

AIG Prop. Cas. Co. v ERREA NY LLC
2021 NY Slip Op 32722(U)
December 20, 2021
Supreme Court, New York County
Docket Number: Index No. 159810/2020
Judge: David Benjamin Cohen
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. DAVID B. COHEN **PART** **58**

Justice

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INDEX NO. 159810/2020

AIG PROPERTY CASUALTY COMPANY,

Plaintiff,

MOTION SEQ. NO. 002

- v -

ERREA NY LLC, JOHN DOE, JANE ROE, BEATRIZ
QUINONES, and L&J APPLIANCE SERVICES INC.,

Defendants,

DECISION + ORDER ON MOTION

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ERREA NY LLC,

Def./Third-Party Plaintiff,

Third-Party
Index No. 595689/2021

-against-

L&J APPLIANCE SERVICES INC., SIRIUS LLC, and
ANSONIA CONDOMINIUM,

Third-Party Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 39, 40, 41, 42, 43, 44, 45, 46

were read on this motion to/for CONTEMPT.

In this property damage/subrogation action, plaintiff AIG Property Casualty Company moves for an order holding nonparty Sirius Realty in contempt for failing to comply with a subpoena duces tecum. After consideration of plaintiff's contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

This action was commenced by plaintiff against defendants Errea NY LLC ("Errea") and Beatriz Quinones ("Quinones") seeking reimbursement for a payment it made to its insureds,

Frederick Wise (“Wise”) and Symra Cohen (“Cohen”), in the sum of \$1,415,710.20 for water damage that they sustained to their apartment on June 18, 2019 due to the alleged negligence of Errea and Quinones. Doc. 41. Wise and Cohen resided in apartment 14-109 (“the Wise and Cohen Unit”) in a building located at 2109 Broadway, New York, New York (“the building”). Doc. 41. Errea owned apartment 15-127 in the building (“the Errea Unit”). Doc. 41. Errea leased the Errea Unit, which was located above the Wise and Cohen Unit, to Quinones and/or John Doe and/or Jane Roe, who resided there as of the date of the alleged incident. Doc. 41.

Plaintiff claims that there was a Subzero refrigerator in the Errea Unit, and that, on June 18, 2019, the said appliance broke as a result of the alleged negligence of defendants Errea, Quinones, and/or John Doe and/or Jane Roe. Doc. 41. This caused a large amount of water to infiltrate the Wise and Cohen Unit, causing the damages alleged. Doc. 41. Plaintiff reimbursed Wise and Cohen for their damages and then commenced this subrogation action against Errea, Quinones, John Doe, and Jane Roe to recover the money it paid out for the loss. Doc. 41.

Errea then commenced a third-party action against L&J Appliance Services, Inc., Sirius LLC, and Ansonia Condominium (“Ansonia”) seeking common-law indemnification and contribution from the said defendants. Doc. 33. Errea also claimed contractual indemnification and breach of contract for failure to procure insurance as against Ansonia. Doc. 33.

On April 9, 2021, plaintiff served Sirius Realty with a Subpoena Duces Tecum (“the subpoena”) seeking certain documentation including, among other things, documents that pertained to the renovation work and/or installation of the refrigerator in the Errea Unit. Docs. 43-44. The subpoena directed Sirius Realty to provide plaintiff with the documents and/or a response on or before June 2, 2021. Doc. 43. However, Sirius Realty failed to comply with the subpoena, providing neither a response nor any documents. Doc. 40.

On June 23, 2021, plaintiff's counsel sent correspondence to Sirius Realty in a good faith attempt have it comply with the subpoena. Doc. 45. However, this did not prompt Sirius Realty to respond to the subpoena.

Plaintiff now moves, in effect, pursuant to CPLR 2308(a) and Judiciary Law §753, for contempt against Sirius Realty which, it claims, was the building's property manager, due to its failure to comply with the subpoena. Docs. 39-40. In support of the motion, counsel for plaintiff argues that Errea and Quinines may have executed an alteration agreement pursuant to which they agreed to indemnify any unit owners who sustained property damage to their units as a result of the performance of renovation work in the building. Doc. 40. Further, counsel asserts that the refrigerator may have been installed during the renovation of the Errea Unit. Doc. 40.

LEGAL CONCLUSIONS

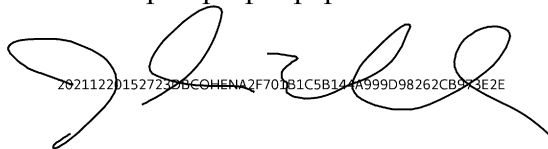
CPLR 2308(a) provides that the failure to comply with a subpoena issued by an officer of the court, such as an attorney, "shall be punishable as a contempt of court." However, an order of contempt cannot be issued here, since plaintiff has failed to establish, or even allege, that Sirius Realty's failure to comply with the subpoena has defeated, impaired, impeded or prejudiced its right to obtain information about the renovation in the Errea Unit (*cf.*, *Giardina v James*, 2020 NY Slip Op 34126[U], *2-4 [Sup Ct, NY County 2020] citing Judiciary Law § 753 [a]; *Farkas v. Farkas*, 209 AD2d 316 [1st Dept 1994]; *Great Neck Pennysaver v. Central Nassau Publications*, 65 A.D.2d 616 [2d Dept 1978]). Nor has plaintiff demonstrated that there is no alternative means of obtaining the alteration agreement and other documents subpoenaed, such as by demanding the same from Errea or Quinones during the course of routine discovery (*cf.*, *Giardina v James*, *supra*).

Additionally, although plaintiff claims that the motion seeks relief against nonparty Sirius Realty, the motion is devoid of any explanation of the relationship, if any, between that entity and third-party defendant Sirius LLC. Neither the complaint nor the third-party complaint alleges that Sirius LLC was the property manager for the building; this is only asserted in the affirmation of plaintiff's counsel, and not in an affidavit by one with personal knowledge. Doc. 40. This issue is further obscured by the fact that Sirius Realty was served with the subpoena at 2109 Broadway in Manhattan, the same address at which Sirius LLC is located. Docs. 33, 44. If Sirius Realty and Sirius LLC are in fact the same entity, then no subpoena may be served against it, since it is well settled that a subpoena may not be "used as a substitute for pretrial discovery" (*Law Firm of Ravi Batra, P.C. v Rabinowich*, 77 AD3d 532, 533 [1st Dept 2010]).

Accordingly, it is hereby:

ORDERED that the motion is denied with leave to renew upon proper papers.

12/20/2021
DATE


HON. DAVID B. COHEN, J.S.C.

CHECK ONE:

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CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

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DENIED

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NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

☐

OTHER

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REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: