

**Green v EQR-160 Riverside, LCC**

2016 NY Slip Op 30632(U)

April 12, 2016

Supreme Court, New York County

Docket Number: 155862/12

Judge: Sherry Klein Heitler

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 30

-----X  
ALLISON GREEN,

Plaintiff,

Index No. 155862/12  
Motion Sequence #04

-against-

**DECISION & ORDER**

EQR-160 RIVERSIDE, LCC d/b/a TRUMP PLACE,  
CUBE MOVING AND STORAGE, LLC, HAGAI  
a/k/a "GUY M. SHAHAR, and AMERICAN  
AUTOMOBILE INSURANCE CO., et al.,

Defendant.

-----X  
**Hon. Sherry Klein Heitler:**

This consolidated action arises out of the alleged theft of plaintiff's property from an apartment plaintiff leased from defendant EQR-160 Riverside, LLC ("EQR"). The alleged theft occurred on or about December 7, 2011. Plaintiff then retained the services of Cube Moving and Storage ("Cube") so that she could vacate the apartment and move her remaining possessions into storage. Plaintiff brought suit against EQR for theft of property in August of 2012 under Index No. 155862/12. Plaintiff commenced a separate action under Index No. 158950/12 against Cube and its principal in December of 2012. The two actions were consolidated under Index No. 155862/12 by order of Justice Anil Singh dated November 6, 2014. On April 13, 2015 this consolidated action was transferred to me by administrative order.

On or about September 10, 2015 EQR served plaintiff with a supplemental notice to produce which sought, among other things, HIPAA authorizations for the release of records from plaintiff's psychologist. EQR further demanded that plaintiff "[i]dentify and provide an authorization for each and every real estate agent the plaintiff utilized in order to secure a

residence following her eviction from [EQR]" and "[i]dentify and provide an authorization for each building to which plaintiff applied for residency following her eviction which serves as the basis for this lawsuit".<sup>1</sup> Plaintiff failed to respond. By order dated November 9, 2015 the court directed plaintiff to provide the HIPAA authorizations on or before November 23, 2015 and to provide "original documents for Supplemental Notice dated 10 September 2015 or [an] affidavit from client saying no such documents exist."<sup>2</sup> On December 14, 2015, by so-ordered stipulation, the court again directed plaintiff to provide the requested HIPAA authorizations, this time by December 18, 2015, as well as all documents responsive to EQR's September 10, 2015 notice.<sup>3</sup> A final compliance conference was also scheduled for February 22, 2016, which the court adjourned to February 29, 2016.

On December 28, 2015 EQR filed the instant motion which seeks an order dismissing plaintiff's action in its entirety due to her failure to provide discovery. Plaintiff's attorney filed an unsigned affirmation in opposition on February 28, 2016. EQR filed a reply on March 11, 2016 which further seeks an award of costs and fees as an alternative to dismissal.<sup>4</sup>

CPLR 3126<sup>5</sup> permits the court to impose sanctions upon a party for failing to comply with court-ordered disclosure. The issue whether to strike plaintiff's pleading for her alleged failure

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<sup>1</sup> Defendant's exhibit D, ¶¶ 3-4.

<sup>2</sup> Defendant's exhibit E.

<sup>3</sup> Defendant's exhibit F.

<sup>4</sup> The court held several conferences while the motion was being fully briefed, and thereafter invited the parties to supplement their briefs by letter. EQR and Cube did so on March 28, 2016 and March 29, 2016, respectively.

<sup>5</sup> CPLR 3126 provides in relevant part that if a party "refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just . . . ."

to comply with court-ordered disclosure lies within the sound discretion of this court. *Giano v Ioannou*, 78 AD3d 768, 770 (2d Dept 2010). However, “the drastic remedy’ of striking a pleading pursuant to CPLR 3126 should not be imposed unless the failure to comply with discovery demands or orders is clearly willful and contumacious.” *Rock City Sound, Inc. v Bashian & Farber, LLP*, 83 AD3d 685, 686 (2d Dept 2011) (quoting *Friedman, Harfenist, Langer & Kraut v Rosenthal*, 79 AD3d 798, 800 [2d Dept 2010]); see also *Perez v City of New York*, 95 AD3d 675, 677 (1st Dept 2012); *Bryant v New York City Hous. Auth.*, 69 AD3d 488, 489 (1st Dept 2010).

There can be no dispute that Plaintiff failed to timely comply with at least two written court orders to produce, but EQR has not shown that such omission rises to the level of willful and contumacious conduct as would require the imposition of the draconian sanction of dismissing plaintiff’s case. In this regard, the court credits plaintiff’s counsel’s assertion that his inability to provide certain documentation stemmed from law office failure issues, specifically computer and technology problems. The protracted discovery period also appears to have been the result of considerable confusion as to what exactly was requested from plaintiff, who apparently never retained a real estate agent to secure a new residence nor submitted formal lease applications as requested by EQR’s discovery demand. Only upon the court’s lengthy interactions with the parties did it become apparent that plaintiff had sought to sublet a new apartment through Craigslist, and that the production of all documents and communications related to those Craigslist inquiries would require considerable time and effort by the plaintiff herself. Once the parties agreed upon the scope of the responsive documents their production was not unduly delayed. Defendants’ letter briefs make no mention of any further outstanding

[\* 4]  
discovery, nor do they claim that they have been prejudiced by the prolonged discovery period.

The parties now have ample time to prepare for jury selection on May 16, 2016.

However, plaintiff has yet to file a Note of Issue as previously directed by the court. Plaintiff is hereby admonished that should she fail to file a Note of Issue by April 25, 2016 the court will dismiss this action with prejudice.

Accordingly, it is hereby

ORDERED that EQR-160 Riverside, LLC's motion to dismiss is denied in its entirety; and it is further

**ORDERED that plaintiff is directed to file a note of issue no later than April 25, 2016, failing which the court will dismiss this action with prejudice.**

This constitutes the decision and order of the court.

A copy of this decision and order has been sent to all counsel by email on this date.

DATED: 4-12-16

  
SHERRY KLEIN HEITLER, J.S.C.