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| Chelsea 18 Partners, LP v Shek Yee Mak |
| 2012 NY Slip Op 32743(U) |
| October 22, 2012 |
| Supreme Court, New York County |
| Docket Number: 110264/10 |
| Judge: Joan M. Kenney |
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SCANNED ON 11/9/2012

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

PRESENT: JOAN M. KENNEY
J.S.C.
Justice

PART 8

Index Number : 110264/2010
CHELSEA 18 PARTNERS LP
vs
MAK, SHECK YEE
Sequence Number : 002
— COMPEL

INDEX NO. 110264/10
MOTION DATE 7/28/12
MOTION SEQ. NO. 002

The following papers, numbered 1 to 62, were read on this motion to Compel

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|--|----------------------------------|
| Notice of Motion/Order to Show Cause — Affidavits — Exhibits <u>+ Memos of Law</u> | No(s). <u>1-8</u> |
| Answering Affidavits — Exhibits <u>X Motion + memos (1-2)</u> | No(s). <u>9-50</u> |
| Replying Affidavits <u>to X Motion</u> | No(s). <u>51-61</u> <u>62</u> |

FILED
OCT 26 2012
NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE
WITH THE ATTACHED MEMORANDUM DECISION**

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

Dated: October 22, 2012

Joan M. Kenney, J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 8

-----x
CHELSEA 18 PARTNERS, LP,
Plaintiff,

DECISION & ORDER
Index No.:110264/10

-against-

SHECK YEE MAK, CHOI KUEN MAK, MICHAEL
MAK, JOHN DOE and JANE DOE,
Defendants.

FILED

-----x
JOAN M. KENNEY, J.:

OCT 26 2012

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff moves, pursuant to CPLR 3124 and NYCRR § 130-1.1:
(1) to compel defendant Michael Mak (MM) to comply with the notice
to take deposition upon oral examination; (2) to appear for his
deposition on a date and time fixed by the court; and (3) to award
plaintiff attorney's fees associated with making the instant
motion. MM cross-moves, pursuant to CPLR 2215, 3101, 3103, 3124
and 22 NYCRR § 130-1.1, to preclude plaintiff from taking any
further depositions of MM or, in the alternative: (1) limiting the
scope of said continuing deposition; (2) requiring plaintiff to
maintain deposition transcripts and any personal information
contained therein as confidential; and (3) compelling plaintiff to
provide complete responses to outstanding discovery requests.

This matter was originally discontinued by this court in
October, 2010, in a decision stating that the matter was more
appropriately handled in the Housing Part of the Civil Court. That
determination was reversed by the Appellate Division on November 3,
2011, the Court reasoning that the issues would not be appropriate
for a summary proceeding because of its factual and complicated

nature. The matter was reinstated to this court for further proceedings.

FACTUAL BACKGROUND

The underlying action is one to terminate defendants' tenancy based on allegations of severe nuisance and harassment. The facts appearing in the complaint have been detailed both in this court's prior determination and the decision of the Appellate Division in *Chelsea 18 Partners, LP v Sheck Yee Mak* (90 AD3d 38 [1st Dept 2011]).

Plaintiff is the landlord of the premises in which defendants lease two rent-controlled apartments, and plaintiff alleges that defendants have, since 2006, maliciously harassed plaintiff, resulting in plaintiff being unable to manage the building. MM is the son of the other two Mak defendants.

Plaintiff says that MM is the only defendant who is fluent in English and who would not require a translator. MM was previously noted for a deposition and, after the first day, June 4, 2012, MM's attorneys stated that he would not continue to testify for another day, as previously noticed. Motion, Ex. C. According to plaintiff, MM's counsel said that too much time had been spent on issues that were wholly irrelevant to the underlying matter. Motion, Ex. D.

Plaintiff maintains that the questions that were posited to MM were all relevant to the litigation, focusing on his work history,

time spent in the apartment, hobbies, conflicts with other tenants in the building, both residential and commercial, and the allegedly illegal alterations to the plumbing and electrical wiring of the two apartments in question. Plaintiff asserts that all of these issues are relevant to the underlying complaint and that it is entitled to a full disclosure of all evidence that is material and necessary to its claims.

Plaintiff states that its complaint consists of over 40 pages of alleged misconduct on the part of defendants, and that the answer asserts seven affirmative defenses and five counterclaims. As indicated in its deposition notice, plaintiff anticipated multiple days of testimony, and specifically indicated that MM's deposition would continue day-to-day until completed. Motion, Ex. C.

With respect to the specific areas about which MM was asked at his deposition, plaintiff contends that: (1) MM's work history is relevant, because it relates to his constant presence in the building; (2) MM's hobbies are relevant, because MM identified his videotaping of contractors, repair personnel and other tenants as one of his hobbies; and (3) the period from which MM stopped working relates to the time that plaintiff alleges that the harassing conduct began.

Lastly, plaintiff argues that MM should be directed to pay its costs in bringing this motion because his refusal to continue with

the deposition was frivolous.

In opposition to plaintiff's motion, MM asserts that the questions posited at the deposition were irrelevant and were designed to embarrass and harass MM. Further, MM says that the motion to compel should be denied because plaintiff has failed to make a good faith effort to resolve the matter prior to filing the motion. The court notes that an affirmation of good faith was filed by plaintiff along with the notice of motion.

MM maintains that plaintiff's questions regarding his medical condition, medications and symptoms are not relevant to the issue of harassment alleged in the complaint. In addition, MM says that the court should deny plaintiff's request for attorney's fees because his refusal to continue the deposition was not frivolous.

In support of his cross motion, MM avers that, should the court direct him to continue the deposition, a protective order be issued limiting the scope of the deposition to information relevant to the issues at hand. It is MM's contention that plaintiff has been trying to evict him and his parents from their rent-controlled apartments and that this lawsuit is nothing more than an intimidation tactic. Consequently, MM proposes that, should the court order the deposition to continue, the transcripts be kept confidential, since it may disclose confidential information. MM indicates that plaintiff has previously refused to enter into a confidentiality agreement.

Lastly, MM asks that plaintiff be compelled to respond to defendants' first set of interrogatories and requests, dated January 30, 2012. The court notes that the parties are scheduled to appear in court for a compliance conference on November 1, 2012.

In reply, plaintiff reiterates its initial position that all of its questions were material and necessary, basing this assertion on MM's allegedly antisocial behavior which resulted in the present action. Plaintiff also restates its request for attorney's fees, alleging frivolous conduct on MM's part requiring the instant motion.

In opposition to MM's cross motion, plaintiff argues that the portion of MM's motion seeking a protective order should be denied because all of the questions are relevant to the inquiry.

Lastly, plaintiff asserts that the portion of defendants' motion seeking to compel it to respond to their request for documents and interrogatories should be denied because it has already adequately responded to those demands.

DISCUSSION

CPLR § 3101 (a) provides that there shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof. *Spectrum Systems International Corporation v Chemical Bank*, 78 NY2d 371 (1991); see *Allen v Crowell-Collier Pub Co.*, 21 NY2d 403 (1968); *Quevedo v Eichner*, 29 AD3d 554 (2d Dept 2006). The Court of

Appeals in *Allen* held that "[t]he words 'material and necessary' are ... to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason." 21 NY2d at 406; see also *Andon v 302-304 Mott Street Associates*, 94 NY2d 740, 746 (2000); *Parise v Good Samaritan Hospital*, 36 AD3d 678 (2d Dept 2007). This statute embodies the policy determination that liberal discovery encourages fair and effective resolution of disputes on the merits, minimizing the possibility for ambush and unfair surprise. See *Rivera v NYP Holdings Inc.*, 63 AD3d 469 (1st Dept 2009).

The court has examined the items objected to by MM and has found MM's arguments against his further deposition to be without merit, not finding any of the questions to be palpably irrelevant. *Mora v Saint Vincent's Catholic Medical Center of New York*, 8 Misc 3d 868 (Sup Ct, NY County 2005). Plaintiff is entitled to full disclosure of all relevant information and, pursuant to the allegations of the complaint, all of the areas examined relate thereto. Therefore, MM is ordered to continue with his deposition, day-to-day, until completed.

CPLR § 3103 (a) provides that "a court may ... make a protective order ... conditioning or regulating the use of any disclosure device...to prevent unreasonable annoyance, expense,

embarrassment, disadvantage or other prejudice to any person or the courts." "[T]he burden of establishing any right to protection is on the party asserting it [and] the protection claimed must be narrowly construed." *Spectrum Systems*, 78 NY2d at 377.

In the instant matter, the court does not find that MM has satisfied this burden, and so his request for a protective order is denied. However, in order to avoid further problems, the court is ordering that the continuing deposition of MM be held in the court under the supervision of a Special Referee, who is hereby appointed for that purpose.

That portion of defendants' cross motion seeking an order compelling plaintiff to respond to their discovery demands is denied, based on the affirmation of plaintiff's counsel that plaintiff has adequately responded thereto.

Finally that portion of the motion and cross motion seeking an award of attorney's fees is denied. Such awards lie within the sound discretion of the court, and the court declines to order such in the instant matter. See *Derby v Bitan*, 89 AD3d 889 (2d Dept 2011).

Based on the foregoing, it is hereby

ORDERED that the branch of plaintiff's motion seeking to compel defendant Michael Mak to appear for a continuation of his deposition, day-to-day until completed, is granted; and it is further

ORDERED that the continued deposition of defendant Michael Mak is to take place in the court at 60 Centre Street under the supervision of a Special Referee designated by the Special Referee Clerk for that purpose, at a day and time set by the Special Referee; and it is further

ORDERED that counsel for the plaintiff shall, no later than October 31, 2012, serve a copy of this order together with a completed Information Sheet¹, upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date; and it is further

ORDERED that the branch of plaintiff's motion seeking to be awarded attorney's fees associated with making the instant motion is denied; and it is further

ORDERED that defendants' cross motion is denied; and it is further

ORDERED that the parties appear for their scheduled status conference on November 1, 2012, as previously directed.

Dated: October 22, 2012

FILED
OCT 26 2012
NEW YORK
COUNTY CLERK'S OFFICE

Joan M. Kenney, J.S.C.

¹Copies are available in Rm. 119M at 60 Centre Street and on the Court's website at www.nycourts.gov/supctmanh under the "References" section of the "Courthouse Procedures" link).