

Scialdone v Stepping Stones Assoc., LP

2014 NY Slip Op 33861(U)

November 10, 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

-----X
GREGORY P. SCIALDONE,

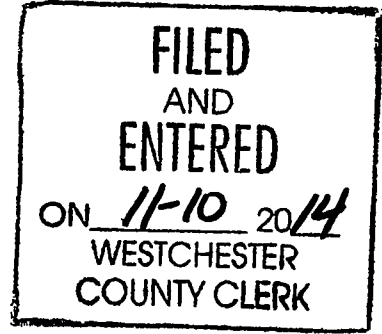
Plaintiff,

-against-

STEPPING STONES ASSOCIATES, LP,
and DEROSA BUILDERS INC.,

Defendants.
-----X

LEFKOWITZ, J.

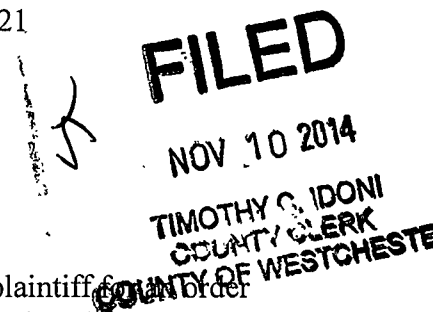


DECISION & ORDER

Index No. 12514/11

Motion Date: Sept. 24, 2014

Seq. No. 21



The following papers numbered 1 to 30 were read on this motion by plaintiff's counsel, vacating the trial readiness order and striking the note of issue and certificate of readiness, staying the time frame to make motions for summary judgment, and permitting plaintiff to renew and reargue the portions of the Court's orders dated April 7, 2014 and June 19, 2014, denying plaintiff's motion to compel defense counsel Kenneth Finger to appear for a deposition, and denying the production of all original documents claimed to have been affixed to the premises and other tenant's automobiles by the plaintiff.

Notice of Motion - Affirmation in Support - Affidavit in Support - Exhibits	1-17
Affirmation in Opposition - Exhibits	18-27
Reply Affirmation - Exhibits	28-30

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. By 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. 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 increases 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.

By order dated April 7, 2014 (Lefkowitz, J.), the Court declined 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 failed to make a proper motion to compel (Plaintiff's Exhibit D). On November 20, 2013, plaintiff served a notice of nonparty deposition and a subpoena on defense counsel Kenneth Finger seeking to take his deposition. By order dated June 19, 2014 (Lefkowitz, J.), the Court denied the branch of plaintiff's motion seeking an order compelling defense counsel Kenneth Finger to comply with the subpoena and notice of nonparty deposition and holding him in contempt for failing to appear or move for protective relief. Plaintiff argued that Kenneth Finger will be called as a witness to give testimony concerning the lease. Mr. Finger stated his deposition is not necessary, as he did not have anything to do with the size of the print in the lease, and the lease speaks for itself. The Court determined that defendants established that the deposition of Mr. Finger is not relevant to the remaining claims in the action (Defendants' Affirmation in Opposition, Exhibit I). In the June 19, 2014 order, the Court denied the branch of plaintiff's motion seeking an order compelling defendants to produce all original documents allegedly affixed by the plaintiff to the premises or tenants' automobiles in violation of the lease, finding plaintiff failed to demonstrate defendants did not produce the complete set of documents or the original documents for inspection (Defendants' Affirmation in Opposition, Exhibit I).

Plaintiff moves to renew and reargue the portion of the June 19, 2014 order denying plaintiff's motion to compel defense counsel Kenneth Finger to appear for a deposition, and denying the production of all original documents claimed to have been affixed to the premises and other tenant's automobiles by the plaintiff (Plaintiff's Exhibits D, G). The branch of the instant motion seeking leave to reargue the June 19, 2014 order is denied. Plaintiff fails to establish this Court overlooked any relevant facts or misapplied any controlling principle of law in reaching its prior decision (CPLR 2221[d][2]; *Haque v Daddazio*, 84 AD3d 940 [2d Dept 2011]). Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted (*Pryor v Commonwealth Land Title Ins. Co.*, 17 AD3d 434 [2d Dept 2005]; *Dinstber v Fludd*, 2 AD3d 670 [2d Dept 2003]). The determination to grant leave to reargue a motion lies within the sound discretion of the court which decided the prior motion (*see Barnett v Smith*, 64 AD3d 669 [2d Dept 2009]).

Plaintiff seeks leave to renew the portion of the June 19, 2014 order denying the branch of plaintiff's motion seeking to compel defense counsel Kenneth Finger to appear for a deposition (Plaintiff's Exhibits D, G). A motion to renew must be based on new facts not offered on the prior motion that would change the prior determination or a change in the law that would change the prior determination (CPLR 2221[2]). A motion to renew based on new facts must be

supported by new or additional facts which were in existence at the time of a prior motion, but were not known to the party seeking renewal, and consequently were not made known to the court (*Shapiro v State*, 259 AD2d 753 [2d Dept 1999]). Renewal “is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation” (*Doviak v Finkelstein & Partners, LLP*, 90 AD3d 696 [2d Dept 2011]; *Matthews v New York City Housing Auth.*, 210 AD2d 205 [2d Dept 1994]). The branch of the motion seeking leave to renew is denied. A review of the record and plaintiff’s submissions on the instant motion do not offer any facts or legal arguments that would change this Court’s prior determination.

Plaintiff seeks an order vacating the trial readiness order and striking the note of issue and certificate of readiness, and directing that the time to make motions for summary judgment is stayed pending the completion of discovery and the filing of a new note of issue and certificate of readiness. Plaintiff argues the note of issue was filed over objection that discovery and nonparty depositions were not complete. On July 13, 2014, plaintiff served a motion seeking the issuance of a subpoena for the nonparty deposition of Damon Amadio, the Commissioner of Buildings of the City of White Plains. A trial readiness order was issued on July 14, 2014 and plaintiff served a note of issue on August 14, 2014 (Plaintiff’s Exhibit A). By order dated September 10, 2014 (Lefkowitz, J.), the Court denied plaintiff’s motion, finding plaintiff failed to demonstrate that a deposition of the City of White Plains is necessary, and the subpoena was defective on its face insofar as it failed to give notice of the circumstances or reasons such disclosure was sought or required. The Court noted plaintiff provided no reasonable excuse for not seeking the non-party deposition until after approximately three years of discovery proceedings (Defendants’ Exhibit G).

Plaintiff seeks an order striking the note of issue for the purpose of conducting a deposition of nonparty witnesses, the Commissioner of the Department of Buildings of the City of White Plains, Damon Amadio, and defense counsel, Kenneth Finger. The Court issued a trial readiness referee report and order dated July 14, 2014, providing “all disclosure has been completed or waived and the... action is ready for trial.” Plaintiff was directed to file a note of issue and certificate of readiness within twenty days. The trial readiness order provides summary judgment motions by any party must be served within sixty days following the filing of the note of issue (Plaintiff’s Exhibit A). Plaintiff served a note of issue and a certificate of readiness on August 14, 2014 (Plaintiff’s Exhibit A). Once the note of issue has been filed and discovery presumably completed, the applicable standard for allowing additional discovery is governed by 22 NYCRR 202.21[d][e]. Within twenty days after service of a note of issue, a party may move to vacate the note of issue, upon affidavit showing in what respects the case is not ready for trial and the Court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect (22 NYCRR 202.21[e]). A request for judicial intervention was filed in this matter on July 14, 2011 and a preliminary conference order was issued on June 18, 2012. The parties have engaged in extensive motion practice related to discovery issues and have had sufficient time to complete discovery. The Court issued an order dated September 10, 2014, denying plaintiff’s motion seeking to depose the Commissioner of the Department of Buildings of the City of White Plains. Plaintiff now seeks to restate arguments and relitigate issues he had

a full and fair opportunity to address. The movant fails to demonstrate on this motion that the case is not ready for trial and the Court finds vacatur of the note of issue is not warranted (22 NYCRR 202.21[e]).

In view of the foregoing, it is

ORDERED that the branches of plaintiff's motion seeking an order vacating the trial readiness order, striking the note of issue, and staying the time frame to make motions for summary judgment are denied, and it is further

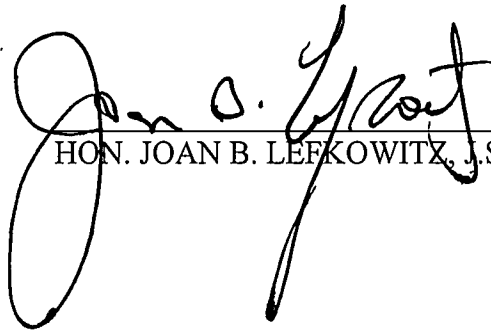
ORDERED that the branches of the motion seeking leave to renew and reargue the portions of the Court's decisions dated April 7, 2014 and June 19, 2014, denying a nonparty deposition of Kenneth Finger, and denying the production of all original documents claimed to have been affixed to the premises and other tenants' automobiles by the plaintiff are denied; and it is further

ORDERED that defendants' request for an award of costs and attorneys' fees incurred in opposing plaintiff's motion is denied; and it is further

ORDERED that plaintiff's counsel shall serve a copy of this order with notice of entry on defense counsel within ten days of entry.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
November 10, 2014


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

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