08
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **HON. EILEEN A. RAKOWER**

PART 15

Index Number : 102744/2008

LEE, CHAZ

vs

1610 REALTY

Sequence Number : 003

COMPEL

INDEX NO. 102744/08

MOTION DATE _____

MOTION SEQ. NO. 003

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 ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

PAPERS NUMBERED

FILED

MAY 05 2010

NEW YORK COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

Dated: 5/3/10

HON. EILEEN A. RAKOWER

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):

5-5-10

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
CHAZ LEE, an infant by his mother and natural guardian,
ANGELIA LEE, and ANGELIA LEE, individually,

Plaintiffs,

Index No.
102744/08

- against -

DECISION/ORDER

1610 REALTY, LLC and SAFEGUARD REALTY
MANAGEMENT INC.,
Defendants.

002&003

-----X
HON. EILEEN A. RAKOWER

Plaintiffs bring this action for personal injuries allegedly sustained by infant plaintiff's exposure to "hazardous chipping, peeling and/or flaking paint, paint chips and/or dust containing lead," while residing at the premises located at 267 West 139th Street in the County and State of New York, beginning with infant plaintiff's birth on September 12, 2005, until his diagnosis of lead poisoning, on or about August 10, 2007. Infant plaintiff's mother, Angelia Lee, brings the action as infant plaintiff's guardian and individually. Defendants 1610 Realty, LLC and Safeguard Realty Management, Inc. ("Safeguard") are alleged to have owned, managed, maintained and controlled the subject premises.

Safeguard asserts that at Ms. Lee's deposition, she testified that she and her son lived at a shelter before moving into the subject apartment, and that while living at the shelter, infant plaintiff tested positive for lead poisoning. Ms. Lee would not provide the name of the shelter, and her counsel has refused to provide the name and address to Safeguard's counsel. Safeguard argues that it will be prejudiced without the shelter records because they have a direct bearing on plaintiffs' injury and damages claims. Safeguard claims that as plaintiffs assert that infant plaintiff has developmental issues, it is entitled to have access to the shelter records because his problems "could be the result of his removal from an abusive household or the events and conditions that precipitated the removal."

Safeguard now moves for an order compelling plaintiffs to (a) "provide the name and address of the shelter in which plaintiff and her infant child resided as well

as compel plaintiff to provide authorizations permitting [Safeguard's counsel] to obtain copies of records maintained by the shelter; (b) In the alternative . . . [an] Order, pursuant to judicial subpoena, the release of the records maintained by the aforementioned shelter to this Court for an in camera inspection . . . " Plaintiffs oppose Safeguard's motion. By separate motion, plaintiffs move to strike Safeguard's answer pursuant to CPLR 3126 and move to compel a further deposition of Ivan Villaruel and/or Halbert Walker pursuant to CPLR 3124; and for an Order permitting them leave to file their note of issue while discovery is continuing. Safeguard opposes plaintiffs' motion.

Safeguard, in support of its motion, submits: a Judicial Subpoena Duces Tecum; the pleadings; the deposition transcript of plaintiff Angelia Lee; and two letters exchanged between Safeguard's counsel and plaintiffs' counsel.

Plaintiffs, in opposition, claim that the name and address of a domestic violence shelter is confidential, and that Safeguard is not entitled to shelter records pursuant to 18 NYCRR §452.10. Plaintiffs submit copies of records from the New York City Department of Health regarding an inspection that was conducted of the subject shelter. The report shows that there was no lead found on the shelter premises. Thus, plaintiffs argue, Safeguard has no legitimate basis for requesting the address of the shelter or the shelter records. In any event, plaintiffs assert, Ms. Lee does not recall the shelter address.

18 NYCRR 452.10 is part of the Regulations of the Department of Social Services, and does not address disclosure of information by private persons such as Ms. Lee. 18 NYCRR 452.10 (c) (1) directs that the addresses of shelters must be held confidential. The statute also directs that information about "operation of residential programs for victims of domestic violence and . . . the residents of such programs are confidential." Such information may only be obtained by court order. Additionally, disclosure by an "agency or person given access to any books, records, reports and papers relating to the operation of a residential program for victims of domestic violence pursuant to subdivision (a) of this section or to the residents of such program " may only be made pursuant to a court order.

There is no valid reason to disclose information about the subject shelter. On or about November 20, 2009, plaintiffs sent Safeguard copies of New York City Department of Health records regarding the inspection of the subject shelter. The inspection report does not list the shelter address, but was conducted on August 21, 2007, during the three month period of time that Ms. Lee testified she stayed at the shelter. The report states, in relevant part:

Conducted a visual and XRF inspection 27 readings were taken. 0 were positive for lead hazards . . .¹

The DOH report establishes that infant plaintiff's elevated lead levels, discovered during the time that he was at the shelter, were not attributable to any lead hazards within the shelter. Plaintiffs also provided Safeguard with an updated authorization so that it could obtain infant plaintiff's health and environmental records. Safeguard's argument, that it still needs the shelter records in order to determine whether infant plaintiff's alleged developmental problems "could be the result of his removal from an abusive household or the events and conditions that precipitated the removal," is without merit. The medical authorizations and IME of infant plaintiff are sufficient.

Plaintiffs, in support of their motion to strike and/or compel, submit: a copy of their combined discovery demands, dated May 2, 2008; a copy of Safeguard's response to plaintiffs' combined demands and the "preliminary conference order dated August 15, 2008; a copy of plaintiffs' notice for discovery and inspection, dated September 30, 2009; and a copy of plaintiffs notice for discovery and inspection, dated November 20, 2009. Plaintiffs claims that Safeguard has failed to comply with certain enumerated demands contained in plaintiffs' May 2, 2008 combined demands. Plaintiffs also point out that Safeguard has failed to comply with plaintiffs' D&Is, dated September 30, 2009, November 20, 2009 or this the so-ordered stipulation dated November 20, 2009. Additionally, plaintiffs claim that they are entitled to further depositions of Safeguard's witnesses, Ivan Villarruel, Building Manager and Halbert Walker, Superintendent of the subject building, because they specifically

¹The report states that the "dust [wipe] samples taken for further analysis." However, Safeguard does not allege, and there is no evidence, that this testing resulted in any positive lead findings.

reserved their right to do so in the November 20, 2009 stipulation. Finally, plaintiffs argue that, due to Safeguard's repeated failure to comply with outstanding discovery, they have been prevented from placing their case on the trial calendar. Thus, plaintiffs assert, they should be permitted to file their note of issue because the delay is due to Safeguard's, not their, failure.

Safeguard, in opposition to plaintiffs' motion, submits responses to plaintiffs' various demands and claim that plaintiffs' motion is now moot. Further, Safeguard asserts that plaintiffs' request for additional depositions of its witnesses is improper since plaintiffs have failed to show why additional depositions are needed. By way of reply, plaintiffs assert that "defendants' belated and wholly inadequate attempts to comply with the aforementioned discovery . . . only came after this motion was served . . . [d]efendants' purported Supplemental Response to Plaintiffs' Combined Demands, dated March 15, 2010 . . . contain untimely and improper boilerplate objections . . . Plaintiffs go on to list the discovery which remains outstanding.

Pursuant to CPLR §3126, a court may impose sanctions when a party willfully fails to disclose information which the court finds ought to have been disclosed. The sanction of striking a party's answer is warranted when a party repeatedly and persistently fails to comply with several disclosure orders issued by the court. (*Yoon v. Costello*, 29 A.D.3d 407[1st Dept. 2006]).

CPLR 3124 states:

If a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article . . . the party seeking disclosure may move to compel compliance or a response.

Here, Safeguard's conduct does not rise to the level of noncompliance necessary to impose the extreme sanction of striking its answer. Indeed, Safeguard has responded to plaintiffs' discovery demands. Even so, plaintiffs assert that certain of the responses to its May 2, 2008 demands are deficient. The Court notes that the parties entered into a preliminary conference order on August 15, 2008, which directed Safeguard to "respond to [plaintiffs'] combined demands 5/2/08 within 45 days." After the preliminary conference, a response to the 5/2/08 combined demands was not specifically noted as outstanding at any of the compliance conferences that were held on January 9, 2009, March 13, 2009, May 15, 2009 or September 11, 2009.

Plaintiffs did not raise the issue again until a compliance conference which was held on November 20, 2009. There, the so-ordered stipulation directed Safeguard to “provide supplemental responses to the demands 15,16,18,28,29,30,31,32,33,34,37,39,40,41,42,43,46,48,49,50,55,63,70, 73,75&76 of [plaintiff’s] combined demands w/in 45 days . . .”

Safeguard submits its “supplemental Response to Plaintiffs’ Combined Demands . . .” which is dated March 15, 2010. The supplemental response addresses each of plaintiffs’ demands. Thus, Safeguard has evidenced that it has substantially complied with plaintiffs’ discovery requests through its submissions here. (see generally; *Simpson v. Sinha*, 246 A.D.2d 361[1st Dept. 1998]). In support of their arguments that Mr. Villarruel and Mr. Walker should be further deposed, plaintiffs point to the fact that Safeguard produced new photographs. However, plaintiffs do not state how further depositions of the witnesses would provide additional information about the photographs.

Wherefore it is hereby

ORDERED that defendants 1610 Realty, LLC and Safeguard Realty Management, Inc.’s motion to compel is denied; and it is further

ORDERED that plaintiffs’ motion to strike and/or compel is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: May 3, 2010



EILEEN A. RAKOWER, J.S.C.

FILED
MAY 05 2010
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