

Benayoun v Hamptons Mgt. Co., LLC

2010 NY Slip Op 32768(U)

October 1, 2010

Supreme Court, New York County

Docket Number: 115643/09

Judge: Eileen A. Rakower

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

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

PART 15

Index Number : 115643/2009
BENAYOUN, EYTAN
VS.
HAMPTONS MANAGEMENT
SEQUENCE NUMBER : 001
STRIKE

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

his motion to/for _____

PAPERS NUMBERED
1
2, 3
4

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

FILED
OCT 06 2010
NEW YORK
COUNTY CLERK'S OFFICE

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

Dated: 10/1/10.


HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/JUDG. SETTLE ORDER /JUDG.

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

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

-----X
EYTAN BENAYOUN,

Plaintiff,

- against -

HAMPTONS MANAGEMENT COMPANY LLC,
ROC-LE TRIOMPHE ASSOCIATES, LLC and
GENERAL ELECTRIC COMPANY,

Defendants

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

Index No.
115643/09

**DECISION
and ORDER**

Mot. Seq.
001

FILED
OCT 06 2010
NEW YORK X
COUNTY CLERK'S OFFICE

Plaintiff Eytan Benayoun ("Plaintiff") brings this action to recover damages for personal injuries allegedly sustained on October 31, 2008, when the oven in Plaintiff's brother's kitchen "blew up". Plaintiff alleges causes of action sounding in negligence, strict products liability, and breach of warranty. According to the complaint, defendants Hamptons Management Company LLC and Roc-Le Triomphe Associates, LLC ("the Building Defendants") were the building owner and management agency at the time of the incident, and General Electric Company ("GE") was the manufacturer of the of the oven.

Presently before the court is a motion by GE for an order pursuant to CPLR §3126 striking the pleadings of both Plaintiff and the Building Defendants for their alleged failure to comply with their discovery obligations. Alternatively, GE seeks an order compelling Plaintiff and the Building Defendants to produce the sought-after discovery pursuant to §3124, and adjourning the parties' deposition until 60 days after completion of said discovery.

GE submits an affirmation of counsel attesting to its good faith efforts to obtain the sought-after discovery prior to making the within application; and an affirmation in support of its motion. GE states that it served Plaintiff with its First Set of Interrogatories on December 29, 2009, seeking information as to the model and type of oven, the history of the particular oven, the nature of Plaintiff's injuries

and the resultant damages therefrom, and other questions. GE states that, as of the date of the affirmation (June 7, 2010), Plaintiff has failed to provide a response to GE's interrogatories.

Also on December 29, 2009, GE served its Combined Demands upon Plaintiff. The Combined Demands contained demands for discovery and inspection, collateral source information, any accident reports, expert information, medical records, party statements, the identity of witnesses, and a notice to take deposition. GE states that Plaintiff has failed to provide any response to its Combined Demands.

On January 29, 2010, GE served a set of Combined Demands, a Second Notice for Discovery and Inspection, and a Notice to Take Deposition upon the Building Defendants. GE states that it has yet to receive a response from the Building Defendants.

A Preliminary Conference ("PC") was held on March 9, 2010, wherein the parties entered into a PC Order. In the PC Order, Plaintiff was directed to provide authorizations for medical records by April 8, 2010 and to provide authorizations for employment records by April 23, 2010. The Building Defendants were directed to make the subject stove available for inspection upon reasonable notice, if it was still within their possession. GE states that none of the aforementioned directives in the PC Order were complied with.

Plaintiff submits an affirmation in opposition to GE's motion. Plaintiff's three-paragraph opposition states that Plaintiff served his interrogatory responses and responses to GE's demands upon GE on July 12, 2010, and attaches said responses as an exhibit to the affirmation.

The Building Defendants also submit an affirmation in opposition. The Building Defendants submit their responses to GE's Combined Demands upon them as exhibits to the affirmation, and claim that the motion must be denied as moot as against the Building Defendants.

GE submits a reply affirmation in further support of its motion. With respect to Plaintiff, GE notes that its opposition neither makes any mention of, nor submits any documents responsive to the PC Order. As for the responses submitted by

Plaintiff, GE claims that those responses are insufficient. GE also points out that Plaintiff's response to GE's interrogatories is not sworn to by the Plaintiff.

As for the Building Defendants, GE asserts that the Building Defendants have "failed to provide the most important discovery demanded of them - documentation identifying the stove." GE states that, while the Building Defendants have produced an invoice purporting to identify the subject stove, that invoice is dated November 5, 2008 (several days after the incident), and is thus an invoice for a stove other than the one which allegedly caused Plaintiff's injuries. Further, GE states that despite numerous requests to inspect the subject stove, the Building Defendants have failed to provide said stove for inspection.

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]). The moving party must show "conclusively that failure to disclose was willful, contumacious or due to bad faith." (*Dauria v. City of New York*, 127 AD2d 416[1st Dept. 1987]).

Plaintiff has failed to provide any response in its opposition addressing its non-compliance with the PC Order. Accordingly, Plaintiff is directed to provide any and all outstanding discovery from the PC Order within 20 days of receipt of a copy of this order with notice of entry thereof. In addition, Plaintiff is directed to provide a sworn response to GE's interrogatories within 20 days of receipt of a copy of this order with notice of entry thereof. Plaintiff's failure to comply with this order will be deemed willful and contumacious by the court.

The court directs the Building Defendants to produce any and all invoices pertaining to the purchase, delivery, and/or installation of the subject stove, or an affidavit stating that no such records are in the Building Defendants' custody or control within 20 days of receipt of a copy of this order with notice of entry thereof. Furthermore, to the extent that the subject stove remains in the custody or control of the Building Defendants, the court directs that the Building Defendants produce said stove for inspection within 60 days of receipt of a copy of this order with notice of entry thereof.

Wherefore it is hereby

* 5] ✓
ORDERED that Plaintiff is directed to produce all outstanding discovery from the court's March 9, 2010 PC Order, as well as sworn responses to GE's interrogatories within 20 days of receipt of a copy of this order with notice of entry thereof; and it is further

ORDERED that Plaintiff's failure to comply with this order will be deemed willful and contumacious by the court; and it is further

ORDERED that the Building Defendants produce any and all invoices pertaining to the purchase, delivery, and/or installation of the subject stove, or an affidavit stating that no such records are in the Building Defendants' custody or control, within 20 days of receipt of a copy of this order with notice of entry thereof; and it is further

ORDERED that to the extent that the subject stove remains in the custody or control of the Building Defendants, the Building Defendants shall produce said stove for inspection within 60 days of receipt of a copy of this order with notice of entry thereof; and it is further

ORDERED that the parties' depositions are hereby adjourned, with the dates to be determined at the previously scheduled October 19, 2010 compliance conference.

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

DATED: October 1, 2010



EILEEN A. RAKOWER, J.S.C.

FILED
OCT 06 2010
NEW YORK
COUNTY CLERK'S OFFICE