

Faller v Grant

2021 NY Slip Op 32121(U)

October 26, 2021

Supreme Court, New York County

Docket Number: Index No. 155523/2020

Judge: John J. Kelley

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY **PART** **56M**

Justice

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MORLEY WAGNER FALLER and REBECCA ANN FALLER

Plaintiffs,

- v -

RONALD GRANT, as executor of the estate of INGE V.
VERSTANDIG, and IRA CHECKLA,

Defendants.

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INDEX NO. 155523/2020

MOTION DATE 08/16/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32

were read on this motion to/for DISCOVERY.

In this action for the return of a down payment made in connection with the purchase of shares in a residential cooperative housing corporation, and to recover damages for breach of contract, breach of fiduciary duty, and conversion, the plaintiffs move pursuant to CPLR 3124 to compel the defendants to respond to certain discovery demands. In the alternative, the defendants move pursuant to CPLR 3126 for the imposition of sanctions for the defendants' failure to comply with a prior discovery order or respond to outstanding discovery demands. The defendants oppose the motion. That branch of the motion seeking to compel disclosure is denied as academic, in light of the court's issuance of a compliance conference order directing the defendants to provide the subject discovery responses by a date certain. That branch of the motion seeking the imposition of sanctions is denied.

. In a May 6, 2021 preliminary conference order, this court directed the defendants to serve their responses to the plaintiff's first set of interrogatories and first set of document requests on or before May 24, 2021. According to the plaintiffs' attorney, after the defendants

failed to comply with the deadlines set forth in the preliminary conference order, and the defendants' responses to the plaintiffs' discovery demands were not forthcoming,

“[o]n May 25, 2021 and again on June 3, 2021, in good faith, Plaintiffs contacted Defendants' counsel to attempt to resolve this dispute without Court intervention. Plaintiffs' correspondence was met with radio silence. Copies of the May 25 and June 3 correspondence are attached as Exhibits I and J, respectively.”

The plaintiffs thereafter made the instant motion less than 45 days after this court issued that order, and only 25 days after the defendants' responses were due. In their motion, the plaintiffs seek to compel the defendants to respond to the plaintiffs' first set of interrogatories and first set of document requests, and to produce all responsive documents. Alternatively, the plaintiffs seek to impose sanctions upon the defendants, including the preclusion of the defendants' right to propound any discovery demands, the waiver all objections to the plaintiffs' interrogatories, and the striking of the defendants' answer.

While this motion was pending, this court conducted a compliance conference, resulting in the issuance of a compliance conference order dated July 14, 2021, in which the court directed the defendants to serve responses to plaintiffs' first set of interrogatories and first document request on or before August 18, 2021, fixed a deadline for the defendants' service of discovery requests, and set forth a schedule for depositions.

Inasmuch as the court, in its compliance conference order, has already granted the plaintiffs the relief that they sought pursuant to CPLR 3124, their request for relief under that statute must be denied as academic.

Moreover, the court concludes that there is no basis for the imposition of any sanctions upon the defendants.

Pursuant to the court rules adopted on February 10, 2021,

“[a]bsent exigent circumstances, prior to contacting the court regarding a disclosure dispute, counsel must first consult with one another in a good faith effort to resolve all disputes about disclosure. *Such consultation must take place by an in-person or telephonic conference. In the event that a discovery dispute cannot be resolved other than through motion practice, each such discovery motion shall be supported by an affidavit or affirmation from counsel attesting to*

counsel having conducted an in-person or telephonic conference, setting forth the date and time of such conference, persons participating, and the length of time of the conference”

(22 NYCRR 202.20-f[b] [emphasis added]). The affirmation of the plaintiffs’ attorney indicates that she only transmitted two letters to the defendants’ counsel by email, and did not consult with the defendants’ counsel by an in-person or telephonic conference, thus preventing her from attesting to such a consultation, as required by the court rule. Hence, the branch of the motion seeking the imposition of sanctions must be denied on that ground alone, as the plaintiffs did not establish that they satisfied a condition precedent to the submission of this motion.

In any event, CPLR 3126 authorizes the court to sanction only a party who “*refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed*” (*Kutner v Feiden, Dweck & Sladkus*, 223 AD2d 488, 489 [1st Dept 1998] [emphasis added]). A party’s failure to satisfy his or her discovery obligations, particularly after a series of court orders has been issued, “may constitute the dilatory and obstructive, and thus contumacious, conduct” (*Kutner v Feiden, Dweck & Sladkus*, 223 AD2d at 489; see *CDR Creances S.A. v Cohen*, 104 AD3d 17 [1st Dept 2012]; *Reidel v Ryder TRS, Inc.*, 13 AD3d 170 [1st Dept 2004]). The plaintiffs, however, failed to establish that the defendants’ conduct during the short course of discovery was willful, contumacious, or in bad faith (see *Lee v 13th St. Entertainment LLC*, 161 AD3d 631, 632 [1st Dept 2018]; *Palmenta v Columbia Univ.*, 266 AD2d 90, 91 [1st Dept 1999]). At the time that this motion was made, there was only one court order in effect that directed discovery. After the issuance of that preliminary conference order on May 6, 2021, the court, less than three months later, issued its compliance conference order. Even if the defendants did not timely comply with the one case-management order that had been issued by the court, their conduct did not constitute a “pattern of disobeying court orders and failing to comply with disclosure obligations” (*Amini v Arena Constr. Co., Inc.*, 110 AD3d 414, 415 [1st Dept 2013]; see *Palmenta v Columbia Univ.*, 266 AD2d at 91 [noncompliance with one discovery order is not willful and contumacious conduct]; see also *Brigham v Jaffe*, 189 AD3d

475, 475-476 [1st Dept 2020];- *Butler v Knights Collision Experts, Inc.*, 165 AD3d 406, 407 [1st Dept 2018]; *Figueroa v City of New York*, 129 AD3d 596, 597 [1st Dept 2015] [party's failure to comply with three discovery orders was not willful and contumacious where that party evinced willingness to provide outstanding discovery]).

Accordingly, it is

ORDERED that the plaintiffs' motion is denied.

This constitutes the Decision and Order of the court.

10/26/2021
DATE


JOHN J. KEENEY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: