

BMM Two, LLC v BMM Two, LLC
2013 NY Slip Op 34004(U)
July 3, 2013
Supreme Court, Westchester County
Docket Number: 60249/11
Judge: Joan B. Lefkowitz
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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
BMM FOUR, LLC,

Plaintiff,

DECISION & ORDER

-against-

Index No. 60249/11

Motion Date: 6/3/13

BMM TWO, LLC and BMM THREE, LLC,
JP MORGAN CHASE BANK, N.A., as successor in
interest to WASHINGTON MUTUAL BANK, F.A.
and WORKERS' COMPENSATION BOARD OF
THE STATE OF NEW YORK,

Seq. No. 3

Defendants.
-----X

LEFKOWITZ, J.

The following papers were read on this motion by plaintiff for an order pursuant to CPLR 3126 precluding defendants BMM Two, LLC and BMM Three, LLC from introducing, using, or relying on certain documentary evidence in this action.

Order to Show Cause - Affirmation of Lawrence Gottlieb - Affidavit of
Michael Otis - Exhibits
Affirmation in Opposition - Exhibits - Affidavit of Mark Fonte

Upon the foregoing papers and the proceedings held on June 3, 2013, this motion is determined as follows:

Plaintiff commenced this partition action with respect to certain real property and improvements located at 204 Union Avenue, Mount Vernon. It is alleged plaintiff and the BMM defendants owned the property as tenants in common. It is alleged the BMM defendants have been in possession and control of the premises since the date of acquisition on April 5, 2004, keeping the funds generated by residential and commercial tenants. The Court issued a trial readiness stipulation and order dated April 5, 2013. Plaintiff filed a note of issue and certificate of readiness on April 23, 2013.

Plaintiff's first request for production of documents dated May 14, 2012 seeks a copy of

the closing statement related to the property and all documents maintained by the BMM defendants since acquisition of the premises so as to permit the plaintiff to determine the income and expenses associated with the operation of the premises (Plaintiff's Exhibits F, Plaintiff's First Request for Production of Documents, p. 5-6). Plaintiff argues defendants have had complete ownership and control of the premises for in excess of eight years, but they were unable to provide any bank statements or other evidence of income except for the twenty-one month period of June 2010 through February 2012 (Plaintiff's Exhibit H, bank statements). Plaintiff argues defendants did not provide documentation of expenditures, except seven pages of documents (Plaintiff's Exhibit I). A compliance conference order dated July 12, 2012 directs the BMM defendants to serve on or before August 3, 2012 responses to plaintiff's discovery and inspection demand dated May 14, 2012 (Plaintiff's Exhibit L). Plaintiff argues defendants produced additional documents at the March 5, 2013 deposition of Mark Fonte, a principal of defendant BMM Two and at the March 6, 2013 deposition of Robert Fonte, a principal of BMM Three (Plaintiff's Exhibits U, V). Plaintiff seeks to preclude the introduction of documents produced immediately prior to the March 2013 depositions, arguing they were produced late in violation of the July 12, 2012 compliance conference order.

In opposition, defendants BMM Two and BMM Three argue they fully complied with the documentary discovery requests to the extent they could find documents responsive to the demands. Defendants argue documents, particularly documents prior to 2010, were difficult to locate. They reportedly continued searching for documents in a good faith effort to comply with defendants' disclosure obligations. Defendants argue a box of documents responsive to the document requests was located the day before the scheduled deposition of Mark Fonte and was provided to plaintiff's counsel the evening before the March 5, 2013 deposition (Plaintiff's Exhibit U). The documents were reportedly marked as exhibits at Mark Fonte's deposition and he was questioned about them. On the evening of March 5, 2013, defendants continued their search and located more documents. These documents were delivered to plaintiff's counsel on March 6, 2013 just prior to the deposition of Robert Fonte (Plaintiff's Exhibit V). Plaintiff's counsel reportedly did not object to the late production of documents at that time and did not request that either witness be produced for a further deposition related to the documents. Defendants submits the affidavit of Mark Fonte, who states when discovery was initiated he personally searched for documents related to the property in offices and an off site storage facility. When the discovery responses were due the BMM defendants reportedly produced the documents they had and continued searching. Mr. Forte states prior to depositions he went back to the storage facility, conducted a search for additional documents, and located documents related to the property. Defendants argue the documents were produced late in good faith and plaintiff has not been prejudiced by the late production of documents.

By order to show cause dated January 3, 2013, plaintiff made a prior motion seeking to strike the answer of the BMM defendants based in part on the alleged failure to disclose documents. In opposition to the motion, defense counsel submitted an affirmation dated January 18, 2013 stating relevant documentation was disclosed and "other documentation is either not in defendants' possession, custody or control or has been lost." The affirmation states "regarding documents requested but not produced, the defendants were fully forthcoming in their

responses.” After this motion was decided and immediately prior to defendants’ depositions, defendants conducted a further search and located relevant documents, including documentation of expenditures, cancelled checks, home depot credit card statements, and a closing statement related to the property.

“The nature and degree of the penalty to be imposed on a motion pursuant to CPLR 3126 is a matter generally left to the discretion of the Supreme Court” (*Carbajal v Bobo Robo, Inc.*, 38 AD3d 820 [2dDept 2007]). To invoke the drastic remedy of preclusion a court must determine that the party’s failure to disclose is willful and contumacious (*Greene v Mullen*, 70 AD3d 996 [2d Dept 2010]; *Kingsley v Kantor*, 265 AD2d 529 [2d Dept 1999]). Willful and contumacious conduct can be inferred from repeated noncompliance with court orders or a failure to comply with court ordered discovery over an extended period of time, coupled with the lack of an adequate excuse for the failure (*Mei Yan Zhang v Santana*, 52 AD3d 484 [2d Dept 2008]; *Carbajal v Bobo Robo, Inc.*, 38 AD3d 820 [2d Dept 2007]; *Prappas v Papadatos*, 38AD3d 871 [2d Dept 2007]).

At oral argument on June 3, 2013 counsel for the BMM defendants was questioned on the search for documents, the prior motion practice, and on the late production of documents that are clearly relevant to the allegations in this matter. Counsel failed to give a reasonable explanation as to why the documents were not located and produced in a timely manner. Counsel stated his clients are not good record keepers. It appears some of the documents at issue, such as cancelled checks and credit card statements, could have been obtained by the BMM defendants from other sources. Counsel failed to give a reasonable explanation as to why efforts were not made to obtain the documents from other sources. Pursuant to the July 12, 2012 compliance conference order, the BMM defendants were directed to serve discovery responses, including the documents at issue, on or before August 3, 2012 (Plaintiff’s Exhibit L). Counsel submitted a January 18, 2013 affirmation stating relevant documentation was disclosed and “other documentation is either not in defendants’ possession, custody or control or has been lost,” then instructed his clients to keep looking for documents. The definitive representation made by counsel in the motion papers was disingenuous, as the clients were directed to keep looking for documents. Defense counsel then produced relevant documents immediately prior to defendants’ March 5, 2013 and March 6, 2013 depositions. The BMM defendants have not stated a reasonable explanation for the late production of relevant documents. As the BMM defendants fail to demonstrate a good faith effort was made to comply with the July 12, 2012 compliance conference order and counsel does not set forth an adequate excuse for this failure, defendants’ conduct is deemed willful and contumacious and an order of preclusion is warranted.

In view of the foregoing, it is

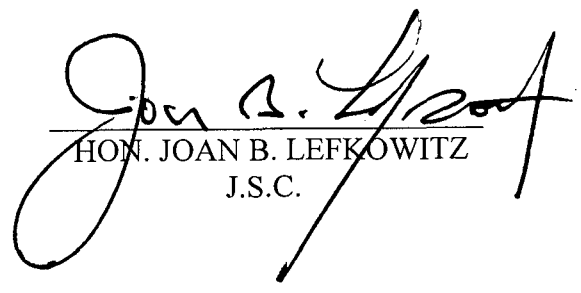
ORDERED that plaintiff’s motion for an order precluding defendants BMM Two, LLC and BMM Three, LLC from introducing, using, or relying on certain documentary evidence marked as plaintiff’s Exhibits U and V is granted; and it is further

ORDERED that plaintiff is directed to serve a copy of the order with notice of entry within ten days of entry.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York

~~June~~ *July 3*, 2013


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

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cc: Compliance Part Clerk