

Liberty Equity Restoration Corp. v Pil Soung Park
2015 NY Slip Op 32827(U)
April 27, 2015
Supreme Court, Westchester County
Docket Number: 69828/12
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
LIBERTY EQUITY RESTORATION CORPORATION,

Plaintiff,

-against-

PIL SOUNG PARK,

Defendant.

-----X
PIL SOUNG PARK,

Third-Party Plaintiff,

-against-

FRANK LOPRIORÉ, 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
LEFKOWITZ, J.

The following papers were read on these motions: (1) by defendant, pursuant to CPLR 3124 and 3126, for an order compelling plaintiff to answer questions at an examination before trial, precluding the trial testimony of Frank Lopriore, and awarding defendant attorney's fees in the amount of \$4,500; and (2) by plaintiff for an order compelling defendant/third-party plaintiff to appear for a deposition and deeming the deposition of Frank Lopriore completed.

Seq. no. 5

Order to Show Cause - Affirmation in Support - Exhibits A-I
Memorandum of Law in Support

DECISION AND ORDER

Index No. 69828/12

Motion Date: Apr. 27, 2015

Seq. Nos. 5 & 6

Seq. no. 6

Order to Show Cause - Affirmation in Support - Exhibits 1-3

Affirmation in Opposition - Exhibits A-C

Memorandum of Law in Opposition

Upon the foregoing papers and proceedings held on April 27, 2015, the motions are determined as follows:

Plaintiff Liberty Equity Restoration Corporation commenced the present action seeking specific performance of an alleged purchase and sale agreement concerning the real property located at 75 Wildway in Bronxville, New York. By Decision and Order dated January 24, 2013, the Court (Bellantoni, J.) transferred a holdover proceeding pending in the Yonkers City Court brought by Park against the tenants of the real property at issue to the Supreme Court and consolidated it with the present action.

Plaintiff commenced a related action under Index Number 70040/12 against defendants Maeng-Soon Yun and Kil-Chung Yun (hereinafter the "Yun action"), 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. As in the present action, by Decision and Order dated January 24, 2013, the Court (Bellantoni, J.) transferred a summary eviction proceeding pending in the North Castle Town Court brought by the Yuns against the tenants of the real property at issue in that action, and consolidated it with the Yun action in Supreme Court.

Accordingly, the respective tenants in the present action and in the Yun action were denominated as third-party defendants. Thereafter, third-party complaints were filed in the respective actions.

On September 29, 2014 and again on October 20, 2014, Frank Lopriore, a principal of plaintiff and a third-party defendant in both actions, appeared for a deposition in the Yun action.¹

Thereafter, defendant/third-party plaintiff (hereinafter "defendant") moved for, inter alia, an order compelling Mr. Lopriore to answer deposition questions based upon plaintiff's counsel's

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 present action and the Yun action were consolidated with each other. Accordingly, the deposition proceeded under the Yun action, but is alleged to apply also to the present action.

repeated interruption of the deposition and blocked questions. Plaintiff moved for, inter alia, a protective order with respect to the continued deposition. At oral argument of those motions, plaintiff's counsel advised the court that Frank Lopriore was admitted to Long Island Hospital.

By Decision and Order dated February 9, 2015 and entered February 10, 2015, this court denied plaintiff's motion for a protective order, and granted defendant's motion to the extent that Frank Lopriore was directed to be produced for a deposition on March 6, 2015 at Long Island Hospital or other treatment facility where he may be located, unless counsel stipulated on or before February 18, 2015 to an alternative date but no later than March 6, 2015.

By letter dated February 25, 2015, counsel for defendant reminded plaintiff's counsel of the court's order with respect to Frank Lopriore's deposition, and asked for the specific name and address of the treatment facility and/or hospital where Frank Lopriore was located so that defense counsel could notify the court reporter and videographer. Defense counsel asserts that plaintiff's counsel did not respond to the letter.

On March 5, 2015, plaintiff's counsel's office left a message at defense counsel's office that Frank Lopriore would appear for his further deposition at plaintiff's counsel's office on March 6, 2015. By email and facsimile sent on March 5, 2015, counsel for plaintiff asserted that he had been advised by Jennifer from defense counsel's office that defense counsel did not have a court reporter or videographer for the court-ordered deposition of Frank Lopriore. Therein, plaintiff's counsel stated that it was his office's job to get a court reporter or videographer for the deposition, but that his office could call a court reporter. Plaintiff's counsel further stated that his office did not have a videographer. Plaintiff's counsel advised defense counsel that if defense counsel did not attend the deposition, the deposition would be waived.

On the same day, defense counsel responded to plaintiff's counsel's email. Therein, defense counsel advised plaintiff's counsel that defense counsel was unable to obtain a court reporter and videographer on such short notice since counsel's office was closed due to inclement weather and plaintiff's counsel had failed to advise defense counsel of Mr. Lopriore's location until the day prior to the scheduled deposition. Defense counsel also noted that plaintiff's counsel had failed to respond to the request for Mr. Lopriore's location which was mailed and emailed to plaintiff's counsel on February 25, 2015. Additionally, defense counsel suggested that the deposition be scheduled for a day that works for counsels' schedules and gives sufficient time to schedule the videographer. Defense counsel asserts that plaintiff's counsel did not respond to the email.

On March 6, 2015, Mr. Lopriore appeared at plaintiff's counsel's office for the further deposition. Defense counsel did not appear.

By letter dated March 9, 2015, defense counsel requested court intervention regarding the deposition. Defense counsel asserted that at 11:03 A.M. on March 5, 2015, the day before the scheduled deposition, someone from plaintiff's counsel's office left a telephone message that Mr.

Lopriore was no longer in the hospital and the deposition would need to be done in the office of plaintiff's counsel. Defense counsel further asserted that due to the short notice and defense counsel's office being closed due to the weather, that defense counsel was unable to obtain a court report and videographer for the deposition. Defense counsel asked for alternate dates for the deposition, but plaintiff's counsel did not provide any alternate dates.

Thereafter, the parties appeared for a compliance conference at which plaintiff's counsel refused to produce Mr. Lopriore for a further deposition. A briefing schedule was then issued for the present motions.

Defendant now moves for an order compelling the deposition of Frank Lopriore and/or precluding his testimony at trial. Defense counsel contends that they were unable to go forward with the deposition of Frank Lopriore on March 6, 2015, as directed in this court's prior order, since plaintiff's counsel failed to inform them of Mr. Lopriore's whereabouts until the day before the scheduled deposition, a day on which defense counsel's office was closed due to a snow storm. Defense counsel further asserts that plaintiff's counsel has refused to provide additional dates for Mr. Lopriore's deposition. Defense counsel contends that plaintiff's counsel has made it "nearly impossible" to conduct the deposition of plaintiff by rescheduling and cancelling depositions and compliance conference appearances. Defense counsel further contends that the present motion was necessary since, at the last compliance conference, plaintiff's counsel refused to produce Mr. Lopriore for a further deposition. Finally, defense counsel contends that in addition to an order compelling plaintiff to appear for a further deposition, plaintiff and plaintiff's counsel should be ordered to pay defense counsel's fees, sanctions and costs for frivolous conduct. Defense counsel asserts that in addition to not appearing for the further deposition and repeatedly rescheduling and cancelling deposition dates, plaintiff has not produced any discovery in response to a Notice of Supplemental Discovery, which was served on September 3, 2014. Defense counsel contends that the foregoing conduct on the part of plaintiff and plaintiff's counsel has increased defendant's litigation costs. Defendant seeks a total of \$4,500 in attorney's fees, inclusive of fees for the present motion.

Plaintiff moves for an order compelling defendant to appear for a deposition and an order holding that the deposition of Frank Lopriore is completed. Plaintiff's counsel contends that his office made three telephone calls to defense counsel's office, as set forth in the Affidavit of Jenny Chavarri, who works in plaintiff's counsel's office. Plaintiff's counsel further contends that on March 6, 2015, an attorney from his firm, Frances Marinelli, and Frank Lopriore appeared at his office for the deposition, but defense counsel never appeared. Accordingly, plaintiff's counsel asserts that Frank Lopriore was ready, willing and able to give the deposition, but that defense counsel did not attend the deposition. Plaintiff's counsel further asserts that his office followed the court's order, while defense counsel's office "feels that they can run roughshod over these depositions and that they can make all of the rules."

In the affidavit of Ms. Chavarri, which is annexed as an exhibit to plaintiff's counsel's affirmation, she avers that she called defense counsel's office on March 5, 2015, to confirm the

continuation of the court-ordered deposition of Frank Lopriore and was informed that defense counsel was not in the office and someone would call her back. Ms. Chavarri further avers that Jennifer from defense counsel's office called her back and stated that she was returning the call from home. Ms. Chavarri avers that she advised Jennifer that Mr. Lopriore was ready for the continued deposition. According to Ms. Chavarri, Jennifer responded that she would try and get in touch with defense counsel, and later called and stated that she could not reach defense counsel, that defense counsel's office did not have a videographer or court reporter for the deposition, that the deposition could go ahead if plaintiff's counsel's office obtained a court reporter and videographer, but could not confirm the deposition without a videographer.

Plaintiff also annexes an affidavit of Frances Marinelli, Esq., who avers that Mr. Lopriore appeared on March 6, 2015 for the continuation of his court-ordered deposition, that defense counsel failed to appear for the deposition, and she then placed on the record that Mr. Lopriore was ready to proceed with the deposition. The transcript of the deposition appearance was also annexed as an exhibit. Ms. Marinelli acknowledged on the record that the deposition was to take place with a court reporter and a videographer. Ms. Marinelli further stated on the record that plaintiff's counsel's office was in contact with defense counsel's office the day before to confirm the deposition and as of 5:00 P.M. had not heard from them and plaintiff's counsel's office sent a letter advising them that they would call a court reporter for the deposition. At approximately 10:08 A.M., Ms. Marinelli also placed on the record that it was her understanding that defense counsel would not be appearing, she stated that Mr. Lopriore was willing and able to give testimony at the deposition, and plaintiff's counsel considered the failure to appear to be a waiver of the deposition.

Defendant opposes plaintiff's motion and asserts that full disclosure is necessary in the present action. Defendant contends that there is no viable excuse for plaintiff's failure to produce Mr. Lopriore for his further court-ordered deposition. Defendant notes that this court has previously found that Mr. Lopriore's deposition was not complete and ordered plaintiff to produce him for a further deposition on March 6, 2015 at Long Island Hospital, based upon plaintiff's counsel's representations, or other treatment facility where he may be located. Defendant also again notes that plaintiff's counsel failed to respond to the request on February 25, 2015 regarding Mr. Lopriore's whereabouts. Defense counsel further asserts that plaintiff's counsel only contacted defense counsel's office about the location of the deposition the day before the deposition and during a snow storm, which closed defense counsel's office. Defense counsel also asserts that despite counsel's email to plaintiff's counsel that same day, which advised plaintiff's counsel that defense counsel's office was closed due to the weather, that a court reporter and videographer could not be scheduled, and that plaintiff's counsel had not responded to a prior request regarding Mr. Lopriore's whereabouts, plaintiff's counsel refused to respond to the request to reschedule the deposition.

At oral argument, in response to the court's questioning, plaintiff's counsel asserted, inter alia, that Frank Lopriore had been released from Long Island Hospital approximately 5 days after counsel appeared for oral argument on the prior motion, which was held on February 9, 2015.

Plaintiff's counsel further asserted that his office did not advise defense counsel as to what facility Mr. Lopriore was admitted since he had been released. Plaintiff's counsel also advised the court that his office had obtained a court reporter for the deposition to be held on March 6, 2015, but did not have a videographer since his office does not use videographers. Finally, plaintiff's counsel advised the court that his office informed defense counsel's office that Mr. Lopriore would be appearing for his deposition at plaintiff's counsel's office two days before the scheduled deposition.

As asserted by defendant, this court in its prior Decision and Order determined that defendant is entitled to the further deposition of Frank Lopriore, a principal of plaintiff and a third-party defendant, and directed plaintiff to produce him for a further deposition on March 6, 2015 at Long Island Hospital or any other treatment facility where he was located. To the extent that plaintiff's counsel advised the court and defense counsel at oral argument on February 9, 2015, that Mr. Lopriore was being treated at Long Island Hospital and then failed to advise the court or defense counsel as to Mr. Lopriore's whereabouts sufficiently in advance of the scheduled deposition so that defense counsel could schedule a court reporter or videographer, it cannot be said that defendant waived Mr. Lopriore's further deposition. Plaintiff's counsel's assertion of the waiver is without basis. Moreover, plaintiff's counsel's continued refusal to produce Mr. Lopriore for a further deposition at a subsequent compliance conference can only be deemed by this court to be obstructionist. As noted by this court in its prior Decision and Order, the court has the broad discretion to supervise discovery and issue such determinations as necessary to vindicate litigant rights and enforce litigant's 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]). To that end, that branch of defendant's motion seeking an order compelling plaintiff to produce Mr. Lopriore for a further deposition is granted. Plaintiff's motion is granted only to the extent that defendant shall produce a witness for a deposition within 30 days after the deposition of Mr. Lopriore is completed.

In view of plaintiff's counsel's conduct of refusing to produce Mr. Lopriore based upon his contention that defendant had waived the further deposition, which has again frustrated and delayed discovery in this action, that branch of defendant's motion seeking attorney's fees, sanctions and costs is granted to the extent that plaintiff's counsel shall pay defendant motion costs for the present motion in the sum of \$250.

In view of the foregoing, it is

ORDERED that the motion of defendant/third-party plaintiff is granted to the extent that (1) plaintiff shall produce Frank Lopriore for a further deposition on May 14, 2015, the date agreed upon by counsel at oral argument, at 10:00 A.M. at the office of defense counsel or any treatment facility at which Frank Lopriore is admitted on the scheduled date of the deposition, and plaintiff's counsel shall notify defense counsel no later than five days prior to the deposition of the name and address of the facility at which Frank Lopriore is admitted or will be admitted on the date of the scheduled deposition; (2) in the event that plaintiff does not make Frank Lopriore

available for his further deposition on May 14, 2015, defendant shall submit, on or before May 21, 2015, an affidavit of noncompliance and a proposed order precluding Frank Lopriore from testifying at trial, upon notice to plaintiff; and (3) on or before May 8, 2015, plaintiff's counsel shall pay defendant motion costs for the present motion in the sum of \$250, and upload an affirmation on or before such date that payment was made; and it is further

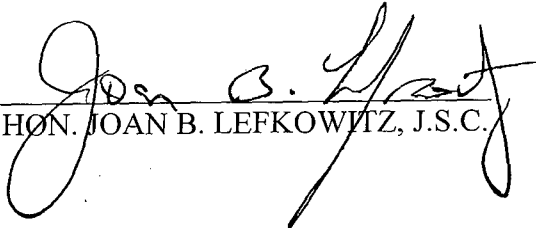
ORDERED that plaintiff's motion is granted only to the extent that the deposition of defendant shall be completed within 30 days of Frank Lopriore's further deposition; and it is further

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

ORDERED that counsel are directed to appear for a conference in the Compliance Part, Courtroom 800, on May 22, 2015 at 9:30 A.M.

The foregoing constitutes the Decision and Order of this court.

Dated: White Plains, New York
April 27, 2015


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

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

Tilem & Campbell P.C.
By Jasmine Hernandez, Esq.
Attorneys for Defendant/Third Party Plaintiff
188 East Post Road
White Plains, New York 10601
By NYSCEF

cc: Compliance Part Clerk