Shultz v Cambridge Dev., L.L.C.
2016 NY Slip Op 33080(U)
June 24, 2016
Supreme Court, New York County
Docket Number: 106632/2009
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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GREGORY SHULTZ, ALBINA TAMALONIS, MELORA SOCHET, ANDREA TRUPPIN, and all other persons similarly situated,

Index No. 106632/2009

Plaintiffs,

-against-

CAMBRIDGE DEVELOPMENT, L.LC., CAMBRIDGE AFFILIATES, LLC, ATRIA SENIOR LIVING GROUP, INC., SENIOR QUARTERS MANAGEMENT CORP. d/b/a/ ATRIA WEST SIDE a/k/a ATRIA 86TH STREET a/k/a ATRIA RETIREMENT AND ASSISTED LIVING, and KAPSON SENIOR QUARTERS CORP.,

FILED
JUN 29 2016
COUNTY CLERK'S OFFICE
NEW YORK

Defendants.

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JOAN A. MADDEN, J.:

Defendants move pursuant to CPLR 3126 for an order imposing sanctions on plaintiffs, including striking the amended complaint and awarding them reasonable attorneys' fees and cost, based on plaintiffs' failure to comply with this court's orders dated May 17, 2012 and July 30, 2015; and defendants' discovery demands. Plaintiffs oppose the motion and cross move for a protective order pursuant to CPLR 3103.

Background

This putative class action asserts causes of action for nuisance, breach of the warranty of habitability and harassment under New York City's Administrative Code. It is alleged that defendants attempted to induce plaintiffs to give up possession of their rent regulated apartments by, among other things, engaging "in a course of conduct designed to convert the Building, in whole or in part, into assisted living residences, an enhanced assisted living facility, adult care facility and/or nursing home" (Amended Verified Class Action Complaint, ¶ 24). It is further

alleged that defendants failed to provide repairs and services, left common areas in an unsanitary condition, permitted elevators to become overcrowded, and allowed unsupervised workers in the Building and provided inadequate security. Defendants consist of the lessee of 33 West 86th Street, New York, NY ("the Building"), the fee owner and other corporate entities that are affiliates of the lessee.

The action was initially commenced by Cambridge House Tenants Association ("CHTA"), an unincorporated tenants' association for the Building and two of individual tenants Elizabeth Boyar ("Boyar") and Annette Gourgey ("Gourgey") who are members of the CHTA. By decision and order dated January 14, 2010, the court dismissed the that portion of the complaint asserted by CHTA for lack of standing, and found that plaintiffs' claim for the intentional infliction of emotional distress failed to state a cause of action. However, the court denied the motion to dismiss the class action allegations and directed that pre-certification disclosure be conducted regarding whether plaintiffs satisfy the numerosity, commonality and superiority requirements of CPLR 901.

Boyar and Gourgey settled with defendants and discontinued the action against them, and five other CHTA members, Gregory Shultz ("Shultz"), Albina Tamalonis ("Tamalonis"), Melorra Sochet ("Sochet"), Andrea Truppin ("Truppin") and Chris Spring ("Spring"), moved for leave to intervene in the action as plaintiffs and served an Amended Complaint. By decision and order dated January 12, 2012, the court granted the proposed intervenors' motion. Two of the plaintiffs, Tamalonis and Sochet, subsequently settled with defendants, leaving three plaintiffs.

Defendants now move for discovery sanctions against plaintiffs, arguing that plaintiffs have repeated failures to timely comply with their discovery demands and the court's orders, including plaintiffs' most recent failure to comply with the court's order dated July 30, 2015.

That order required Shultz, who is the President of the CHTA, to produce documents identified at his deposition and following the production of such documents, directed that Shultz's deposition continue.

Defendants also assert that plaintiffs' "persistent abuse of their discovery obligations is part of a pattern of bad faith they have displayed throughout the litigation." In this connection, defendants argue that they learned during discovery in this action that no effort was made to determine whether the "laundry list" of wrongs set forth in the complaint, which came from a CHTA check list of complaints distributed to tenants, were actual claims of the entire proposed class. Defendants also point to plaintiffs' refusal to respond to defendants' efforts to resolve the parties' dispute regarding the overcrowded elevators.

Plaintiffs oppose the motion and seek a protective order. Plaintiffs point out that two previous sanction motions by defendants were denied by court orders dated February 14, 2013, and February 5, 2015. As for July 30, 2015 order under which plaintiffs agreed to produce the documents by August 31, 2015, plaintiffs point to a November 13, 2015 email sent after the instant motion was made, which attached a supplemental document response and log requested during Shultz's deposition, and explain that the delay was due to the fact that "the task provided to be far more of a project for my client and with that, other factors prevented him from completing this as soon as he would have liked."

Plaintiffs also submit an affidavit from Shultz, who states:

> I have overwhelmingly complied with Defendants' abusive repeated requests for documents in the July 31, 2015 stipulation. The delay in collecting these documents originated in underestimating such a vast task and overcoming some health issues. Once I regained my health I fulfilled the Defendants' demands to the best of my ability. In a November 13, 2015 email, my attorney forwarded all the documents in my possession to the Defendants. The attachment contained: a log of incidents from

> February 28, 2012-October 29, 2015, photographs from 2012-October 29, 2015 and requested emails from 2012-October 29, 2015. The entire file contained 92 pages of documents. There is nothing more I can produce ...

As for defendants' assertions of bad faith, plaintiffs argue that the only pattern of bad faith relates to defendants' numerous motions for sanctions.[1] With respect to the effort to resolve the issue of elevator overcrowding, plaintiffs argue that while such effort is a positive step, it is not a solution from the many problems facing the building caused by its alleged illegal operation as a senior living home. Moreover, plaintiffs argue that defendants' motion is an attempt to avoid the depositions of defendants which will occur after Shultz deposition is completed.

In reply, defendants point to evidence that plaintiffs have delayed discovery by failing to comply with discovery deadline. Moreover, defendants note that Tamalonis' asserted excuse for the delay in production that the documents were in storage in the Bronx did not justify the approximate 11 months it took plaintiffs to provide the documents identified by Tamalonis during her deposition. In the case of Shultz, the documents were not produced until seven and a half months after his deposition and almost three months after the court ordered deadline of August 31, 2015. Defendants also point out that plaintiffs requested, and received, numerous adjournments of the sanction motions, including the instant one which was initially returnable in the motion support office on October 30, 2015, but was not fully submitted until March 11, 2016.

As for the Shultz production of documents, defendants note that they emailed plaintiffs counsel six days after receiving the production that it was insufficient. Defendants assert that plaintiffs' counsel did not inquire as to why it was insufficient but, instead, sought adjournments of this motion. Defendants argue that the production is insufficient on various grounds,

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[1]At oral argument, plaintiffs asserted that during discovery they produced four redwells measuring 14 ¾ by 9 ½ by 5 ½ inches.

including that although the action was commenced in 2009, and alleges wrongs dating back to September 1997, and defendants requested documents dating back to 2003, the documents produced by Shultz relate only to incidents from 2012 to the present. Defendants point to evidence, including the deposition testimony of other named plaintiffs which, they assert, indicate that Shultz should have documents dating back to at least 2010. Defendants argues that Shultz is not in possession of such documents that he must have disposed of them such that spoliation sanctions are appropriate.

Discussion

CPLR 3126(3) provides that if a party "refuses to obey an order for disclosure or willfully 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," including "an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party." Under CPLR 3126 (1)(2), the court is also authorized to order that the issues encompassed by the disclosure demand "be deemed resolved," or that the party be precluded from introducing certain evidence or from supporting or opposing certain claims.

"The drastic sanction of striking pleadings is justified only when the moving party shows conclusively that the failure to disclose was wilful, contumacious or in bad faith" Roman v. City of New York, 38 AD3d 442 (1st Dept 2007)(citation omitted); see also, Marks v. Vigo, 303 AD2d 306 (1st Dept 2003)(noting that "[i]n view of the strong preference in our law that actions be decided on their merits... a court should not resort to the drastic remedy of striking a pleading for failure to comply with discovery directives unless the noncompliance is established to be both deliberate and contumacious"); cf, Couri v. Siebert, 48 AD3d 370 (1st Dept 2008)(holding that

plaintiff's "dilatory, evasive, obstructive, and ultimately contumacious conduct" warranted striking his complaint)(internal citations omitted).

Under the circumstances here, striking plaintiffs' pleading is not an appropriate remedy, as while the record shows plaintiffs failed to timely respond to discovery, it is devoid of proof that such conduct was intentional, wilful or in bad faith. Likewise, sanctions are not warranted based on plaintiffs' failure to respond to defendants' overtures to resolve issues related to elevator overcrowding. Nor does the record support a basis for sanctioning plaintiffs based on the lack of differentiation in the complaint with respect to the conditions complained of by the individual plaintiffs. In addition, the court finds that the circumstances here do not warrant an award of attorneys' fees and expenses.

As for defendants' request for spoliation sanctions, the court notes that under New York law, spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence ... before the adversary has an opportunity to inspect them." Kirkland v New York City Housing Authority, 236 AD2d 170, 175 (1st Dept 1997). However, the severe sanction of dismissing the action or striking responsive pleadings is not warranted unless the party seeking such sanctions meets its burden of establishing that the evidence destroyed is crucial to the moving parties' case, and that the party suffered prejudice as a result of its destruction. See Balaskonis v. HRH Constr. Corp., 1 AD3d 120 (1st Dept 2003); Riley v. ISS Intern. Service System, Inc., 304 AD2d 637 (2d Dept 2003). At the same time, when the destroyed evidence is not shown to be crucial, the lesser sanctions in the form of an adverse inference instruction, a missing document charge or a preclusion order have been found to be a proper exercise of the court's discretion. See Metropolitan New York Coordinating Council on Jewish Poverty v. FGP Bush Terminal, Inc., 1 AD3d 168 (1st Dept 2003).

Here, the record lacks proof that Shultz or the plaintiffs destroyed any evidence or that such evidence, if it existed, is crucial to defendants' defense of this matter. Accordingly, there is no basis for defendants' request for spoliation sanctions. Moreover, defendants fail to offer any compelling argument that they have been prejudiced by the alleged lack of documents prior to 2012 supporting Shultz claims, or even if it can be reasonably inferred that such documents exist. However, the court finds that plaintiffs should be precluded from offering any evidence at trial of any documents not disclosed to date.

Finally, plaintiffs' motion for a protective order is denied.

Conclusion

In view of the above, it is

ORDERED that defendants motion for sanctions is granted to the extent that plaintiffs are precluded from offering any evidence at trial of any documents not disclosed to date and is otherwise denied; and it is further

ORDERED that plaintiffs' cross motion for a protective order is denied; and it is further

ORDERED that all depositions shall be completed by September 30, 2016; and it is further

ORDERED that a status conference shall be held on October 27, 2016 at 11:00 am.

DATED: June 17 2016

J.S.C.
HON. JOAN A. MADDEN
J.S.C.

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