

Chiarizia v Henry V Murray Senior LLC

2020 NY Slip Op 33579(U)

October 30, 2020

Supreme Court, New York County

Docket Number: 152456/2018

Judge: Arlene P. Bluth

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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. ARLENE P. BLUTH PART IAS MOTION 14

Justice

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JOSEPH CHIARIZIA,

Plaintiff,

- v -

HENRY V MURRAY SENIOR LLC, BOARD OF MANAGERS
OF THE WARREN STREET CONDOMINIUM, PLAZA
CONSTRUCTION LLC, B & G ELECTRICAL
CONTRACTORS OF N.Y. INC.

Defendant.

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INDEX NO. 152456/2018
MOTION DATE 10/23/2020
MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 67, 68, 69, 70, 71

were read on this motion to/for STRIKE PLEADINGS.

The motion by plaintiff to strike defendants' answers is granted in part and denied in part.

Background

Plaintiff files a motion to strike the answer of all defendants based on their failures to appear for their respective depositions on several occasions or, in the alternative, compelling defendants to appear for a deposition.

Defendants Henry V. Murray Senior LLC ("Murray") and Plaza Construction LLC ("Plaza") oppose on the basis that their conduct was not willful or contumacious. (NYSCEF Doc. No. 67). Defendants also argue that, prior to the instant motion, plaintiff waived the Murray deposition and the "coordination of the [Plaza deposition] has unfortunately been difficult to date due to the present time and circumstances"(id. at 4 and 6).

Defendant B&G Electrical Contractors of N.Y. Inc. (“B&G”) opposes on the ground that it offered to appear for a scheduled deposition on October 22, 2020, but plaintiff declined because he “preferred to keep the depositions in caption order.” (NYSCEF Doc. Nos. 68 and 69).

In reply, plaintiff argues that since the filing of the instant motion, Plaza failed to appear for another deposition scheduled on October 19, 2020 (NYSCEF Doc. No. 70). Plaintiff did not dispute the contention that he waived the Murray deposition or that he declined to go forward with the B&G deposition.

Discussion

Failure to comply with discovery, particularly after a court order has been issued, may constitute the “dilatatory and obstructive, and thus contumacious, conduct warranting the striking of [the answer]” (*Kunter v Feiden, Dweck & Sladkus*, 223AD2d 488, 489 [1st Dept 1996]. “The striking of a party’s pleadings should not, however, be imposed except in instances where the party seeking disclosure demonstrates conclusively that the failure to disclose was willful, contumacious or due in bad faith” (*Hassan v Manhattan & Bronx Surface Tr. Operating Auth.*, 286 AD2d 303, 304 [1st Dept 2001]). The determination to strike a pleading lies “within the court’s broad discretion” (*Banner v New York City Hous. Auth.*, 73 AD3d 502, 503 [1st Dept 2010]).

Although there are five court orders in this matter scheduling defendants’ depositions dated back from October 15, 2018, the Court excuses the non-appearance pursuant to the first two orders because the plaintiff had not yet been deposed. The plaintiff was deposed in May 2019 and so the Court focuses on the three orders from August 2019, December 2019 and August 2020.

Plaza

This Court grants plaintiffs' motion to the extent that it seeks to compel Plaza to appear for a deposition. The only explanation that Plaza offers for its noncompliance with the orders is that "the coordination of the examination before trial with the witness has unfortunately been difficult under the circumstances" (NYSCEF Doc. No. 67 at ¶ 6). That excuse is not good enough. In the August 2019 order, Plaza agreed to appear in October 2019 – the witness had notice for two months. The Court does excuse the appearance scheduled for March 2020 due to COVID and the resulting uncertainty it created. However, in August 2020, Plaza agreed to appear in September 2020; there is no excuse for the failure to appear.

Plaza's only excuse – that it was hard to coordinate with its witness – is vague, conclusory and wholly unacceptable. It is holding up this whole case and will not be tolerated. This Court gives Plaza one final opportunity to appear for a deposition; if it fails to appear without good cause, its answer will be stricken. This deposition must be held on or before November 24, 2020.

Murray

This Court denies plaintiff's motion with respect to Murray. Plaintiff does not dispute that it waived the Murray deposition prior to the filing of the instant motion (NYSCEF Doc. Nos. 67 at 4, and 70).

B&G

This Court denies plaintiff's motion with respect B&G. Pursuant to an email sent by plaintiff on October 20, 2020, plaintiff "prefer[ed] to keep the deposition in order at this point, so [they] will not be going forward with [B&G's deposition] ..." on October 22 2020 (NYSCEF Doc. No. 69). Plaintiff cannot decline to go forward with B&G's deposition and then have

B&G's answer struck for its failure to appear at said deposition. B&G's deposition should be held within thirty days after Plaza's deposition, but the failure will not result in striking its answer; it may result in some other penalty, but not striking the answer.

Accordingly, it is hereby

ORDERED that plaintiff's motion to strike the defendants' answers or for other relief is granted to the extent that the Plaza's answer will be stricken unless it appears for a deposition on or before November 24, 2020, and it is further

ORDERED that any relief not expressly granted herein is denied.

Remote Conference adjourned to November 30, 2020 at ~~2:30PM~~.
2:00

10/30/2020
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER
 INCLUDES TRANSFER/REASSIGN

SUBMIT ORDER
 FIDUCIARY APPOINTMENT

REFERENCE

CHECK IF APPROPRIATE: