

<b>Tabor v 148 Duane LLC</b>
2021 NY Slip Op 31360(U)
April 23, 2021
Supreme Court, New York County
Docket Number: 156655/2018
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12

Justice

-----X

TIMOTHY TABOR and AKIKO TABOR,

Plaintiffs,

- v -

148 DUANE LLC,

Defendant.

-----X

INDEX NO. 156655/2018

MOTION DATE

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 196-217, 223, 225-229

were read on this motion for entry of judgment on arrears and other relief .

By order to show cause, plaintiffs seek an order (1) awarding them a money judgment for defendant's breach of the parties' so-ordered temporary relocation agreement dated August 1, 2019, (2) imposing a \$100 per diem fine for each day defendant fails to pay plaintiffs' monthly rent, (3) granting them leave to amend their complaint, and (4) compelling defendant to respond to outstanding discovery demands and staying discovery. Defendant opposes.

I. PERTINENT BACKGROUND

By first amended complaint dated May 29, 2020, plaintiffs seek a judgment declaring that defendant has breached the warranty of habitability and the covenant of quiet enjoyment, and that defendant has constructively evicted them from their apartment. They also seek money damages for defendant's breach of the warranty of habitability and breach of the lease, and an award of attorney fees. (NYSCEF 206).

In the agreement, as pertinent here, plaintiffs agreed to relocate from their apartment for 12 months, so that defendant could make it habitable. During that period, defendant agreed to

pay 100 percent of plaintiffs' moving costs, storage costs, brokerage commission, and up to \$25,000 a month for comparable housing. If plaintiffs' relocation extended beyond the 12-month period, defendant agreed to pay a \$500 per diem penalty. Defendant also agreed to pay plaintiffs' and the relocation landlord's brokerage commissions, and if plaintiffs hired a broker, they agreed to choose "Halstead or Brown, Harris, Stevens." The agreement also provides that in the event of noncompliance, plaintiffs may seek other remedies in addition to the \$500 per diem penalty. Defendant likewise expressly reserved its right to raise counterclaims and defenses. (NYSCEF 198).

By affidavit dated February 10, 2021, plaintiff Timothy Tabor states that defendant paid only half of the broker's fee for their temporary apartment and repeatedly paid the rent late. He maintains that he and his wife, plaintiff Akiko Tabor, did not retain a broker, and that the only broker used was that of the relocation landlord, as reflected on two New York State broker disclosure forms, dated May 15, 2019 and August 17, 2019. (NYSCEF 203). He also asserts that defendant failed to pay plaintiffs' rent from September 2020 to the present, forcing them to pay it themselves. He maintains their entitlement to a money judgment of \$157,493.56, made up of \$13,000 for the unpaid brokerage fee, \$67,993.56 for unpaid rent, and \$76,500 in per diem penalties. He also seeks an order requiring defendant to pay monthly rent by the fifth day of each month, and for each day defendant fails to make such payment, the imposition of a \$100 per diem penalty. (NYSCEF 197).

## II. CONTENTIONS

Plaintiffs contend that they are entitled to a money judgment for defendant's failure to comply with the agreement and seek leave to amend their complaint, annexing a proposed verified second amended complaint, in which they advance a new cause of action for breach of

the agreement. (NYSCEF 200). As the allegations pertaining to the breach of the agreement occurred after the filing of the amended complaint, plaintiffs maintain that leave to amend should be granted, and as discovery remains ongoing, they deny that defendant suffers any prejudice from the amendment.

Plaintiffs also seek an order compelling defendant to produce outstanding discovery, referencing their demand dated August 29, 2018, by which they sought, among other things:

10. Any and all communications, notes, reports, sketches, correspondence, memos, letters, transcriptions of phone messages, phone messages, emails or other communications between or among any of Defendant's agents concerning renovations and/or repairs, either already performed, in progress, or to be performed, affecting any portion of the common areas of the Building.

11. Any and all communications, notes, reports, sketches, correspondence, memos, letters, transcriptions of phone messages, phone messages, emails or other communications between or among any of Defendant's agents and any other person concerning renovations and/or repairs, either already performed, in progress, or contemplated to be performed, affecting any portion of the common areas of the Building.

(NYSCEF 208).

According to plaintiffs, defendant failed to produce contracts or communications with any contractors involved in renovating and/or repairing the building, communications among defendant's employees and principals regarding payment issues, services rendered at the building, and work stoppages, proofs of payments for contractors, construction progress or status reports, budgets, or any condominium offering plan and amendments. Plaintiffs contend that they have discovered some of these documents in the course of another action, *Lark Duane LLC v Kent Swig, et al.*, pending in this court under index number 652466/2020, including an "Owners Status Report" and a construction budget for the property. They observe that the petitioner in *Lark* alleges the existence of progress reports concerning the project, but these were not produced in this action.

One such document recovered from the *Lark* action, a May 11, 2020 progress report directed to defendant, reflects a discussion about plaintiffs' relocation and a plan to have plaintiffs suspend/cancel their lease, allowing defendant to file a condominium plan as a "vacant" building. They also cite a reference in the progress report to a construction manager, whose communications have not been produced. (NYSCEF 211). Plaintiffs contend that the construction budget obtained from the *Lark* action reflects incomplete payments to contractors working on the building. (NYSCEF 212). In light of defendant's failure to produce responsive documents, plaintiffs also seek an adjournment of defendant's deposition. (NYSCEF 204).

Defendant does not oppose plaintiffs' motion to the extent that they seek leave to amend their complaint. However, if plaintiffs are granted leave to amend, defendant seeks an extension of time for further discovery related to plaintiffs' amendments. In light of the amendments, defendant argues that awarding a money judgment is, in essence, summary judgment on their amended complaint, for which issue has not been joined, and thus, such an award is premature.

Plaintiffs' new claim, defendant argues, is a breach of contract claim for which it has the right to raise defenses, including that its business is struggling due to the COVID-19 pandemic. It submits the affidavit of its managing agent's senior vice president dated August 31, 2020, in which he states that COVID-19 has delayed work on the building (NYSCEF 226), and the affidavit of defendant's member dated March 8, 2021, in which he states that the COVID-19 pandemic has delayed construction and put defendant under financial stress, but that defendant would be able to meet its financial obligations to plaintiffs by April 30, 2021 (NYSCEF 227). Defendant denies defaulting on its discovery obligations and contends that it has objected to many of plaintiffs' discovery demands, and moreover, it argues that in light of the amended complaint, an order compelling production of documents is premature. Defendant denies that

there is a basis for per diem penalties beyond those outlined in the stipulation, especially as plaintiffs do not allege that they were evicted or threatened with eviction based on rent due for the relocation apartment. (NYSCEF 225).

In reply, plaintiffs observe that defendant does not dispute plaintiffs' entitlement to any relief, except for the award of a money judgment. They argue that the agreement is clear in requiring defendant to pay rent and per diem penalties, and given the inequities of their relocation and the undisputed breach of the so-ordered agreement, plaintiffs maintain entitlement to a money judgment, which they now contend amounts to \$192,548.32 to reflect additional unpaid rent and per diem penalties. As defendant does not dispute its obligation to pay rent, not imposing a money judgment would cause plaintiffs to unfairly shoulder the costs of rent every month. The COVID-19 pandemic, plaintiffs contend, does not preclude the award of a money judgment. (NYSCEF 228).

### III. ANALYSIS

A so-ordered stipulation is a binding contract between the parties, and it is to be construed in accordance with the parties' intent and contract principles, the court being unauthorized to imply terms that the parties themselves failed to include. (*City of New York v Quadrozzi*, 189 AD3d 1342, 1344 [2d Dept 2020]). While the agreement provides for the payment of rent, broker's fee, and per diem penalties, it does not provide an enforcement mechanism in the event of noncompliance, such as the entering of a money judgment. Moreover, defendant reserved the right to raise counterclaims and defenses. Thus, absent an enforcement mechanism, plaintiffs are not entitled to a money judgment. (See e.g. *Aivaliotis v Cont'l Broker-Dealer Corp.*, 30 AD3d 446, 447-48 [2d Dept 2006] [declining to award judgment for noncompliance with so-ordered stipulation where stipulation did not provide for entry of

judgment]).

Pursuant to CPLR 3025(b), leave to amend pleadings shall be freely given where “the amendment is not patently lacking in merit” and the nonmoving party suffers no prejudice.

(*Davis v S. Nassau Communities Hosp.*, 26 NY3d 563, 580 [2015], quoting *Pink v Ricci*, 100 AD3d 1446 [4th Dept 2012]). Here, leave to amend is warranted, especially absent opposition thereto, and in any event, the proposed amendments are not without merit.

Pursuant to CPLR 3101(a), “[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action ...” What is “material and necessary” is generally left to the court’s sound discretion and may include “any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity.” (*Andon ex rel. Andon v 302-304 Mott St. Assocs.*, 94 NY2d 740, 746 [2000], quoting *Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 406 [1968]). A party may seek an order compelling compliance or a response to any request, notice, interrogatory, demand, question, or order under CPLR article 31. (CPLR 3124).

As this action concerns renovations and repairs to the premises, or lack thereof, documents and communications concerning them are discoverable. While defendant disputes defaulting on its discovery obligations and claims to have objected to plaintiffs’ demands, it neither specifies those objections nor offers substantive argument in opposition. That plaintiffs are granted leave to amend their complaint does not relieve defendant of its obligation to produce documents responsive to their demands, especially as the demands were made before the instant motion and pertain to the claims in the original and first amended complaints.

Given the foregoing, an adjournment of defendant’s deposition is warranted.

Accordingly, it is hereby

ORDERED, that plaintiffs' application for a money judgment is denied; it is further

ORDERED, that plaintiffs' motion to amend their complaint is granted; it is further

ORDERED, that the second amended verified complaint, in the form annexed to the motion papers (NYSCEF 200), shall be deemed served upon service of a copy of this order with notice of entry upon all parties who have appeared in the action; it is further

ORDERED, that plaintiffs' motion to compel is granted to the extent of directing defendant to produce, within 60 days of the date of this order, all documents responsive to demands 10 and 11 of their August 29, 2018 demands; and it is further

ORDERED, that the parties either enter into a stipulation encompassing their compliance conference and a new date for defendant's deposition on or before July 14, 2021, or appear for the conference in room 341, 60 Centre Street, New York, New York, on July 14, 2021 at 2:15 pm or virtually if necessary.

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BARBARA JAFFE, J.S.C.

4/23/2021  
DATE

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE