

Guzzardi v Lake Ave. Owners, Inc.
2018 NY Slip Op 33812(U)
August 10, 2018
Supreme Court, Westchester County
Docket Number: 51828/2017
Judge: Joan B. Lefkowitz
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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER-COMPLIANCE PART

-----X
STEPHEN GUZZARDI,

Plaintiff,

-against-

LAKE AVENUE OWNERS, INC.,
J.L. WHITE MANAGEMENT, INC., a/k/a/
WHITE MANAGEMENT, VINCENT BIANCO
LANDSCAPING, VINCENT BIANCO, and
JOHN DOE 1-10, representing
additional potentially liable persons and/or entities,

Defendants.
-----X

LAKE AVENUE OWNERS, INC.,
J.L. WHITE MANAGEMENT, INC., a/k/a/
WHITE MANAGEMENT, INC.,

Third-Party Plaintiffs,

-against-

RIVERMERE APARTMENTS, INC.,
RIVERMERE-SOUTHGATE, INC.,
SOUTHGATE APARTMENTS, INC.,
NORTHGATE APARTMENTS, INC.,
KEN-COURT, INC., EASTBOURNE
APARTMENTS, INC., ALGER
COURT, INC., and STUDIO ARCADE. L.L.C.,

Third-Party Defendants.
-----X

LEFKOWITZ, J.

The following papers were read on motion sequence number five by third-party defendants Southgate Apartments, Inc., Northgate Apartments, Inc., and Eastbourne Apartments, Inc. (hereinafter to be referred to jointly as "SNE") for an order: (1) dismissing the third-party action against SNE on the grounds that it was commenced in violation of the preliminary



conference order; (2) severing the third-party action against SNE; and (3) for such other and further relief as this court deems just and proper.

Order to Show Cause dated June 29, 2018; Affirmation in Support; Exhibits A-H
Affirmation in Opposition; Exhibits A-G
NYSCEF File

The following papers were read on motion sequence number six by third-party defendant Rivermere Apartments, Inc. (hereinafter "Rivermere Apartments"), for an order: (1) dismissing the third-party action against Rivermere Apartments on the grounds that it was commenced in violation of the preliminary conference order; (2) severing the third-party action against Rivermere Apartments; and (3) for such other and further relief as this court deems just and proper.

Order to Show Cause dated July 6, 2018; Affirmation in Support; Exhibits A-I
Affirmation in Opposition; Exhibits A-G
NYSCEF File

The following papers were read on motion sequence number seven by defendants/third-party plaintiffs, Lake Avenue Owners, Inc., and J.L. White Management, Inc. (hereinafter the "Lake Avenue defendants"), for an order: (1) striking plaintiff's complaint due to his failure to provide discovery; (2) precluding plaintiff from offering evidence or testimony at trial as to his claims; (3) compelling plaintiff to provide all outstanding discovery on a date certain and to attend a further deposition relating to his claim for lost business opportunities; and (4) for such other and further relief as this court deems just and proper.

Order to Show Cause dated July 9, 2018; Affirmation in Support; Exhibits A-Z; AA-AD
Affirmation in Opposition; Exhibits A-R
NYSCEF File

The following papers were read on motion sequence number eight by third-party defendant Studio Arcade, L.L.C. (hereinafter "Studio"), for an order: (1) dismissing the third-party action against Studio on the grounds that it was commenced in violation of the preliminary conference order; (2) severing the third-party action against Studio; and (3) for such other and further relief as this court deems just and proper.

Order to Show Cause dated July 9, 2018; Affirmation in Support; Exhibits A-H
Affirmation in Opposition; Exhibits A-G
NYSCEF File

The following papers were read on plaintiff's motion sequence number nine for a protective order regarding the Lake Avenue defendants' discovery demands.

Order to Show Cause dated July 10, 2018; Affirmation in Support; Exhibits A, B, C (a-b),
D (1-2)

Affirmation in Opposition; Exhibits A and B
NYSCEF File

Upon the foregoing papers and proceedings held on August 6, 2018, these motions are determined as follows:

In his complaint dated February 3, 2017, plaintiff claims that on February 18, 2014, he was injured when he slipped and fell on ice at premises located at the Alger Court complex in Bronxville, New York, specifically on the roadway in front of parking garage number eight behind Lake Avenue. The Lake Avenue defendants filed an answer on February 24, 2017, and their co-defendants (hereinafter "the Bianco defendants") filed an answer on August 17, 2017.

Motion Sequence Numbers 5, 6, and 8:

The preliminary conference stipulation executed by plaintiff and the Lake Avenue defendants dated June 6, 2017, and so-ordered by this court (Lefkowitz, J.), stated, among other things, that all third-party actions be commenced on or before December 4, 2017, and that joinder of a third-party action beyond that date without leave of court may result in severance.

A compliance conference was held on April 24, 2018. The compliance conference referee report and order, so-ordered by the court (Lefkowitz, J.), provided for the completion of discovery by June 15, 2018. The parties were directed to appear for a final conference on June 21, 2018, "at which time it is contemplated that a trial readiness order will be issued."

On May 14, 2018, the Lake Avenue defendants commenced a third-party action against SNE, Rivermere Apartments, and Studio, among others, seeking contractual and common law indemnification, and contribution. In the third-party complaint the Lake Avenue defendants alleged that the third-party defendants owned an easement which included the roadway where plaintiff's fall occurred. The Lake Avenue defendants further alleged that pursuant to the easement agreement all easement owners were required to maintain the easement as well as pay all charges incurred in connection with snow removal.

By letter addressed to this court, dated May 31, 2018, plaintiff requested a pre-motion conference. Plaintiff noted that the Lake Avenue defendants filed a third-party complaint attempting to implead eight previously undisclosed corporate entities on theories of indemnity and contribution. Plaintiff argued that this late impleader, approximately five months after the deadline set forth in the preliminary conference order and without leave of court, would severely impede the progress of this action and questioned why the impleader was not performed at an earlier stage when the prejudicial impact would have been minimized.

SNE filed their third-party answer dated June 18, 2018, denying the essential allegations asserted against it, asserting several affirmative defenses, asserting counterclaims against the Lake Avenue defendants, and asserting cross claims against the other third-party defendants. Rivermere Apartments and Studio filed similar third-party answers, both dated June 22, 2018.

In support of their motion, SNE contends that the third-party action was commenced based solely on the terms of an easement, a document that would have been in the possession of the Lake Avenue defendants. SNE argues that therefore, there is no excuse for failing to commence the third-party action in a timely manner pursuant to the terms of the preliminary conference order. SNE further contends that it has not had the chance to fully participate in discovery and that there is still substantial discovery needed. SNE asserts that even if previous discovery exchanged in this matter was provided to it, it is still entitled to pursue its own discovery. SNE further argues that severance is warranted pursuant to CPLR 603 and 1010.

In support of its motion, Rivermere Apartments asserts that the subject easement is dated April 14, 1959. It further asserts that the Lake Avenue defendants knew of the easement document which was in their possession but nevertheless failed to timely commence the third-party action pursuant to the terms of the preliminary conference order. Rivermere Apartments argues that severance is warranted pursuant to CPLR 603 and 1010. It notes that it served discovery demands upon the Lake Avenue defendants as well as on plaintiff but that it has only received limited discovery at this time. Rivermere Apartments asserts that it also requires all parties' depositions.

In support of its motion, Studio asserts that there is no excuse for the untimely commencement of the third-party action pursuant to the terms of the preliminary conference order. Studio asserts that the Lake Avenue defendants waited until just before the main action was to be certified and placed on the trial calendar before commencing the third-party action. Studio argues that severance is warranted pursuant to CPLR 603 and 1010.

The Lake Avenue defendants oppose these motions. They contend that all third-party defendants have had the opportunity to serve discovery demands and demands for bills of particulars and have done so. The Lake Avenue defendants further contend that they have responded to these demands which include providing copies of all pleadings, discovery demands served to date, copies of all deposition transcripts, court orders, and IME reports. The Lake Avenue defendants assert that they have served bills of particulars on all third-party defendants.

The Lake Avenue defendants note that the preliminary conference order is an agreement between plaintiff and the Lake Avenue defendants and they assert that therefore the third-party defendants cannot be beneficiaries thereof. They also note that they commenced the third-party action once the party depositions were completed. The Lake Avenue defendants assert that movants will not be prejudiced if they are permitted more time to conduct necessary discovery.¹

¹On July 17, 2018, plaintiff moved for leave permitting him to file an amended complaint to add as defendants in this action the same parties impleaded into the action by the Lake Avenue defendants, and to add another entity, the purported agent for the Lake Avenue defendants for performing ice removal and de-icing services on the subject premises. This motion is returnable on August 27, 2018. The Lake Avenue defendants argue that insofar as plaintiff has moved to amend his complaint to include the third-party defendants as additional parties to the main action, there can be no claim that plaintiff is prejudiced by the commencement of the third-party action.

CPLR 603 provides that the court may order a severance of claims or a separate trial of any claim or issue in furtherance of convenience or to avoid prejudice. Pursuant to CPLR 1010, the court may dismiss a third-party complaint without prejudice, order a separate trial of the third-party claim or of any separate issue thereof, or make such other order as may be just. In exercising its broad discretion, the court shall consider whether the controversy between the third-party plaintiff and the third-party defendant will unduly delay the determination of the main action or prejudice the substantial rights of any party. Even where the main action and the third-party action share common questions of law and fact, severance is appropriate when the main action is ready to proceed to trial and discovery in the third-party action is incomplete due to a delay in the commencement of the third-party action (*see Abreo v Baez*, 29 AD3d 833 [2d Dept 2006]). Severance will avoid undue delay in the main action and will avoid prejudice to the parties to the third-party action, who have not had an adequate opportunity to complete discovery (*Whippoorwill Hills Homeowners Assn., Inc. v Toll at Whippoorwill, L.P.*, 91 AD3d 864 [2d Dept 2012]).

In the case at bar, the main action was commenced almost one and one-half years before the Lake Avenue defendants commenced their third-party action. Indeed, the last compliance conference order issued right before the third-party action was commenced noted that the next conference was a final conference at which time it was contemplated that a trial readiness order would be issued (*see Whippoorwill Hills Homeowners Assn., Inc. v Toll at Whippoorwill, L.P.*, 91 AD3d 864 [2d Dept 2012]). Furthermore, the record indicates that although the Lake Avenue defendants knew, or should have known, of the easement document, they nevertheless delayed commencing the third-party action (*see Soto v CBS Corp.*, 157 AD3d 740 [2d Dept 2018]). The Lake Avenue defendants failed to set forth a satisfactory explanation for the delay during oral argument. Finally, after the third-party action was commenced, it was plaintiff that requested a pre-motion conference to address the “issues relating to the dilatory third-party complaint.” Under the circumstances present here, it is proper to direct the severance of the third-party action from the main action.

Motion Sequence Numbers 7 and 9:

Presently, the Lake Avenue defendants seek an order striking plaintiff’s complaint due to his alleged wilful and contumacious failure to provide discovery or, precluding plaintiff upon the trial of this action from giving or offering any evidence or testimony in support of his claims, or compelling plaintiff to provide all outstanding discovery. The Lake Avenue defendants assert that to date plaintiff has failed to provide documents/authorizations as demanded in their May 8, 2018 demand, failed to provide Medicare authorizations from the date of the accident to the present, and failed to appear for a further deposition to testify about his lost business opportunities. The Lake Avenue defendants assert that plaintiff’s failure to provide complete, substantive responses to their discovery requests has prejudiced them.

Plaintiff opposes this motion. He contends that he has made claims regarding lost business opportunities as to two specific construction projects. He further contends that he has provided discovery regarding his claim for these lost business opportunities and that the discovery he has provided obviates the need for production of his personal and business tax

returns and employment records. Plaintiff asserts that at his deposition he testified regarding the two construction projects at issue and that the post-deposition discovery requests correspond to his testimony. Plaintiff also alleges that his period of confinement and reduced mobility allegedly stemming from the subject accident ended no later than June, 2014. He argues that there is no reason to provide medical authorizations through the present.

Presently, plaintiff seeks a protective order pertaining to the demands of the Lake Avenue defendants seeking the production of personal and corporate income tax returns and related financial information, as well as their demand for his further deposition. Plaintiff contends that he already testified about two specific construction projects in Puerto Rico which he could not bid upon due to his injury and inability to travel. He asserts that the Lake Avenue defendants seek to re-depose him about the same issues regarding which he already testified. Plaintiff asserts that the Lake Avenue defendants seek disclosure of tax returns despite the fact that he is not pursuing a claim for lost salary. He also asserts that tax returns are not discoverable unless the party seeking disclosure can establish that the documents are indispensable and the information cannot be obtained through other sources.

The Lake Avenue defendants oppose the motion seeking a protective order. They contend that insofar as plaintiff is claiming lost business opportunities as a result of the subject accident, he must provide additional information and documents regarding bids/proposals for projects that he was not awarded, copies of his individual and business W-2 forms and/or 1099 forms and/or tax equivalent documents from 2009 to the present, and authorizations for the same, as well as copies of his filed individual and business, state and federal, tax returns from 2009 to the present, and authorizations for the same. In the alternative, should this court grant plaintiff's motion for a protective order, they assert that plaintiff should be precluded from offering any evidence as to lost business opportunities. The Lake Avenue defendants contend that a further deposition is necessary since additional documentation as to plaintiff's lost business opportunities was provided after he was deposed on January 12, 2018.

CPLR 3101(a)(1) provides that there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action. It is the burden of the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims (*Quinones v 9 East 69 Street, L.L.C.*, 132 AD3d 750 [2d Dept 2015]).

CPLR 3126 provides that if any party "wilfully fails to disclose information which the court finds ought to have been disclosed," the court may, inter alia, issue an order of preclusion or an order striking the pleadings, dismissing the action, or rendering judgment by default against the disobedient party. "The nature and degree of the penalty to be imposed on a motion pursuant to CPLR 3126 is a matter generally left to the discretion of the Supreme Court" (*Carbajal v Bobo Robo*, 38 AD3d 820 [2d Dept 2007]). To invoke the drastic remedy of striking a pleading a court must determine that the party's failure to disclose is wilful and contumacious (*Greene v Mullen*, 70 AD3d 996 [2d Dept 2010]; *Maiorino v City of New York*, 39 AD3d 601 [2d Dept 2007]). "Wilful and contumacious conduct can be inferred from repeated noncompliance with court orders ... coupled with no excuses or inadequate excuses" (*Russo v Tolchin*, 35 AD3d 431, 434

[2d Dept 2006]; *see also Prappas v Papadatos*, 38 AD3d 871, 872 [2d Dept 2007]).

Upon a review of the record in this matter the court finds that plaintiff has provided some documents and information requested by the Lake Avenue defendants, although plaintiff has not properly responded to all requests for material and relevant information. More than one year ago, this court issued the preliminary conference order in which plaintiff was directed to provide, among other discovery, employment records. Thereafter, the court issued five compliance conference orders directing plaintiff to provide discovery relating to his claim of two lost business opportunities and/or proper Medicare authorizations. Furthermore, the Lake Avenue defendants have repeatedly sought information regarding plaintiff's claim of the two business opportunities he allegedly lost as a result of the injuries he sustained in the subject slip and fall accident, and proper authorizations for plaintiff's Medicare records.

The record demonstrates that although plaintiff has provided some discovery relating to his allegations of two lost business opportunities, including his deposition testimony, a copy of a bid proposal in or about December, 2011, and documents relating to a Department of Housing of Puerto Rico construction project, the Lake Avenue defendants have shown that the further discovery they seek is material and relevant. Accordingly, plaintiff shall provide to the Lake Avenue defendants, and to all parties, copies of, and duly executed authorizations, for the years 2011 to the present, for: (1) his individual and business W-2 forms and/or 1099 forms from the year 2011 to the present; (2) his individual and business, state and federal, tax returns, from 2011 to the present; and (3) his employment records. Plaintiff shall also provide a detailed list of all other companies who submitted bids/proposals for the two construction projects in Puerto Rico that plaintiff claims he was not awarded because of the subject accident and copies of all bids/proposals and related documents, or an affidavit stating that following a thorough search, he is not in possession of the requested information and documents. Finally, plaintiff shall also provide a proper, duly executed authorization for his Medicare records from the date of the accident to the present. Should plaintiff fail to provide any of this discovery, he will be precluded from offering evidence on the claims to which they relate, on a subsequent motion and/or at trial.

All other arguments raised and evidence submitted by the parties have been considered by this court notwithstanding any specific absence of reference thereto.

In light of the foregoing it is:

ORDERED that the branch of motion sequence number five by third-party defendants Southgate Apartments, Inc., Northgate Apartments, Inc., and Eastbourne Apartments, Inc., for an order severing the third-party action against them is granted; and it is further,

ORDERED that the second branch of their motion seeking a dismissal of the third-party action asserted against them is denied; and it is further,

ORDERED that the branch of motion sequence number six by third-party defendant Rivermere Apartments, Inc., for an order severing the third-party action against it is granted; and

it is further,

ORDERED that the second branch of its motion seeking a dismissal of the third-party action asserted against it is denied; and it is further,

ORDERED that the branch of motion sequence number eight by third-party defendant Studio Arcade, L.L.C., for an order severing the third-party action against it is granted; and it is further,

ORDERED that the second branch of its motion seeking a dismissal of the third-party action asserted against it is denied; and it is further,

ORDERED that counsel for defendants/third-party plaintiffs, Lake Avenue Owners, Inc., and J.L. White Management, Inc., is directed to file an RJI and to pay the RJI fee in the third-party action, and the County Clerk is directed to issue a new index number in the severed third-party action. Counsel for defendants/third-party plaintiffs, Lake Avenue Owners, Inc., and J.L. White Management, Inc., is directed to provide the County Clerk's Office with a copy of this order, and to file an RJI, within ten days of the date of entry of this order; and it is further,

ORDERED that the parties in the severed third-party action are directed to appear for a conference in the Preliminary Conference Part, Room 811, on September 17, 2018, at 9:30 a.m.; and it is further

ORDERED that the branch of motion sequence number seven by defendants/third-party plaintiffs, Lake Avenue Owners, Inc., and J.L. White Management, Inc., for an order precluding plaintiff from offering evidence or testimony on a subsequent motion or at trial is granted to the extent that unless on or before August 27, 2018, plaintiff provides to the Lake Avenue defendants, and to all parties: (1) copies of, and duly executed authorizations, for the years 2011 to the present, for: (a) his individual and business W-2 forms and/or 1099 forms from the year 2011 to the present; (b) his individual and business, state and federal, tax returns, from 2011 to the present; (c) his employment records; (2) a detailed list of all other companies who submitted bids/proposals for the two construction projects in Puerto Rico that plaintiff claims he was not awarded because of the subject accident, and copies of all bids/proposals and related documents, or an affidavit stating that following a thorough search, he is not in possession of the requested information and documents; and (3) a proper, duly executed authorization for his Medicare records from the date of the accident to the present, he will be precluded from offering evidence or testimony pertaining to the claims to which this discovery relates on a subsequent motion or at trial; and it is further,

ORDERED that in the event plaintiff fails to provide any or all of this outstanding discovery, defendants/third-party plaintiffs shall upload to the NYSCEF website, on or before September 5, 2018, a detailed affidavit/affirmation of noncompliance, outlining what discovery is still outstanding and a Proposed Order precluding plaintiff from offering evidence or testimony pertaining to the claims to which the discovery relates, on a subsequent motion or at trial, upon notice to all parties; and it is further,

ORDERED that all other branches of motion sequence number seven are denied; and it is further,

ORDERED that plaintiff's motion sequence number nine for a protective order is granted only to the limited extent that a second deposition of plaintiff is not required; and it is further,

ORDERED that all parties in the main action are directed to appear in the Compliance Part, Room 800, on September 10, 2018, at 9:30 a.m. at which time it is contemplated that a trial readiness order will be issued; and it is further,

ORDERED that counsel for third-party defendants Southgate Apartments, Inc., Northgate Apartments, Inc., and Eastbourne Apartments, Inc., is directed to serve a copy of this decision and order, with notice of entry, upon all parties, in the main action and in the third-party action, within seven days of the date of entry of the order.

The foregoing constitutes the decision and order of this court.

Dated: White Plains, New York

August 10, 2018



HON. JOAN B. LEFKOWITZ, J.S.C.

To:

Eli J. Rogers, Esq., Dreifuss, Bonacci & Parker, L.L.P.

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Alger Court, Inc., and Ken-Court, Inc.

Third-Party Defendants who are unrepresented

cc: Compliance Part Clerk

Chambers of the Hon. William J. Giacomo, J.S.C.