

James v East Harlem Pilot Block-Bldg. 3 Hous. Dev. Fund Co., Inc.
2017 NY Slip Op 30124(U)
January 21, 2017
Supreme Court, New York County
Docket Number: 157857/14
Judge: Gerald Lebovits
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: PART 7**

ANDRE JAMES,

Plaintiff,

-against-

EAST HARLEM PILOT BLOCK-BUILDING 3
HOUSING DEVELOPMENT FUND COMPANY,
INC., TAINO TOWERS CORP. and
ARCO MANAGEMENT CORPORATION,

Defendants.

Index No.: 157857/14
DECISION/ORDER
Motion Seq. 1

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing plaintiff's motion under CPLR 3124 and 3126.

Papers

Numbered

Plaintiff's Notice of Motion.....	1
Defendant's Affirmation in Opposition	2
Plaintiff's Reply Affirmation.....	3

Scott L. Sherman & Associates, P.C., New York (Scott L. Sherman of counsel), for plaintiff.
Babchik & Young, LLP, New York (Thomas G. Connolly of counsel), for defendants East Harlem Pilot Block-Building 3 Housing Development Fund Company, Inc. and Taino Towers Corp.

Gerald Lebovits, J.

Plaintiff, Andre James, moves under CPLR 3124 to compel defendants to produce additional witnesses for examinations before trial (EBT). Plaintiff also moves under CPLR 3101 (a) to compel defendants to disclose information about witnesses who can offer testimony on the issue of defendants' liability and actual notice. Plaintiff also moves under CPLR 3126 to strike defendants' answer and to monetarily sanction defendants for their willful and contumacious conduct.

According to plaintiff's complaint, plaintiff is a tenant at 230 East 123rd Street, apartment #2004, in New York County. On June 26, 2014, plaintiff was in his apartment when he tripped and fell on the interior stairway because of a "defective step . . . which . . . had a raised rubber covering" on it. (Plaintiff's Notice of Motion, Exhibit B, at ¶ 18.) Plaintiff complained to management about the rubber covering for over a year. His complaints were ignored. Plaintiff suffered serious injuries. Plaintiff asserts that defendants are liable for negligence.

Although plaintiff testified at his EBT that he complained to management for a year about the rubber covering, defendants' witnesses testified that work orders are no longer available: Defendants discarded the evidence when it computerized its files in 2015. (Plaintiff's Notice of Motion, at ¶ 5.) Plaintiff testified that one day before his accident, defendants sent two HVAC mechanics to replace an air filter inside his air conditioner. (Plaintiff's Notice of Motion, at ¶ 6.) One of the HVAC mechanics tripped over the rubber covering and fell down the steps. (Plaintiff's Notice of Motion, at ¶ 6.) The HVAC mechanic called the management office to report the problem.

Defendants have produced three witness for EBTs: Manny Diaz, defendants' property manager; Wilfredo Sandoval, an HVAC mechanic; and Manuel Manana, superintendent and supervisor of four buildings for defendant Arco Management Corporation.

Plaintiff argues that it needs to depose additional witnesses on the issue of defendants' actual notice. Plaintiff states that the witnesses whom defendants produced, Sandoval and Manana, had no knowledge of the incident. Plaintiff argues that the HVAC mechanic who tripped the day before plaintiff tripped might be either Victor Estrella, William Ayala, or Freddy Sandoval — defendants' employees. Plaintiff also seeks the last known addresses for Amaris Pacheco and Iris Aponte — defendants' former employees. According to plaintiff, these witnesses were employed as secretaries; plaintiff states that they fielded his phone calls. Plaintiff also seeks Maria Cruz for an EBT. According to plaintiff, Cruz is the supervisor of defendants' maintenance department. Plaintiff argues that Cruz knew about the defect — one day before his accident — and was responsible for destroying the maintenance files when defendants implemented its computer system. Plaintiff submits an affidavit about his meeting with Cruz — he did not recall this meeting when he was deposed.

In opposition, defendants argue that according to the June 22, 2016, disclosure order, disclosure is complete; plaintiff had to file its note of issue by July 29, 2016. Defendants argue that plaintiff has the burden to identify the names of the witnesses to whom he gave notice. Defendants argue that they produced Sandoval based on plaintiff's description of the HVAC employee. Defendants do not want to turn over any additional information about Pacheco's and Aponte's last known addresses, given that disclosure is complete. As for plaintiff's latest affidavit in which he remembered a meeting with Cruz, defendants argue that plaintiff's affidavit violates CPLR 3116: Plaintiff may not change his EBT testimony.

The court grants plaintiff's motion in part and denies it in part: Plaintiff's motion to compel disclosure is granted, but plaintiff's motion to strike defendants' answer and to monetarily sanction defendants is denied.

CPLR 3101 (a) requires all parties to provide "full disclosure of all matters material and necessary to the defense of an action." (*Kavanagh v Ogden Allied Maintenance Corp.*, 92 NY2d 952 [1998].) The court must take a "liberal and practical view . . . of what is necessary." (*Marie Dorros, Inc. v Dorros Bros., Inc.*, 274 AD 11, 13 [1st Dept 1948].)

A CPLR 3126 motion is appropriate when a party disobeys a court order for disclosure or “willfully disobeys” a disclosure notice. (*Goldner v Lendor Structures, Inc.*, 29 AD2d 978, 979 [2d Dept 1968].) The moving party must establish the non-moving party’s willfulness by showing a pattern of disobedience. (*Fish & Richardson, P.C. v Schindler*, 75 AD3d 219, 220 [1st Dept 2010] [“Supreme Court did not abuse its discretion in striking defendant’s answer based on a pattern of disobeying court orders and failing to provide discovery.”].) Willful and contumacious conduct can be inferred from a party’s “repeated failure to comply with orders . . . and the inadequate excuses [a party] offer[s] to explain [its] noncompliance.” (*Wright v Mount Vernon Hosp.*, 88 AD3d 873, 873 [2d Dept 2011].) To avoid a finding that a noncomplying party’s conduct was willful and contumacious, the noncomplying party must provide a reasonable excuse for its noncompliance. (*Dietrick v Gutman*, 39 AD 3d 392, 392 [1st Dep’t 2007].)

Plaintiff explains that disclosure is not yet complete; it has not yet filed its note of issue. Steven Rosenberg sufficiently explains that he was mistaken when he agreed on June 22, 2016, that disclosure was complete. (Plaintiff’s Reply Affirmation, Exhibit D.) He explained that the same day, in the afternoon, Sandoval’s EBT was scheduled to take place. Thus, disclosure was not yet complete. Plaintiff sufficiently explains that the information it seeks is material and necessary.

An order to strike defendants’ answer is harsh in the current circumstances. Defendants’ conduct was not willful and contumacious. And monetary sanctions are inappropriate at this time. Within 30 days of this decision upon service with notice of entry, defendants must produce for an EBT the HVAC individual who allegedly tripped in plaintiff’s apartment — either Victor Estrella, William Ayala, or Freddy Sandoval. Within 14 days, of this decision upon service with notice of entry, defendants must produce to plaintiff the last known addresses for Amaris Pacheco and Iris Aponte.

CPLR 3116 (a) provides that “[i]f the witness fails to sign and return the deposition within sixty days, it may be used as fully as though signed. No changes to the transcript may be made by the witness more than sixty days after submission to the witness for examination.” Plaintiff never signed and returned his EBT transcript within 60 days from his EBT of November 30, 2015. In support of his motion, plaintiff provides an affidavit dated August 18, 2016 — about 10 months after his EBT — in which he states that he now remembers a conversation he had with Cruz; he mentioned no such conversation at his EBT. He states that his son reminded him about the conversation about “two months ago,” in June 2016. (Plaintiff’s Notice of Motion, Exhibit J.)

The court need not decide at this time whether plaintiff has changed his EBT testimony and whether the court will consider plaintiff’s affidavit for its truth. Before the court is plaintiff’s motion to compel disclosure, not the parties’ respective summary-judgment motions in which the court must consider the evidence and whether issues of fact exist. The court relies on plaintiff’s affidavit in determining only that Cruz’s EBT is material and necessary.

Within 30 days of this decision upon service with notice of entry, defendants must produce Maria Cruz for an EBT.

Defendants' failure to comply with this order may result in the court striking defendants' answer.

Accordingly, it is

ORDERED that plaintiff's motion in granted in part and denied it in part: Plaintiff's motion to compel disclosure is granted: Within 30 days of this decision upon service with notice of entry, defendants must produce for an EBT the HVAC individual who allegedly tripped in plaintiff's apartment — either Victor Estrella, William Ayala, or Freddy Sandoval. Within 14 days, of this decision upon service with notice of entry, defendants must produce to plaintiff the last known addresses for Amaris Pacheco and Iris Aponte. Within 30 days of this decision upon service with notice of entry, defendants must produce Maria Cruz for an EBT. Plaintiff's motion to strike defendants' answer and to monetarily sanction defendants is denied.

ORDERED that disclosure must be completed by May 12, 2017. Plaintiff to file its note of issue/certificate of readiness on or before May 25, 2017; and it is further

ORDERED that counsel for plaintiff is directed to serve a copy of this order with notice of entry upon defendants; and it is further

ORDERED that the parties must appear for a compliance conference on April 5, 2017, at 10:00 a.m., in Part 7, room 583, at 111 Centre Street

This opinion is the court's decision and order.

Dated: January 21, 2017


J.S.C.
HON. GERALD LBOVITS
J.S.C.