

Flaherty v Midtown Moving & Stor. Inc.

2019 NY Slip Op 30869(U)

March 27, 2019

Supreme Court, New York County

Docket Number: 651260/13

Judge: Lynn R. Kotler

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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. LYNN R. KOTLER, J.S.C.

PART 8

MARIE FLAHERTY

INDEX NO. 651260/13 (Action 1)

- v -

MOT. DATE

MIDTOWN MOVING & STORAGE INC.

MOT. SEQ. NO. 002

MARIE FLAHERTY

INDEX NO. 158612/13 (Action 2)

- v -

MOT. DATE

MIDTOWN MOVING & STORAGE INC.

MOT. SEQ. NO. 012 and 013

The following papers were read on this motion to/for <u>quash (012 and 013) and leave to file amended complaint (002)</u>	
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits	NYSCEF DOC No(s). _____
Notice of Cross-Motion/Answering Affidavits — Exhibits	NYSCEF DOC No(s). _____
Replying Affidavits	NYSCEF DOC No(s). _____

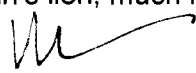
For the sake of clarity, the court will discuss the procedural history of these related actions. According to her Verified Petition in Action 2 which was filed on September 19, 2013, petitioner, Marie Flaherty ("Flaherty") is "an attorney and fraud victim and tenant of the foreclosed New York City property known as 'Stuyvesant Town'". In that proceeding, Flaherty seeks:

to dispute the validity of Respondent Midtown Moving & Storage Inc.[]'s alleged Warehouseman's lien, and any monetary amounts demanded by Respondent [], as well as to dispute the validity of Respondent's ability to auction Petitioner Tenant's personal and household property and legal case files to obtain payment for sole benefit of Respondent and to cancel such scheduled auction of October 8, 2013 and restrain any other sale, to return Petitioner's property to her, and to compensate Petitioner for Respondent's willful conversion and criminal destruction and theft of Petitioner's property and legal files.

Respondent Midtown Moving & Storage, Inc. ("Midtown") answered the petition.

Action 2 was previously pending before the Honorable Joan Madden, who in a decision/order dated April 24, 2014, stayed the auction of Flaherty's property, granted Flaherty 30 days to retrieve her possessions from Midtown and denied Midtown's motion to dismiss. In denying the motion to dismiss, Justice Madden noted that Midtown's motion was "inadequate to support a motion to dismiss the first and second causes of action which address the validity of the warehouseman's lien, much less the third

Dated: 3-27-19


HON. LYNN R. KOTLER, J.S.C.

1. Check one:

^{651260/13}
 CASE DISPOSED ^{158612/13} NON-FINAL DISPOSITION

2. Check as appropriate: Motion is

⁰¹²⁺⁰¹³ GRANTED ⁰⁰² DENIED GRANTED IN PART OTHER

3. Check if appropriate:

SETTLE ORDER SUBMIT ORDER DO NOT POST
 FIDUCIARY APPOINTMENT REFERENCE

through ninth causes of action.” Justice Madden noted that Flaherty did not improperly bring her causes of action for damages in this special proceeding, and otherwise declined to “prune the amended petition” based upon Midtown’s failure to “address[] the substance of causes of action three through nine, or the individual allegations that Midtown seeks to have stricken.”

In an order dated August 20, 2014, Justice Madden appointed Jack Suter, Esq., as a Special Referee “to supervise the discovery in this action, including the depositions which shall be held in the courthouse.”

In a decision/order dated April 25, 2016, Justice Madden granted Midtown’s motion to compel petitioner to respond to its demands.

In an order dated January 31, 2017, Justice Madden directed that the parties’ depositions be held on a date certain at 60 Centre Street.

In an order dated January 11, 2017, Justice Madden directed that Flaherty’s medical information be provided to Midtown subject to specific enumerated proscriptions therein.

Then in two separate orders dated July 13, 2017 by the Honorable Carol Edmead and August 9, 2017 by Justice Madden, respectively, Action 2 was transferred to Justice Edmead to join Action 1. Justice Edmead wrote in her order that these actions were related and “share common issues of law and fact” and noted that her part “ha[d] the earlier Request for Judicial Intervention.”

Meanwhile, Action 1 was commenced on April 9, 2013 by summons with notice. In her subsequently filed complaint, Flaherty asserted causes of action for injunctive relief, violation of the RICO Act, fraud, harassment, criminal mischief, theft, interference with contract, extortion, intentional infliction of emotional distress, and negligent infliction of emotional distress. In an order dated May 2, 2013, Justice Edmead ordered *inter alia* that “all causes of action in this Complaint related to the Warehouseman’s Lien that is the subject of this litigation are dismissed” and directed plaintiff to serve an amended complaint within 30 days thereafter. According to the court’s file, no amended complaint was ever served.

In an order dated August 6, 2013, Justice Edmead directed that a traverse hearing be held on the issue of service. Justice Edmead referred to a petition and notice of petition, even though action 1 is an ordinary action, and referred to the parties as petitioner and respondent. It is unclear whether a traverse hearing was ever held.

In an order dated October 24, 2017, Justice Edmead granted Flaherty leave to

move to amend the complaint within forty-five (45) days. Plaintiff shall not make a claim against any party and address any issue that has been raised before any Housing Court, Appellate Term, Supreme Court, and Federal Court.

Justice Edmead further ordered:

That a claim against a party in this action may only be brought in this Court if another court expressly excluded or dismissed the action because of the action pending under this index number (index no. 651260/2013), pending under this Court. It is further

ORDERED that every party that Plaintiff seeks to make a claim against shall be served Plaintiff’s motion to amend in accordance with the CPLR.

In another order also dated October 24, 2017, Justice Edmead granted non-party Borah, Goldstein, Altschuler, Nahins & Goidel, P.C. (“Borah Goldstein”)’s motion to quash the subpoena *duces tecum* and *ad testificandum* served on it. Justice Edmead further wrote that:

Any and all racketeering claims asserted against [Borah Goldstein] that were the subject of Judge Anil Singh's order shall not be raised again before any Supreme Court Justice.

Then, in an order dated May 31, 2018, Justice Edmead recused herself from these actions and directed that these actions be randomly reassigned to another part. The cases were then assigned to this court.

THE PRESENT MOTIONS

There are three motions pending in these two related actions. The court will first consider Flaherty's motion in Action 1, since it goes to the merits of that action.

Motion for leave to file an amended complaint, etc.

Flaherty seeks an order in Action 1: [1] granting her an extension of time to file and serve a verified first amended complaint; [2] granting her a hearing; and [3] "taking judicial notice of the April 24, 2014 [] Order of the Honorable Judge Joan Madden in [Action 2] which granted [Flaherty] judgment on two causes of action relevant to this action, denying in its entirety [] Midtown[]'s motion to dismiss the exact same New York State and Common Law Claims relevant to this action. Midtown opposes that motion. Midtown points to a so-ordered stipulation dated November 20, 2018 in which the parties agreed that Flaherty "will file a motion for leave to file an amended complaint within sixty (60) days. [Midtown] alleges [Flaherty] is precluded from doing so." The court agrees with Midtown.

There are three separate orders in Action 1 directing Flaherty to either file an amended complaint or move for leave to do so which Flaherty has failed to comply with. Instead of complying with the first order on May 2, 2013, Flaherty commenced a special proceeding against Midtown. Despite being granted 45 days to move to file an amended complaint in the order dated October 24, 2017, Flaherty did not. Finally, in spite of the November 20, 2018 so-ordered stipulation granting plaintiff another 60 days to file an amended complaint, Flaherty has only moved for an extension of time to do so. Indeed, Flaherty has not filed a proposed amended complaint nor even explained the nature of her proposed causes of action or the identity of the parties against whom she seeks to assert any claims. The court cannot countenance these dilatory tactics.

Flaherty complains of the lack of discovery in this action and blames a number of nonparties as well as her own inability to obtain the court file in the underlying housing court proceeding. These excuses are insufficient to warrant any further extensions. Accordingly, the motion for an extension of time to file an amended complaint is denied.

The basis for Flaherty's request that the court take judicial notice of Justice Madden's April 24, 2014 decision/order is unclear. Justice Madden's decision/order has not bearing on whether there is an pleading in this case. Further, implicit in this argument is the fact that the allegations asserted in both actions are essentially the same. In any event, based upon Justice Edmead's order dated May 2, 2013, ordered that "all causes of action in this Complaint related to the Warehouseman's Lien that is the subject of this litigation are dismissed" and since plaintiff failed to file an amended complaint as directed by Justice Edmead, the Clerk is directed to mark Action 1 disposed and enter judgment accordingly.

Finally, Flaherty's request for "a hearing requiring the testimony of Recused Judge Carol Edmead and law Clerk Allen Crony" is denied. Without passing on the merits of Flaherty's contentions, this court does not have the authority to grant such relief.

Accordingly, Flaherty's motion in Action 1 is denied in its entirety.

Motions to quash

The court will next consider the motions brought in Action 2. Both motions have been brought by non-parties Borah Goldstein and Tishman Speyer Properties, L.P. ("Tishman"). They each seek an order quashing Flaherty's subpoenas served upon them. In motion sequence number 012, Borah Goldstein seeks to quash a subpoena *ad testificandum* dated December 24, 2018 so-ordered by the Honorable Martin Shulman requesting the testimony of Paul N. Gruber, a member of Borah Goldstein, and also seeks a protective order denying its suits upon the grounds that the subpoena seeks information barred by the doctrine of collateral estoppel, fails to comply with CPLR § 3101[a][4], seeks immaterial and unnecessary information, and constitutes an fishing expedition. Alternatively, Borah Goldstein requests that if the court denies the motion to quash, that the court appoint a referee to supervise the deposition. In motion sequence number 013, Tishman moves to quash a subpoena *ad testificandum* dated July 31, 2017 and so-ordered by Justice Edmead on similar grounds.

Flaherty opposes the motions to quash. With respect to the first motion, she claims that Attorney Gruber's testimony is relevant and is a material and necessary witness. Specifically, petitioner claims that Borah Goldstein is the only witness available to testify about

Respondent Midtown Moving's conduct concerning the subject matter of this Special Proceeding since Respondent Midtown Moving's CEO Willie Tomlin somehow obtained a 'fractured skull' and was unavailable for a scheduled deposition and then Petitioner was told on November 20, 2018 that he coincidentally died from his injuries (sic) within the three months a deposition was to be reschedule. Additionally, Respondent informed Petitioner on December 11, 2018 that 'no other witnesses are available' (i.e., they disappeared). Previously, Respondent Midtown Moving's Donald Odum has disappeared and failed to show up for a scheduled deposition September 19, 2017."

As for the second motion, petitioner details at length the conversations she's had with Tishman and/or its attorneys regarding their compliance with the subpoena. Petitioner maintains that it comes as a surprise to her that Tishman now is moving to quash the subpoena.

The purpose of a subpoena is to compel the production of specific documents and/or particular testimony that are "relevant and material to facts at issue in a pending judicial proceeding" (see i.e. *Velez v. Hunts Point Multi-Service Center, Inc.*, 29 AD3d 104 [1st Dept 2006]). A motion to quash should be granted where the movant demonstrates that the documents and/or testimony sought is "utterly irrelevant to any proper inquiry." (*Id.*)

Borah Goldstein's motion to quash is granted. The court agrees with movant that Flaherty is on a fishing expedition and is seeking information which she has failed to demonstrate that Attorney Gruber possesses. Indeed, Borah Goldstein has shown that the question of the whereabouts of her property and/or the circumstances of how it came to be in Midtown's possession is not something that Attorney Gruber would have personal knowledge of on this record. Borah Goldstein and Attorney Gruber's only connection to Flaherty is that they represented Flaherty's former landlord in an underlying housing court nonpayment proceeding. It is unclear how they would possess any information regarding Midtown's handling, possession and/or disposition of Flaherty's property, notwithstanding Flaherty's unfounded conspiracy claims. Since the information sought in the underlying subpoena is not material or necessary to the prosecution of Flaherty's case on this record, the motion to quash must be granted. Further, the court finds that prior court orders warrant denial. Indeed, Justice Edmead previously quashed a subpoena served on Borah Goldstein. Accordingly, motion sequence number 012 under Action 2 is granted.

The court next turns to Tishman's motion, wherein it maintains that it does not have relevant information based upon the sworn affidavit of its managing director, Bradley Turk, who claims:

[Tishman] is the sole member of another entity which was the property manager for Stuyvesant Town and Peter Cooper Village until October 2010. Neither [Tishman] nor Mr. Speyer have any ownership interest in ST Owner, LP, the entity which brought the non-payment proceeding against [Flaherty]. No [Tishman] employee or officer has any first-hand knowledge with respect to [Flaherty]'s property or its disposition.

Turk has also provided a copy of a decision/order dated January 29, 2013 by the Honorable Anil Singh in another action previously pending before this court entitled Flaherty v. CW Capital Asset Management, LLC et al., Index Number 107310/11. The subject of Justice Singh's decision was a motion to dismiss by the defendants, which included Tishman. Justice Singh granted that motion and ordered that the complaint be dismissed. Justice Singh wrote:

Plaintiff Marie Flaherty, who is an attorney, was the rent-stabilized tenant of apartment I2-G at I Stuyvesant Oval in Manhattan. The apartment building is owned by defendant ST Owner L.P. ("ST").

In November 2011, a warrant of eviction was issued against plaintiff in a non-payment proceeding commenced by her landlord in Housing Court. The warrant executed on April 20, 2012. She is no longer in possession of the apartment.

Plaintiff commenced the instant action against her former landlord and several other entities by filing a summons on June 22, 2011, and a verified complaint on November 10, 2011.

Plaintiff's lengthy complaint is 59-pages long. The introductory section of the complaint summarizes "the nature" of plaintiff's claims as follows:

This is an action for damages and injunctive relief arising out of the illegal, fraudulent and harassing conduct of the defendants including relief for breach of contract, common law fraud, racketeering, Federal Fair Debt Collections Practices Act (FFDCPA), conversion, violation of the New York Rent Stabilized Laws, consumer protection law, intentional and negligent infliction of emotional distress, and unjust enrichment.

Justice Singh dismissed plaintiff's complaint "[b]ecause the claims asserted by plaintiff in the instant action were raised in the Housing Court proceeding, [therefore] plaintiff's claims are now barred by the doctrines of issue preclusion and/or res judicata."

Assuming *arguendo* that Tishman received the subject subpoena approximately a year and a half prior to moving to quash it, two wrongs do not make a right. Flaherty did not diligently move to compel Tishman to respond to the subpoena or for contempt. As evidenced by this court's decision herein, these actions have an incredibly protracted history for which there is no basis. On the balance, the court finds that Turk's affidavit obviates the need for any further testimony from Tishman. A deposition of any Tishman employee would be fruitless since Turk maintains in a sworn affidavit that no Tishman employee has personal knowledge regarding Flaherty's property or its disposition.

This six-year old action needs to move towards its conclusion. Since Flaherty has not demonstrated that the targets of her subpoenas possess material and relevant information to her claims in these actions, the motions to quash are granted (see i.e. *Smith v. Moore*, 31 AD3d 628 [2d Dept 2006]). To the extent that any material and relevant discovery, including depositions, remains outstanding, the court will conduct a conference to set an expedited schedule on June 4, 2019 at 9:30am.

CONCLUSION

In accordance herewith, it is hereby

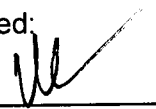
ORDERED that motion sequence number 002 in Action 1 is denied and the Clerk is directed to mark this action disposed and enter judgment accordingly; and it is further

ORDERED that motion sequence numbers 012 and 013 in Action 2 are granted and the underlying subpoenas, which were served upon Borah Goldstein dated December 24, 2018 and Tishman dated July 31, 2017, are quashed; and it is further

ORDERED that the parties are directed to appear for a status conference on June 4, 2019 at 9:30am to determine what, if any, discovery remains outstanding and to set an expedited schedule.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 3.27.19
New York, New York

So Ordered:


Hon. Lynn R. Kotler, J.S.C.