

Filatava v Rome Realty Group LLC

2011 NY Slip Op 32547(U)

September 27, 2011

Supreme Court, New York County

Docket Number: 106544/07

Judge: Martin Shulman

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

PRESENT: MARTIN SHULMAN
J.S.C. Justice

PART 1

Index Number : 106544/2007
FILATAVA, VALIANTSINA
VS.
ROME REALTY GROUP LLC.
SEQUENCE NUMBER : 005
RENEWAL

INDEX NO. 106544/07
MOTION DATE _____
MOTION SEQ. NO. 005
MOTION CAL. NO. _____

this motion to/for _____

NOTICE OF MOTION/ ~~Order to Show Cause~~ — Affidavits — Exhibits A-H
Answering Affidavits — Exhibits A-D
Replying Affidavits _____

PAPERS NUMBERED	
1	
2	
3	

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion is decided in accordance with the attached decision and order.

FILED

SEP 28 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: September 27, 2011


MARTIN SHULMAN 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 1

-----X
 VALIANTSINA FILATAVA and SERGEY
 SALOMONOV,

Index No.: 106544/2001

Plaintiff(s),

Decision and Order

-against-

ROME REALTY GROUP LLC and JOHN DOE 1-10

FILED

Defendant(s).

SEP 28 2011

MARTIN SHULMAN, J.:

NEW YORK
 COUNTY CLERK'S OFFICE

Defendant Rome Realty Group LLC ("defendant") moves pursuant to CPLR 2221(d) and (e) to renew and/or reargue this court's decision and order dated March 21, 2011: (1) denying defendant's motion to vacate plaintiffs Valiantsina Filatava and Sergey Salomonov's ("plaintiffs") note of issue and to dismiss plaintiffs' complaint pursuant to CPLR § 3126 (motion seq. 002);¹ (2) denying defendant's motion to extend the time to serve dispositive motions (motion seq. 004); and (3) granting plaintiffs' motion to strike defendant's answer (motion seq. 003). Plaintiffs oppose the motion, which is granted in part and denied in part for the reasons stated below.

Motion to Renew

CPLR 2221(e) states as follows:

A motion for leave to renew.

(1) shall be identified as such; (2) shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and (3) shall

¹ Alternatively, motion sequence 002 sought an order compelling plaintiffs to provide outstanding discovery.

contain reasonable justification for the failure to present such facts on the prior motion.

On renewal, defendant first argues that plaintiffs had not appeared for depositions at the time the prior motions were filed and plaintiff Filatava had not appeared for all scheduled independent medical examinations ("IMEs").² In response, plaintiffs argue that defendant did not designate the experts to conduct the IMEs until almost three (3) months after plaintiffs filed their motion to strike. Additionally, plaintiffs produced e-mails from defense counsel specifically requesting plaintiffs to not schedule the IMEs because defendant wanted to settle the matter without incurring unnecessary expenses. Defense counsel advised plaintiffs to proceed with the IMEs only after this court struck defendant's answer. Finally, plaintiffs contend that plaintiff Salomonov was always available to be deposed but defendant failed to schedule it.

Defendant also relies upon two (2) affidavits which were allegedly unavailable in the prior round of motion practice. First, defense counsel submits an affidavit from Mandi Biello (the "Biello affidavit"), its calendar coordinator, claiming Ms. Biello could not have submitted an affidavit previously because she was on maternity leave while the prior motions were pending. The Biello affidavit avers in relevant part that plaintiffs' counsel's office contacted her on September 29, 2010 regarding Filatava's deposition, at which time she advised that this deposition had been scheduled for September 23, 2010 and plaintiffs had failed to confirm it.

For the first time, defendant also includes an affidavit from Oleg Rabinovich (the "Rabinovich affidavit"), a member of defendant, who allegedly could not be located at

² Subsequently, Filatava was deposed and appeared for all IMEs, leaving plaintiff Salomonov's deposition outstanding.

the time of the prior motions because his contact information had changed.³

Defendant's counsel argues that this newly submitted affidavit establishes that the documents that plaintiffs requested do not exist and that no documents were negligently or intentionally lost or destroyed.

The portion of defendant's motion seeking renewal of this court's March 21, 2011 decision and order is denied. With respect to plaintiffs' failure to appear for depositions and IMEs, this is not a new fact not offered on the prior motion, nor would it change the court's prior determination.

As to the Biello affidavit, even if the court accepts defendant's claim that Ms. Biello was previously unavailable, its allegations fail to refute the factual averments contained in the Burshstein affidavit, cited in this court's prior decision and order. Further, the court rejects defendant's attempts to place the onus upon plaintiffs to confirm their own depositions. According to CPLR 3107, the burden is on the party "desiring to take the deposition" to give notice. Nonetheless, plaintiffs attempted to confirm Filatava's September 23, 2010 deposition to no avail, a fact the Biello affidavit fails to refute.

Finally, with respect to the Rabinovich affidavit, defendant fails to offer a reasonable justification for failing to obtain this affidavit on the prior motion or at least seeking additional time to locate the client. Rather, this affidavit and the Biello affidavit appear to be submitted in response to this court's March 21, 2011 decision and order's

³ Defense counsel claims it was necessary to hire an investigator to locate Mr. Rabinovich. As plaintiffs note, defendant's motion contains no indication as to when efforts were made to reach defendant. However, in reply defense counsel elaborates that his office retained the investigator in early December 2010 and located Mr. Rabinovich in March 2011. Pisiewski Reply Aff. at ¶6.

findings, as mere afterthoughts. Nowhere in the underlying motion papers did defendant's counsel indicate that defendant's principals could not be reached.⁴ Rather, defendant merely failed to address certain issues such as spoliation, as noted in the March 21, 2011 decision and order, and now essentially seeks a second bite at the apple.

In relevant part, the Rabinovich affidavit states that defendant owned and managed the subject building and that, during the almost five (5) month period between defendant purchasing the building and Filatava's attack, defendant was never advised of female guests being harassed or of alleged security deficiencies, nor did defendant receive any complaints or communications of prior complaints. Further, no criminal activity was reported in the building during that time. The Rabinovich affidavit goes on to summarily state that defendant "did not maintain the majority of items" plaintiffs requested and "[n]o documents pertaining to this litigation were negligently or intentionally lost or destroyed." Rabinovich Aff. at ¶¶ 6-7. However, Rabinovich does not indicate his responsibilities with respect to the building, nor does his affidavit clarify whether the documentation plaintiffs requested ever existed. As such, even if defendant established a reasonable justification for not including the Rabinovich affidavit, this submission is insufficient to justify renewal and that portion of defendant's motion must be denied.

⁴ As plaintiffs note, the claim that defendant could not be reached contradicts the repeated representations that defendant was available to be deposed.

Motion to Reargue

For the reasons stated below, the portion of defendant's motion seeking reargument is granted, and on reargument, the court adheres to its March 21, 2011 decision. CPLR 2221(d) states as follows:

A motion for leave to reargue.

(2) shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion

A motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. *Foley v. Roche*, 68 AD2d 558 (1st Dept 1979). Motions for leave to reargue are not designated to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented. *Pro Brokerage, Inc. v. Home Ins. Co.*, 99 AD2d 971 (1st Dept 1984); *William P. Pahl Equip. Corp. v. Kassis*, 182 AD2d 22 (1st Dept 1992).

In support of its motion to reargue, defendant argues that it complied with all of plaintiffs' discovery demands and this court's discovery orders and that plaintiffs are merely dissatisfied that they did not receive the documents they expected. Defendant emphasizes that this court overlooked plaintiffs' own violation of this court's discovery orders by failing to provide a supplemental bill of particulars as to actual notice and, for the first time, cites plaintiffs' default as impairing defendant's search efforts.

Defendant also disputes this court's characterization of its actions as indicating

that no good faith effort was made to locate responsive documents. Specifically, defendant disputes that it conducted discovery "at [its] leisure" and argues that although this court did not approve of the manner in which defendant responded to plaintiffs' requests, defendant has never had the documents that plaintiffs requested and its responses fully answered each of plaintiffs' demands.

The court rejects the foregoing arguments on the grounds that they either improperly rehash defendant's prior arguments or raise new arguments. The court did not overlook plaintiffs' discovery defaults. Rather, the March 21, 2011 decision and order specifically notes this court's frustration at both parties' discovery deficiencies, finding that defendant's transgressions were "far more numerous and egregious than those of plaintiffs" and detailing the specific details of defendant's defaults. Nor did the court misconstrue defendant's conduct in view of the record before the court.

Finally, defendant argues that this court inappropriately relied on speculative allegations of spoliation, claimed to have been inaccurately attributed to defense counsel, since plaintiffs failed to show that the requested documents ever existed or were actually destroyed. *Papa v. Russo*, 279 AD2d 744, 746 (3d Dept 2001). However, as this court noted in its March 21, 2011 decision and order and above, defendant "glaringly" did not address the spoliation claim in the underlying motions. Defendant now belatedly submits the Rabinovich affidavit in an effort to cure its oversight. As a motion to reargue is not meant to present arguments different from those previously presented, this court rejects defendant's attempt to raise new arguments.

Importantly, this court's decision is not predicated upon a specific finding of spoliation. Rather, the March 21, 2011 decision and order makes clear that the determination to strike defendant's answer was based on cumulative factors, including defendant's one year delay in serving its response to plaintiffs' second discovery demand, which substantially mirrored its first response; its longstanding evasiveness in providing an explanation for its claimed lack of documentation; and its failure to refute or even address plaintiffs' arguments.

The court has considered defendant's remaining arguments and finds them lacking in merit. Accordingly it is

ORDERED that the portion of defendant's motion seeking renewal is denied and the portion of defendant's motion seeking reargument is granted, and on granting reargument this court adheres to its prior decision.

The foregoing constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to counsel for the parties.

Dated: New York, New York
September 27, 2011



Hon. Martin Shulman, J.S.C.

FILED

SEP 28 2011

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