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| Big Bear LLC v Yaghoubian |
| 2016 NY Slip Op 31026(U) |
| June 2, 2016 |
| Supreme Court, New York County |
| Docket Number: 159087/2015 |
| Judge: Manuel J. Mendez |
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

BIG BEAR LLC,

Plaintiff,

-against-

INDEX NO. 159087/2015
MOTION DATE 05-25-2016
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

SHAHROUKH YAGHOUBIAN and
CAROL POVEDA,

Defendants.

The following papers, numbered 1 to 6 were read on this motion to compel discovery.
PAPERS NUMBERED

| | |
|---|--------------|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | <u>1 - 3</u> |
| Answering Affidavits — Exhibits _____ | <u>4 - 5</u> |
| Replying Affidavits _____ | <u>6</u> |
| Cross-Motion: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No | |

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Upon a reading of the foregoing cited papers, it is Ordered that Plaintiff’s motion to compel discovery is granted to the extent stated herein.

Plaintiff is the landlord of the building located at 900-906 Columbus Avenue, New York, New York 10025 (herein “the Building”). Defendants Shahroukh Yaghoubian (herein “Yaghoubian”) and Carol Poveda (herein “Poveda”) (Yaghoubian and Poveda collectively referred to herein as “Defendants”) were the former commercial tenants of a portion of the first floor of the Building (herein “the Premises”) pursuant to a ten year commercial lease (herein “the Lease”).

Plaintiff commenced the instant action by summons and complaint dated September 1, 2015, against the Defendants seeking (1) damages for past rent and additional rent due from Defendants for vacating the Building prior to the end of the Lease term, and (2) damages for illegal work and alterations done by the Defendants on the premises in further breach of the commercial lease. Issue was joined and the parties proceeded with discovery.

Plaintiff served Defendants with a Notice for Discovery and Inspection dated November 11, 2015. (Mot. Exh. D). Defendants responded to Plaintiff’s Notice for Discovery and Inspection on December 15, 2015. (Mot. Exh. E).

Plaintiff now moves pursuant to CPLR 3124 and 3126, seeking an Order directing: (1) Defendants to properly respond to Plaintiff’s First Notice of Discovery and Inspection dated November 11, 2015, by identifying, organizing and/or labeling the documents responsive to each document request numbered 2, 9, 10, 11, 12 and 13 pursuant to CPLR 3122(c), (2) Defendants to provide full responses to the requests

objected to, numbered 1, 3-8, 15, and 16 of Plaintiff's November 11, 2015 Notice for Discovery and Inspection, and (3) a conditional order striking Defendants' Answer and awarding Plaintiff legal fees for making the instant motion pursuant to 3126(3) upon Defendants failure to fully respond to requests numbered 1, 3-8, 15 and 16.

Plaintiff contends that of the 200 or so documents produced by the Defendants in response to requests numbered 2, 9, 10, 11, 12 and 13 of Plaintiff's Notice for Discovery and Inspection, Defendants response was deficient because they failed to identify, organize, or label which documents corresponded to which discovery request.

In opposition, Defendants argue that the documents were produced as they are kept in the regular course of Defendants' business, and the documents, such as bills and receipts, are generally grouped together and not kept in any particular order.

CPLR 3122(c) states: "Whenever a person is required pursuant to such notice or order to produce documents for inspection, that person shall produce them as they are kept in the regular course of business or shall organize and label them to correspond to the categories in the request." "The Supreme Court has broad discretion in supervising disclosure and in resolving discovery disputes." (H.P.S. Management Co., Inc. v. St. Paul Surplus Lines Ins. Co., 127 A.D.3d 1018, 7 N.Y.S.3d 462 [2nd Dept. 2015]), Clarke v. Clarke, 113 A.D.3d 646 [2nd Dept. 2014]). It is within the Court's discretion to direct a party to "provide their discovery responses in a manner that allows the defendants to know and understand which documents apply to their separate discovery demands." (H.P.S. Management, Supra).

Plaintiff's Notice for Discovery and Inspection specifically requested that the Defendants produce documents as they were kept in the usual course of business, and that the Defendants indicate the paragraph or subparagraph of the particular request in response to which each document is produced. Defendants argument that the documents were produced as they were kept in the regular course of business so they did not have to particularize which documents correspond to which request is unavailing. Defendants need to provide the appropriate responses and indicate which documents correspond to Plaintiff's requests numbered 2, 9, 10, 11, 12 and 13.

Plaintiff also argues that Defendants' objections to its Notice of Discovery and Inspection requests numbers 1, 3-8, 15 and 16 were improper. The requests were for:

(1) All Documents, including but not limited to, cancelled checks and bank statements related to Defendants payment of rent pursuant to the Lease.

(3) All leases, guaranties, licenses and/or other occupancy agreements executed by Shahroukh Yaghoubian, individually, or on behalf of a corporation or partnership, related to renting, using, or occupying commercial premises other than the Premises.

(4) All leases, guaranties, licenses and/or other occupancy agreements executed by Carol Poveda, individually, or on behalf of a corporation or partnership, related to renting, using, or occupying commercial premises other than the Premises.

(5) All brokerage agreements executed by Shahroukh Yaghoubian, individually, or on behalf of a corporation or partnership, related to renting, using or occupying

commercial premises other than the Premises.

(6) All brokerage agreements executed by Carol Poveda, individually, or on behalf of a corporation or partnership, related to renting, using, or occupying commercial premises other than the Premises.

(7) All Documents related to Shahroukh Yaghoubian's payment of rent and/or the use and occupancy for commercial premises other than the Premises in an individual capacity, or on behalf of a corporation or partnership.

(8) All Documents related to Carol Poveda's payment of rent and/or the use and occupancy for commercial premises other than the Premises in an individual capacity, or on behalf of a corporation or partnership.

(15) All Documents related to any construction and/or alteration that took place in the Premises and proofs of payment of same.

(16) All Documents, including but not limited to, contracts, insurance policies or certificates of insurance related to the contractors or other workers performing construction and/or alterations in the Premises.

Plaintiff argues that request number 1 is relevant because it seeks documentation of payments made by Defendants which is materially relevant to Plaintiff's claim that rent and additional rent is owed under the Lease. Plaintiff also argues that requests numbered 3-8, 15 and 16 are relevant to (1) Plaintiff's second cause of action that Defendants performed unauthorized work and alterations thereby causing damage to the Premises, and (2) Defendants defenses and counterclaims of constructive eviction. Defendants objected to these requests as either irrelevant or vague.

Defendants argue that (1) request number 1 is seeking documentation regarding payments which are not in dispute, (2) requests numbered 3-8 seek documentation relating to a commercial premises other than the Premises at issue in the litigation, and (3) requests numbered 15 and 16 seek documentation regarding construction/alterations on the Premises performed by Defendants, and Defendants contend that any work done to convert the space into a dental office was done by Plaintiff's prior tenant. Further, Defendants contend that they do not have any additional documents in their possession other than what has already been produced relating to repair work at the Premises.

CPLR § 3101(a) allows for the "full disclosure of all evidence material and necessary in the prosecution or defense of an action regardless of the burden of proof." CPLR § 3124 grants the court the power to compel a party to provide discovery demanded. CPLR § 3126 grants the court the power to sanction a party that fails to comply with a court's discovery order.

Pursuant to CPLR § 3124, the Court may compel compliance upon failure of a party to provide discovery. It is within the Court's discretion to determine whether the materials sought are "material and necessary" as a legitimate subject of inquiry or are being used for purposes of harassment to ascertain the existence of evidence (see *Roman Catholic Church of the Good Shepherd v. Tempco Systems*, 202 A.D. 2d 257, 608 N.Y.S. 2d 647 [1st Dept., 1994]). "The words 'material and necessary' as used in section 3101 must be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist in preparation for trial by sharpening the issues and reducing delay and prolixity" (*Kapon v. Koch*, 23 N.Y.3d 32, 38, 11 N.E.3d 709, 988 N.Y.S.2d 559 [2014] citing to, *Allen v. Crowell-Collier Publishing Co.*, 21 N.Y.2d 403, 406, 288 N.Y.S.2d 449, 452, 235 N.E.2d 430, 432 [1968]).

The majority of Plaintiff's demands are overly broad, vague and/or burdensome. The documentation sought would include the production of documentation that is irrelevant, and therefore the demands are palpably improper. It is within the Court's discretion to "vacate the entire demand...rather than prune [it]." *Lerner v. 300 West 17th St. Housing Development Fund Corp.*, 232 A.D.2d 249, 648 N.Y.S.2d 439 [1st Dept. 1996], citing *Editel, N.Y. v. Liberty Studios*, 162 A.D.2d 345 [1st Dept. 1990]).

Request number 15 is however relevant, material and necessary to the claims or defenses of the instant action, and the Defendant is required to produce any such related documents to Plaintiff.

In the event that Defendants cannot find any further documents as to request number 15, and have produced all the documentation in their possession, then the Defendants must provide Plaintiff with a proper search affidavit detailing the time, place, and manner in which the search was conducted. When certain discovery is unavailable, the party ordered to produce the discovery may submit "[a]n affidavit regarding the unavailability of documents that are the subject of a discovery order," and that affidavit "must document a thorough search conducted in good faith." (*Henderson-Jones v. City of New York*, 87 A.D.3d 498, 505, 928 N.Y.S.2d 536, 542[1st Dept. 2011]). A court may also preclude a party from testifying at the time of trial or otherwise submitting evidence in support of, or in opposition to, the discovery sought. (*Id.*; see also *Yong Soon Oh v. Hua Jin*, 124 A.D.3d 639, 1 N.Y.S.3d 307 [2nd Dept., 2015]).

Plaintiff has not stated a basis for finding that the Defendants have acted willfully, contumaciously, or in bad faith, to warrant a conditional Order striking the Defendants' Answer.

Accordingly, it is ORDERED, that Plaintiff's motion to compel discovery is granted to the extent stated herein, and it is further,


ORDERED, that Defendants respond and produce the documents sought in request number 15 of Plaintiff's November 11, 2015 Notice for Discovery and Inspection, and it is further,

ORDERED, that in the event Defendants cannot produce the documents sought, Defendants provide a search affidavit detailing the time, places and manner that a search was conducted for the documents requested in item number 15 of Plaintiff's November 11, 2015 Notice for Discovery and Inspection, and that the documents cannot be located, within thirty (30) days of the service of this Order with Notice of Entry, and it is further,

ORDERED, that Defendants provide a supplemental response to the requests numbered 2, 9, 10, 11, 12 and 13 of Plaintiff's Notice for Discovery and Inspection dated November 11, 2015, specifying which documents correspond to which request, within thirty (30) days of the service of this Order with Notice of Entry, and it is further,

ORDERED, that the parties appear for a Preliminary Conference in IAS Part 13, 71 Thomas Street, Room 210, New York, New York 10013, on August 31, 2016, at 9:30 a.m.

ENTER:

MANUEL J. MENDEZ
J.S.C.


MANUEL J. MENDEZ
J.S.C.

Dated: June 2, 2016

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE