

Scialdone v Stepping Stones Assoc., LP

2014 NY Slip Op 33859(U)

April 7, 2014

Supreme Court, Westchester County

Docket Number: 12514/11

Judge: Joan B. Lefkowitz

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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

FILED
AND
ENTERED
ON 4-8-2014
WESTCHESTER
COUNTY CLERK

-----X
GREGORY P. SCIALDONE,
Plaintiff,

-against-

STEPPING STONES ASSOCIATES, LP,
and DEROSA BUILDERS INC.,
Defendants.
-----X

LEFKOWITZ, J.

DECISION & ORDER

Index No. 12514/11

Motion Date: Feb. 3, 2014
Seq. No. 17

FILED
APR - 8 2014

TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

The following papers numbered 1 to 27 were read on this motion by defendants for an order dismissing the remaining causes of action in the amended complaint, or alternatively, precluding the plaintiff from testifying and offering evidence due to plaintiff's failure to provide adequate deposition testimony and provide adequate responses in a verified bill of particulars. Defendants seek an order compelling plaintiff to comply with prior discovery demands and Court orders, compelling plaintiff to provide authorizations as the issuance of a handicap parking permit, issuing sanctions and attorneys fees for the cost of conferences and motions required due to plaintiff's failure to respond to defendants' demands and deposition questions.

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|---|-------|
| Order to Show Cause - Affirmation in Support - Exhibits | 1-17 |
| Affirmation in Opposition - Exhibits | 18-27 |

Upon the foregoing papers, this motion is determined as follows:

Plaintiff commenced this action for, inter alia, declaratory and injunctive relief relating to a parking space at an apartment complex owned and operated by defendants. Plaintiff is a tenant in the apartment complex. Defendants moved to dismiss twenty three causes of action in the amended complaint. In an order dated February 27, 2013 (Jamieson, J.), the Court dismissed a number of the causes of action and ruled the seventh, eighth, ninth, tenth, eleventh and twentieth causes of action remain (Affirmation in Opposition by Kenneth Finger, Exhibit 2). In the remaining causes of action, plaintiff alleges he is entitled to a declaratory judgment declaring the lease or some of its provisions unconscionable, declaring plaintiff to be a tenant under the rent stabilization laws and the emergency tenant protection act, declaring all rents and rent increase for all apartments at the premises frozen pursuant to the emergency tenant protection act and the rent stabilization laws, and directing defendants to issue a statutory tenancy and lease renewal. Plaintiff alleges he and his wife have medical conditions and disabilities and have been issued handicap parking permits, defendants failed to provide plaintiff with parking spaces for disabled

persons, defendants have discriminated against persons with disabilities, and defendants have violated the fair housing protection act. Plaintiff seeks an order directing defendants to provide handicap parking spaces at the premises.

Defendants argue in a September 11, 2013 order (Lefkowitz, J.), the Court ordered plaintiff to provide a further supplemental bill of particulars and the supplemental responses provided are inadequate, improper, and not responsive to the demands (Defendants' Exhibit I). The September 11, 2013 order states plaintiff was directed to provide on or before September 24, 2013 a supplemental bill of particulars as to demands 406 through 415, 417 through 428, and 493 through 499 in defendants' demand for a verified bill of particulars (Defendants' Exhibit H). Defendants argue the responses by plaintiff in his further bill of particulars are inadequate and improper. Defendants argue the Court should dismiss the causes of action related to the demands for which insufficient responses were provided and plaintiff should be precluded from testifying as to any of these causes of action. Upon review of plaintiff's further bill of particulars, the Court finds plaintiff's responses to demands 406, 413, 414, 418, 419, 420, 421, 422, 493, 499 are adequate (Defendants' Exhibit J). Plaintiff's responses to demands 410, 412, 415, 424, 425, 426, 427 are insufficient and plaintiff is directed to provide an amended further bill of particulars as to these demands.

Defendants argue plaintiff's deposition testimony was inadequate because plaintiff testified to having memory loss issues, plaintiff's counsel objected to questions, and plaintiff refused to answer questions. Defendants argue plaintiff should be precluded from testifying as to anything he stated at his deposition, as he testified he took Valium and he did not know whether Valium had an effect on his memory. In opposition, plaintiff argues any objection based on plaintiff's prescription regimen should have been addressed to the Court for a ruling by telephone or at a conference prior to taking three days of deposition testimony. The issue of seeking a ruling as to whether to continue with the deposition based on plaintiff's testimony regarding medications was raised at plaintiff's first deposition session on October 21, 2013, and defense counsel opted to continue with the deposition and make a future motion (Defendants' Exhibit L, deposition transcript of Gregory Scialdone, p. 13-14). At plaintiff's October 21, 2013 deposition, plaintiff was asked whether he had taken any medication that could affect his ability to respond to any of the questions, he stated "possibly and likely." Plaintiff testified to his daily regimen of medications and testified he took Valium that morning (Defendants' Exhibit M, deposition transcript of Gregory Scialdone, p. 12-13). At plaintiff's third deposition session on November 3, 2013, he testified it is possible the drugs affect his ability to understand questions and he sometimes has memory issues (Defendants' Exhibit O, deposition transcript of Gregory Scialdone, p. 326-327). Plaintiff argues defendants fail to point to caselaw to support the contention that plaintiff's claims should be dismissed or plaintiff should be precluded from testifying at trial based on this testimony.

Insofar as defendants seek an order precluding plaintiff from testifying at trial due to plaintiff's testimony regarding medications and memory loss issues, this branch of the motion is denied. While this testimony may raise an issue of fact regarding plaintiff's credibility,

defendants fail to cite to any authority indicating plaintiff should be precluded from testifying at trial on this basis. Resolving questions of credibility and determining the accuracy of witnesses are for the trier of fact (*LeBlanc v Skinner*, 103 AD3d 202 [2d Dept 2012]).

Defendants seek dismissal of causes of action as to which plaintiff refused to provide answers at the deposition, or alternatively, seek an order precluding plaintiff from testifying as to any causes of action or allegations as to which he refused to provide answers at the deposition. Pursuant to the Uniform Rules of the Trial Courts 22 NYCRR §221.2, a deponent shall answer all questions at a deposition except to preserve a privilege or right of confidentiality, to enforce a court ordered limitation, or when the question is plainly improper and would, if answered, cause significant prejudice to any person. An attorney shall not direct a witness not to answer except under these limited circumstances or pursuant to an objection set forth in CPLR 3115 (*see Parker v Ollivierre*, 60 AD3d 1023 [2d Dept 2009]). Additionally, Uniform Rules of the Trial Courts 22 NYCRR §221.1(b) provides that “[s]peaking objections [are] restricted. Every objection raised during a deposition shall be stated succinctly and framed so as not to suggest an answer to the deponent... Except to the extent permitted by CPLR Rule 3115 or by this rule, during the course of the examination persons in attendance shall not make statements or comments that interfere with the questioning.” “[G]enerally, the proper procedure is to allow a witness to answer all questions subject to objections which are reserved for trial in accordance with CPLR 3115” (*Walter Karl, Inc. v Wood*, 161 AD2d 704 [2d Dept 1990]).

The Court rejects the contention by plaintiff’s counsel that any issues with regard to parking, whether plaintiff rented a parking space, and the circumstances are not relevant to the claims (Defendants’ Exhibit N, plaintiff’s October 21, 2013 deposition transcript, p.155-156). Plaintiff’s remaining causes of action include allegations that plaintiff is entitled to a declaratory judgment determining the legal number of parking spaces permitted to be used at the premises by the defendants, a declaratory judgment finding that defendants have no authority or capacity to take any action to terminate the plaintiff’s parking space, plaintiff has been issued a handicap parking permit from the State of New York, defendants did not provide handicap parking at the premises in the last twenty four years, defendants failed to provide plaintiff with parking spaces for disabled persons, and defendants discriminated against persons with disabilities or medical conditions concerning providing parking spaces (Defendants’ Exhibit B, Amended Verified Complaint, tenth and eleventh causes of action). While the allegations in plaintiff’s first cause of action relating to the alleged constructive eviction of the plaintiff from one of three parking spaces were dismissed, questions pertaining to parking spaces occupied by the plaintiff are relevant to the remaining causes of action. Plaintiff’s counsel improperly objected to and blocked questioning on this issue (Defendants’ Exhibit M, plaintiff’s October 21, 2013 deposition transcript, p.83-86). Plaintiff shall appear for a further deposition limited to questions related to parking spaces used or rented by the plaintiff.

As to defendants’ argument that plaintiff refused to provide answers to certain other questions during his deposition, the Court finds these questions seek information more properly sought in pleadings, improperly seek legal conclusions, specifically refer to paragraphs in the

complaint that were dismissed, or plaintiff's responses were sufficient. Insofar as defendants seek information pertaining to all doctors who treated plaintiff for conditions prior to or subsequent to the issuance of the handicap parking permit or treated plaintiff for the conditions for which a handicap parking permit was issued, the information sought is overbroad and is not relevant to the claims (Defendants' Exhibit N, plaintiff's October 21, 2013 deposition transcript, p.235, 236, 239-240, 243, 244). Plaintiff testified Dr. Stanley Holstein was the only doctor involved in treating him for the purpose of obtaining a handicap parking permit (Defendants' Exhibit N, plaintiff's October 21, 2013 deposition transcript, p.235-236). The Court rejects the contention by plaintiff's counsel that he is entitled to know every doctor who treated plaintiff for his entire life for those conditions which lead to the issuance of a parking permit (Defendants' Exhibit N, plaintiff's October 21, 2013 deposition transcript, p.238). Defendants fail to demonstrate on this motion that plaintiff's treating providers other than Dr. Holstein are relevant to the allegations in this matter. As defendants fail to demonstrate on this motion that plaintiff's conduct was willful and contumacious, an order dismissing the remaining causes of action in the amended complaint, or precluding the plaintiff from testifying is not warranted under the circumstances of this case (*see Voutsinas v Voutsinas*, 43 AD3d 1156 [2d Dept 2007]; *Gateway Tit. & Abstract, Inc. v Your Home Funding, Inc.*, 40 AD3d 919 [2d Dept 2007]).

Defendants seek an order compelling plaintiff to provide medical authorizations without limitation with respect to the issuance of a handicap parking permit. Defendants argue they are entitled to documentation and medical reports from all medical providers who treated the plaintiff for the alleged conditions that led to the issuance of a handicapped parking permit (Affirmation of Kenneth Finger, p. 16). Defendants assert the records obtained from Dr. Stanley Holstein, who is reportedly the doctor who authorized the parking permit, are completely devoid of any reference to a handicap parking permit (Defendants' Exhibit K).

In a September 11, 2013 order (Lefkowitz, J.), the Court directed plaintiff to provide an authorization for plaintiff's physician permitting defendants to obtain the supporting documentation for the issuance of the handicap parking permit. The Court found the handicap parking permit and "the supporting documentation from a physician for the permit clearly constitute a record of having... an impairment or being regarded as having an impairment. Any additional medical records of the plaintiff and whether the permit was properly issued to the plaintiff are not relevant to the claims in this action. Plaintiff should not have to provide authorizations and medical records related to the medical conditions for which a permit was issued" (Defendants' Exhibit I).

The Court rejects defendants' contention that they are entitled to medical reports from all medical providers who treated the plaintiff for the alleged conditions that led to the issuance of the handicap parking permit. Plaintiff testified Dr. Holstein was the only doctor involved in him obtaining a handicap parking permit. He testified he was not sure of the date Dr. Holstein first gave him medical clearance for the issuance of a handicap parking permit (Defendants' Exhibit N, p. 235, 241). Plaintiff submits an authorization dated October 15, 2013 for Dr. Stanley Holstein provided to defense counsel for "supporting documentation for the issuance of a handicap parking permit" (Plaintiff's Exhibit D). Plaintiff argues he has provided a copy of the

permanent handicap parking permit issued and a portion of Dr. Holstein's medical records. Plaintiff argues he provided a copy of the handicap parking permit application completed by Dr. Holstein dated July 3, 2009. While this document states page 1 of 2, only page 1 was submitted to the Court (Plaintiff's Exhibit G). Defendants are entitled to an updated authorization for Dr. Stanley Holstein. The authorization shall specify that a complete copy of all records, forms, and supporting documentation pertaining to the issuance of a handicap parking permit be provided.

The Court declines to consider that portion of plaintiff's opposition papers essentially seeking an order compelling defense counsel Kenneth Finger to appear for a nonparty deposition pursuant to a subpoena served by plaintiff's counsel, as this issue was not addressed in the motion papers and plaintiff has failed to make a proper motion to compel.

In view of the foregoing, it is

ORDERED that defendants' motion is granted to the extent that plaintiff is directed to provide on or before April 28, 2014 an amended further bill of particulars as to demands 410, 412, 415, 424, 425, 426, and 427; and it is further

ORDERED that the plaintiff shall appear on or before April 28, 2014 for a further deposition limited to questions related to parking spaces used or rented by the plaintiff; and it is further

ORDERED that plaintiff shall provide on or before April 28, 2014 an updated authorization for Dr. Stanley Holstein. The authorization shall specify that a complete copy of all records, forms, and supporting documentation pertaining to the issuance of a handicap parking permit be provided; and it is further

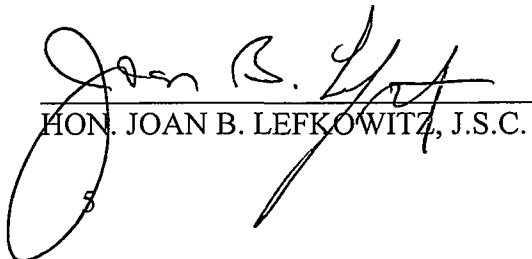
ORDERED that the branch of the motion seeking an order dismissing the remaining causes of action in the amended complaint, or precluding the plaintiff from testifying is denied; and it is further

ORDERED that the branch of the motion seeking costs and attorneys' fees for conferences and motions required due to plaintiff's failure to respond to defendants' demands and deposition questions is denied; and it is further

ORDERED that all parties are directed to appear in the Compliance Part, Courtroom 800, for a conference on May 6, 2014 at 9:30 a.m.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
April 7, 2014


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