Stern v Starwood Hotels & Resorts Worldwide, Inc.
2020 NY Slip Op 30304(U)
February 5, 2020
Supreme Court, New York County
Docket Number: 108672/2011
Judge: W. Franc Perry

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. W. FRANC PERRY** **PART** **IAS MOTION 23EFM**

Justice

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GLORIA STERN

Plaintiff,

- v -

STARWOOD HOTELS AND RESORTS WORLDWIDE, INC.,

Defendant.

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INDEX NO. 108672/2011

MOTION DATE 01/24/2020

MOTION SEQ. NO. 006

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154

were read on this motion to/for STRIKE PLEADINGS

In this personal injury action, plaintiff, a New York resident, was a guest at a hotel in Ann Arbor, Michigan on March 6, 2009, when she allegedly tripped and fell at the entranceway to the hotel, sustaining injury to her knee. In motion sequence number 006, plaintiff moves to strike defendant's answer for failing to comply with discovery demands. Plaintiff opposes the motion.

BACKGROUND

This action has a protracted litigation history and has been pending in this court since July, 2011. (NYSCEF Doc. Nos. 68 and 86). After extensive document and deposition discovery and multiple discovery orders issued by the court, plaintiff seeks an order to strike defendant's answer or "or alternatively, resolve the issues of Defendant's control over the premises in question, . . . in Plaintiff's favor, precluding the defendant from disputing same; or compelling the defendant to produce said discovery by a date certain or its Answer will be deemed automatically stricken to resolve for failure to provide discovery". (NYSCEF Doc. No. 113, ¶ 1).

The First Department upheld this court's denial of defendant's motion for summary judgment concluding that:

> Although the license agreement required ZLC to disclose that it was an "independent legal entity operating under license" from Sheraton and to place "notices of independent ownership" on the premises, Starwood did not provide any evidence that ZLC complied with those requirements.[1]
>
> Accordingly, the motion court properly found that the motion for summary judgment was premature, since plaintiff is entitled to discovery of matter exclusively within Starwood's control concerning issues relating to its possible agency relationship with the hotel, including its reservations system and advertising [citations omitted].

NYSCEF Doc. No. 86.

Plaintiff argues that "[t]here are numerous documents that Defendant has not exchanged, and Plaintiff has been deprived not only of these records, but of the ability to question the Defendant's witnesses with respect to said items and has suffered irreparable prejudice as a result." (NYSCEF Doc. No. 113, ¶ 4). Plaintiff lists ten discovery items which she claims are still outstanding. (NYSCEF Doc. No. 113, ¶ 32).

In opposition, defendant contends that plaintiff has greatly exaggerated defendant's alleged non-compliance and attaches as exhibits, defendant's numerous responses to plaintiff's discovery responses, demonstrating that voluminous documents have been produced by Starwood and in some instances noting that the documents demanded are not in Starwood's possession. (NYSCEF Doc. Nos. 147 through 154). Additionally, defendant provides proof that it has responded to plaintiff's supplemental discovery demands which have been the subject of the last four status conferences orders extending plaintiff's Note of Issue filing deadline to January 24, 2020. (NYSCEF Doc. Nos. 108 – 111). Defendant argues that it has complied with

[1] ZLC Inc.'s motion to dismiss the complaint as against it pursuant to CPLR 3211(a) (8) for lack of personal jurisdiction, was granted by this court and unanimously affirmed by the First Department. (NYSCEF Doc. Nos. 18, 19 and 68).

this court's directives and plaintiff's discovery demands, including documents produced in its response dated January 20, 2020. (NYSCEF Doc. Nos. 147-154).

STANDARD OF REVIEW/DISCUSSION

The determination whether to strike a pleading lies within the sound discretion of the trial court (see CPLR 3126 [3]; (*Mew v Civitano*, 151 AD3d 840, 841, 56 N.Y.S.3d 560 [2d Dep't 2017]; *Walter B. Melvin, Architects, LLC v 24 Aqueduct Lane Condominium,* 51 AD3d 784, 785, 857 NYS2d 697 [2d Dep't 2008]; *Cianciolo v Trism Specialized Carriers,* 274 AD2d 369, 370, 711 NYS2d 441 [2d Dep't 2000]). However, the drastic remedy of striking an answer is not appropriate absent a clear showing that the failure to comply with discovery demands was willful or contumacious (see CPLR 3126 [3]; *Walter B. Melvin, Architects, LLC v 24 Aqueduct Lane Condominium*, 51 AD3d at 785; *Harris v City of New York,* 211 AD2d 663, 664, 622 NYS2d 289 [2d Dep't 1995]).

Here, the record does not support a finding that the defendant willfully and deliberately failed to comply with outstanding discovery requests. Rather, the record shows that the defendant complied with numerous discovery demands made by the plaintiff, at times providing responsive documents on more than one occasion. (NYSCEF Doc. No. 147). There has been no showing that defendant is "guilty of a deliberately evasive, misleading and uncooperative course of conduct or a determined strategy of delay that would be deserving of the most vehement condemnation". (*cf. Brandi v Chan*, 151 AD2d 853, 854, [3d Dep't 1989]).

To the contrary, the fact that defendant cooperated with all aspects of discovery and made extensive efforts to locate corporate records during a change in hotel ownership, is certainly not indicative of the extreme conduct required before imposition of the ultimate penalty of striking the answer (see, *Dauria v City of New York*, 127 AD2d 459, 460, 511 NYS2d 271 [1st Dep't

1987]). Moreover, plaintiff has not met her "burden of coming forward with . . . a clear-cut showing of willfulness" (*Orlando v Arcade Cleaning Corp.*, 253 AD2d 362, 363, 676 NYS2d 164 [1st Dep't 1998]).

Finally, plaintiff's demand for a Jackson affidavit is unwarranted as defendant has produced voluminous documents in compliance with the outstanding discovery demands and in some instances, noted that the documents demanded did not exist. (NYSCEF Doc. Nos.147-154). (see, *Jackson v. City of New York*, 185 A.D.2d 768, 770, 586 N.Y.S.2d 952 [1st Dep't 1992]) (where the court held that when unable to produce documents, a party must set forth where the records were kept, what efforts, if any, were made to preserve them and the circumstances surrounding their disappearance or destruction).

As noted, this action has been pending for almost a decade. Summary judgment was previously denied by this court as premature and its decision was upheld by the First Department which noted that plaintiff, who allegedly tripped and fell at the entranceway to a hotel while she was in Ann Arbor, Michigan, "is entitled to discovery of matter exclusively within Starwood's control concerning issues relating to its possible agency relationship with the hotel, including its reservations system and advertising [citations omitted]. (NYSCEF Doc. No. 86).

The parties have since exchanged hundreds of documents, produced multiple witnesses for depositions and have attended multiple status conferences where outstanding discovery items were identified and agreed upon by the parties. The court then issued orders extending the discovery and note of issue deadlines to allow defendant, who had indicated that Starwood was being sold thereby resulting in a change of systems and personnel, time to comply with the outstanding demands. Defendant has demonstrated that it has complied with the outstanding discovery set forth in the last four status conference orders. (NYSCEF Doc. Nos. 147-154).

In keeping with this state's strong public policy which favors resolution of matters on the merits, the striking of a party's pleading is a drastic remedy that is warranted only where there has been a clear showing that the failure to comply with discovery is willful and contumacious (see *Singer v Riskin*, 137 AD3d 999, 1001, 27 NYS3d 209 [2d Dep't 2016]; *Stone v Zinoukhova*, 119 AD3d 928, 929, 990 NYS2d 567 [2d Dep't 2014]; *A.F.C. Enters., Inc. v New York City School Constr. Auth.*, 33 AD3d 737, 822 NYS2d 775 [2d Dep't 2006]). Plaintiff has failed to demonstrate that defendant engaged in willful and contumacious conduct, therefore the motion to strike defendant's answer is denied. (*Mew v Civitano*, 151 AD3d 840, 841, 56 N.Y.S.3d 560 [2d Dep't 2017]).

Accordingly, it is hereby,

ORDERED that plaintiff's motion sequence number 006, to strike defendant's answer is denied in all respects; and it is further

ORDERED that plaintiff is directed to file her note of issue, as directed in the Status Conference Order dated September 17, 2019 and the Status Conference scheduled for February 11, 2020 is vacated.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

2/5/2020
DATE

W. FRANC PERRY, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE