

Smith v Columbus Manor, LLC
2011 NY Slip Op 31576(U)
June 8, 2011
Supreme Court, New York County
Docket Number: 110729/2008
Judge: Louis B. York
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **LOUIS B. YORK**

PART 2

Index Number : 110729/2008

J.S.C.

SMITH, TONI

vs
COLUMBUS MANOR

Sequence Number : 005

VACATE NOTE OF ISSUE/READINESS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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 _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

FILED

JUN 13 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/8/11

[Signature]
LOUIS B. YORK J.S.C.

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 2

-----X
TONI SMITH and MOSES SMITH,

Plaintiffs,

Index No.: 110729/08

-against-

COLUMBUS MANOR, LLC., a/k/a COLUMBUS
MANOR STOCK, LLC., and STELLAR MANAGEMENT
LLC.,

Defendants.

-----X
COLUMBUS MANOR, LLC., a/k/a COLUMBUS MANOR
STOCK, LLC., and STELLAR MANAGEMENT LLC.,

Third-Party Plaintiffs,

Index No.: 590262/09

-against-

CONCORD BUILDING SERVICES, INC., ARIES
MANAGEMENT COLLECTIONS, INC. and ARIES
MANAGEMENT, INC.,

FILED

JUN 13 2011

Third-Party Defendants.

NEW YORK
COUNTY CLERK'S OFFICE

-----X
YORK, J.:

This action involves personal injuries which Toni Smith, plaintiff, allegedly sustained as a result of a cabinet falling on her in her apartment located at 70 West 93rd Street in Manhattan. The owner of the apartment building where the accident took place is Columbus Manor, LLC, and the managing agent of the building is Stellar Management, LLC. Aries Management, Inc., and Aries Management Collections, Inc., are alleged to be the former agents of the building, and Concord Building Services, Inc., is a company that allegedly replaced cabinetry in the building.

Defendants/third-party plaintiffs Columbus Manor, LLC, a/k/a Columbus Manor Stock,

LLC, and Stellar Management, LLC (third-party plaintiffs), move, pursuant to CPLR 3126, to strike the answer of Concord Building Services, Inc., Aries Management Collections, Inc., and Aries Management, Inc. (third-party defendants), for failure to provide requested discovery.¹ In the alternative, third-party plaintiffs move, pursuant to CPLR 3402 and Title 22, Part 202.21 of New York Codes, Rules and Regulations, to vacate the note of issue and certificate of readiness, and to stay the time in which third-party plaintiffs can move for summary judgment.

FACTUAL ALLEGATIONS

A preliminary conference was held for this matter on November 19, 2008, at which time, discovery deadlines were set. The discovery end date for this case was June 8, 2009 and the note of issue was to be filed on June 15, 2009. On March 24, 2009, third-party plaintiffs commenced a third-party action against Concord Building Services, Inc., Aries Management Collections, Inc., Aries Management, Inc., and Aries Management.²

On October 21, 2009, a status conference was held. At the conference, the court ordered that depositions of parties were to be completed by December 31, 2009, and that third-party plaintiffs were to respond to third-party defendants' interrogatories by November 18, 2009. The court also noted that third-party discovery was limited to only what has not been covered in the main action. The discovery end date was extended to January 30, 2010, the note of issue was to be filed on February 6, 2010, and there were to be no adjournments of the dates without prior

¹ In a letter dated December 6, 2010, Mark A. Taustine, Esq., attorney for third-party plaintiffs, clarifies that this motion mistakenly moves to dismiss the plaintiff's complaint. (Derin Affirm., ex. 1).

² The third-party complaint was dismissed as to Aries Management on January 27, 2010.

court approval.

On December 28, 2009, third-party defendants moved, pursuant to CPLR 3101 and 3124, to compel third-party plaintiffs to respond to interrogatories, to respond to the first document demand, and to appear for depositions. On July 9, 2010, the court ordered that documentary discovery was to be exchanged by third-party plaintiffs and third-party defendants within fifteen days of entry of the order, and that third-party depositions were to be conducted by September 10, 2010. The court also noted that there were to be no adjournments without prior court authorization.

Plaintiff filed the note of issue on February 5, 2010. However, third-party plaintiffs and third-party defendants moved to vacate the note of issue, because documentary discovery needed to be exchanged in the third-party action, depositions were not completed, and because plaintiff's amended bill of particulars alleged new injuries. On August 23, 2010, the court vacated the note of issue and ordered that all discovery in this matter must be completed by September 30, 2010, and that the note of issue must be filed by October 15, 2010. The court also held that, pursuant to the rules of Part 2, motions for summary judgment must be made within 60 days from filing the note of issue, or will be denied, absent a showing of good cause.

DISCUSSION

Third-party plaintiffs argue that the answer of third-party defendants should be stricken, or alternatively, that the note of issue should be vacated, because third-party defendants have failed to provide responses to discovery demands, specifically copies of the contract of sale, lease, and agreements for the property at 70 West 93rd Street. Third-party plaintiffs maintain that third-party defendants may be in possession of a purchase agreement, because there was a

reference made to such an agreement in an affidavit of Mark R. Kook, Esq., counsel for third-party defendants, which accompanied a motion to dismiss filed in this action.

In his affirmation in opposition to this motion, Mr. Kook affirms that “[t]here are **no** documents requested that are in the Third-Party Defendants’ possession.” (Kook Affirm., ¶ 7). Mr. Kook maintains that, although third-party plaintiffs requested a contract of sale, “[n]either Concord nor Aries Collections were involved in that transaction, and neither has such a document.” (Kook Affirm., ¶ 8). Third-party defendants maintain that third-party plaintiffs should have a copy of the contract of sale.

Plaintiff contends that it would be prejudiced if this case was stricken from the trial calendar, because the court previously granted additional time to complete discovery in the third-party action. Plaintiff maintains that the deposition of the third-party defendants took place on November 17, 2010, well after the deadline imposed by the court for the completion of all discovery, and that although third-party plaintiffs were aware of the note of issue deadline, they did not contact the court to schedule a status conference.

The Court of Appeals has held that “[i]f the credibility of court orders and integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity.” *Brill v City of New York*, 2 NY3d 648, 652-653 (2004) (citations omitted). Here, the discovery period has ended and this case is ready for trial. The request for judicial intervention for this matter was filed on October 9, 2008, and this case exceeds the court system’s standards and goals by over two years. Also, the court has extended the note of issue filing deadline three times, has previously vacated the note of issue, and extended the time period for the filing of dispositive motions. Pursuant to the August 23, 2010 order of this court, the parties were notified that the

discovery deadline was September 20, 2010, and the deadline for filing motions for summary judgment was 60 days from October 15, 2010, the date which the note of issue was filed.

Counsel for third-party plaintiffs maintains that on August 24, 2010, he requested, via an e-mail to counsel for third-party defendants, an affidavit from the person who conducted the search for documents regarding the ownership of the subject building. However, counsel for third-party plaintiff apparently did not contact the court before the discovery end date regarding this necessity of an affidavit. This is in violation of the preliminary conference order which directs that "as soon as a disclosure problem arises and before the end date of all disclosure, the affected party, must call the part to arrange a conference . . . [f]ailure to comply constitutes waiver." (Taustine Affirm., ex. C).

Also, with regards to the deposition deadlines, although third-party depositions were to be conducted by September 10, 2010, the depositions were held on November 17, 2010, which was over one month after the note of issue was filed. Although the court specified that there were no adjournments of the dates without prior court approval, neither counsel for third-party plaintiffs or third-party defendants contacted the court to request a later deposition date.

Therefore, because the discovery end date has passed and because counsel for third-party defendants has affirmed that his clients are not in possession of any of the requested documents, the court will not strike the answer of the third-party defendants, vacate the note of issue, or extend the time period for the filing of dispositive motions.

CONCLUSION and ORDER

Accordingly, it is hereby

ORDERED that the motion of defendants/third-party plaintiffs Columbus Manor, LLC, a/k/a Columbus Manor Stock, LLC, and Stellar Management, LLC, to strike the answer of of Concord Building Services, Inc., Aries Management Collections, Inc., and Aries Management, Inc., or alternatively, to vacate the note of issue, is denied.

Dated: 6/8/11

ENTER: *Hy*
J.S.C.

LOUIS B. YORK
J.S.C.

FILED

JUN 13 2011

NEW YORK
COUNTY CLERK'S OFFICE