

Abramowitz v Rolling Realty, LLC

2021 NY Slip Op 30250(U)

January 28, 2021

Supreme Court, New York County

Docket Number: 159848/2018

Judge: Barbara Jaffe

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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. BARBARA JAFFE PART IAS MOTION 12

Justice

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INDEX NO. 159848/2018

GILDA ABRAMOWITZ, THOMAS BYRNE

MOTION DATE 05/20/2020

Plaintiff,

MOTION SEQ. NO. 002

- v -

ROLLING REALTY, LLC,
CLEARWATER PROPERTIES, LLC,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is

Defendants move pursuant to CPLR 3216(a) for an order dismissing the complaint.

Plaintiffs oppose.

By summons and verified complaint dated October 23, 2018, plaintiffs commenced this action alleging that their apartment was infested with bed bugs. (NYSCEF 27). On January 25, 2019, defendants served their verified answer, along with a demand for a bill of particulars and other discovery demands. (NYSCEF 28).

By notice of motion dated April 12, 2019, defendants moved to compel plaintiff to serve a bill of particulars and comply with their discovery demands. (NYSCEF 30). Their motion was granted to the extent of directing the parties to appear for a preliminary conference. On June 12, 2019, the parties entered into a so-ordered preliminary conference order providing that plaintiffs would respond to defendants' demands within 60 days and provide a bill of particulars within 30 days. (NYSCEF 31).

By so-ordered stipulation dated September 4, 2019, the parties' compliance conference was adjourned to November 13, 2019, given counsel's representation that plaintiff Byrne had suffered a stroke. The stipulation provided that all outstanding discovery would be scheduled at the next conference. By so-ordered stipulation dated November 13, 2019, plaintiffs agreed to serve outstanding discovery responses by January 15, 2020. (NYSCEF 32).

By letter dated February 7, 2020, defendants' counsel advised plaintiffs' counsel that no discovery responses had been received and that failure to comply with discovery demands within 10 days may result in the filing of a motion. (NYSCEF 33).

Defendants contend that dismissal of the complaint pursuant to CPLR 3216(a) is warranted given plaintiffs' failure to provide any discovery. (NYSCEF 25).

In opposition, plaintiffs maintain that before September 4, 2019, Byrne suffered a medical emergency, requiring admission to the hospital, and while he was released after November 13, 2019, he was immobile, requiring constant care from his spouse, plaintiff Abramowitz. They claim that the "stress and time" of his care and lack of mobility delayed efforts to produce discovery and that once the COVID-19 pandemic began, they were forced to limit contact with others, given their "many underlying health conditions," were and are limited in their ability to obtain the necessary discovery from "every source." Thus, they seek an order suspending discovery for six months and scheduling a compliance conference thereafter to re-evaluate the situation. (NYSCEF 36).

In reply, defendants contend that dismissal is warranted pursuant to CPLR 3126. They observe that plaintiffs have been given multiple adjournments for discovery, some before the start of the COVID-19 pandemic and have also requested adjournments for the resolution of this motion. They argue that basic information could have been provided by now, and that plaintiffs'

delay is willful and contumacious. (NYSCEF 40).

Pursuant to CPLR 3216(a), a party's pleadings may be dismissed where that party "unreasonably neglects to proceed generally in an action or otherwise delays in the prosecution thereof against any party who may be liable to a separate judgment, or unreasonably fails to serve and file a note of issue" However, as a prerequisite for dismissal, the party seeking relief

shall have served a written demand by registered or certified mail requiring the party against whom such relief is sought to resume prosecution of the action and to serve and file a note of issue within ninety days after receipt of such demand, and further stating that the default by the party upon whom such notice is served in complying with such demand within said ninety day period will serve as a basis for a motion

(CPLR 3216[b][3]). Defendants offer no evidence of their compliance with this statute, and thus, dismissal of the complaint is unwarranted.

Even had defendants moved under CPLR 3126, which provides for the striking of a party's pleading if the party refuses to obey a discovery order or willfully fails to disclose information, dismissal is unwarranted because they moved to compel before a discovery schedule had been set at a preliminary conference and absent any orders granting preclusion. (*See Michaluk v New York City Health and Hosps. Corp.*, 169 AD3d 496, 496 [1st Dept 2019] [as defendant never sought to compel disclosure or have preclusionary language added to parties' compliance conference orders, motion to dismiss pursuant to CPLR 3126(3) premature given absence of evidence that plaintiffs' delay in providing discovery willful, contumacious or in bad faith]).

Nevertheless, a court has broad discretion and power to control and supervise discovery (*Deep v Boies*, 121 AD3d 1316 [3d Dept 2014], *lv denied* 25 NY3d 903 [2015]), irrespective of any motions made by the parties (*AQ Asset Mgt. LLC v Levine*, 111 AD3d 245 [1st Dept 2013]),

and it has the prerogative to control its calendar. Moreover,

the public policy favoring resolution of cases on their merits is not promoted by permitting a party to a single such matter to impose an undue burden on judicial resources to the detriment of all other litigants. Nor is the efficient disposition of the business before the courts advanced by undermining the authority of the trial court to supervise the parties who appear before it.

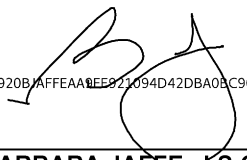
(*Arts4All Ltd. v Hancock*, 54 AD3d 286, 286-87 [1st Dept 2008], *aff'd* 12 NY3d 846 [2009]).

It is undisputed that plaintiffs have not complied with so-ordered discovery stipulations and have not produced any discovery in this matter. Nor do they offer evidence supporting their contention, advanced through counsel only, that they are incapable of engaging in discovery. Defendants are thus entitled to an order compelling plaintiffs to comply with their discovery demands.

Accordingly, it is hereby

ORDERED, that defendants' motion is granted to the extent of directing plaintiffs to serve outstanding discovery responses within 60 days of the date of this order, and is otherwise denied; and it is further

ORDERED, that the parties are directed to either enter into a stipulation encompassing their next compliance conference on or before April 7, 2021, or appear for the conference in room 341, 60 Centre Street, New York, New York, on April 7, 2021 at 2:15 pm or virtually if necessary. The parties must set definitive dates for depositions, which may be conducted virtually, at that next conference.

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BARBARA JAFFE, J.S.C.

1/28/2021
DATE

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	REFERENCE
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT		

APPLICATION:

CHECK IF APPROPRIATE: