

Lorocco v 375 Park Ave., L.P.

2010 NY Slip Op 32980(U)

October 14, 2010

Supreme Court, New York County

Docket Number: 115754/2007

Judge: Louis B. York

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

PRESENT: YORK
Justice

PART 2

LOROCO, JOSEPH

INDEX NO.

115754/07
590683/09

MOTION DATE

- v -
375 PARK AVENUE, L.P.

MOTION SEQ. NO.

06

MOTION CAL. NO.

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

PAPERS NUMBERED

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

FILED

OCT 22 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/14/10

Luy

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION
LOUIS B. YORK

Check if appropriate: DO NOT POST

REFERENCE
J.S.C.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

-----X
JOSEPH LOROCCO,
Plaintiff,

-against-

Index Number 115754/2007

375 PARK AVENUE, L.P., RFR REALTY LLC, 757
THIRD AVENUE ASSOCIATES, LLC, TRI-STAR
CONSTRUCTION, INC., ROBERT M. WEISS &
CO., LTD., COMMERCIAL FLOORING
MANAGEMENT, LLC, and BRONFMAN
ASSOCIATES, LLC,

Defendants.

-----X
TRI-STAR CONSTRUCTION,
Third-Party Plaintiff,

-against-

ROBERT M. WEISS & CO., LTD.,
Third-Party Defendant.

-----X
ROBERT M. WEISS & CO., LTD.,
Second Third-Party Plaintiff,

-against-

COMMERCIAL FLOORING MANAGEMENT, LLC.,
Second Third-Party Defendant.

-----X
Louis B. York, J.:

This personal injury case relates to injuries that Plaintiff allegedly sustained when he fell on a piece of carpet during renovation work in a building owned by defendants, 375 Park Avenue, L.P and 757 Third Avenue Associates, LLP (collectively, "375 Park"). RFR Realty, as management, oversaw renovation work done to the building. However, the renovation work at issue was conducted by Bronfman, a tenant in the building. This matter has been conferenced by the Court several times, most recently on March 17, 2010 for a status conference. The Court

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notes that it only schedules matters for a status conference when the parties to an action have been delinquent, missing court-imposed deadlines and exceeding the case's administratively mandated "standards and goals."

At the March 17 conference, the parties raised several discovery disputes. In particular, plaintiff stated that defendants have not complied with his demands and have not produced a further party for deposition. Defendants challenged plaintiff's contentions and/or his right to additional discovery. The parties were unable to reach a resolution at the conference, and accordingly this Court extended the Note of Issue deadline until May 6, 2010, in order to give plaintiff an opportunity to bring a timely motion, enabling him to resolve the dispute in advance of the filing deadline. At the conference plaintiff alleges that he also discussed his desire to consolidate this with a related action, and the Note of Issue extension was to afford plaintiff the opportunity to take care of the consolidation in advance of the deadlines as well.

Apparently, and for reasons plaintiff does not explain in his papers, plaintiff did not bring a timely motion for either request. Instead, he waited until the Note of Issue filing date to bring two motions, by way of Order to Show Cause. At this point, due to plaintiff's delay, plaintiff missed his Note of Issue deadline and the matter was urgent.

Plaintiff argues that he has made eight different discovery demands with which Defendants have not fully complied. He states that on the date of the status conference he was aware of only six of the outstanding demands. From 375 Park, Plaintiff requests various records pursuant to the Notice for Discovery and Inspection dated November 6, 2009, documents pursuant to the Notice for Discovery and Inspection dated March 22, 2010, and depositions from Mark Grannata and Frank Spadatoro pursuant to two Notices to Take Deposition dated November 6, 2009. From Defendant TRI-STAR Construction, Inc. ("Tri-Star"), Plaintiff

requests the deposition of Michael Fiscilla pursuant to a Notice to Take Deposition dated January 4, 2010, and production of documents and reports pursuant to a Notice for Discovery and Inspection dated January 4, 2010. Finally, from Defendant Commercial Flooring Management, LLC ("Commercial Flooring"), Plaintiff requests a completed deposition of Robert Brenckman, the deposition of Robert Smith pursuant to a Notice to Take Deposition dated February 23, 2010, and production of documents relating to the installation of carpet at 375 Park Avenue pursuant to a Notice for Discovery and Inspection dated February 23, 2010.

In addition, plaintiff moved to consolidate, albeit at the last minute as well. The Court consolidated the two actions pursuant to this motion. Though the papers in this current motion are incomplete,¹ it appears the consolidation did not add new parties to the action except for a correction to pursue the correct Bronfman defendants. In addition, it appears plaintiff added as direct defendants parties who had been brought into the case as second and third party defendants last year. Based on this consolidation, plaintiff also seeks additional discovery. However, it appears that all of the parties were in the case by both the October 28, 2009 and February 24, 2010 conferences. Thus, any request for an extension based on the addition of new parties has no basis.

ANALYSIS

According to CPLR 2004, requests for extensions may be granted under the following terms:

¹ Because plaintiff did not properly bind his papers, some of the pages became detached. The Court has attempted to ascertain that it has the correct papers before it, but admonishes plaintiff's counsel to bind motion papers more durably and appropriately in the future.

Except where otherwise expressly prescribed by law, the court may extend the time fixed by any... order for doing any act, upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed.

Where, as here, the Court has imposed strict deadlines on the parties, an untimely application for an extension must also explain the good cause for the delay. See Sicoli v. Sasson, 76 A.D.3d 1002, – N.Y.S.2d –, –(2nd Dept. 2010)(avail at 2010 WL 3700187, at *1). As there was a Note of Issue deadline, absent a showing of good cause for his untimeliness, plaintiff had to either file the Note of Issue on time or move before the deadline for an extension. See Palumbo v. Dell, 73 A.D.3d 723, 899 N.Y.S.2d 642 (2nd Dept. 2010)(involving Court’s 90-day order, and affirming dismissal of the action); cf. Cadichon v. Facelle, 71 A.D.3d 520, 521, 897 N.Y.S.2d 67, 68 (1st Dept. 2010)(90-day notice). In the case at hand, plaintiff has not shown good cause for the untimely request for the extension or proffered a reasonable excuse for the delay. In fact, Plaintiff does not give a single reason, let alone good cause, as to why an extension of the Note of Issue should be granted. The entire motion simply contains a list of outstanding discovery requests. Under the circumstances, the motion should be denied.

Even if this Court did not deny for untimeliness, it would find that plaintiff did not show good faith under 22 NYCRR 202.7. Under that rule, all discovery motions must be accompanied by a good faith affirmation showing an earnest attempt to resolve the disputes prior to the motion practice. The affirmation must be specific as to the details of the good faith efforts. Even if a motion is not opposed, the failure to include an adequate showing of good faith requires denial of the motion. See Bustamante v. Green Door Realty Corp., 69 A.D.3d 521, 521-22, 853 N.Y.S.2d 57; 57-58 (1st Dept. 2010). A single letter, without follow up, is not sufficient to show good faith.

Here, plaintiff's affirmation of good faith is completely deficient. Plaintiff simply refers the Court to Exhibits H and K of his motion, which annex the discovery demands at issue and plaintiff's follow up letters requesting further discovery. These single letters to the parties, with no indication that there was any follow up outside of the Court conferences, is inadequate under the standard above. The good faith showing also is deficient because the letter to 375 Park was served on December 14, 2009; and the letter to Tri-Star is dated November 6, 2009. There is no showing of a good faith attempt to resolve the disputes addressed at the March 2010 conference – which, obviously, took place months after plaintiff sent the letters. As to the third party from whom plaintiff seeks discovery, there is no letter or good faith showing at all.

Yet another reason for denying the motion is that the delays and problems involved here are part of a pattern. This case was initiated on August 4, 2008, over two years ago. Thus, the parties have had ample time for discovery. However, this is not the first occasion that Plaintiff has failed to adhere to Court ordered deadlines. In every preliminary conference (“PC”) order, including the one held in this case, the Court requires, as to depositions, that no adjournments are permitted without Court approval. Further, at paragraph seven, the PC order states:

Before making any motions, as soon as a disclosure problem arises and before the end date for discovery, the affected party must call the part and arrange a telephone conference.... Failure to comply by discovery deadline waives all pending and future discovery absent good cause.

Finally, the additional directives sheet reiterates these principles in stern language, warning that sanctions, the striking of the pleadings, or alternative measures may result from noncompliance. In addition, the compliance conference orders for each case not only incorporate these portions of the PC order but reiterate the requirement that the parties contact the Court by phone in a timely fashion.

Here, these rules have repeatedly been ignored. In the preliminary conference held in October 2008, dates were set for depositions to be held in January 2009 and the discovery deadline was set for May 15, 2009. Disregarding this specific and clear language, Plaintiff waited until May 14, 2009, only one day before the discovery deadline and over three months after the deposition dates, to request an extension from the court because discovery had not been completed. This conduct is strikingly similar to his conduct here, where he waited until the Note of Issue deadline to make the instant application.

It appears that following a second conference, on May 20, the parties were scheduled to appear for discovery conference on August 26. At that time, because of the age of the case and the history of delays and missed deadlines, the Court converted the conference to a status conference instead. However, the parties did not appear on that date, instead adjourning the conference to October 28, 2009 – apparently so all new parties, including third and fourth party defendants, could appear. It seems that by the October 28 conference, all of the current parties were in the case. That order scheduled depositions of the plaintiff for January 14, 2010 and a discovery deadline of February 27, 2010. Again, the parties did not comply with the rules set forth in the PC and compliance conference orders.

The Court finally notes on this issue that in an earlier motion, sequence number 2, plaintiff also sought a last minute stay of discovery, and the Court denied that prong of the request and instructed plaintiff not to make such a last minute application. The current motion overlooks the Court's earlier directive. For further problems with the manner in which plaintiff has proceeded in this action, the Court refers the parties to its decisions in motion sequence number 2 and motion sequence number 4.

If this were not enough, the Court notes finally that according to the opposition to this motion, the parties have complied with most or all of plaintiff's demands. Defendant 375 Park submitted a response to each discovery request. Defendant also provided an affidavit from Frank Spadatoro, a senior vice president at defendant RFR Realty, stating that RFR does not oversee renovation work or debris removal when the tenants are responsible for their interior renovations. Moreover, 375 Park points to the deposition transcript of a Tri-Star employee acknowledging that it was responsible for the debris removal. Therefore, a further deposition of 375 Park on this issue is unnecessary. Furthermore, it has stated twice – in responses dated January 19, 2010 and April 12, 2010 – that it does not possess records relating to the debris removal process because it did not have responsibility for the project. Also, based on the repeated statements that RFR was not responsible for debris removal and cleanup – including the Spadatoro affidavit referred to above – plaintiff's request to depose the president of the company would also have been denied as superfluous and unnecessary.

Defendant Commercial Flooring notes that it produced a party with knowledge; and asserts that the owner of the company and his sister have no knowledge of the incident. Commercial Flooring's objection to the deposition on grounds of privity of contract between itself and plaintiff is unpersuasive, but the Court has denied the motion on other bases. However, to the extent that Commercial Flooring has copies of the contracts relating to debris cleanup and/or removal and has not provided them to plaintiff, the Court encourages Commercial Flooring to provide copies of these documents – or, if no written contract existed, an affidavit by Mr. Smith setting forth this fact and/or stating who was responsible for debris cleanup and/or removal. This cooperation also is in Commercial Flooring's best interest, in the event that it wishes to produce the documents or have Mr. Smith testify as to this issue at trial.

As for plaintiff's request to depose Mark Grannata may have been appropriate if the Plaintiff had not been aware since December 14, 2009 that Defendant was refusing to produce this deponent.

Moreover, Tri-Star also has provided an affidavit as to the documents it has not produced – some of which simply never existed, according to Tri-Star. Plaintiff's request to depose Michael Fiscilla may have been appropriate but for its untimeliness, particularly as Tri-Star denies the request on grounds which are reflexive and somewhat evasive. If Tri-Star seeks to present testimony or evidence as to any issues of which Fiscilla had knowledge or if it wishes to produce Fiscilla at trial, to preserve its own rights it may decide to produce him for a short deposition at plaintiff's expense no later than 60 days prior to trial. However, the Court will not order this for the many reasons set forth above.

The Court reiterates that to the extent that plaintiff suggests a discovery conference is appropriate because of the recent consolidation, it does not appear that any new parties have been added to the case since the most recent conferences. Therefore, this application is denied. The Court has considered all of the other arguments raised and none of them alter its decision.

Accordingly, it is

ORDERED that the motion is denied; and it is further

ORDERED that plaintiff has until October 29, 2010 to file the Note of Issue or this case shall be dismissed.

Dated: Dec. 14 2010

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Louis B. York, J.S.C.

**LOUIS B. YORK
J.S.C.**

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