

City of New York v 330 Cont. LLC

2010 NY Slip Op 31532(U)

June 2, 2010

Supreme Court, New York County

Docket Number: 406350/07

Judge: Michael D. Stallman

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

PRESENT: Hon. MICHAEL D. STALLMAN
Justice

PART 21

CITY OF NEW YORK, DEPARTMENT OF BUILDINGS and DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT,

INDEX NO. 408350/07

Plaintiffs,

- v -

MOTION DATE 3/24/10

MOTION SEQ. NO. 002

330 CONTINENTAL LLC, et al.,

MOTION CAL. NO. 28

Defendants.

The following papers, numbered 1 to 9 were read on this motion to dismiss, to suppress, and to disqualify and for sanctions, and cross motion for sanctions.

Order to Show Cause— Affirmation — Exhibits 1-12

PAPERS NUMBERED

1-2

Notice of Cross Motion—Affirmation — Affirmation—Exhibits A-C [Affirmation—Exhibits A-E], D-P

4-6

Replying Affirmation — Exhibit 1; Affirmation in Further Support of Defendants' Motion

7; 8

Affirmation in Reply

9

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion and cross motion are decided in accordance with the annexed memorandum decision and order.

Dated: 6/2/10
New York, New York

FILED
JUN 10 2010
NEW YORK COUNTY CLERK'S OFFICE

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NOTICE FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

[Stamp] MICHAEL D. STALLMAN

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

6 9-10

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7**

-----X
CITY OF NEW YORK, DEPARTMENT OF BUILDINGS
and DEPARTMENT OF HOUSING PRESERVATION
AND DEVELOPMENT,

Index No. 406350/07

Plaintiffs,

DECISION and ORDER

v.

330 CONTINENTAL LLC, LEE SAM LLC,
315 MONTROYAL LLC, BELT LLC, RB
ESTATES LLC, 316 PENNINGTON LLC,
PARKWAY LLC, FITOS NEOPHYTOU,
SHARON OLSEN a/k/a SHARON PODOLSKY,
GEORGE DFOUNI, THE LAND AND
BUILDING THEREON KNOWN AS 330-336
WEST 95TH STREET, NEW YORK, NEW YORK,
BLOCK 1253, LOT 41, THE LAND AND
BUILDING THEREON KNOWN AS 315
WEST 94TH STREET, NEW YORK, NEW YORK,
BLOCK 1253, LOT 13, THE LAND AND
BUILDING THEREON KNOWN AS 316
WEST 95TH STREET, NEW YORK, NEW YORK,
BLOCK 1253, LOT 3, AND "JOHN DOE"
AND "JANE DOE," FICTITIOUS NAMES,
TRUE NAMES UNKNOWN, THE PARTIES
INTENDED BEING OWNERS, OPERATORS,
LESSORS, LESSEES, OCCUPANTS AND
OTHER PERSONS AND ENTITIES CLAIMING
ANY RIGHT, TITLE OR INTEREST IN THE
PREMISES WHICH IS THE SUBJECT OF
THIS ACTION, AND THEIR AGENTS AND
EMPLOYEES,

Defendants.

-----X
HON. MICHAEL D. STALLMAN, J.S.C.:

In this action to abate an alleged public nuisance, plaintiffs allege that defendants, who own apartment hotels on the Upper West Side, are renting the rooms to tourists and other transients, in violation of zoning restrictions and the certificates of occupancy of the buildings. Except for

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JUN 10 2010
NEW YORK
COUNTY CLERK'S OFFICE

defendant 315 Montroyal LLC, all defendants now move for an order to dismiss the complaint and for sanctions against the City, contending that the City improperly obtained rent registrations from the State Division of Housing and Community Renewal (DHCR). Alternatively, the moving defendants seek an order suppressing the information obtained from DHCR. The City cross-moves for sanctions against the moving defendants, on the ground that these defendants made a frivolous motion intended to delay the nuisance abatement action.

BACKGROUND

The relevant background of this nuisance abatement action is set forth in the Appellate Division's decision in *City of New York v 330 Continental LLC* (60 AD3d 226 [1st Dept 2009]).

“For the better part of a century, some of the units in three single room occupancy apartment hotels on the Upper West Side of Manhattan have been rented out as short-term accommodations for tourists and others temporarily staying in the City of New York.

* * *

The three subject buildings are seven-story single room occupancy (SRO) apartment hotels [citation omitted]. The Continental, located at 330 West 95th Street, has 207 SRO units; the Montroyal, located at 315 West 94th Street, has 200 SRO units; and the Pennington, located at 316 West 95th Street, has 184 SRO units. The record reflects that, in each of the three buildings, certain SRO units are rented to tenants for permanent occupancy, and other SRO units are rented to tourists on a short-term basis. Defendants, the owners and managers of the buildings, advertise the buildings as offering short-term accommodations to tourists on travel-oriented Web sites such as Orbitz.com, Expedia.com, Hotels.com and Yahoo Travel.

The record establishes that the rental of units within the buildings for short-term, nonpermanent occupancy is a practice with a long history, dating back to the 1940s, if not earlier. The longstanding practice of renting rooms in the buildings for short-term occupancy, including to overnight lodgers, is documented by such contemporaneous evidence in the record as the daily registers that were maintained for the buildings for the years 1941, 1945, 1948 and 1950, and by the buildings' listings and advertisements in the Manhattan 'Yellow Pages' during the same time period.”

Id. at 227-228.

In their First Set of Interrogatories and Demand for Discovery and Inspection dated December 17, 2007, plaintiffs requested, among other things, "All documents filed with and/or received from the NYS DHR and/or the Hotel Stabilization Association and/or the Office of Rent Control from [12/1/59] to the present." Gavaris Affirm., Ex 1. Plaintiffs' discovery request was prepared by Deborah Rand, Esq., the Assistant Commissioner of Housing Litigation for the New York City Department Housing Preservation and Development and Acting Assistant Corporation Counsel for the City of New York, and by Mary O'Sullivan, Esq., an Assistant Corporation Counsel for the City of New York. In emails purportedly sent on April 13, 2009 and on April 23, 2009, an attorney for plaintiffs, Rand asked defendants' counsel when plaintiff would received "the DHCR annual rent registration forms for all of the units in each of the three buildings for 2007, for 2008 and, if filed by the time the documents are provided, for 2009 . . ." Gavaris Affirm., Exs 2, 3.

In early May 2009, O'Sullivan contacted DHCR to request the rent registration statements for the buildings for 2006, 2007, and 2008. O'Sullivan Aff. ¶ 7. On May 13, 2009, O'Sullivan executed a "Pledge of Confidentiality" with DHCR. Shortly thereafter, O'Sullivan received certified "Registration Roll Reports" for 2006, 2007, and 2008 for each of the buildings. *Id.* ¶ 8.

As the moving defendants indicate, plaintiffs continued to press for production of DHCR rent registrations notwithstanding that they had received the rent registrations from DHCR. In an email purportedly sent on September, 2009, Rand states, "I wanted to remind to you of your assurance that you would advise us by Tuesday, September 8 whether you would be turning over the DHCR registrations from the three subject premises for the period requested in Plaintiffs' discovery requests." Gavaris Affirm., Ex 8.

DISCUSSION

The moving defendants contend that plaintiffs illegally obtained confidential documents from DHCR. The moving defendants argue that plaintiffs' conduct constitutes an abuse of discovery warranting dismissal of the action, citing *Lipin v Bender* (84 NY2d 562 [1994]). Alternatively, the moving defendants request a protective order suppressing use of the rent registrations and disqualification of the attorneys who obtained the registration statements. Plaintiffs oppose the motion and cross-move for sanctions against defendants for having brought the motion.¹

Some fundamental principles are worth reviewing. “[A]venues of informal discovery of information . . . may serve both the litigants and the entire justice system by uncovering relevant facts, thus promoting the expeditious resolution of disputes.” *Niesig v Team I*, 76 NY2d 363, 372 (1990). “Article 31 does not ‘close[] off’ these ‘avenues of informal discovery,’ and relegate litigants to the costlier and more cumbersome formal discovery devices.” *Arons v Jutkowitz*, 9 NY3d 393, 407 (2007). Thus, it was not improper for plaintiffs to have resorted to other means of obtaining the rent registrations than through discovery requests.

Contrary to defendants' argument, CPLR 3120 does not require a party to disclose the fact that information was obtained through informal discovery. *Matter of Beiny* (129 AD2d 126 [1st Dept 1987]) is inapposite. In that trust accounting proceeding, counsel to the beneficiary of a trust served a combined notice of deposition and subpoena duces tecum upon a non-party, without giving notice to the trustee. The *Beiny* court found that notice did not comply with CPLR 3107. Here, plaintiffs did not subpoena documents from DHCR, and CPLR Article 31 did not require plaintiffs to proceed

¹ As a preliminary matter, the Court does not reject plaintiffs' opposition papers because they exceeded the page limits imposed by Rule 14 of the Rules of the Justices of the Supreme Court of NY County. Plaintiffs heeded the suggestion in this Court's own part rules to submit papers “with a readable typeface in large print (e.g., Arial - 14 point).”

by a subpoena.

As defendants indicate, the Rent Stabilization Law of 1969 and the Rent Stabilization Code assure that rent registrations are not subject to the Freedom of Information Law. Administrative Code of the City of NY § 26-517 (b); Rent Stabilization Code [9 NYCRR] § 2528.5.² Rent regulations also require DHCR to safeguard the confidentiality of certain information. For example, Rent Stabilization Code [9 NYCRR] § 2526.5 states, “The DHCR shall safeguard the confidentiality of information furnished to it at the request of the person furnishing such information, unless such information must be made public or available to a governmental agency in the interest of establishing a record for the future guidance of persons subject to the RSL [Rent Stabilization Law].”³

As plaintiffs point out, the fact that DHCR rent registration statements are not publicly available through FOIL is irrelevant to the question of whether plaintiffs properly obtained documents from DHCR, insofar as the City apparently was not seeking documents as a member of the public at large.

²The moving defendants also cite Emergency Housing Rent Control Law § 8586 (8) [McKinney’s Uncons Laws of NY § 8586]. However, the Emergency Housing Rent Control Law does not apply to the City of New York, by virtue of the Local Emergency Housing Rent Control Act [McKinney’s Uncons Laws of NY §§ 8601-8617]. See L 1962 ch 21 § 1.

Pursuant to the authority granted under the Local Emergency Housing Rent Control Act, the New York City Council enacted the City Rent and Rehabilitation Law (Administrative Code § 26-401 *et seq.*), commonly known as the New York City Rent Control Law. See *e.g. Stahl Assocs. Co. v State Div. of Housing and Community Renewal, Office of Rent Admin.*, 148 AD2d 258 (1st Dept 1989); *Festa v Leshen*, 145 AD2d 49 (1st Dept 1989).

³ The moving defendants also cite Emergency Tenant Protection Regulations [9 NYCRR] § 2506.5. However, it is not clear that the Emergency Tenant Protection Act of 1974 [ETPA] applies to these accommodations. See ETPA § 5 (a) (7) [Uncons Law § 8625 (a) (7)].

“[T]here have been many instances in which records need not be disclosed to the public at large under the Freedom of Information Law, but in which the same records have been shared with other government agencies when it is clear that the agencies have sought the records in the performance of their official duties. Unless a statute forbids an agency from so doing, cooperation among agencies has been encouraged and fostered.”

Comm on Open Govt FOIL-AO-13091 (2001). Here, Public Housing Law § 14 (m) grants the Commissioner of DHCR the power to “assist, participate in and otherwise cooperate with, at the request of, the person or persons or department of any county, city, town, village or other local government charged with the enforcement of laws, ordinances, codes and regulations in relation to multiple dwellings in the discharge of such duties. . .” As defendants indicate, DHCR has a Memorandum of Understanding (MOU) granting access to DHCR with several New York City agencies. *See* Gavaris Reply Affirm., Ex 1. The fact that DHCR does not have a MOU with the New York City Law Department does not imply, in itself, that DHCR could not share information with the New York City Law Department at all.

As quoted above, Rent Stabilization Code § 2526.5 requires DHCR to safeguard the confidentiality of information furnished to it “at the request of the person furnishing it.” Here, the moving defendants do not claim that they had previously requested DHCR to keep the rent registrations confidential. Neither has DHCR stated that it deems all rent registrations to be confidential. *See* Rand Affirm., Ex C [Connor Affirm.]. It would appear that, in requiring plaintiffs’ counsel to execute a pledge of confidentiality before providing the requested rent registrations, DHCR believed that it was authorized to share the information with the New York City Law Department on a condition of confidentiality.

The circumstances under which DHCR may release confidential information appears to

depend on the rent-regulated status of the building or units at issue. To illustrate, if the Rent Stabilization Code applies,⁴ then DHCR may make confidential information public or available to a governmental agency “in the interest of establishing a record for the future guidance of persons subject to the RSL [Rent Stabilization Law].” 9 NYCRR 2526.5. If the New York City Rent and Eviction Regulations (governing rent controlled apartments) apply, then DHCR may make confidential information public if the Commissioner “determines that the withholding thereof is contrary to the public interest.” 9 NYCRR 2209.6. Thus, release of confidential information “in the public interest” for rent-controlled units would appear to cover a broader range of circumstances than disclosure for rent-stabilized apartments.⁵ Only DHCR is in the best position of knowing the actual rent-regulated status of the units registered with DHCR, and thus, only DHCR would know the permissible circumstances under which it may release confidential information. This Court cannot here determine the rent regulatory status of the housing accommodations at issue; the owners’ filings are not dispositive.

⁴ It is not clear that the Rent Stabilization Code applies to the housing accommodations at issue. The Rent Stabilization Code applies to all classes of housing accommodations subject to the Rent Stabilization Law, except for “rooms or other housing accommodations in hotels where such housing accommodations (1) are used for transient occupancy . . .” Rent Stabilization Code [9 NYCRR] § 2520.11 (g).

It is not clear that this exception does not apply. On the one hand, it cannot be determined here whether the housing accommodations at issue fall within definition of a “hotel” under the Rent Stabilization Code. *See* 9 NYCRR 2520.6 (b). On the other hand, defendants have consistently maintained that the apartment hotels may be used, and have been used, for transient occupancy. As the Appellate Division stated, “defendants readily admit that a significant number of units in each building are (and have been for many decades) rented to tourists for periods of less than 30 days.” *330 Continental LLC*, 60 AD3d at 232.

⁵ The Court notes that this difference also exists between the ETPA regulations and the Emergency Housing Rent Control Act. *Compare* 9 NYCRR 2506.5 *with* Emergency Housing Rent Control Act § 8586 (8).

Because confidential information can be released, it was not improper for plaintiffs to have requested the information from DHCR. In addition, O'Sullivan made her identity and interest known to DHCR when she requested the rent registrations. *See Niesig*, 76 NY2d at 376. In her email request to DHCR, O'Sullivan identified herself as "an attorney at the NYC Law Department," "assigned to the above-reference litigation concerning the above-identified building locations." *Gavaris Affirm.*, Ex 5. The subject line of the email was "RE: City of New York, DOB and HPD v 330 Continental, LLC et al., Index No. 406350/07, NY County, Sup Ct." *Id.* Thus, DHCR was aware that O'Sullivan was requesting the information in connection with litigation, and that she was not seeking information as a member of the general public.

Defendants' argument that plaintiffs should not have been able to obtain the rent registration from DHCR is, in effect, a collateral attack on DHCR's determination to release the information. Thus, this is not the proper context to review whether DHCR properly released information to plaintiffs' counsel. Moreover, DHCR is not a party to this action.

Even if one were to assume (as this Court does not) that DHCR erred in releasing the information to plaintiffs' counsel, for the sake of argument, plaintiffs' action should not be dismissed due to such an error. Neither should the rent registration be suppressed. *Lipin v Bender* (84 NY2d 562, *supra*) is distinguishable. In *Lipin*, at a hearing before a Special Referee, the plaintiff took and read privileged documents belonging to defendants' counsel. It was clear that the documents were privileged as attorney work product and as attorney-client communications. *Id.* at 570. Unlike attorney work product, which is not discoverable (CPLR 3101 [c]), the confidential information here may be released. DHCR willingly provided the information to plaintiffs' counsel, and only DHCR was in the position of determining, in the first instance, whether it properly disclosed confidential

information. The Court notes that item 41 of plaintiffs' discovery request was broader than the specific records that DHCR turned over to plaintiffs.

Moreover, defendants have not demonstrated that they are seriously prejudiced as a result of the production of the rent registration statements. The "wasted hours and effort dealing with a disputed discovery issue that simply did not exist" (Gavaris Reply Affirm ¶ 20) does not constitute prejudice under the circumstances presented.⁶

Therefore, the branch of the moving defendants' motion to dismiss the action, or in the alternative, to suppress the rent registration statements obtained from DHCR or to disqualify plaintiffs' counsel is denied.

Defendants also seek costs and sanctions against plaintiffs and their counsel. According to the moving defendants, plaintiffs misled the Court because Deborah Rand continued to demand production of rent registrations from defendants, even after Mary O'Sullivan obtained the rent registrations from DHCR.

DHCR undisputedly provided O'Sullivan with the 2007, 2008, and 2009 rent registrations on or about May 14, 2009. In an email purportedly sent on September, 2009, Rand states, "I wanted to remind to you of your assurance that you would advise us by Tuesday, September 8 whether you would be turning over the DHCR registrations from the three subject premises for the period requested in Plaintiffs' discovery requests." Gavaris Affirm., Ex 8. The moving defendants claim that counsel for plaintiffs claimed the need for the DHCR documents at discovery conferences on July 23, 2009 and on September 10, 2009. Gavaris Affirm. ¶ 14.

⁶ The Court notes that both sides could improve the current level of mutual cooperation in disclosure. Neither side has been as forthcoming as the Court would have preferred.

Although defendants argue that plaintiffs' counsel "misled" the Court, the record does not establish that plaintiffs asserted material factual statements that were false. 22 NYCRR 130-1.1 (c) (3). Defendants' counsel contends that, at a court conference on July 23, 2009, Rand informed a court attorney conducting the conference (referred to as a discovery master) that the City could not obtain the rent registrations from DHCR. Sheridan Affirm. in Further Support ¶ 3. However, the Court does not consider this contention, for it was raised for the first time in reply.⁷

Generally, a party should not be directed to produce documents that are already in the possession of the demanding party. *See Apple Bank for Sav. v Noah's Route 110, Inc.*, 210 AD2d 277 (2d Dept 1994)(granting protective order vacating request for documents); *see also Cornex, Inc. v Carisbrook Indus., Inc.*, 161 AD2d 376 (1st Dept 1990)(prolix notice to produce found improper because much of the information sought was also already in plaintiff's possession). However, according to Rand, "the City attorneys believed, albeit incorrectly, that in order to use DHCR rent registrations at trial in this action, the City would need to obtain the documents from defendants or by way of a court-ordered subpoena." Rand Opp. Affirm. ¶ 52; *see also* O'Sullivan Affirm. ¶ 9. Under these circumstances, the Court does not find that plaintiffs' continued demand for the production of the rent registration statements was "undertaken primarily to delay or prolong the resolution of the litigation or to harass or maliciously injure another." 22 NYCRR 130-1.1 (c) (2).

The City's cross motion for sanctions against the moving defendants is denied. Although the

⁷ Defendants also contend in reply that, in October 2009, plaintiffs did not truthfully respond to Defendants' Joint Second Demand for Discovery and Inspection, wherein plaintiffs answered that "Plaintiffs have no knowledge of 'Enforcement Case No. XI 410001/3-HI,' and therefore, are unable to respond to this request." *See* O'Sullivan Affirm., Ex F.

Plaintiffs claim that they did not learn of the enforcement proceeding until February 2010. Rand Reply Affirm. at 6-7 n 7. The issue of whether plaintiffs must now produce responsive documents to that demand can be raised at a future discovery conference.


Court has denied defendants' motion, it did not find it to be frivolous.

Accordingly, it is hereby

ORDERED that defendants' motion for dismissal of the complaint, or in the alternative, for disqualification of plaintiffs' counsel and for a protective order to suppress certain information, and for costs and sanctions is denied; and it is further

ORDERED that plaintiff's cross motion for sanctions against the moving defendants is denied.

Dated: June , 2010
New York, New York

ENTER: 

J.S.C.

MICHAEL MICHAEL D. STALLMAN

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