

DeMaio v Fleiger

2013 NY Slip Op 32696(U)

October 21, 2013

Supreme Court, Westchester County

Docket Number: 54551/11

Judge: Joan B. Lefkowitz

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

-----X

ANTHONY DeMAIO,

Plaintiff,

DECISION & ORDER

-against-

Index No. 54551/11
Motion Date: Oct. 21, 2013

SUE A. FLEIGER,

Seq. No. 1

Defendant.

-----X

LEFKOWITZ, J.

The following papers were read on this motion by plaintiff for an order (1) pursuant to CPLR 3124 and 3126 compelling defendant to make the staircase, upon which plaintiff allegedly fell, available for inspection, or, alternatively (2) pursuant to 3124 striking defendant's answer, or, alternatively (3) pursuant to 3126 precluding defendant from making any claims or relying on any evidence that is the subject of the outstanding discovery.

Order to Show Cause - Affirmation in Support - Exhibits A-I
Affirmation in Opposition - Exhibit A-I

Upon the foregoing papers and the proceedings held on October 21, 2013, this motion is determined as follows:

Plaintiff commenced this action in August, 2011, to recover damages for personal injuries which he allegedly sustained when he fell down a staircase between the second and third floors of a residence located at 15 Slocum Avenue, Yonkers, New York ("subject premises"). Plaintiff, in the verified complaint, alleges, inter alia, that defendant, through her agents, servants and/or employees, operated, occupied, maintained, and made repairs to the subject premises, including building a staircase leading to the attic. Plaintiff further alleges defendant was negligent, inter alia, for allowing and permitting the staircase to have defective steps, no handrails, and remain in an unsafe condition with no warning of defects of the treads or risers.

On February 5, 2013, the parties appeared for a compliance conference. On the same date, a Compliance Conference Order was issued which, inter alia, directed a site inspection to be completed on or before March 22, 2013.

Thereafter, on June 13, 2013, the parties again appeared for a compliance conference, and another Compliance Conference Order was issued on that date. The order directed, *inter alia*, that photographs of the staircase taken by plaintiff be provided within 10 days and a site inspection be completed on or before July 5, 2013.

By letter dated June 26, 2013, plaintiff's counsel advised defense counsel that the defense had failed to provide a date for the inspection of the subject premises despite court orders, and asked if the subject premises was available for inspection on June 28, 2013, July 1, 2013, July 2, 2013, or July 3, 2013. Plaintiff's counsel further asked for alternative dates if the foregoing dates were not suitable. In the letter, plaintiff's counsel also asserted that both defendant and her ex-husband are named insurers under the insurance policy. Finally, plaintiff's counsel requested that if defense counsel was unable to provide access to the subject premises to advise him in writing and indicate what efforts were made to obtain access. Defense counsel asserts that the letter was not received until July 1, 2013 and the request for the inspection was on short notice, but he, nevertheless, attempted to schedule an inspection without success.

By letter dated July 10, 2013, plaintiff's counsel asked that the court conference scheduled for July 19, 2013 be adjourned for two weeks so that defense counsel may determine whether the subject premises was available for inspection. Alternatively, plaintiff's counsel asked that the letter serve as a request for an expedited conference regarding the issue. Plaintiff also demanded photographs and measurements taken by State Farm Insurance, which he had recently learned about.

By response dated July 16, 2013, defense counsel provided plaintiff with six photographs of the staircase on which plaintiff was allegedly injured. The photographs represented various angles of the staircase.

A compliance conference was held on July 19, 2013, and a Trial Readiness Order was issued and entered. That order directed plaintiff to file a note of issue within 20 days of entry. Plaintiff, however, failed to file a note of issue.

On August 14, 2013, another compliance conference was held and a briefing schedule for the present motion was issued. Defense counsel asserts that he advised the court and plaintiff's counsel that defendant no longer had possession of the subject premises and all efforts to set up an inspection through alternate means had failed. At that conference, the trial readiness order was also vacated.

Plaintiff now seeks an order compelling defendant to make the staircase available for inspection, striking defendant's answer, or precluding defendant from making any claims or relying on any evidence that is the subject of outstanding discovery. Plaintiff contends that since he is alleging design flaws in the staircase, he requires an inspection by a structural engineering expert so that an expert opinion can be rendered regarding defendant's failure to comply with the building code. Plaintiff contends that he will be extremely prejudiced without the inspection

since he would be unable to submit an opinion regarding whether the design flaws caused or contributed to plaintiff's accident. Plaintiff further contends that defendant has failed to provide a site inspection in violation of several court orders. Plaintiff notes that orders issued after compliance conferences held on February 2, 2013 and June 13, 2013, both directed a site inspection. Plaintiff asserts that, despite the court orders, defendant never made the subject premises available for inspection, never objected to plaintiff's demand, never moved to vacate the court orders or requested an extension of time. Further, plaintiff contends that insofar as defendant and her husband, Blake Perez, remain insureds under the insurance policy on the subject premises, defense counsel is in a position to make the subject premises available for inspection by asking their insureds to cooperate. Plaintiff asserts that defense counsel has control over defendant's husband since he is a named insured on the policy covering the subject premises. Accordingly, plaintiff requests that defense counsel allow plaintiff's expert to enter the property to inspect the staircase. If defendant is unable to make the subject premises available, plaintiff seeks an order directing defendant to provide a sworn affidavit setting forth the reasons the subject premises cannot be made available for inspection.

Defendant opposes the motion. Initially, defense counsel notes that plaintiff only commenced the action against defendant, plaintiff's girlfriend, and not defendant's husband, Blake Perez, who is co-owner of the subject premises. In an affidavit submitted as an exhibit to the opposition, defendant avers the following: She and Blake Perez, her now estranged husband, purchased the subject premises in 2004. She lived in the subject premises from November, 2004 until April, 1, 2012, when she removed all her possessions from the subject premises, gave her key to Blake Perez, abandoned the property and relinquished all possessory interest in the subject premises. She and Blake Perez entered into an agreement under which she had no right to possess or enter the premises. Defendant further avers that she obtained a court order of protection from Blake Perez on December 17, 2008, and they are now separated.

In view of the foregoing, defense counsel contends that defendant currently has no control over the subject premises and should not be punished for "not allowing an inspection" of the subject premises. Defense counsel further asserts that defendant had abandoned the subject premises prior to plaintiff's request for an inspection, and had neither possessory or legal right to consent to the inspection. Defense counsel also asserts that plaintiff was aware that defendant no longer had control over the subject premises since plaintiff was advised at multiple court conferences that defendant was no longer in possession of the subject premises, but that defense counsel would attempt to assist in scheduling an inspection if plaintiff provided proposed dates for the inspection. Defense counsel further asserts that plaintiff's counsel failed to provide any proposed dates for the inspection following the court conferences and court orders directing the completion of the inspection. Accordingly, defense counsel sent a letter on June 25, 2013 by fax and mail asking for possible dates for the inspection. Defense counsel asserts that by letter dated June 26, 2013, which was not received until July 1, 2013, plaintiff's counsel provided possible dates for an inspection, but that one of the dates, July 28, 2013, had already passed by the time defense counsel received the letter, one date was the day the letter was received, July 1, 2013, and the other two dates, July 2nd and 3rd, 2013, gave no advance notice to schedule the inspection.

Despite the short notice, defense counsel asserts that he attempted to schedule the inspection with defendant and Blake Perez. Defense counsel was advised by defendant she had no access to the subject premises and although Blake Perez was cooperative, he advised defense counsel that the subject premises was being foreclosed and he no longer resided there, but would see if he could access the premises. In early August, 2013, defense counsel was advised by Blake Perez that he no longer had access to the subject premises as his key no longer worked. Thereafter, Blake Perez failed to return defense counsel's telephone calls.

Defense counsel also contends that plaintiff incorrectly asserts that defense counsel is in control of Blake Perez, a nonparty, who is not represented by defense counsel. Defense counsel notes that plaintiff fails to provide any support for the argument that defense counsel is in control of Blake Perez since he is an insured under the premises' insurance policy.

Accordingly, defense counsel contends that plaintiff's motion seeking to compel defendant to make the staircase available for inspection or sanctioning defendant for failing to make the staircase available must be denied since defendant had no control over the staircase at the time plaintiff requested the inspection, has no control over nonparty Blake Perez, and has not acted in bad faith. Finally, defendant contends that defendant is not responsible for plaintiff's failure to conduct the inspection as plaintiff took no affirmative steps to obtain the inspection until July 1, 2013, and never named Blake Perez, as an owner of the subject premises, as a defendant.

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." The phrase "material and necessary" is "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" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 406 [1968]; *Foster v Herbert Steppoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). Although the discovery provisions of the CPLR are to be liberally construed, "a party does not have the right to uncontrolled and unfettered disclosure" (*Foster*, 74 AD3d at 1140; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531 [2d Dept 2007]). The party seeking disclosure has the burden to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims (*Foster*, 74 AD3d at 1140). The court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*Mironer v City of New York*, 79 AD3d 1106, 1108 [2d Dept 2010]; *Auerbach v Klein*, 30 AD3d 451, 452 [2d Dept 2006]).

Although defendant contends that she no longer has control over the subject premises, defendant has failed to provide the court with sufficient evidence establishing the foregoing. Notably, although defendant alleges that she entered into an agreement with nonparty Blake Perez, her estranged husband and co-owner of the subject premises, relinquishing her possessory rights to the subject premises, defendant did not allege that such agreement was in writing, nor

was a written agreement provided to the court. General Obligations Law § 5-703 (1) provides, in relevant part, that an interest in real property, other than a lease for a term of less than one year, can only be transferred or surrendered “by an act or operation of law, or by a deed or conveyance in writing.” Accordingly, to transfer an ownership interest in real property, there must be a deed or other conveyance in writing (*Goodell v Rosetti*, 52 AD3d 911 [3d Dept 2008]; *Wali v City of New York*, 22 Misc3d 478 [Sup Ct, Kings County 2008], *aff’d* 71 AD3d 1134 [2d Dept 2010]). A search of the Westchester County Clerk’s Online Records shows the deed for the subject premises remains in the names of Sue Perez, presumably defendant’s married name, and Blake Perez.

Additionally, defense counsel has not provided the court with any legal support for his contention that defendant no longer has control over the subject premises because defendant abandoned the subject premises. Notably, the only case relied upon by defense counsel in support of his contention, *Starrett City Inc. v Smith* (25 Misc3d 42, 46 [App Term, 2d Dept 1009]), is factually distinguishable from the present action. *Starrett* does not support defense counsel’s contention insofar as the court therein only held that a tenant had abandoned leased property by failing to pay rent, her extended absence and relocation to Florida. Moreover, although courts have held that certain rights can be abandoned, including rights to a leasehold (*Wofford v Adams*, 299 AD2d 249 [1st Dept 2002]), equipment (*Selkirk Ventures, LLC v GE Capital Public Finance*, 5 Misc3d 1008 [A]), contract to purchase real property (*EMF Gen. Contr. Corp. v Bisbee*, 6 AD3d 495 [1st Dept 2004]), a nonconforming use (*City of Binghamton v Gartell* (275 AD 457 [3d Dept 1949]), and an easement by grant (*Gerbig v Zumpano*, 7 NY2d 327 [1960]; *Iacovelli v Schoen*, 170 AD2d 1044 [4th Dept 1991]), this court’s own research did not reveal any cases wherein it was held that a real property owner could abandon an ownership interest in real property.

In view of the foregoing, insofar as defendant’s name appears on the deed for the subject premises, defendant is still an owner of record of the subject premises and has the right to access the subject premises. Accordingly, since it is not disputed that plaintiff is entitled to an inspection of the staircase in the subject premises and defendant is still a record owner of the subject premises, defendant has an obligation to provide plaintiff access to the subject premises for the inspection. To the extent that a lock has been placed on the door to the subject premises allegedly by a party other than defendant or Blake Perez and Blake Perez has indicated that the house is in foreclosure, it is likely that a mortgagor may have placed the lock on the subject premises in order to protect its interest in the property upon a determination that the subject premises had been abandoned.¹ Therefore, once the parties agree upon a time and date for inspection, defendant shall serve any third-party holding a mortgage on the subject premises with

¹ The Lands Records of the Westchester County Clerk as listed in Westchester Records Online demonstrates that a mortgage for the subject premises was obtained by Blake Perez and Sue Perez and that such mortgage was transferred by assignment to Bank of New York Mellon on July 19, 2006. The Westchester Records Online also list a mortgage obtained by Blake and Sue Perez from JP Morgan Chase Bank NA on January 29, 2008.

notice of the time and date of the inspection with a copy of this order at least 10 days prior to the agreed upon date of inspection. In the event that the owner of the lock does not agree to unlock or remove the lock for purposes of the inspection, defendant shall retain a locksmith to unlock or remove the lock to allow access to the subject premises.

In view of the foregoing, it is

ORDERED that the branch of plaintiff's motion seeking an order compelling defendant to make the staircase available for inspection is granted, and defendant is directed to provide access to the staircase in the subject premises to plaintiff's counsel and expert on a date agreed upon by the parties, but no later than November 25, 2013; and it is further

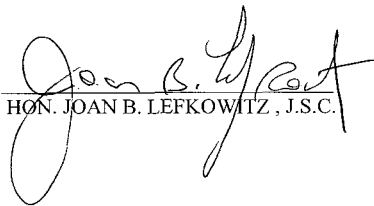
ORDERED that, insofar as a lock has been placed on the subject premises by a party other than defendant, defendant shall serve Blake Perez, co-owner of the subject premises, and all parties holding a mortgage on the subject premises, at least 10 days prior to the inspection, with a copy of this order and notice of the time and date of inspection and advising them that if the lock on the subject premises is not voluntarily unlocked or removed by the owner of the lock, the lock will be unlocked or removed pursuant to this court's order to allow access to the subject premises for inspection of the staircase; and it is further

ORDERED that the remaining branches of the motion are denied; and it is further

ORDERED that counsel are directed to appear for a conference in the Compliance Part, Courtroom 800, on November 26, 2013 at 9:30 A.M., at which time it is contemplated that a Trial Readiness Order will be issued.

The foregoing constitutes the decision and order of this court.

Dated: White Plains, New York
October 21, 2013


HON. JOAN B. LEFKOWITZ, J.S.C.

TO:

McMillian Constable Maker & Perone
By Stewart A. McMillian, Esq.
Attorneys for Plaintiff
2180 Boston Post Rd.
Larchmont, NY 10538
BY NYSCEF

Devitt, Spellman & Barrett, LLP
By Joshua S. Shteierman, Esq.
Attorneys for Defendant
50 Route 111
Smithtown, NY 11787
BY NYSCEF

cc: Compliance Part Clerk