

| |
|--|
| 90th St. Corp. v 203 W. 90th St. Retail, LLC |
| 2021 NY Slip Op 30827(U) |
| March 10, 2021 |
| Supreme Court, New York County |
| Docket Number: 654532/2016 |
| Judge: Louis L. Nock |
| Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service. |
| This opinion is uncorrected and not selected for official publication. |

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LOUIS L. NOCK PART IAS MOTION 38EFM

Justice

-----X

90TH STREET CORP.,

Plaintiff,

- v -

203 WEST 90TH STREET RETAIL, LLC,

Defendant.

-----X

LOUIS L. NOCK, J.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, and 187

were read on this motion IN LIMINE.

Upon the foregoing documents, the motion of plaintiff 90th Street Corp. ("Plaintiff") in limine, and the cross-motion of defendant 203 West 90th Street Retail, LLC ("Defendant"), in limine, are determined as follows.

Background

On December 1, 2013, Plaintiff, as tenant, and Defendant, as owner and landlord, entered into a commercial lease agreement for the store and basement located at 620 Amsterdam Avenue, New York, New York (the "Premises").¹ In or about November 2014, Plaintiff approached Defendant "for an amicable surrender of the lease" because Plaintiff was unable to meet its Lease obligations (Decision and Order of Hon. David B. Cohen dated November 4, 2019 [NYSCEF Doc 188] at 1). In early 2015, Defendant commenced a nonpayment proceeding

¹ An abbreviated background is set forth here for the purposes of this motion. A full recitation of the case background is included in the November 4, 2019, decision and order on Plaintiff's motion for summary judgment (motion seq. no. 002) (NYSCEF Doc 188).

against Plaintiff in Civil Court, New York County, captioned *203 W. 90th St. Retail, LLC v 90th St. Corp.* (index No. 050551/2015) (*id.* at 2). The parties subsequently executed a stipulation of settlement (the “Stipulation”) in the nonpayment proceeding (*id.*). Under the terms of the Stipulation, Plaintiff consented to a final judgment of possession in Defendant’s favor, but Defendant agreed to refrain from executing a warrant of eviction if Plaintiff paid \$60,000 in use and occupancy “in advance” for six months beginning January 2015 (*id.*). The Stipulation further required Plaintiff to vacate and return the Premises in “broom clean condition and free of all . . . tenant’s property” (*id.*). Finally, the Stipulation provided that if Plaintiff complied with all these terms and timely vacated the Premises, Defendant would return Plaintiff’s security deposit (*id.*). Plaintiff ultimately vacated the Premises on May 13, 2015, and Defendant refused to return the security deposit because (1) Plaintiff failed to pay use and occupancy for May and June 2015; and (2) Plaintiff failed to vacate and leave the Premises in the condition required under the Stipulation (*id.* at 3).

Plaintiff commenced this action, asserting a single cause of action for breach of the Stipulation and seeking restitution of its \$316,668.68 security deposit (NYSCEF Doc 2 ¶ 21). Defendant answered the complaint and interposed three counterclaims for (1) damages in the amount of \$1,583,333.40 for monthly rent due from May 2015 through December 2016; (2) alleging that Plaintiff damaged the Premises by removing fixtures belonging to Defendant, including the HVAC system, shelving, and refrigerated display cases; and (3) for legal fees, costs, and expenses under the Lease (NYSCEF Doc 36 ¶¶ 33-54). After extensive discovery, Plaintiff moved for summary judgment on its single cause of action, and Defendant cross-moved for summary judgment on all of its counterclaims. In a decision and order on the motion for summary judgment, the court determined that Plaintiff had breached the Stipulation by failing to

pay use and occupancy for May and June 2015; by failing to timely vacate the Premises; and by failing to leave the property in broom swept condition (*see* NYSCEF Doc 188). The court denied Plaintiff's motion for summary judgment and granted Defendant's motion for summary judgment on its first and third counterclaims (*id.*). The court denied summary judgment on the second counterclaim, the only remaining claim in contention, on the ground that "a triable issue of fact exists whether plaintiff improperly removed defendant's bathroom fixtures" (*id.* at 17).

While the motion for summary judgment was *sub judice*, Plaintiff filed the instant motion *in limine*, seeking a ruling that eleven particular emails are relevant and admissible at trial (NYSCEF Docs 153-164), and seeking a ruling that a deposition transcript errata sheet (the "Errata Sheet") of Defendant's witness, Hugo Ruiz, who was assistant property manager for the Premises, is not admissible at trial. Defendant opposes the Plaintiff's motion only to the extent of objecting to the admission of one of the eleven emails and opposing the exclusion of the Errata Sheet. Defendant also cross-moves for an order *in limine* precluding a May 4, 2015, email chain (the "Olshever Emails") from admission at trial.

Discussion

A motion *in limine* may be used as a means to exclude or admit evidence before trial (*see Woodie v Azteca Intl. Corp.*, 60 AD3d 535, 536 [1st Dept 2009]). However, in the present instance, the relevance and admissibility of several of the items the parties speak of now has been, as a practical matter, already resolved by virtue of the disposition remaining in the wake of the court's summary judgment decision. For instance, the email dated March 31, 2015, at 6:14 p.m., from John R. Ramsen, sent to Michael S. Cole (Defendant's Bates No. LB000038) (NYSCEF Doc 153), which Defendant objects to in its cross-motion *in limine*, does not contain any information relevant to the second counterclaim – the only counterclaim left to be tried – and

is, therefore, irrelevant and inadmissible at trial. The Olshever Emails (NYSCEF Doc 183), which Defendant objects to, are also not relevant to the second counterclaim and are, therefore, also inadmissible at trial.

Defendant does not object to the admissibility of the remaining ten of the eleven emails Plaintiff seeks to admit into evidence (NYSCEF Docs 154-164). Therefore, those items are deemed admissible at trial.

Lastly, Plaintiff seeks to strike the Errata Sheet. CPLR 3116 (a) provides relevant guidance as follows:

Signing. The deposition shall be submitted to the witness for examination and shall be read to or by him or her, and any changes in form or substance which the witness desires to make shall be entered at the end of the deposition with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness before any officer authorized to administer an oath. If the witness fails to sign and return the deposition within sixty days, it may be used as fully as though signed. No changes to the transcript may be made by the witness more than sixty days after submission to the witness for examination.

The Ruiz deposition was held on October 24, 2017, and he signed the Errata Sheet on December 28, 2017. Plaintiff asserts that this was untimely because the signing took place more than sixty days after the deposition. Nevertheless, Defendant's counsel has affirmed that she did not receive a copy of the deposition transcript until November 2, 2017, as evidenced by the transcript transmittal letter of the same date from Plaintiff's counsel (NYSCEF Doc 178). Plaintiff's counsel does not deny that the transcript was transmitted to Defendant's counsel on November 2, 2017. Therefore, the court finds that the Errata Sheet was timely signed within sixty days of Plaintiff's transmission of the deposition transcript to Defendant's counsel.

But, Plaintiff asserts another, separate, ground for the striking of the Errata Sheet; to wit, that it seeks to change the substance of Mr. Ruiz' actual deposition testimony, a usage that is

improper as a post-deposition way of extricating one's self from clear and unambiguous live testimony (*see, e.g., Torres v Bd. of Educ.* (137 AD3d 1256 [2d Dept 2016]). The court has compared the Errata Sheet to the recorded testimony and is prepared to analyze same hereinbelow. But first, it is important to note that Mr. Ruiz' deposition was defended by not one; but two, attorneys from Defendant's legal team (*see* NYSCEF Doc 131 at 2). Yet – at no time did either of those two attorneys object to the form of any of the questions cited in the Errata Sheet (NYSCEF Doc 164) on the grounds of confusion, or language difficulty on Mr. Ruiz' part, or on any other grounds. Moreover, no interpreter was requested by those attorneys, and Mr. Ruiz' answers, as recorded, were completely responsive to the questions, and with no complaint whatsoever from him as to his comprehension. Nor did Mr. Ruiz, either on his own or at the request of either of Defendant's two attorneys, ask Plaintiff's counsel for an opportunity to go back on the record for purposes of any clarification. In fact, at the outset of the deposition, Mr. Ruiz was asked by Plaintiff's counsel to let him know if he does not understand any question (NYSCEF Doc 131 at 2). With that preface, the following observations are made by this court, referencing a sampling of the items dealt with in the Errata Sheet:

Transcript Page 22, Line 23, contains a straight answer from Mr. Ruiz – “No” – to the question whether he saw certain “personal property or other materials” (NYSCEF Doc 131). The Errata Sheet (NYSCEF Doc 164) seeks to constrict that answer to “fixtures” only.

Transcript Page 22, Line 25, contains a straight answer from Mr. Ruiz – “Completely clean” – to the question whether the Premises in June 2015 [the month after Defendant's vacatur from the Premises] was “completely clean.” The Errata Sheet seeks to constrict that answer to “fixtures” only.

Transcript Page 25, Line 19, contains a straight answer from Mr. Ruiz – “It was outside the premises” – to the question of how the compressor was installed. The Errata Sheet seeks to inject equivocation into Mr. Ruiz' straight answer by adding qualifiers like “I believe” and “I am not sure.” The same is true at Transcript Page 25, Line 23, where Mr. Ruiz testifies that the compressor was attached to the roof by “Screw.” The Errata Sheet injects equivocation by adding the qualifier “I'm guessing.”

Such injections of equivocation and uncertainty permeate the Errata Sheet (*see* NYSCEF Doc 164 at 3 [“I am not sure,” “I do not know,” “I’m guessing”], 4 [“I thought it might have been,” “I thought the compressor might have been,” “I am guessing”], 5 [“I am guessing”]). In each of those instances, Mr. Ruiz’ actual answers were direct and unequivocal (*see*, Transcript [NYSCEF Doc 131] at 26-27). Indeed, when Mr. Ruiz found it appropriate to qualify his answers to certain questions, or to indicate directly that he did not see something asked about, he was perfectly able to do so on the record (*see* NYSCEF Doc 131 at 26 [“I didn’t see the installation”], 27 [“No, I did not,” “I didn’t see the installation,” “I don’t know how”]).

Defendant submits an affidavit from Mr. Ruiz (NYSCEF Doc 172) which attests that English is his second language and that he is “sometimes confused by or misunderstand[s] the English language” (*id.* ¶¶ 4, 7). While it is true that a genuine need by a witness to make substantive changes to a deposition transcript can be accommodated by the law in appropriate circumstances (*see Cillo v Resjefal Corp.*, 295 AD2d 257 [1st Dept 2002]), this court’s review of the transcript – and the direct and unambiguous responsive answers provided by the witness – do not lead this court to the conclusion that amendment of the transcript is the appropriate avenue in this particular circumstance, especially since, as noted above, neither of Defendant’s two attorneys objected at deposition, or moved to strike, or asked for an interpreter, or asked for an on-the-record-opportunity to allow the witness to correct the record. Rather, the appropriate avenue at this post-deposition stage for Defendant to offer Mr. Ruiz’ accurate observations is to explore them further during examination at trial and to allow Mr. Ruiz to explain to the trier of fact why his actual observations might in any way diverge from the literal answers he testified to at deposition.

For this reason, Plaintiff’s motion *in limine* to strike the Errata Sheet is granted.

Accordingly, it is

ORDERED that Plaintiff's motion *in limine* is granted to the extent that the emails identified as exhibits B through L to its motion (NYSCEF Docs 154-164) are deemed admissible at trial; and to the extent that the deposition transcript errata sheet of witness Hugo Ruiz is stricken, without prejudice to Defendant's right to examine said witness at trial with regard to his accurate observations and his deposition testimony; and it is further

ORDERED that Defendant's cross-motion *in limine* to exclude the Olshever Emails is granted; and it is further

ORDERED that a status conference will be held in this matter via Microsoft Teams on March 31, 2021 at 2:00 p.m.

This will constitute the decision and order of the court.

ENTER:



| | | | | | |
|-----------------------|---|---------------------------------|---|------------------------------------|--|
| <u>3/10/2021</u> | | | | <u>LOUIS L. NOCK, J.S.C.</u> | |
| | DATE | | | | |
| CHECK ONE: | <input type="checkbox"/> CASE DISPOSED | <input type="checkbox"/> DENIED | <input checked="" type="checkbox"/> NON-FINAL DISPOSITION | <input type="checkbox"/> OTHER | |
| APPLICATION: | <input type="checkbox"/> GRANTED | | <input checked="" type="checkbox"/> GRANTED IN PART | | |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> SETTLE ORDER | | <input type="checkbox"/> SUBMIT ORDER | | |
| | <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN | | <input type="checkbox"/> FIDUCIARY APPOINTMENT | <input type="checkbox"/> REFERENCE | |