

Courtney v 18th & 8th, LLC

2014 NY Slip Op 32731(U)

October 17, 2014

Supreme Court, New York County

Docket Number: 108499/07

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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TODD COURTNEY and 304 WEST 18, LLC,

Index No.: 108499/07

Plaintiffs,

Motion Seq. Nos. 006
and 007

-against-

18th& 8th, LLC, and BDG CONSTRUCTION CORP.,

Defendants.

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HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

Defendant BDG Construction Corp. (“BDG”) moves (motion sequence 006) pursuant to CPLR 3211(a)(5) to dismiss plaintiffs’ amended complaint filed on April 24, 2014, and pursuant to CPLR 3124 and 3126 to dismiss the amended complaint for plaintiffs’ failure to provide responses to outstanding discovery.

Plaintiffs move (motion sequence 007) pursuant to CPLR 2221 for leave to reargue and renew their motion for leave to amend the complaint, and upon reargument and renewal, granting plaintiffs’ prior motion in its entirety. Both motions are consolidated for joint disposition herein.

Factual Background¹

BDG’s Motion

According to BDG, in the April Decision, the court granted in part plaintiffs’ motion to amend the complaint. Subsequently, plaintiffs filed an amended complaint, but did not conform same to the court’s order, and instead merely corrected a typographical error contained in the

¹ For a detailed factual summary, the parties are directed to the Court’s decision and order on motion sequence 005, dated April 14, 2014 (the “April Decision”). All capitalized terms herein are defined as they were in the April Decision.

amended complaint. Thus, BDG argues, plaintiffs' willful failure to obey the court's decision warrants either total denial of plaintiffs' motion to amend, or dismissal.

BDG also moves to dismiss the action based on plaintiffs' failure, despite numerous court orders, to provide certain discovery in response to its fifth notice for discovery and inspection dated May 16, 2013; namely, plaintiffs' bank account records and income tax returns.² Thus, BDG argues that plaintiffs should not be permitted to pursue their damages claims.

BDG references Courtney's depositions, wherein Courtney testified, *inter alia*, that he used his "personal accounts" to deposit all rents, security deposits and withdrawals for operating expenses to run the Building. Courtney further testified that he deposited all rents received into his personal accounts, and only started to segregate deposits in 2007. And, although Courtney testified that he kept records of repairs performed, and that he either paid by cash, credit card or check, plaintiffs have not produced records to this effect. BDG further argues that Courtney has never been able to state with specificity as to the exact losses he incurred, and has referred to records and documents that he has never produced. Also, Courtney testified that 304 West did file income tax returns, and that he has maintained (yet never produced) copies of same.

In opposition, plaintiffs object to the demands at issue as duplicative and/or privileged, and note that BDG's counsel previously had an opportunity to inspect and copy all documents in plaintiffs' counsel's possession.

Plaintiffs nevertheless submit in opposition a response to BDG's fifth notice for discovery and inspection. As to the demands at issue, plaintiffs state that they "will provide an

² Although BDG originally moved regarding 14 outstanding demands, in reply, it notes that plaintiff provided responses in opposition to all but two of the demands. Accordingly, the court only discusses the two demands that remain outstanding.

authorization for [304 West's] bank records"; however, no such authorization was attached to the disclosure. Also, Courtney objected to the disclosure of his personal banking records, and plaintiffs objected to providing income tax records on the specific grounds that the demands were "overreaching, onerous, irrelevant, privileged, an invasion of privacy, and is not likely to lead to the production of admissible evidence."

As to the amended complaint, plaintiffs state that the April Decision "addresses the portions of the amended complaint which are permissible and those which are not. As such, the order serves as the law of the case." Plaintiffs further note that their instant motion to renew and reargue their prior motion to amend will affect the contents of the amended complaint.

In reply, BDG notes that plaintiffs have not yet provided an authorization for 304 West's bank records. BDG reiterates its contentions as to Courtney's bank account records, and adds that Courtney recanted his testimony regarding his keeping of records of Building repairs, and instead averred that he did not keep any separate ledger to document his operating expenses, which would be reflected only by withdrawals from his bank account.

BDG further notes that Courtney has been unable to state with specificity the exact losses he incurred, and has instead referred to "records"; "rent rolls"; and "bank records" as the underlying substantiation, which have not been produced. Thus, BDG contends that plaintiff should be compelled to produce an authorization for Courtney's personal banking records for 2006 through 2007, due to his testimony that his personal account was used as the conduit for all income and expenses for the Building.

Regarding income tax returns, BDG argues that plaintiffs should be compelled to produce or provide an authorization for all of plaintiffs' personal and business income tax returns from

2006 until the time when 304 West lost the Building in foreclosure. BDG contends that income tax returns are discoverable in a negligence action where an element of damages is lost income, and also where a self-employed plaintiff claims lost earnings as a result of the incident. Here, Courtney has failed to provide any secondary backup financial records. In sum, there has been no disclosure of any financial records sought by BDG, thus necessitating the demanded income tax returns.

Thus, plaintiffs' income tax returns will reflect the amount of income received from the Building from 2006 until the foreclosure, and will provide information as to the losses and operating expenditures incurred which have not yet been provided. Moreover, Courtney should be considered as "self-employed" for purposes of tax return disclosure, as he testified that he treated rental revenue received from 2006 through 2007 as his personal income. Additionally, following the Building's refinancing, Courtney has been the sole managing member of 304 West, a closely held corporation. And, since it is unknown what, if anything, 304 West's bank records will reveal, the income tax returns will certainly show the actual income and losses to which Courtney was unable to testify, and for which records have never been disclosed.

BDG also adds that a determination by the Court on plaintiffs' instant motion to reargue/renew their prior motion to amend the complaint, might alter the contents of the Amended Complaint. Therefore, the Court should dismiss the Amended Complaint, pending a decision on plaintiffs' motion to renew/reargue.

Plaintiffs' Motion

Plaintiff argues that the Court erred in part by denying those portions of their motion which sought to amend the complaint to particularize damages which arose out of defendants'

negligence.

Plaintiffs seek reargument/renewal as to their claims regarding failure to properly underpin the premises. Plaintiffs argue that BDG improperly failed to point to the portion of the deposition of non-party witness Jeff Serravezza (“Serravezza”) which showed that his analysis of the underpinning damage was not provided to Courtney until December 2012. The evidence, as presented by BDG, gave the inaccurate appearance that Courtney was advised of Serravezza’s opinion regarding damage caused by underpinning back in 2007. And, since plaintiffs served an amended bill of particulars to include allegations of damages from the underpinning just days after Serravezza emailed his report, and BDG explored this issue at Serravezza’s deposition, BDG cannot claim surprise of the underpinning claim.

Plaintiffs further argue that amendment to add damages for diminution of value to the Building, lost profits and loss of business expectation is warranted, as such claims are not new theories of liabilities, but simply additional damages flowing from BDG’s negligence.

Plaintiffs also argue that the court’s “focus” on the passage of time between the original complaint’s filing (in 2007) and the prior motion to amend (made in 2013) was inappropriate, as there were other factors which caused the delay, “of which the Court was unlikely aware.” Such factors include that plaintiffs’ original attorneys did not include the additional damages claims sought in the motion. Also, “while several of these claims of damages became apparent over time during the course of discovery, there was an extensive delay in the case when [304 West] filed for bankruptcy” in February 2010, resulting in a stay. Once the bankruptcy was dismissed, plaintiffs retained new counsel. However, although that counsel worked on the file for several months, he ultimately passed away in December 2011, and plaintiffs’ current counsel was not

formally retained until May 2012. Counsel then had to obtain the file's records from prior counsel's widow, as he was a solo practitioner. Thus, the passage of time referenced by the court was not due to "neglect," but rather due to an unfortunate series of circumstances which delayed the case in its entirety.

In opposition, BDG notes that plaintiffs' claims that Courtney was not made aware of underpinning issues until December 2012 are being made for the first time. Plaintiffs, under the guise of reargument, advance new arguments that were not raised but were available to them in the original motion papers, and thus constitute another improper "bite at the apple." Such arguments should have been proffered in the prior motion practice (*e.g.*, in plaintiffs' reply), or when Courtney became aware of the underlying facts of the proposed new causes of action.

In any event, Courtney's claim that he was unaware in 2007 of damages caused by underpinning is belied by his affidavit submitted with plaintiffs' motion. Upon close examination, it was only the extent of damages that could not be determined until December 2012, not the potential for damages themselves. Moreover, plaintiffs do not explain why Courtney's affidavit was not submitted in connection with the prior motion. Thus, all arguments that until 2012, Courtney was unaware of damages from faulty underpinning are unsupported by the record.

And, the issue of when Courtney discovered damages related to underpinning is not the issue; the action, one for negligence, has a three-year statute of limitations and accrued when the injury to the Building occurred in 2006-2007. On this note, BDG reiterates its contentions as to prejudice, due to the time elapsed since the action accrued.

BDG further argues that the motion for renewal must be denied, as plaintiffs did not offer

any reasonable justification for the failure to submit Courtney's affidavit or as raise the purported new facts related to Serravezza in the prior motion.

Discussion

BDG's Motion

CPLR 3124 provides, that "if a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article . . . the party seeking disclosure may move to compel compliance or a response." CPLR 3126 provides that in the event a party refuses to obey an order for disclosure, the court may, among other things, prohibit the disobedient party from supporting its claims, strike the party's pleadings or parts thereof, and/or dismiss the action or any part thereof.

The court declines to strike plaintiffs' complaint. Although plaintiffs' failure to respond to BDG's fifth notice for discovery and inspection until the instant motion practice is without excuse, plaintiffs responded nonetheless, and thus, the court will evaluate plaintiffs' objections to the remaining outstanding demands.

Here, plaintiffs must produce their bank account records and income tax returns, and/or authorizations for the release of same (*see Cook v. HMC Times Square Hotel, LLC*, 112 A.D.3d 485 [1st Dept 2013], *citing Daniels v City of New York*, 291 AD2d 260, 260 [1st Dept 2002] ("Supreme Court is vested with broad discretion to supervise disclosure and its orders in this regard should not be disturbed absent an abuse of that discretion"); *MSCI Inc. v Jacob*, 120 AD3d 1072 [1st Dept 2014] ("A trial court is vested with broad discretion in its supervision of disclosure")).

304 West has already agreed to supply an authorization for its bank records; such

authorization, which will provide for the release of all 304 West banking records during the period it owned the Building, must be served forthwith. Moreover, Courtney must produce his personal banking records (or authorizations for same) from January 2006 through December 2007, as the record shows that Courtney used his “personal accounts” as a conduit for all income and expenses for the Building which relate to the alleged damages in this matter (*see DIV-COM, Inc. v Tousignant*, 116 AD3d 1118 [3d Dept 2014] (disclosure of personal financial records appropriate when such documentation relevant to issues in case)).

This mandate is further warranted by Courtney’s inability to state with any specificity as to the exact losses incurred, and admitted dearth of other documentation which would substantiate his claims (*see DG & A Mgmt. Services, LLC v Securities Industry Ass’n*, 78 AD3d 1316, 1319 [3d Dept 2010] (“inasmuch as plaintiff has averred that it ‘did not maintain income and expense statements, a general ledger, balance sheet, audit reports, statements of cash flow, or similar financial statements,’ we cannot say that Supreme Court abused its discretion in granting defendant access to, among other things, plaintiff’s bank and credit card records”)).

In the same vein, plaintiffs must produce their respective tax returns (or authorizations for same) from 2006 through the time when 304 West lost the Building in foreclosure. Although tax returns are generally not discoverable absent a showing of overriding necessity (*see Four Aces Jewelry Corp. v. Smith*, 256 AD2d 42 [1st Dept 1998]), they are discoverable when the party in question fails to provide other documentation of income (*see Kay v Kay*, 223 AD2d 684 [2d Dept 1996]; *DG & A, supra*). Moreover, tax returns have been found to be discoverable in negligence actions where an element of damages is lost income (*see Niagara Falls Urban Renewal Agency v Friedman*, 55 AD2d 830 [4th Dept 1976]).

Here, BDG has made the requisite showing in that plaintiffs have failed to produce other documentation indicating plaintiffs' income and expenses, which are relevant and essential to this action and plaintiffs' claims. Accordingly, BDG's motion to compel the outstanding discovery is granted.

However, as to BDG's request to dismiss the Amended Complaint pursuant to CPLR 3211(a)(5), it is noted that BDG does not explain how plaintiffs' failure to amend the complaint in accordance with the Court's instructions in its April Decision warrants dismissal pursuant to CPLR 3211(5). CPLR 3211(a)(5) permits dismissal on the grounds that

"5. the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds.

And, BDG offers no other authority to warrant dismissal the Amended Complaint based on plaintiffs' failure to add the claims they were permitted to add.

In any event, as BDG notes, the court's determination on plaintiffs' motion to renew/reargue their motion to amend the complaint (see *infra*, p.12), resolves the contents of the Amended Complaint. And, As such, the Court declines to dismiss the Amended Complaint filed in April 2014.

Plaintiffs' Motion

A motion for leave to renew pursuant to CPLR 2221 "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 "shall contain reasonable justification for the failure to present such facts on the prior motion." (*American Audio Serv. Bur. Inc. v AT & T Corp.*, 33 AD3d 473, 476 [1st Dept 2006]). The motion to renew,

when properly made, posits newly discovered facts that were not previously available or a sufficient explanation is made why they could not have been offered to the court originally (*see discussion in Alpert v. Wolf*, 194 Misc2d 126, 133, 751 NYS2d 707 [Civ Cty New York Cty 2002]; Siegel New York Practice § 254 [3rd ed. 1999]). A motion to renew, “is intended to draw the court’s attention to new or additional facts which, although in existence at the time of the original motion, were unknown to the party seeking renewal and therefore not brought to the court’s attention” (*Beiny v. Wynyard*, 132 AD2d 190, *lv. dismissed* 71 NY2d 994 [1988]).

Therefore, plaintiffs’ motion, if considered as one for leave to renew, must be denied, as plaintiffs do not proffer any justification (let alone, reasonable justification) for their failure to present the newly made assertions in the prior motion to amend (*see Feaster v Boulabat*, 85 AD3d 664 [1st Dept 2011]).

A motion to reargue states that the Court overlooked or misapprehended the facts or the law. A motion for leave to reargue under CPLR 2221 “is addressed to the sound discretion of the court and may be granted only upon a showing ‘that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision’” (*William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22 [1st Dept 1992] *lv denied and dismissed* 80 NY2d 1005 [1992], *rearg. denied* 81 NY2d 782 [1993]). Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided (*see Pro Brokerage v Home Ins. Co.*, 99 AD2d 971 [1st Dept 1984]) or to present arguments different from those originally asserted (*Foley v Roche*, 68 AD2d 558 [1st Dept 1979]). On reargument, the court’s attention must be drawn to any controlling fact or applicable principle of law which was misconstrued or overlooked (*see Macklowe v Browning School*, 80 AD2d 790 [1st Dept 1981]).

The court grants plaintiffs' application for leave to reargue the motion to amend the complaint. Notwithstanding, upon reargument, the court adheres to its prior determination.

As to the claim that Courtney was not made aware of potential damages from underpinning until 2012 (as opposed to 2007), the only argument raised by Courtney herein is that the *extent* of the damages could not be determined until Serravezza rendered his opinion in December 2012. However, Courtney's affidavit, combined with citations to other portions of Serravezza's testimony, does not refute BDG's showing in the original motion that Serravezza raised the issue of the underpinning in 2007 (**e file document 49, pp. 24-25, 83**), and that Courtney was provided photographs demonstrating the alleged damage from underpinning in 2007. And, Courtney does not address the five-year gap between Serravezza's initial 2007 examination and his 2012 opinion, in which there is no indication that Serravezza's conclusions ever changed. Moreover, Courtney does not address Serravezza's testimony that in 2007, Serravezza advised Courtney to further survey and evaluate the property due to the potential for structural damages (**e file document, 49 p. 20**). On this note, Courtney does not explain why the "extent" of such damages "could not be determined" until Serravezza sent Courtney his December 2012 opinion.³ Thus, plaintiffs have not rebutted the court's prior holding that they were aware of this potential claim on or before 2007.

As to the delay in seeking amendment, the court did not make a finding that the delay was a product of "neglect" as urged by counsel. Rather, the court noted that plaintiffs offered no excuse (let alone a reasonable one) for the delay, and submitted no legal authority submitted in support of their motion, made untimely in defiance of a prior court order.

³ Notably, plaintiffs' do not submit an affidavit from Serravezza to clarify any of the above issues.

Plaintiffs' remaining arguments are nothing more than regurgitations of their previous contentions, of which the court has already disposed. Since reargument is not designed to afford a party successive opportunities to reargue issues previously decided (*Pro Brokerage v Home Ins. Co.*, 99 AD2d 971, 472 NYS2d 661 [1st Dept 1984]), the court declines to further discuss these contentions.

Accordingly, plaintiffs' motion, upon reargument is denied. However, plaintiffs shall serve and file an amended complaint that conforms to the April Decision within 20 days of service of notice of entry of this order.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of BDG's motion pursuant to CPLR 3211(a)(5) to dismiss plaintiffs' amended complaint filed on April 24, 2014, is denied; and it is further

ORDERED that the branch of BDG's motion pursuant to CPLR 3124 and 3126 to dismiss the amended complaint for plaintiffs' failure to provide responses to outstanding discovery is granted to the extent that plaintiffs shall provide Courtney's banking records and income tax returns (from 2006-2007) and 304 West's banking records and income tax returns from the time it assumed ownership of the Building until it lost same in foreclosure, and/or authorizations for the release of same, within 20 days of service of a copy of this order with notice of entry; and it is further

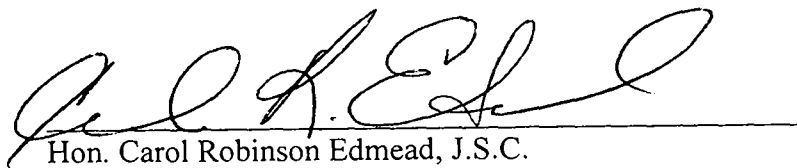
ORDERED that plaintiffs' motion for leave to renew/reargue is granted to the extent that the court grants leave to reargue plaintiffs' motion to amend the complaint; however, upon reargument, the court adheres to the April Decision; it is further

ORDERED that plaintiffs shall serve and file an amended complaint in accordance with the April Decision within 20 days; and it is further

ORDERED that BDG serve a copy of this order with notice of entry upon plaintiffs within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: October 17, 2014



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMED