

Marion Scott Real Estate, Inc. v Riverbay Corp.

2018 NY Slip Op 33129(U)

October 29, 2018

Supreme Court, New York County

Docket Number: 653953

Judge: Gerald Lebovits

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. GERALD LEBOVITS **PART** **IAS MOTION 7EFM**

Justice

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INDEX NO. 653953/2014
MOTION DATE 09/27/2018
MOTION SEQ. NO. 005

MARION SCOTT REAL ESTATE, INC.

Plaintiff,

- v -

RIVERBAY CORPORATION,

Defendant.

DECISION AND ORDER

-----X
 The following e-filed documents, listed by NYSCEF document number (Motion 005) 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111
 were read on this motion to/for DISCOVERY

Plaintiff, Marion Scott Real Estate, Inc., brings this CPLR 3124 motion to compel defendant, Riverbay Corporation, to comply with outstanding discovery demands. In this action, defendant cross-moves to vacate the case’s “disposed” marking; and accept defendant’s note of issue or, in the alternative, direct the parties to conduct a preliminary conference to establish an expedited discovery schedule, to compel the plaintiff to answer defendant’s outstanding discovery demands, and to quash plaintiff’s discovery demands, which they allege ignore the corporate defendant’s right to designate a witness with knowledge.

I. Background

Plaintiff was hired as the managing agent of defendant’s housing development. This action arose out of plaintiff’s allegation that defendant wrongfully terminated plaintiff as the managing agent. Plaintiff asserts several causes of action, including breach of contract, and defendant answered with several counterclaims.

On March 25, 2015, plaintiff moved for partial summary judgment on its second cause of action for breach of contract. On June 20, 2016, Hon. Paul Wooten granted partial summary judgment to plaintiff and awarded plaintiff \$1,166,190.00. Defendant appealed and sought a temporary restraining order preventing the entry and enforcement of plaintiff’s judgment against defendant. This court denied the motion to stay. (NYSCEF Doc No. 94, Decision and Order on Motion.)

Defendant filed a note of issue on March 19, 2018, for a trial on its counterclaims, but the clerk rejected the note of issue on the basis that the matter had been marked as disposed.

On June 18 of 2018, plaintiff served defendant with document demands and interrogatories. On July 13, 2018, plaintiff sent one letter to defendant requesting compliance with discovery demands and a second letter on July 30, 2018.

Plaintiff moved to compel compliance with discovery demands on August 10, 2018, this current motion sequence 05. On August 24, 2018, defendant cross-moved for the court accept the note of issue.

II. Discussion

As a threshold matter, this court vacates the marking of this proceeding as disposed. Neither party claims that this matter was final or that all remaining issues were disposed of upon the grant of partial summary judgment. Although this case was marked settled on February 22, 2018, the only claim in this case that has received a final decision is plaintiff’s second cause of action, for breach of contract. The defendant’s counterclaims have not been disposed.

Plaintiff’s Motion

Motion to Compel

Plaintiff’s motion to compel is granted. Defendant must respond to plaintiff’s discovery requests dated June 18, 2018 because plaintiff is entitled to pretrial discovery and full disclosure with respect to defendant’s counterclaims. (CPLR 3101.)

Under CPLR 3124, a party may move to compel discovery after discovery requests have been issued under CPLR 3120 and after the party has made “a good faith effort to bring about a non-judicial resolution of any remaining discovery disputes.” (*Barber v Ford Motor Co.*, 250 AD2d 552, 553 [1st Dept 1998].) On June 18, 2018, plaintiff served defendant with valid discovery demands. (See CPLR 3120; Plaintiff’s Affirmation in Support of Motion, Exhibit E-F.) Plaintiff’s counsel mailed two letters to defendant’s counsel in a good-faith effort to address the discovery requests before moving to compel discovery compliance. (Plaintiff’s Affirmation in Support of Motion, Exhibit G-H.) The record does not reflect any attempt by defendant to comply with plaintiff’s discovery requests. Defendant has acknowledged that discovery demands were made, but instead of responding to the discovery demands, defendant cross-moved to direct that the court accept the previously submitted note of issue. (Defendant’s Affidavit in Support of Cross-Motion, at ¶¶ 22-24.)

Defendant must respond to plaintiff’s discovery demands dated June 18, 2018 within thirty (30) days of service of a copy of this order with notice of entry.

The aspect of the plaintiff’s motion seeking an award of costs for this motion is denied. A party that prevails in an action may not be awarded attorney’s fees from the losing party unless “an award is authorized by agreement between the parties, statute, or court rule.” (*Atlantic Development Grp., LLC v 296 E 149th St., LLC*, 70 AD3d 528, 529 [1st Dept 2010].)

Defendant's Cross-Motion

A. Motion to Compel Clerk of the Court to Accept the Note of Issue

Defendant's cross-motion does not explicitly object to discovery. Defendant does, however, move the court to accept the previously submitted – and returned – note of issue. Defendant has not shown that this lawsuit is ready for trial.

A note of issue is filed with a certificate of readiness, and “a certificate of readiness certifies that all discovery is completed, waived, or not required and that the action is ready for trial.” (*Tirado v Miller*, 75 AD 3d 153, 156 [2d Dept 2010].) Not only does plaintiff oppose the contention that discovery is complete and that the remaining claims are ready for trial in a motion to compel discovery compliance against defendant, defendant has asserted the existence of outstanding discovery. (Defendant's Affidavit in Support of Cross-Motion, at ¶¶ 6-7.) Discovery is incomplete, and the remaining claims in this lawsuit cannot be ready for trial without complete discovery.

That aspect of the defendant's cross-motion to compel the clerk of the court to accept the note of issue is denied.

B. Motion for Expedited Discovery Schedule; Motion to Compel Plaintiff to Answer Defendant's Outstanding Discovery Demands; Motion to Quash Depositions of Corporate Defendants

Defendant alternatively moves for (i) an expedited discovery schedule; (ii) to compel plaintiff to answer defendant's outstanding discovery demands; and (iii) to quash plaintiff's discovery demands, which defendant alleges ignore the corporate defendant's right to designate a witness with knowledge.

Both parties agree to the scheduling of a preliminary conference. However, defendant has requested that the preliminary conference be held to establish an expedited discovery schedule. Defendant has not supported its request for expedited discovery with any factor that might persuade this court to consider the need for a special discovery schedule. Thus, the request for expedited discovery is denied.

Defendant asserts in its cross-motion that it served plaintiff with deposition notices and document requests, as well as multiple demands for discovery compliance. (Defendant's Cross-Motion, Affidavit in Support of Cross Motion at ¶ 7.) Although this court is not persuaded that defendant has shown that plaintiff was served with discovery demands, or that plaintiff has ignored these demands, this matter has yet to have full discovery, and this court orders that both parties comply with the other's request for discovery. Plaintiff must comply with defendant's discovery requests detailed in Affidavit in Support of Cross-Motion Exhibit A within 30 days of entry of this order. (NYSCEF Doc No. 108, Exhibit A.)

Discovery requests by both parties must comply with CPLR rules of discovery, including the rule that a corporation may decide which of its representatives will be examined at a pretrial deposition. (See *Faber v New York City Transit Auth.*, 177 AD 2d 321, 322 [1st Dept 1991].)

Defendant's motion for expedited discovery is denied, while defendant's motion to compel compliance with valid discovery requests is granted.

Accordingly, it is hereby

ORDERED that defendant respond to discovery demands dated June 18, 2018 within 30 days of service of a copy of this order: and it is further

ORDERED that defendant's cross-motion is granted in part and denied in part: that aspect of defendant's cross-motion to compel disclosure is granted, and the motion is otherwise denied. Plaintiff must comply with defendant's discovery requests detailed in Affidavit in Support of Cross-Motion Exhibit A within 30 days of entry of this order: and it is further

ORDERED that plaintiff shall serve a copy of this decision and order on the General Clerk's and the County Clerk's Office, which is directed to vacate the designation that this matter was disposed and restore this matter on the Part 7 calendar; and it is further

ORDERED that the parties appear for a compliance conference in Part 7, room 345, at 60 Centre Street, on March 6, 2019, at 10:00 a.m.

10/29/2018
DATE


GERALD LEBOVITS, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input type="checkbox"/> DENIED
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> SUBMIT ORDER
		<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> OTHER
		<input type="checkbox"/> REFERENCE