

Liberty Equity Restoration Corp. v Pil Soung Park
2015 NY Slip Op 32826(U)
February 9, 2015
Supreme Court, Westchester County
Docket Number: 69828/2012
Judge: Joan B. Lefkowitz
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
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
LIBERTY EQUITY RESTORATION CORPORATION,

Plaintiff,

-against-

PIL SOUNG PARK,

Defendant.

-----X
PIL SOUNG PARK,

Third-Party Plaintiff,

-against-

FRANK LOPRIORE, JAMIL NABER, PASCAL NABER,
JOHN AND JANE DOE BEING FICTITIOUS NAMES FOR
OTHER OCCUPANTS AT THE PREMISES KNOWN AS
75 WILDWAY, BRONXVILLE, NEW YORK 10708,
FIRST NAME OF TENANT AND/OR UNDERTENANT
BEING FICTITIOUS AND UNKNOWN TO PETITIONER,
PERSONS INTENDED BEING IN POSSESSION OF THE
PREMISES HEREIN DESCRIBED,

Third-Party Defendants.

-----X
LIBERTY EQUITY RESTORATION CORPORATION,

Plaintiff,

-against-

MAENG-SOON YUN and KIL-CHUNG YUN,

Defendants.

-----X
MAENG-SOON YUN and KIL-CHUNG YUN,

Third-Party Plaintiffs,

DECISION AND ORDER

Index No. 69828/2012
Motion Date Feb. 9, 2015
Sequence No. 3 & 4

DECISION AND ORDER

Index No. 70040/2012
Motion Date Feb. 9, 2015
Sequence No. 3 & 4

-against-

FRANK LOPRIORE, MARY ANN LOPRIORE,
JOHN AND JANE DOE BEING FICTITIOUS NAMES FOR
OTHER OCCUPANTS AT THE PREMISES KNOWN AS
180 BEDFORD/BANKSVILLE ROAD, BEDFORD, NEW
YORK 10506, FIRST NAME OF TENANT AND/OR
UNDERTENANT BEING FICTITIOUS AND UNKNOWN TO
PETITIONER, PERSONS INTENDED BEING IN POSSESSION
OF THE PREMISES HEREIN DESCRIBED,

Third-Party Defendants.

-----X
LEFKOWITZ, J.

The following papers were read on these motions: (1) by plaintiff in each of the above listed actions, for a protective order pursuant to CPLR 3103 against the continued deposition of plaintiff and for sanctions against third-party defendants (Motion Sequence #3); and (2) by defendants/third-party plaintiffs in each of the above listed actions, for an order pursuant to CPLR 3124 for an order compelling plaintiff to answer deposition questions and/or pursuant to CPLR 3126 to preclude the testimony of Frank Lopriore at trial, and for an order pursuant to CPLR 3126 and Rule 130-1.1 awarding them sanctions against plaintiff in the amount of \$2,500:

Motion Sequence #3: Order to Show Cause, Maria Aff., LoPriore Aff., Exh. 1-12
(in both actions) Aff. in Opposition, Exhs. A-D2

Motion Sequence #4: Order to Show Cause, Aff. in Support, Exh. A-H
(in both actions) Memorandum of Law in Support
Aff. in Opposition

Upon the foregoing papers and proceedings held on February 9, 2015, the motions are consolidated for purposes of decision and are determined as follows:

Plaintiff Liberty Equity Restoration Corporation commenced two actions that are the subject of the instant motions. The first action, under Index Number 69828/2012 against defendant Pil Soung Park (hereinafter the "Park action"), was commenced by Summons and Complaint dated November 29, 2012, seeking specific performance of an alleged purchase and sale agreement concerning the real property located at 75 Wildway in Bronxville, New York. The second action, under Index Number 70040/2012 against defendants Maeng-Soon Yun and Kil-Chung Yun (hereinafter the "Yun action"), was commenced by Summons and Complaint also dated November 29, 2012, seeking specific performance of an alleged purchase and sale agreement concerning the real property located at 180 Bedford/Banksville Road in Bedford, New York. The complaint in the Yun action alleged that defendant in the Park action was a prior owner and current controller of certain beneficial interests of the real property that is the subject of the Yun action.

By Decision and Order in the Yun action dated January 24, 2013, this Court (Bellantoni, J.) transferred to Supreme Court for consolidation therewith a summary eviction proceeding then pending in the North Castle Town Court, brought by the Yuns against the tenants of the real property at issue in that action. By Decision and Order in the Park action also dated January 24, 2013, this Court (Bellantoni, J.) transferred to Supreme Court for consolidation therewith a holdover proceeding then pending in the Yonkers City Court brought by Park against the tenants of the real property at issue in that action. Accordingly, the respective tenants in each action thereby are denominated as third-party defendants, the respective defendants are denominated as third-party plaintiffs in such actions, and such party designations thereafter were confirmed by third-party complaints in each of the respective actions. By subsequent respective Decisions and Orders dated August 28, 2013, this Court (Bellantoni, J.) denied Park's dispositive motion in the Park action, and separately denied the Yuns' dispositive motion in the Yun action. Such Decisions and Orders set down these matters to commence discovery via Preliminary Conferences.

Pursuant to the Decisions and Orders of August 28, 2013, the respective parties entered into Preliminary Conference Stipulations and thereafter appeared for a number of compliance conferences in early 2014 before the court attorney-referee then assigned to hear and report in these actions pursuant to CPLR 3104. Discovery delays resulted in the deferral of depositions until autumn 2014, during which period the parties appeared for further compliance conferences on September 22, 2014; October 24, 2014; and December 5, 2014. Subsequent to the conference of September 22, 2014, this Court entered a Compliance Conference Order directing that depositions shall commence on or before September 29, 2014. On September 29, 2014 and again on October 20, 2014, third party defendant Frank Lopriore, a principal of plaintiff, appeared for deposition in the Yun action.¹ Defendants allege that during this deposition, plaintiff's counsel, Mr. Joseph Maria, repeatedly interrupted and blocked questions in violation of Uniform Rule 221.1. Pursuant to a briefing schedule, defendants/third-plaintiffs in each of the above-entitled actions move for an order pursuant to CPLR 3124 compelling Mr. Lopriore to answer deposition questions and/or pursuant to CPLR 3126 to preclude his testimony at trial, and for an order pursuant to CPLR 3126 and Rule 130-1.1 awarding sanctions against plaintiff in the amount of \$2,500. Also pursuant to a briefing schedule, plaintiff in each of the above listed actions moves for a protective order pursuant to CPLR 3103 against the continued deposition of plaintiff and for sanctions against third-party defendants.²

¹ After parties in both actions proceeded to discovery in 2013, the parties and the court attorney referee then assigned to hear and report in this action pursuant to CPLR 3104 appeared to believe that not only the main Supreme Court actions and the related local court proceedings were consolidated with each other, but also that the Yun and Park actions themselves were consolidated with each other. Accordingly, the deposition proceeded under the Yun action but is alleged to apply also to the Park action and thus is relevant to all motions hereunder.

² Because the parties appeared to believe that the Yun and Park actions themselves were consolidated with each other, the instant movants brought their respective motions under a case caption reflecting a consolidation of the Yun and Park actions. As this Court finds no record on which to conclude that these cases were in fact consolidated, this Decision and Order consolidates the instant motions only for purposes of decision.

The gravamen of the respective defendants' assertion is that Mr. Maria, in defending his client's deposition, improperly blocked questions, interrupted, cued his client and spoke on behalf of his client in violation of Rule 221.1. Defendants allege to this Court the following instances of inappropriate conduct by Mr. Maria:

1. In response to a question about the length of the leasehold on the relevant property, Mr. Maria stated, "I am going to object to the form of the question, the document speaks for itself; if you know, you can answer" (Tr., at 177).
2. After his client answered a question about rental invoices, Mr. Maria spoke to his client on the record as follows, "Okay, time-out, because this record is so confusing. If you would just look at the documents, please, you will see. Just look at number 37, 38, 39 up through 52, 53, and answer the man's question. Look at the documents please" (Tr., at 226).
3. In response to a question by defense counsel Peter Tilem about the nature of deponent's claim for breach of contract, Mr. Maria at first objected to the form of the question but allowed his client to answer it, and then himself interjected answers:

"MR. MARIA: No, he didn't renege on the contract.

MR. TILEM: I said, that's you[r] claim, that [defendant Yun] reneged on the contract.

MR. MARIA: Meaning?

MR. TILEM: That Mr. Yun reneged on the contract.

MR. MARIA: Well, actually, Mr. Yun wasn't really in these contracts, it was Mr. Yun's wife.

MR. TILEM: Your client is answering the questions. I'm just trying to understand what he is telling me" (Tr., at 246-247).

4. In response to deponent's answer to a question about an invoice for water use, Mr. Maria interrupted to re-state the question, "The question was, was it for ten gallons of water" (Tr., at 258).
5. Concerning certain receipts previously produced in discovery, Messrs. Tilem and Maria engaged in a colloquy that included Mr. Maria's objection to the question:

"MR. TILEM: These are receipts that support your claims in this case, correct?

MR. MARIA: Objection, that's a vague question. Claims of what; of a counterclaim. The claim of this case is breach of contract, that's the claim, but this is, in particular, the answer to your question, so just if you can make the question a little better.

MR. TILEM: Why were these [receipts] provided to me, why did you provide these to me?

MR. MARIA: That's really a lawyer question.

Q. Do you know why they were provided to me?

A. This is a response for some of the things that you asked for and we answered.

Q. So these receipts that are attached as Exhibit 1, what are they?

MR. MARIA: The document speaks for itself; Exhibit 1 is in response to your question to A, B, C, and D. That's a legal question. I mean –

MR. TILEM: No, I don't think asking him what is included in Exhibit 1, which is documents he provided, I don't think that's a legal question.

Q. What is included in Exhibit 1?

A. The same thing as the other one: it says receipts, copies of receipts, expenses, and bills (Tr., at 273-274).

6. Concerning the existing mortgage on relevant real property under paragraph 4 of the contract, Mr. Maria objected and engaged in a colloquy with Mr. Tilem:

“Q. So you don't understand what paragraph 4 says, is that correct?”

A. I didn't say that.

MR. MARIA: Objection.

THE WITNESS: What?

MR. MARIA: Nothing. I am just objecting to the question.

Q. Do you understand paragraph 4; do you want to read it?

A. I just read it. What does it exactly mean and could I make a judgment on what it means, I can't do that.

MR. MARIA: Okay, that's your answer.

THE WITNESS: No.

MR. MARIA: No, that's your answer; you do not know if –

THE WITNESS: Yeah.” (Tr., at 291)

7. Concerning how deponent supported plaintiff's position that defendant Yun was to convey the deed on the real property at issue in the Yun action in exchange for \$25,000 and remain liable on the mortgage, Mr. Maria objected and stated, “Objection. Counsel, there are three documents involved, there is not just a contract, right? There is a lease, there is a Power of Attorney, and I think that's it. So my question – I mean, I think if you ask him, including all three of those documents, is there any other written documents, I think that gets to where you are without a legal conclusion, but you can do whatever you want” (Tr., at 295).
8. After the deponent and Mr. Tilem had further colloquy concerning whether deponent had other evidence, Mr. Maria interrupted as follows:

“MR. MARIA: “Time-out, time-out; that's not what he wants to say, it's the answer to your question.

MR. TILEM: It wasn't the answer to the question, [the answer] had nothing to do with the question.

MR. MARIA: Okay, then we can move to strike it, because it was nothing to do with the question, and you can start a new question” (Tr., at 299).

9. Concerning Mr. Tilem's question whether deponent obtained the lessor's consent before subletting the real property at 75 Wildway, counsel attempted to reach the Court for a ruling and, being unable to reach the Court, engaged in the following colloquy:

“MR. MARIA: Okay, I'm going to object to that. I'm going to direct him not to answer it. Because it's been asked and answered. And, you know what, if we have to bring him back to answer that question after the court reviews it, we'll do it.

MR. TILEM: I can't go forward with the deposition unless I get

an answer to that question.

MR. MARIA: Okay, you don't have any other questions you want to ask him, other than the questions that stem from that?

MR. TILEM: I cannot go forward with the deposition –

MR. MARIA: That's not the question. The question is – because I'm going to –

MR. TILEM: Yes, I have a lot of questions that I want to ask him. But they're dependent on –

MR. MARIA: That stems – anything that stems from that question, if I am to lose that question, anything that stems from that question, I'm happy to bring him back for. But my question to you is, are there any other questions, in other areas that you want to ask him that aren't related to that?

MR. TILEM: Counsel, counsel, counsel –

MR. MARIA: Because we should finish those today. Otherwise I'm going to take the position, whether it's right or wrong. Because I've been right, and I've been wrong in the past, as you have been, that the deposition is closed as to anything from that question, and questions that naturally flow from that question.

MR. TILEM: I understand that that's your position. And I'm telling you that I have already warned you about unnecessarily interfering with my deposition. The record is clear. There's a videotape. There's a transcript.

MR. MARIA: Fine. I'm not worried about all that.

MR. TILEM: And, I'm not going to proceed with the deposition under this – under these conditions. And what we'll do is, we'll get a ruling of the court and then we'll come back and I'll finish the deposition. And –

MR. MARIA: I just want it to be clear that it's only 2:46 in the afternoon. And, I am perfectly willing, and I'm taking the position that, except for this question, and any questions that naturally flow from this question, this deposition of this gentleman is completed.

MR. TILEM: And you are –

MR. MARIA: Right or wrong, that's my position. Your position is on the record. So, we're even.

MR. TILEM: And, I just want to make it very clear that you have consistently and persistently interfered with my taking of this deposition today. And, I'm not going to go forward until we reach the court. ... This is outrageous. You're directing him not to answer a question that is clearly relevant, that you admit is relevant, but you are saying that it's been asked and answered.

MR. MARIA: At least three or four times.

MR. TILEM: Okay, except that I haven't gotten an answer that I understand. So, I'm trying to get an answer that I understand. If it's been asked and answered, I don't know what the possible prejudice is to him answering the question again..." (Tr., at 390-394).

Movants assert that Mr. Maria engaged in a systematic pattern of objecting to deposition questions, answering for his client and blocking questions – all in violation of Uniform Rule 221.1. Movants allege that when this matter was brought before the court attorney referee on November 21, 2014, Mr. Maria left court at 9:30am and did not return for the conference. When this matter was next brought to the court attorney referee on December 5, 2014, Mr. Maria did not appear and instead sent an unaffiliated attorney unfamiliar with the case. These actions, movants assert, continue to demonstrate a pattern of obfuscation and delay, for which movants seek this Court's intervention to compel the cooperation of Mr. Maria and his client. Movants also seek counsel fees in the amount of \$2,500 for having to appear at multiple compliance conferences at which plaintiff either did not appear or was not prepared to proceed, and for the making of this motion.

In opposition to movant's application and in support of plaintiff's own motion for a protective order pursuant to CPLR 3103 against a further deposition of Mr. Lopriore, Mr. Maria asserts that movant's applications, by casting aspersions on Mr. Maria, constitute violations of the Code of Professional Responsibility. Mr. Maria concedes that he objected to questions but asserts that his objections were proper inasmuch as the questions presented, he asserts, were either argumentative or confusing. In that connection, Mr. Maria asserts that movant's application for a continued deposition of Mr. Lopriore constitutes harassment of his client. In support thereof, he offers an affidavit of Mr. Lopriore in which he explicates and describes his deposition testimony to the Court to suggest that further deposition questions would be immaterial to this action. He also seeks sanctions and counsel fees for what he characterizes as movants' improper conduct in badgering the witness and personal attacks on Mr. Maria.

Analysis

It is axiomatic that parties are entitled to liberal discovery of "all matters material and necessary in the prosecution" of their action (CPLR 3101[a]), and the determination of what is "material and necessary" is within the sound discretion of the trial court (*see e.g. Andon v 302-304*

Mott Assocs., 94 NY2d 740 [2000]). The phrase “material and necessary” is “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 [1968]; *Foster v Herbert Clepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). The foregoing standards vest in the trial court broad discretion to supervise discovery and issue such determinations as necessary to vindicate litigant rights and enforce litigant duties arising in the individual case (*see Mironer v City of New York*, 79 AD3d 1106, 1108 [2d Dept 2010]; *Auerbach v Klein*, 30 AD3d 451, 452 [2d Dept 2006]). Where the court determines that relevant discovery has been withheld, the usual proper remedy is a CPLR 3124 order to compel such disclosure. The CPLR 3126 remedy of dismissing a plaintiff’s complaint as a consequence of a discovery violation is a drastic one requiring the defendant to show that the plaintiff’s withholding of discovery was willful and contumacious (*see Greene v Mullen*, 20 AD3d 996 [2d Dept 2010]; *Maiorino v City of New York*, 39 AD3d 601 [2d Dept 2007]; *Kingsley v Kantor*, 265 AD2d 529 [2d Dept 1999]). This showing, in turn, requires a demonstration of a substantial pattern of noncompliance over time coupled with a lack of excuse for such noncompliance (*see e.g. Estaba v Quow*, 101 AD3d 940 [2d Dept 2012]; *Dokaj v Ruxton Tower Ltd. Partnership*, 91 AD3d 812 [2d Dept 2012]). Conversely, where the court finds that discovery demands are improper, the court may issue a protective order against such discovery to “prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts” (CPLR 3103[a]).

In the instant context of a deposition, objections are to be limited to those required under CPLR 3115 (22 NYCRR [Uniform Rules of the Trial Courts] § 221.1[a]), and our law’s strong presumption is that a “deponent shall answer all questions at a deposition,” subject to a strictly limited number of enumerated exceptions (*id.* § 221.2). The Rules recognizes only three such exceptions: where refusal to answer is necessary to preserve a privilege or right of confidentiality, enforce a limitation set forth in a court order, or if “the question is plainly improper and would, if answered, cause significant prejudice to any person” (Uniform Rule 221.2[iii]). It is against these standards that the nine matters marked above must be adjudged.

As to Matter #1, it appears that the leasehold question ultimately was answered (*see Tr.*, at 177), and thus no judicial relief is necessary. Likewise, as to Matter #2, it appears that the rental invoice question ultimately was answered (*see Tr.*, at 226), and thus there is no basis to compel a further response. This Court does conclude, however, that Mr. Maria appeared to coach his witness by telling him what to look at (“Just look at [certain enumerated documents]”) before Mr. Maria told him to “answer the man’s question.” Mr. Maria’s apparent coaching, even if in the guise of trying to be helpful, did not comply with Part 221. As to Matter #3, Mr. Maria himself volunteered answers to Mr. Tilem’s question by making factual assertions concerning who was and wasn’t a party to the contract that was the subject of Mr. Tilem’s question (*see Tr.*, at 247). Mr. Maria’s interjection did not comply with Part 221. As to Matter #4, while generally it is not a best practice for counsel defending a deposition to re-state or paraphrase a question, in context this Court finds no grounds to issue judicial relief against Mr. Maria’s statement as to Matter #4. As to Matter #5, because the deponent ultimately answered the question about what documents constitute Exhibit 1 published to the deponent for that purpose, this Court perceives no basis to compel a further response. However, it is clear that Mr. Maria again intruded on the deposition by

purporting to indicate that certain documents speak for themselves, a statement that has no proper predicate under Part 221. Concerning Matter #6, this Court concludes that Mr. Maria interrupted the deposition to characterize and perhaps cut off his client's answer, also in derogation of Part 221. As to Matter #7, Mr. Maria made a statement on the record that Rule 221.1 does not invite, concerning three legal documents and, perhaps, whether Mr. Tilem should have clarified or amended his question to reference those three documents. Again, it appears that Mr. Maria was attempting to be helpful rather than obfuscatory, but the plain language of Part 221 does not invite these intrusions on a deposition. As to Matter #8, this Court construes Mr. Maria's statement, in the totality of the context of the transcript, as attempting to clarify the deponent's statement. While Part 221 does not invite this intrusion, this Court perceives no prejudice to defendant inuring as a result.

More concerning to this Court is Matter #9, in which Mr. Maria asserts that the question of whether the deponent obtained the lessor's written consent before subletting 75 Wildway was "asked and answered." This Court does not agree but, more to the point, Mr. Maria does not clearly show this Court where the question was, in fact, "asked and answered." In any event, Rule 221.1(iii) is clear: the only potentially cognizable basis to block this question is whether it was "palpably improper" and would result in "prejudice." As Mr. Tilem's statement in the transcript correctly notes, no palpable prejudice would inure to the deponent or to plaintiff as a result of answering the question presented – even answering it again – and Mr. Maria does not argue otherwise. Against that backdrop, Mr. Maria's intrusion and objection were improper under Rule 221.1(iii). Also improper was Mr. Maria's unilateral suggestion that all subsequent questioning by Mr. Tilem would be waived by Mr. Tilem's refusal to proceed with the deposition. In context, it was not Mr. Tilem but Mr. Maria who substantially interrupted this deposition in violation of Rule 221.1, and thus neither Mr. Tilem nor movants should bear the resulting burden. For the foregoing reasons, plaintiff's motions for a protective order against a continued deposition of Mr. Lopriore, and for sanctions against defense counsel, are denied.

As to defendants' motions, this Court concludes that the blocked question in Matter #9 is material and relevant within the meaning of CPLR 3101(a), that Mr. Maria wrongly blocked this question in violation of Rule 221.1(iii), and that Mr. Tilem did not waive it or subsequent questioning of Mr. Lopriore under the facts and circumstances presented. At oral argument on these motions, Mr. Maria stated that Mr. Lopriore is admitted to a Long Island hospital for the foreseeable future. Accordingly, the motions by defendants/third-party plaintiffs are granted to the extent that: (1) Mr. Lopriore will appear for a further deposition in accordance with this Decision and Order; and (2) Mr. Maria is directed to comply with Part 221, and in particular not to interrupt a deposition except in conformity therewith. Accordingly, it is hereby:

ORDERED that the respective motions by plaintiff in each of the above-entitled actions are denied; and it is further

ORDERED that the respective motions by defendants/third-party plaintiffs in each of the above-entitled actions are granted to the extent that (1) third-party defendant Frank Lopriore will be produced for a further deposition on March 6, 2015 at the Long Island hospital or other treatment facility where he may be located; provided that counsel for all parties may stipulate on or

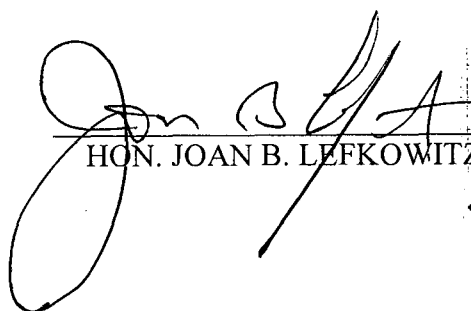
before February 18, 2015, to an alternative date or location for such deposition so long as the deposition is completed by March 6, 2015; and (2) Mr. Maria is directed to comply with Part 221, and in particular not to interrupt a deposition except in conformity therewith; and it is further

ORDERED that counsel for defendants shall serve this Decision and Order, with Notice of Entry, on all parties by NYSCEF in each of the respective actions no later than seven days after the date hereof; and it is further

ORDERED that counsel for all parties in these actions are directed to appear for a conference in the Compliance Part, Courtroom 800, at 9:30am on Tuesday, March 17, 2015.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
February 9, 2015


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

TO: Joseph A. Maria, Esq.
Attorney for Plaintiffs
301 Old Tarrytown Road
White Plains, New York 10603
By NYSCEF

Peter H. Tilem, Esq.
Tilem & Campbell P.C.
Attorneys for Defendants/Third Party Plaintiffs
188 East Post Road
White Plains, New York 10601
By NYSCEF