Natale v Inc. Vil. of Lynbrook
2019 NY Slip Op 34266(U)
April 9, 2019
Supreme Court, Nassau County
Docket Number: Index No. 605503/17
Judge: James P. McCormack
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SUPREME COURT - STATE OF NEW YORK
TRIAL/IAS TERM, PART 21 NASSAU COUNTY

PRESENT:

Honorable James P. McCormack
Justice

________________________________x

JOSEPH NATALE,

Plaintiff(s), **Index No.: 605503/17**

-against- **Motion Seq. No.: 001 & 002**
Motion Submitted: 2/11/19

INC. VILLAGE OF LYNBROOK, and LYNBROOK 44 APARTMENT OWNERS, INC,

Defendant(s).

________________________________x

The following papers read on this motion:

Notice of Motion/Supporting Exhibits....................................X
Notice of Cross Motion/Supporting Exhibits/Opposition..........X
Affirmation in Opposition and Reply.......................................X
Affirmation in Opposition...X
Reply Affirmation...X

Defendant, Inc. Village of Lynbrook (the Village), moves this court (Motion Seq. 001) for a protective order, pursuant to CPLR §3103(a), preventing them from having to produce certain records. Plaintiff, Joseph Natale (Natale), opposes the motion and cross moves (Motion Seq. 002) for an order compelling the Village and co-Defendants Lynbrook 44 Apartment Owners (Lynbrook 44), to more fully respond to certain

discovery demands. The Village and Lynbrook 44 oppose the cross motion.

Natale commenced this trip and fall action by summons and complaint dated June 12, 2017. Issue was joined by service of an answer with cross claims by the Village dated July 14, 2017. Lynbrook 44 interposed an answer with cross claims dated August 17, 2017. The matter certified ready for trial on September 27, 2018 and a note of issue was filed on December 26, 2018.

Before a motion relating to discovery or a bill of particulars can be brought, the movant is required to submit an affirmation of good faith indicating "that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion." 22 NYCRR 202.7(a). The affirmation of good faith is supposed to indicate that the parties consulted over the discovery issues and the "time, place and nature of the consultation and the issues discussed...," unless it would have been futile to do so. 22 NYCRR 202.7(c). The parties are to make a diligent effort to resolve the discovery dispute. (*Deutsch v. Grunwald*, 110 A.D.3d 949 [2nd Dept. 2013]; *Murphy v. County of Suffolk*, 115 A.D.3d 820 [2nd Dept. 2014]; *Chichilnisky v. Trustees of Columbia University in City of New York*, 45 A.D.3d 393 [1st Dept. 2007]). Herein, the Village's counsel provides an affirmation of good faith that contains none of the required information. However, annexed to the moving papers are a series of letters between counsel that do seem to address the one issue in dispute. While letters, in general, do not satisfy the rule, in this instance the letters do meet the spirit of the rule.

The affirmation of good faith in the cross motion is even less compliant with the rule, referencing a compliance conference order and "several phone calls" to Defendants' counsel. As between Natale and the Village, the court accepts the letters referenced *supra*. However, as between Natale and Lynbrook 44, there is no proof of any good faith efforts other than one letter written in November, 2018. This letter alone does not suffice. (*See Eaton v. Chahal*, 146 Misc.2d. 977, 983 [N.Y.Sup. 1990] ("...the court interprets a 'good faith effort' to mean more than an exchange of computer generated form letters or cursory telephone conversation."); *Santiago v. Park Ambulance Serv., Inc.*, 53 Misc.3d 1201(A)[N.Y.Sup. 2016]("Merely sending letters...is not sufficient to satisfy the requirement of 22 NYCRR §202.7(c)."); *Amherst Synagogue v. Schuele Paint Co.*, 30 A.D.3d 1055, 1057 [4th Dept. 2006](sending only letters "'failed to demonstrate that they made a diligent effort to resolve this discovery dispute.'", *quoting Baez v. Sugrue*, 300 A.D.2d 519, 521 [2nd Dept. 2002]). One letter does not equate to "diligent efforts". As a result, the motion is defective as against Lynbrook 44.

The issue between Natale and the Village involves Natale's demand for records regarding permits relating to the sidewalk where Natale fell dating back 10 years prior to the date of the accident. The Village timely objected to the demand, finding 10 years to be over-broad and unduly burdensome, yet indicated they performed a search going back three years and had no documents responsive to the demand. The parties continue to disagree whether Natale has the right to seek records dating back 10 years.

CPLR § 3124 provides that the court has the discretion to compel discovery or to strike a pleading for failure to abide with discovery and disclosure orders. At the discretion of the court, a party's failure to comply with such requests may result in sanctions, pursuant to CPLR § 3126. "Although actions should be resolved on the merits where possible, a court may strike [a pleading] for failure to comply with court-ordered discovery where there is a clear showing that the noncompliance is willful and contumacious" (*Rawlings v. Gillert*, 78 AD3d 806 [2d Dept 2010]; *see also* CPLR 3126[3]; *Moray v. City of Yonkers*, 76 AD3d 618 [2d Dept 2010]; *Palomba v. Schindler El. Corp.*, 74 AD3d 1037 [2d Dept 2010]; *Rini v. Blanck*, 74 AD3d 941 [2d Dept 2010]). The determination of whether to strike a pleading is addressed to the sound discretion of the trial court (*see Raville v. Elnomany*, 76 AD3d 520 [2d Dept 2010]; *Pirro Group, LLC v. One Point St., Inc.*, 71 AD3d 654, 655 [2d Dept 2010]; *Workman v. Town of Southampton*, 69 AD3d 619, 620 [2d Dept 2010]).

Herein, neither side cited to any case law supporting their position that 10 years is either appropriate or unduly burdensome. The court tends to agree that a 10 year look back period is unduly burdensome. In attempting to justify it, Natale's counsel offers speculation: "The demanded items are vital to plaintiff's prosecution of the instant action, especially in view of the deposition testimony and the photographs, which clearly depict that the subject flag of concrete was installed at a different period of time from the surrounding flags of concrete." First, Natale does not specify whose deposition, or

which part of the testimony, he is relying on, rendering that comment meaningless. Second, while the pictures appear to show the subject flag as being a different color than the adjacent flag, counsel offers nothing other than his own opinion that this is proof that the flags were installed at different times. That being said, the court finds that a five year look back period would have been appropriate, under the circumstances of this case.

Accordingly, it is hereby

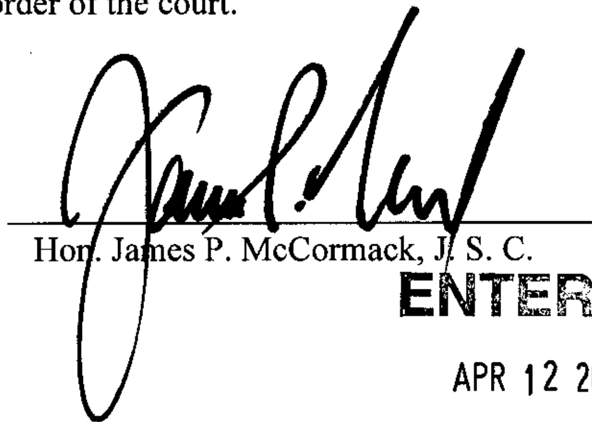
ORDERED, that the Village's motion (Motion Seq. 001) for a protective order is GRANTED to the extent that they do not have to provide records going back 10 years. However, within 10 days of being served with notice of entry of this order, the Village is directed to provide Natale with the results of a search going back five years from the date of the accident; and it is further,

ORDERED, that Natale's motion (Motion Seq. 002) to compel the Village to provide records going back 10 years is DENIED; and it is further

ORDERED, that Natale's motion to compel Lynbrook 44 to comply with discovery demands is DENIED for failure to comply with 22 NYCRR 202.7.

This constitutes the decision and order of the court.

Dated: April 9, 2019
Mineola, N.Y.



Hon. James P. McCormack, J. S. C.

ENTERED
APR 12 2019
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