SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ROBERT D. KALISH** **PART** **IAS MOTION 29EFM**

Justice

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BILL REICHENBACH, JULIE BASEM and AMY KERNER, ERIKA ABRAMS,

Plaintiffs,

- v -

JACIN INVESTORS CORP., N.V., JACIN INVESTORS LLC and NYC YORK HOLDINGS LLC,

Defendants.

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INDEX NO. 155013/2019

MOTION DATE 02/28/2020

MOTION SEQ. NO. 004, 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 102, 103, 104, 105, 106, 107, 108, 109, 110

were read on this motion to/for DISCOVERY.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 111, 112

were read on this motion to/for STRIKE PLEADINGS.

Motion (Seq. 004) by Defendants Jacin Investors Corp., N.V., Jacin Investors LLC and NYC York Holdings LLC (collectively, "Defendants") for a protective order, pursuant to CPLR 3103, in respect to Defendants' collective obligation to respond to the Notice of Discovery and Inspection and the Demand for a Bill of Particulars by Plaintiffs Bill Reichenbach, Julie Basem, Amy Kerner and Erika Abrams (collectively, "Plaintiffs") and the motion (Seq. 005) by Plaintiffs, pursuant to CPLR 3042 (c)-(d), 3124 and 3126, for an order striking Defendants' pleadings, or in the alternative, compelling Defendants compliance with outstanding discovery demands, are each granted in part and denied in part as described herein.

BACKGROUND

The instant action is for rent overcharge commenced by Plaintiffs who are tenants presently occupying certain apartments within a building located at 1410 York Avenue in Manhattan ("the subject building"). Defendant Jacin Investors Corp., N.V. ("Jacin"), is the owner of the subject building. Plaintiffs each claim that they are entitled to rent stabilized leases and for money damages based on overcharges. Defendants assert that the rents for these apartments were lawfully increased pursuant to individual apartment improvements ("IAIs") and/or building-wide capital improvements that occurred before the current owners purchased Jacin around 2014.

The Court now has before it a discovery motion from each side that, in sum and substance, concern the same discovery dispute. Plaintiffs bring a motion (Seq. 005) seeking discovery sanctions against Defendants for the failure to produce or, in the alternative, to compel production of certain documents ("the subject documents") relevant to the increasing of rents for each Plaintiff's unit, particularly, documentation that might support Defendants' claims that these rents were lawfully increased following IAIs and/or building-wide capital improvements. Defendants bring a motion (Seq. 004) for a protective order with respect to their obligations to produce the subject documents.[1]

At the center of this discovery dispute is an individual named Mario Kucher ("Kucher").

It is alleged that Kucher was the property manager of the subject building under Jacin and apparently had some responsibilities with respect to record keeping. (Sohayegh Aff in Supp [Seq004] ¶ 16.) Kucher apparently left Jacin's employ around October 1, 2014.

Elliot Sohayegh ("Sohayegh"), a member and officer of Jacin, states that, years ago, the prior owner of Jacin was looking to sell the subject building and that, knowing this, Kucher approached him about purchasing the subject building.

Sohayegh states that his family eventually did purchase Jacin—and with it the subject building—and that Kuchner was paid $200,000 as a "finder's fee" upon the closing. Sohayegh further states that Kucher was "disgruntled" over his finder's fee, believing that he was to be given $1,000,000.

Sohayegh further states that following the closing, he was "supposed to pick up files for several of the tenants in the subject property[,]" but that Kucher refused to turn over said files and "threatened to go to every tenant in the subject building and lie about having committed criminal fraud in deregulating those apartments in the subject building that had been deregulated." (Id. ¶¶ 23-24.) Sohayegh states that he refused to be "extorted" by Kucher for additional money.

Sohayegh states that, thereafter, Kucher sued him in *Kucher v Sohayegh*, No. 156221/2016 (Sup Ct, NY County) (Kotler, J.) ("the Kucher Action") seeking the balance of the $1,000,000. Sohayegh states that the Kucher Action "languished for years" after joinder of issue, but then Kucher replaced his original attorney with Zachery Meyer, Esq. ("Meyer") – Plaintiff's counsel in the instant action. Sohayegh asserts that Meyer furthered Kucher's aims of extorting him by sending a letter—on his firm's letterhead—to several tenants in the subject building inviting them to commence rent overcharge cases against Defendants. (Id. ¶¶ 27-29.) This alleged "cold call" letter is attached as an exhibit to Defendants' motion papers. (Sohayegh Aff in Supp [Seq004], Ex. N [NYSCEF Doc. No. 87].)

Sohayegh argues that "Meyer only knew to solicit the occupants of [the subject building] because of information he was given by Mario Kucher." (Sohayegh Aff in Supp [Seq004] ¶ 33.) Sohayegh further asserts that, in addition to probably still having possession of the files at issue,

[1] Defendants' motion for a protective order (Seq. 004) was originally brought by order to show cause but was thereafter converted to a motion on notice.

Kucher "may have personal knowledge about the leasing and about the renovations that were performed in respect of the apartments occupied by the Plaintiffs in this case." (Id. ¶ 35.)

Defendants also submit an affidavit from their counsel, Heather Ticotin, Esq. ("Ticotin"). Ticotin states that she had a telephone call with Meyer about the discovery at issue and that Meyer "taunted" her that she would not be able to timely provide said discovery responses. (Ticotin Aff. ¶ 4.) Ticotin states:

> "Mr. Meyer told me that he knew that there was no way we would able to be able to produce the discovery timely or at all because Mario Kucher had the files that contained the information that Defendants needed in order to properly respond and Mario Kucher did not intend to provide that documentation to Defendants."

(Id. ¶ 5.) Based on the above, Defendants seek a protective order, arguing in sum and substance that they cannot produce the documents at issue because those documents are in possession of Kucher who will only turn them over if Defendants pay him an additional $800,000.

In opposition to Defendants' motion for a protective order and in support of their own motion for discovery sanctions, Plaintiffs argue that Defendants' motion should be denied because Defendants fail to submit an affirmation of good faith pursuant to 22 NYCRR § 202.7. Plaintiffs further assert that "[u]pon information and belief, non-party MARIO KUCHER is not in possession of any of Defendants' records." (Affirm in Opp. [Seq004] ¶ 2.) Indeed, Meyer himself denies that he ever told Ticotin that non-party Kucher was in possession of the subject documents. (Id. ¶ 44.)

Rather, Plaintiffs assert that Defendants previously stipulated to provide the documents at issue on two separate occasions: 1) when the parties stipulated to the preliminary conference order (NYSCEF Doc. No. 56); and 2) when the parties resolved, by so-ordered stipulation, Plaintiff's prior motion to compel production (Seq. 003), which included the same demands (NYSCEF Doc. No. 71). Plaintiffs further argue that, even assuming Kucher has the subject documents, Defendants have made no effort to obtain said documents through serving, e.g., a subpoena duces tecum on Kucher. (Id. ¶¶ 38-39.)

Plaintiff further argues that the subject documents are material and necessary to the prosecution and defense of the action and that, pursuant to the Rent Stabilization Law ("the RSL"), Defendants have the burden of producing documentation to substantiate the basis for the subject rent increase. Moreover, Plaintiff argues that Defendants also had an obligation under the RSL to maintain these subject documents in their business records.

For all of the above reasons, Plaintiffs argue that Defendants' conduct has been willful and contumacious and, as such, this Court should deny Defendants' motion for a protective order (Seq. 004) and grant Plaintiffs' motion striking Defendants' answer.

In reply to Plaintiff's opposition and in opposition to Plaintiff's motion, Defendants argue that Plaintiffs' have only submitted statements by counsel and fail to submit an affidavit by an individual with personal knowledge. Defendants further argue that they have responded to

Plaintiffs' discovery demands to the best of their ability—providing, inter alia, a verified bill of particulars—but that they cannot produce the subject documents, which they claim Kucher absconded with, and thus they have moved for a protective order as to those subject documents.

In a two-page letter—apparently submitted as reply papers in further support of Plaintiffs' motion (Seq. 005)—Plaintiffs note that Defendants are represented by different counsel with respect to their defense against Plaintiff Erika Abrams ("Abrams"), and that said counsel have not submitted any opposition papers to their motion. As such, Plaintiffs argue that with regard to Abrams, "all of the relief requested under MSQ No. 005 be granted in her favor [on default]." (NYSCEF Doc. No. 112 at 2.)

After reviewing the papers on the instant motion, this Court held a joint telephone conference with counsel for the parties, on March 30, 2020, in the hope of resolving the instant motions by stipulation. (NYSCEF Doc. No. 118.) During said conference, it appeared to the Court that the parties were amenable to resolving the instant motions by, inter alia, agreeing to conduct depositions Sohayegh and non-party Kucher. However, this Court was subsequently informed that the parties could not finalize the terms of such a stipulation.

DISCUSSION

As a preliminary matter this Court notes that there is no dispute that the subject documents are material and necessary for the prosecution and defense of this action, pursuant to CPLR 3101 (a). (*See generally Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 406 [1968].) Indeed, each side apparently wants to obtain the subject documents and believes the subject documents will ultimately prove up their case.

As such, the issue before this Court is how to handle the fact that Defendants do not have the subject documents in their possession. Plaintiffs assert that this Court should strike Defendants' answer because, inter alia, Defendants are obligated to maintain these subject documents and a failure to produce said records will require a judgment on the merits in favor of Plaintiffs. Defendants contend that this Court should instead grant them a protective order, in sum and substance, excusing their failure to produce the subject records on the ground that Kucher allegedly absconded with the subject documents.[2]

[2] While Plaintiffs seek, in the alternative, to compel Defendants to produce the subject documents, pursuant to CPLR 3124, Defendants have submitted an affidavit from an individual with personal knowledge – Sohayegh – stating that Defendants are not in possession of any of the subject documents. As such, this Court deems that branch of Plaintiffs' motion to be academic.

I. Relevant Law

A. Protective Order

CPLR 3103 (a) states that "[t]he court may at any time on its own initiative, or on motion of any party or of any person from whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device." Such a protective order shall be designed to "prevent unreasonable annoyance ... disadvantage or other prejudice to any person or the courts." (CPLR 3103 [a].) "The burden of establishing any right to protection is on the party asserting it; the protection claimed must be narrowly construed; and its application must be consistent with the purposes of the underlying immunity." (*148 Magnolia, LLC v Merrimack Mut. Fire Ins. Co*., 62 AD3d 486, 487 [1st Dept 2009]).

B. Discovery Sanctions

CPLR 3126 states as follows:

> "If any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them:
>
> 1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or
>
> 2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or
>
> 3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party."

As Chief Judge Kaye has explained, CPLR 3126 was designed to give the Supreme Court the tools to combat discovery abuse:

> "If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity. Indeed, the Legislature, recognizing the need for courts to be able to command compliance with their disclosure directives, has specifically provided that a 'court may make such orders ... as are just,' including dismissal of an action."

(*Kihl v Pfeffer*, 94 NY2d 118, 123 [1999], quoting CPLR 3126.)

"The nature and degree of the penalty to be imposed pursuant to CPLR 3126 lies within the sound discretion of the Supreme Court." (*Schiller v Sunharbor Acquisition I, LLC*, 152 AD3d 812, 813 [2d Dept 2017].) "The striking of a pleading may be appropriate where there is a clear showing that the failure to comply with discovery demands or court-ordered discovery is willful and contumacious." (*Brandenburg v County of Rockland Sewer Dist. #1*, 127 AD3d 680, 681 [2d Dept 2015].) The courts however are encouraged to provide litigants with reasonable latitude before imposing the "ultimate sanction" of striking a pleading. (*See CDR Creances S.A.S. v Cohen*, 62 AD3d 576, 577 [1st Dept 2009].) Moreover, there is a strong preference in this state that, wherever possible, actions be decided on their merits and a discovery sanction lesser than striking a pleading be imposed. (*See Ayala v Lincoln Med. & Mental Health Ctr.*, 92 AD3d 542 [1st Dept 2012].)

II. Analysis

The Court finds that there is no basis for the relief sought by Defendants for a protective order. Further, the Court finds that there is no basis for the relief sought by Plaintiffs to strike the answer as Defendants' conduct is not willful and contumacious. As such, both motions are denied except to the following extent.

Defendants must first produce Sohayegh for a deposition.

Thereafter, Plaintiffs shall produce Kucher for a deposition.

The court is mindful that Kucher is not a party to the instant action but he is a client of Meyer in the Kucher Action which is somewhat related to the instant action. However, if Plaintiffs cannot produce Kucher for a deposition, Meyer shall notify Defendants counsel within ten (10) days of this order being served with notice of entry. In that event, Meyer shall supply the last known address of Kucher to the Defendants' counsel. It will be incumbent on the Defendants to proceed with deposing Kucher if sought as a non-party and seek whatever rights they may have under the CPLR if the witness fails to appear or produce documents.

The parties are free to agree to the scope of either deposition. This Court will not place any pre-emptive restrictions on the subject matter that may be explored during either of the aforesaid depositions. However, given that some of the issues in the Kucher Action and the instant action overlap, and because the parties, the witnesses, and the lawyers in both actions are largely the same, this Court suggests that it would be most efficient to depose Sohayegh and Kucher in regard to the claims in both actions at the same time.

Further, although this Court will not compel the parties to conduct the aforesaid depositions during the current COVID-19 pandemic, the Court encourages the parties to consider conducting these depositions via videoconference in advance of the mandatory dates provided by this decision and order. Of course, the parties should only do so if these depositions can be completed safely and in compliance with the current social distancing guidelines. (*See also*

Administrative Orders of the Chief Administrative Judge of the Courts, dated March 20 and 22, 2020 [AO/71/20; AO/78/20].)

The Court further notes that it has considered the parties other arguments, including Plaintiffs' arguments that Defendants fail to submit an affirmation of good faith and that Defendants' counsel with respect to Abrams has failed to respond to Plaintiffs' motion for discovery sanctions. The Court finds these arguments to be wholly unavailing.

Although Ticotin's affidavit is not denominated as an "affidavit or good faith" and it falls somewhat short of 22 NYCRR 202.7's specific requirement, the Court is satisfied here that "any further attempt to resolve the dispute nonjudicially would have been futile." (*N. Leasing Sys., Inc. v Estate of Turner*, 82 AD3d 490 [1st Dept 2011].)

With regard to the alleged default by Defendants' counsel as to Abrams, the Court finds that Meyer's argument fails here because there are no issues on the instant motions that are particular to Abrams and to grant Plaintiffs' motion with regard to Abrams would create a clear injustice and be inconsistent.

Pursuant to the Court's March 30, 2020 teleconference with counsel for the parties, Defendants shall amend and produce all outstanding documents and disclosure responses in response to Plaintiffs' disclosure requests from the date that Kucher left the employ of Jacin — October 1, 2014—through the present. All such documents and responses shall be served at least fifteen (15) days prior to the deposition of Sohayegh.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion (Seq. 004) by Defendants Jacin Investors Corp., N.V., Jacin Investors LLC and NYC York Holdings LLC (collectively, "Defendants") for a protective order, pursuant to CPLR 3103, in respect to Defendants' collective obligation to respond to the Notice of Discovery and Inspection and the Demand for a Bill of Particulars by Plaintiffs Bill Reichenbach, Julie Basem, Amy Kerner and Erika Abrams (collectively, "Plaintiffs") and the motion (Seq. 005) by Plaintiffs, pursuant to CPLR 3042 (c)-(d), 3124 and 3126, for an order striking Defendants' pleadings, or in the alternative, compelling Defendants compliance with outstanding discovery demands, are each granted in part and denied in part as follows; and it is further

ORDERED that the counsel for Plaintiffs shall serve, via NYSCEF, a copy of the instant decision and order with notice of entry within ten (10) days after Governor Cuomo's Executive Order 202.8 or any order modifying it is lifted; and it is further

ORDERED that compliance with this order is subject to the Administrative Orders of the Chief Administrative Judge of the Courts, dated March 20 and 22, 2020 (AO/71/20; AO/78/20) or any future orders relating to the litigation of non-essential matters during the current COVID-19 pandemic; and it is further

ORDERED that within thirty (30) days of service of a copy of the instant decision and order with notice of entry, Defendants shall produce Elliot Sohayegh ("Sohayegh") for a deposition; and it is further

ORDERED that on or before fifteen (15) days prior to the deposition of Sohayegh, Defendants shall amend and produce all outstanding documents and disclosure responses in response to Plaintiffs' disclosure requests from the date that Kucher left the employ of Jacin — October 1, 2014—through the present; and it is further

ORDERED that within ten (10) days of a copy of the instant decision and order with notice of entry being served, Plaintiff's counsel shall confirm whether Plaintiffs can produce Mario Kucher ("Kucher") for a deposition, and if unable to do so, shall supply Defendants with Kucher's last known address; and it is further

ORDERED that if Plaintiffs can produce Kucher for a deposition, then within thirty (30) days of the completion of Sohayegh's deposition, the parties shall take the deposition of Kucher; and it is further

ORDERED that if Plaintiffs cannot produce Kucher for a deposition, then Defendants – if seeking said deposition – shall serve Kucher with a subpoena ad testificandam and/or duces tecum within (30) days of being so informed by Plaintiffs' counsel and that Kucher's deposition shall be completed within sixty (60) days of service of the subpoena ad testificandam and/or duces tecum; and it is further

ORDERED that counsel for the parties shall confer once a date for Kucher's deposition is arranged and then contact the clerk of this Part to schedule a date for the next compliance conference to occur roughly twenty (20) days after the deposition of Kucher.

The foregoing constitutes the decision and order of the Court.

4/10/2020
DATE

ROBERT DAVID KALISH, J.S.C.

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