

Islip Theaters LLC v Landmark Plaza Props. Corp.
2017 NY Slip Op 33212(U)
September 20, 2017
Supreme Court, Suffolk County
Docket Number: 606246-2017
Judge: John H. Rouse
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INDEX NO. 606246-2017
(related to Index 12315-2015)

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 12 - SUFFOLK COUNTY

PRESENT:

Hon. John H. Rouse
Acting Supreme Court Justice

MOTION DATE: 09/20/2017
ADJ. DATE:
Mot. Seq. 005-MG
e-filed full participation

ISLIP THEATERS LLC,

Plaintiff

DECISION & ORDER

-against-

LANDMARK PLAZA PROPERTIES CORP,

Defendant

TO:

WILLIAM R. GARBARINO, ESQ.
40 MAIN STREET - P.O. BOX 717
SAYVILLE, NY 11782
631-563-4411

LAW OFFICES GLENN T. NUGENT, ESQ.
31 GREENE AVE.
AMITYVILLE, NY 11701

Upon consideration of the following: (1) Notice of Motion by Plaintiff for a Protective Order and to Quash dated August 31, 2017, the Affirmation of Donald R. Hamill Esq. Affirmed on August 31, 2017, and Exhibits A-1; (2) Affirmation in Opposition to Issuance of Protective Order by Glenn T. Nugent affirmed on September 15, 2017, Exhibits A-C; (3) Letter Recusal Request by Defendant; (4) Affirmation in Reply by Donald R. Hamill, Esq. Affirmed on September 19, 2017; (5) all of the e-filed documents numbered 1-144; (6) all of the filings under the related action under Suffolk County Index 12315-2015; and (7) all of the arguments and evidence received in court under both Index Numbers.

ORDERED that the letter application (*e-filed document 140*) by Defendant for this Court to recuse is denied; and it is further

ORDERED that Plaintiff's motion (Mot. 005) for a protective order and to quash the subpoena served upon William H. Rockensees of H2M Engineers & Architects is granted; and it is further

ORDERED that the hearing to determine damages arising from Landmark Plaza Properties Corporation's contempt of the So Ordered Settlement will be held, as agreed upon by the parties, on October 18, 2:00 p.m. in Part 12 where all prior proceedings have been conducted; and it is further

ORDERED that on October 18, 2017 the Court will conference, on the record, the status of Landmark Plaza Properties Corporation's claims of lease defaults alleged to have arisen after November 2, 2016, the dated of the prior settlement, and that do not arise from the performance of the settlement agreement itself.

DECISION

Letter Request for Recusal by Defendant

By Decision and Order of this Court dated June 20, 2017, *e-filed document 67*, this Court determined that Defendant, Landmark Plaza Properties Corp., was in contempt of a So Ordered Stipulation of Settlement granted on November 2, 2016. *See e-filed document 8*. The matter was put down for September 13, 2017 for a hearing on the damages actually caused by the Defendant's contemptuous conduct.

On September 13, 2017, prior to commencing the hearing the Court conducted a conference in chambers with counsel for Plaintiff and Defendant. An informal discussion was had concerning the Defendant's subpoena it had served on William H. Rockensees of H2M Engineers & Architects and the Plaintiff's pending motion to quash returnable before this Court on September 20, 2017. This motion (Seq. 005) is addressed below. At the conference Plaintiff provided Defendant's counsel with a ring binder that was to be an exhibit upon the hearing on the issue of damages from Defendant's contempt. Defendant's counsel requested an adjournment of the proceedings to permit review of the Exhibit to be submitted. Also upon this conference the outstanding rental credits, which after discussion between counsel was settled upon as being in the amount of \$60,354 past due to the Plaintiff was resolved and the time and method of payment was settled. *See e-document 67, Decision on the Motion for Contemp that provided part of the contempt was refusal to credit Plaintiff with payments towards rent*. At the conclusion of the conference the substance of the conference was placed on the record in open court.

The Court is now in receipt of Defendant's letter by counsel dated September 18, 2017. *E-filed document 140*. Defendant requests the Court to recuse based upon mistaken allegations of fact. In counsel's letter he advises that from the conference in chambers on September 13, 2017 he reached the understanding the H2M is, or has, provided engineering services to the Court personally. This is wrong. At no time has the court ever engaged the services of H2M, past or present, nor has the court ever spoken with or had any communication with H2M, any of its principals or employees. While the Court did have in chambers a piece of raised seam roofing that it had recently installed and this was the subject of comment among the parties, H2M had

nothing whatsoever to do with the work performed for the court. Defendant only now in its September 18, 2017 letter states that it clearly understood the court to say otherwise. This misunderstanding was not raised in that conference nor on the record in open court when it could have been promptly corrected. Now, five days later it is advanced in a letter as a ground for the court to recuse. The letter application for this Court to recuse is without foundation and is denied.

Plaintiff's Motion for a Protective Order and to Quash Subpoena (Mot. 005)

This court's decision and order dated June 20, 2017 on the motion to hold the Defendant, Landmark Plaza Properties Corp. in contempt of a November 2, 2016 So Ordered Stipulation of Settlement recounted the history of the conduct of the Defendant leading up to this proceeding. See e-filed document 67. It will not be repeated here in full, but is in part the basis for the decision rendered this date. In short, Plaintiff Islip Theaters LLC, a tenant operating a movie theater in premises owned by Defendant Landmark Plaza Properties Corp. discovered that Landmark Plaza Properties Corp. had obtained a substantial reduction in the assessed value of the property and a reduction of property taxes that Landmark Plaza Properties Corp. wrongfully failed to pass on to tenant Plaintiff Islip Theaters LLC's as reduction in monthly rent. This resulted in rent overcharges. When Islip Theaters LLC insisted upon prompt repayment of the rent overcharges the Defendant Landmark Plaza Properties Corp. refused. Instead, Landmark Plaza Properties Corp. claimed various breaches of the lease and sent a notice to cure. Islip Theaters LLC brought an action¹ to obtain a *Yellowstone* injunction to preserve its rights in the long term commercial lease. The Court expended a great deal of time with several trips to the premises to assess the claims of the parties. This culminated in the Settlement Agreement of November 2, 2016 that the parties requested the Court So Order.

A part of that settlement agreement provided that the tenant would hire a contractor of tenant's choice to replace the roof at the premises, and upon a certification from H2M Architects and Engineers that the installation complied with the roof manufacturer's standards and upon the delivery of a 20 year warranty provided by the roof manufacturer to counsel for Landmark Plaza Properties Corp. counsel would pay from his escrow account to Islip Theaters LLC \$32,500.00.² Islip Theaters LLC provided both the certification and the warranty. Nonetheless, Landmark Plaza Properties Corp. directed counsel not to release the escrow funds. John Fickling, a principal of Landmark Plaza Properties Corp., appeared in court and complained that the roofing contractor selected by Islip Theaters LLC was from "a black church" and unreliable. The express terms of the Settlement Agreement permitted Islip Theaters LLC to select whatever roofing contractor it wished, provided the work was subsequently certified by H2M Architects

¹Suffolk County Index12315-2015

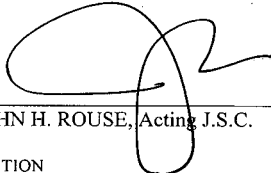
² Landmark Plaza Properties Corp. had contended that it was the tenant's obligation to replace the roof under the terms of the lease. However dubious this contention was under the language in the lease, this disagreement was resolved by replacement of the roof with payment by Landmark Plaza Properties Corp. for the first \$32,500.00 of the cost and the balance to be paid by tenant.

and Engineers. H2M Architects and Engineers did not merely arrive at the completion of the work, but was present during the work and took photographs of the work in progress prior to issuing the certification required by Landmark Plaza Properties Corp. Thereafter the persistent refusal by Landmark Plaza Properties Corp. to fulfill the terms of the Stipulation of Settlement that had been So Ordered culminated in a contempt finding by this court June 20, 2017 after the parties had an opportunity to be heard on the motion by Islip Theaters LLC to punish Landmark Plaza Properties Corp. for contempt.

Landmark Plaza Properties Corp. has now served a *Subpoena Duces Tecum and Ad Testificandum* dated August 2, 2017 commanding William H. Rockensees of H2M Engineers & Architects to appear at the office of the counsel for Landmark Plaza Properties Corp. to produce documents and give testimony. Islip Theaters LLC moves for a protective order and/or to quash the subpoena.³

Under the terms of the Settlement Agreement the parties agreed that while the tenant would select the roofing contractor, H2M Engineers & Architects would be the arbiter of whether the work was performed to the specifications incorporated in the settlement agreement. Now, in this proceeding Landmark Plaza Properties Corp. seeks to litigate the determination of the arbiter it agreed upon. This issue was resolved by H2M Engineers & Architects, and that further became the law of the case upon this court's determination on motion by Islip Theaters LLC to hold Landmark Plaza Properties Corp. in contempt for the So Ordered Settlement Agreement. To the extent Landmark Plaza Properties Corp. disagrees with this Court's determination on this issue its remedy is an appeal. Accordingly, the motion to quash and for a protective order is granted.

Dated: September 20, 2017



JOHN H. ROUSE, Acting J.S.C.

NON-FINAL DISPOSITION

³This Court previously addressed this issue in its decision and order of June 20, 2017 when it issued a protective order (Mot. 002) and vacated Defendant's Notice to Take the Deposition of Matthew Latten wherein Defendant sought discovery from Plaintiff on matters pertaining to the installation of the roof that had already been certified by H2M Engineers & Architects as properly installed.