

Filatava v Rome Realty Group LLC
2011 NY Slip Op 34044(U)
March 21, 2011
Sup Ct, 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

MARTIN SHULMAN

Index Number : 106544/2007
FILATAVA, VALIANTSINA
vs
ROME REALTY GROUP LLC.
Sequence Number : 002
VACATE NOTE OF ISSUE/READINESS

INDEX NO. _____
MOTION DATE _____
MOTION CALS NO. _____
MOTION CALS NO. _____

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

Motion/Motion Affidavit/Affidavits
Exhibits
Affirmation

FILED WITH/INDEXED
INDEXED
FILED

Motion Yes No

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

FILED

MAR 22 2011

CLERK OF COURT

FILED 21 2011

MARTIN SHULMAN

FINAL DISPOSITION NON FINAL DISPOSITION
 DO NOT POST REFERENCE
SUBMIT ORDER/JUDC SETTLE ORDER/JUDC

FILEDSUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

MAR 22 2011

-----X
VALIANTSINA FILATAVA and SERGEY SALOMONOV,NEW YORK
COUNTY CLERK'S OFFICE

Plaintiffs,

Index No.: 106544/07

-against-

DECISION/ORDER

ROME REALTY GROUP LLC and JOHN DOE 1-10,

Motion Seq. 002, 003
& 004Defendants.
-----X

In motion sequence 002, defendant Rome Realty Group LLC ("defendant" or "RRG") moves to vacate the note of issue and dismiss the complaint pursuant to CPLR 3126 based upon plaintiffs' alleged discovery defaults. Alternatively, defendant requests that plaintiffs be precluded at trial from offering any evidence or testimony regarding actual notice and ordered to provide outstanding discovery. In motion sequence 003, plaintiffs Valiantsina Filatava ("Filatava") and Sergey Salomonov (collectively "plaintiffs") move to strike RRG's answer based upon its alleged discovery defaults and upon striking the answer, granting plaintiffs judgment by default and setting the matter down for an inquest as to damages.¹ In motion sequence 004, defendant moves to extend the time for filing dispositive motions. Plaintiffs oppose RRG's motions (seq. 002 and 004) and RRG opposes plaintiffs' motion (seq. 003). All three motion sequences are consolidated for disposition.

Plaintiffs commenced this negligence action against defendant based upon injuries Filatava sustained due to a May 23, 2006 assault and battery while she was lawfully present at 180 Broadway, New York, New York (the "premises" or "building"), a

¹ Alternatively, plaintiffs requested an extension of time to file the note of issue. However, they subsequently filed the note of issue on November 1, 2010.

commercial office building RRG owned at the time of the attack. Her assailant was never apprehended. Co-plaintiff Salomonov is Filatava's spouse who asserts derivative claims.

Defendant acquired the building on January 9, 2006, less than 5 months before Filatava's attack, and sold it on August 22, 2007, shortly after the commencement of this action. Plaintiffs allege RRG was negligent in failing to provide adequate security and surveillance at the premises despite having notice from building tenants of prior criminal activity thereat.

Discovery in this almost four year old case has proceeded at a glacial pace. With the exception of RRG's insurance coverage information, plaintiffs maintain that defendant has not produced a shred of documentary evidence in response to their notices of discovery and inspection dated April 25, 2008 (the "first demand") and December 15, 2009 (the "second demand"). Defendant responded to the majority of plaintiffs' first demands with boilerplate objections and/or by claiming it was not in possession of the documents sought, yet reserved the right to supplement its responses since its "investigation of this incident is ongoing". To date, no such supplementation has been forthcoming and RRG has yet to provide details as to how, when or if it ever conducted any "investigation". Plaintiffs' counsel finds this response incredible, contending that the records sought are of such a nature that any property owner or manager would necessarily have them.² Subsequently and approximately two

² Plaintiffs allege they lack "the most basic information regarding the subject building, such as . . . whether there was a guard on duty on the date of the incident, the identity of any personal [sic] on duty at the time of the incident, if any security systems were in place, if any video recordings were taken . . ." Shapiro Aff. In Support of Motion

years into discovery, defendant's counsel advised the court during a June 22, 2010 status conference that the building had been sold and the requested documents may have been destroyed, thus raising a potential spoliation claim.

At the aforementioned June 22, 2010 status conference, this court issued an order whereby both plaintiffs and defendant were to respond to specific demands. Both parties responded untimely via their respective opposition to the other's motion. Plaintiffs' depositions were scheduled to take place on or before September 23, 2010, followed by defendant's deposition on or before September 30, 2010 and Filatava's independent medical examination ("IME") which was to be conducted within 45 days of her deposition. The order, which the court marked "final", sets a note of issue deadline of November 1, 2010.

The parties' depositions did not take place as ordered. Plaintiffs claim they were willing to be deposed as directed in the June 22, 2010 order, but calls to RRG's counsel to schedule and/or confirm same were not returned. Defendant disputes this, stating RRG was ready to depose plaintiffs on September 23, 2010 but plaintiffs were not produced. Defense counsel provides no details or documentation establishing any attempts to schedule plaintiffs' depositions, nor does he refute or even address the affidavit of plaintiffs' counsel's employee, Zhanna Burshtein (Exh. D to Shapiro Aff. in Opp. to Motion to Vacate Note of Issue), who avers that she contacted defense counsel's EBT clerk on September 21, 2010 to confirm that plaintiffs' depositions would proceed on September 23, 2010 and that an interpreter would be available. Ms.

to Strike, ¶12.

Burshtein states that defendant's counsel's EBT clerk was unaware of plaintiffs' deposition and plaintiffs' counsel received no further calls or written confirmations from defendant.

Notwithstanding that discovery was not complete, plaintiffs filed the note of issue as directed. Plaintiffs' depositions were subsequently conducted on December 21, 2010. However, defendant's deposition remains outstanding since plaintiffs' counsel contends deposing defendant would be futile without first obtaining written discovery. Filatava's IME is also outstanding.

Plaintiffs' Motion to Strike (Seq. 003)

RRG responds to plaintiffs' motion to strike its answer by attaching a simultaneously served response to plaintiffs' second demand (Exh. A to Pisiewski Aff. in Opp.) and contending the motion is now moot. As with its responses to plaintiffs' first demand, defendant again proffers generic objections, claims it is not in possession of the documents sought and reserves its right to supplement pending purported ongoing investigations.³ Defendant vaguely asserts that there is no evidence the documents plaintiffs seek exist or ever existed and plaintiffs should pursue any outstanding information by deposing defendant. However, defendant goes on to conclude that plaintiffs waived the right to depose defendant by prematurely filing the note of issue. Finally, RRG cites plaintiffs' own discovery deficiencies, which are the subject of motion sequence 002, discussed *infra*. Glaringly, defendant does not address the spoliation claim.

³ As plaintiffs' counsel astutely notes, any further investigation defendant might undertake would necessarily be of records, yet RRG claims to have no records.

Defendant's Motion to Vacate the Note of Issue & Dismiss (Seq. 002)

RRG moves to strike the note of issue and dismiss the complaint pursuant to CPLR §3126 claiming discovery is incomplete, particularly Filatava's IME and the following documentary discovery as directed in the June 22, 2010 order, as well as two prior orders dated November 10, 2009 and February 23, 2010 (see Ex. D to Pisiewski Aff. in Support): 1) supplemental bill of particulars as to item 5 (names of witnesses who gave actual notice to defendant); 2) names of individuals actual notice was allegedly given to, and dates of such notice; and 3) names of Concord Rusam executives who provided notice to defendant.

Plaintiffs respond for the first time that all documents in their possession, custody or control have been produced, with the exception of a September 28, 2004 letter referenced in a previously provided September 22, 2006 letter.⁴ While plaintiffs were ultimately deposed, counsel does not address Filatava's outstanding IME.

Defendant's Motion to Extend Time to File Dispositive Motions (Seq. 004)

Like RRG's motion to vacate the note of issue, its motion to extend the time to file dispositive motions is also based upon plaintiffs' alleged premature filing of the note

⁴ Both letters were from then-tenant Concord Rusam, Inc., detailing perceived building security issues. Plaintiff Filatava was a Concord Rusam student at the time of her attack. Plaintiffs submit a current affidavit from Concord Rusam's president (Ex. G to Motion to Strike), averring that his office: sent a letter to "building management" advising of Filatava's assault and that they had previously voiced safety concerns; sent an additional letter thereafter dated September 22, 2006; and previously sent the September 28, 2004 letter which now cannot be located. This letter allegedly advised that: unidentified males entered the building and followed female students to Concord Rusam's suite; the building had insufficient security measures; after 5:00 p.m. the building entrance was left unattended; and the building lacked working security cameras. The probative value of this letter is questionable since RRG did not own the building in 2004.

of issue. Plaintiffs reiterate that they still cannot conduct a meaningful deposition of RRG because no documents have been produced.

ANALYSIS

Section 3126 of the CPLR provides in pertinent part as follows with respect to penalties for refusal to comply with orders to disclose:

If any party . . . refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them:

1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or
2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses . . . ; or
3. an order striking out pleadings or parts thereof, . . . or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

Where a party disobeys a court order and by his conduct frustrates the disclosure scheme provided by the CPLR, dismissal of the party's pleadings is within the broad discretion of the trial court. *Zletz v. Wetanson*, 67 NY2d 711 933 (1986); *Berman v. Szpilzinger*, 180 AD2d 612 (1st Dept. 1992).

In *Stanfill Plumbing & Heating Corp. v. Dravo Constructors, Inc.*, 216 AD2d 101 (1st Dept. 1995), the First Department held that the lower court "did not improvidently exercise its discretion in dismissing the underlying action for the failure of plaintiff to comply with prior court-ordered discovery." The court specifically found that it was proper to dismiss the plaintiff's complaint since the record revealed that the lower court

had given the plaintiff ample opportunity to comply with discovery and the plaintiff repeatedly failed to comply. *Id.*

While the penalty of striking a pleading for failure to comply with disclosure is extreme, the courts nonetheless have held that dismissing the pleading is the appropriate remedy where the failure to comply has been "clearly deliberate or contumacious." *Henry Rosenfeld, Inc. v. Bower & Gardner*, 161 AD2d 374 (1st Dept. 1990); *Kutner v. Feiden, Dweck & Sladkus*, 223 AD2d 488, 489 (1st Dept. 1996), *lv. to app. den.*, 88 NY2d 802 (1996)(disobedience of a series of court orders directing discovery warranted striking of pleading); *Berman v. Szpilzinger, supra*.

Here, discovery in this non-complex negligence action has been ongoing for almost three years.⁵ While the court is frustrated by the manner in which both parties have conducted discovery, defendant's transgressions are far more numerous and egregious than those of plaintiffs. Arguably, both parties have failed to comply with at least three court orders, *viz.*, the June 22, 2010 final order, a February 23, 2010 conference order and a November 10, 2009 conference order (see Exh. D to Pisiewski Aff. in Support of Defendant's Motion to Strike).

However, RRG responded to plaintiffs' second demand almost a year after it was served and after the deadlines set in 3 court orders by again producing nothing and offering no explanation for its dubious responses. More troubling to the court is defendant's evasive response to plaintiffs' motion which suggests that defendant is

⁵ Court records indicate that plaintiffs filed their Request for Judicial Intervention on or about May 27, 2008 and designated the case as "standard", thereby estimating that discovery would be completed within 9 to 12 months.

being less than forthright. RRG makes no effort to refute the serious spoliation allegations and never unequivocally states whether or not the records plaintiffs seek ever existed or were ever in its possession. On this record, there is simply no indication defendant made any good faith effort to locate responsive documentation and its purported "investigation", if any, has been undertaken at RRG's leisure. From all of the foregoing, the court must conclude that defendant has wilfully and contumaciously frustrated the discovery scheme and that its actions have been prejudicial to plaintiffs' ability to prosecute this action. Accordingly, it is hereby

ORDERED that plaintiffs' motion (seq. 003) is granted, defendant's answer is stricken and, upon striking defendant's answer, plaintiffs are granted judgment on default as to liability; and it is further

ORDERED that plaintiff shall file a copy of this decision and order with notice of entry upon the Clerk of the Trial Support Office, who is directed to place this matter on the Part 40 (Administrative Coordinating Part) calendar for an inquest as to damages; and it is further

ORDERED that defendant's motion to strike the note of issue and dismiss the complaint (seq.002) is denied; and it is further

ORDERED that defendant's motion to extend the time to file dispositive motions (seq. 004) is denied as moot.

The foregoing constitutes the Decision and Order of this Court. Copies of this Decision and Order have been sent to counsel for the parties.

Dated: New York, New York
March 21, 2011

FILED

MAR 22 2011



Hon. Martin Shulman, J.S.C.