Brady Risk Envtl., LLC v Alcus
2021 NY Slip Op 33381(U)
February 10, 2021
Supreme Court, Suffolk County
Docket Number: Index No.: 609153/2019
Judge: Denise F. Molia

PUBLISH

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. **DENISE F. MOLIA**
Justice

BRADY RISK ENVIRONMENTAL, LLC and ELIOT BLOOM, Individually,,

Plaintiffs,

-against-

JAMES ALCUS, ALCUS FUEL OIL and SONS, INC. and ENVIRONMENTAL SEWER and DRAIN, INC.,

Defendants.

CASE DISPOSED: NO
MOTION R/D: 11/21/2019
SUBMISSION DATE: 1/31/2020
MOTION SEQUENCE NO.: 004; MOTD

MOTION R/D: 12/6/2019
SUBMISSION DATE: 1/31/220
MOTION SEQUENCE NO.: 005; MD

MOTION RETURN DATE: 1/31/2020
SUBMISSION DATE: 1/31/2020
MOTION SEQUENCE NO.: 006; MD

MOTION RETURN DATE: 6/17/2020
SUBMISSION DATE: 7/10/2020
MOTION SEQUENCE NO.: 007; MD
008; MD.

ATTORNEY FOR PLAINTIFFS:
Raymond Negron, Esq.
234 North Country Road
Mount Sinai, New York 11766

ATTORNEY FOR DEFENDANTS
Scott Lockwood, Esq.
375 Commack Road, Suite 200
Deer Park, New York 11729

Upon the **E-file document list** numbered 52 to 155 read on the application of defendants for an order quashing subpoenas and staying the depositions of Eileen Alcus, Sean Alcus, John Callahan, James Citarella, and Citibank, compelling plaintiffs to provide copies of any subpoenas previously served, directing plaintiff to case and desist from

engaging in ex parte communications with defendants and imposing costs and attorney's fees (Motion Sequence 004), on the application by defendants for an order pursuant to CPLR 3126 striking the complaint or in the alternative compelling plaintiff to appear for a continued deposition and imposing costs and attorney's fees (Motion Sequence 005), on the application by defendants for an order pursuant to Judiciary Law 753 punishing plaintiffs for contempt and imposing costs and attorney's fees (Motion Sequence 006), on the application of plaintiffs for an order imposing sanctions against defendants for disobeying the Court's order dated June 17, 2019 (Motion Sequence 007), and on the application of defendants James Alcus and Alcus Fuel Oil and Sons, Inc. for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint (Motion Sequence 008); it is

ORDERED that the respective motions (Motion Sequences 004, 005, 006, 007, and 008) are consolidated for purposes of a determination herein; and it is further

ORDERED that the motion by defendants for an order quashing subpoenas, staying the depositions of Eileen Alcus, Sean Alcus, John Callahan, James Citarella, and Citibank, compelling plaintiffs to provide copies of any subpoenas previously served, directing plaintiff to case and desist from engaging in ex parte communications with defendants and imposing costs and attorney's fees is **GRANTED** only to the extent and for the reasons set forth herein; and it is further

ORDERED that the motion by defendants for an order pursuant to CPLR 3126 striking the complaint, or in the alternative, compelling plaintiff to appear for a continued deposition and imposing costs and attorney's fees is **DENIED** for the reasons set forth herein; and it is further

ORDERED that the motion by defendants for an order pursuant to Judiciary Law 753 punishing plaintiffs for contempt and imposing costs and attorney's fees is **DENIED** for the reasons set forth herein; and it is further

ORDERED that the motion by plaintiff for an order imposing sanctions against defendants for disobeying the Court's order dated June 17, 2019 is **DENIED** for the reasons set forth herein; and it is further

ORDERED that the motion by defendants James Alcus and Alcus Fuel Oil and Sons, Inc. for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint is **DENIED** for the reasons set forth herein.

Plaintiffs commenced this action for replevin, interference of contract, and defamation by the filing of a summons and verified complaint on May 13, 2019. Plaintiffs

allege in the verified complaint that a certain 2016 EX/TR Trailer with Vehicle Identification Number 5GLBE2223GC000015 ("the trailer") was purchased by plaintiff Brady Risk Environmental, LLC on June 6, 2016. Plaintiffs further allege that the trailer has been "locked up" at the property located at 238 Broadway, Amityville, New York (the "subject premises") since July of 2018 and defendants, who maintain their offices thereat, have denied plaintiffs access to the trailer. Plaintiffs provided a copy of the New York State certificate of title to the trailer to their application seeking an order granting them access to the subject premises in order to retrieve and remove the trailer. In their answer,[1] defendants admit they maintain offices at the subject premises and while defendants James Alcus and Alcus Fuel Oil and Sons, Inc. assert that they do not own the subject premises, no such argument has been raised herein by defendant Environmental Sewer and Drain, Inc. Further, defendants make no claim of ownership to the trailer. By Order dated June 17, 2019, this Court granted plaintiffs' motion for an order to retrieve and remove the trailer, without oppositon. Plaintiffs thereafter were denied access to the subject premises to retrieve and remove the trailer. Defendants then moved by order to show cause to vacate the June 17, 2019 Order and for a stay of its enforcement, which stay was granted on July 30, 2019. By order dated December 29, 2020, defendants' motion was denied and the stay was lifted. In the interim, a preliminary conference order was issued on October 23, 2019, setting forth the agreement between counsel for the exchange of discovery and depositions of the parties. Soon thereafter, extensive motion practice ensued. Specifically, defendants move to strike subpoenas served by plaintiffs upon non-parties to this action, seek to compel the continued deposition of plaintiff Eliot Bloom, and request summary judgment dismissing the complaint as to defendants James Alcus and Alcus Fuel Oil and Sons, Inc. Both parties seek sanctions and attorneys' fees for alleged violations of orders of this Court.

Addressing first the defendants' discovery applications, CPLR 3101(a) directs that there shall be "full disclosure of all matter material and necessary in the prosecution or defense of an action" (***Kooper v Kooper***, 74 AD3d 6, 10, 901 NYS2d 312 [2d Dept 2010]). The Court of Appeals has stated the words "material and necessary" are to be interpreted to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity" (***Allen v Crowell-Collier Publ. Co.***, 21 NY2d 403, 406, 288 NYS2d 449 [1968]). "If there is any possibility that the information is sought in good faith for possible use as evidence-in-chief or in rebuttal or for cross-examination, it should be considered 'evidence material ..... in the prosecution or defense'" (***Allen v Crowell-Collier Publ. Co.***, at 407, 288 NYS2d 449, *quoting* CPLR 3101). The mandatory disclosure with reference to medical records is found in CPLR 3121. Moreover, CPLR 3124 provides that a party seeking disclosure may move to compel compliance or a response "if a person fails to respond to or comply with any

[1]The Court notes that only defendant James Alcus verified the answer.

request, notice, interrogatory, demand, question or order." It is well-established that "[t]he supervision of disclosure and the setting of reasonable terms and conditions therefor rests within the sound discretion of the trial court and, absent an improvident exercise of that discretion, its determination will not be disturbed" (***Mattocks v White Motor Corp.***, 258 A.D.2d 628, 629, 685 N.Y.S.2d 764 [2d Dept 1999]; *see also* ***Auerbach v Klein***, 30 AD3d 451, 816 NYS2d 376 [2d Dept 2006]).

Striking a pleading or issuing a preclusion order for failure to provide discovery is a drastic remedy which will only be invoked where the non-movant's conduct was willful, deliberate or contumacious (*see* ***Zakhidov v Boulevard Tenants Corp*** , 96 AD3d 727, 945 NYS2d 756 [2d Dept2012]; ***Tinkleman v Hudson Valley Winery***, 80 A.D.2d 844 [2d Dept, 1981]). When a party fails to comply with a court order and frustrates the disclosure scheme set forth in the CPLR, it is well within the trial judge's discretion to dismiss the pleadings (***Kihl v Pfeffer***, 94 N.Y.2d 118 [1999]). "The general rule is that the court will impose a sanction commensurate with the particular disobedience it is designed to punish and go no further than that" (***Chowdhury v Hudson ValleyLimousine Serv, LLC,*** 162 AD3d 845, 81 NYS3d 63 [2d Dept 2018]). Indeed, it is always preferable to have actions decided on their merits (***Sieden v Copen***, 170 A.D.2d 262, 565 NYS2d 803 [1st Dept1991]).

Upon review of the subpoenas addressed to non-parties Eileen Alcus, Sean Alcus, John Callahan, James Citarella, and Citibank, it is evident that they do not comply with the notice requirements set forth in CPLR 3101 (a)(4) (*see* ***Kapon v Koch***, 23 NY3d 32, 988 NYS2d 559 [2014]). In addition, plaintiffs have not complied with the service requirements of CPLR 2303, the notice requirements of CPLR 3106, or CPLR 3111. Thus, defendants' motion to quash the subpoenas is granted. Being that the subpoenas are quashed and not valid, plaintiff need not provide copies of same to defendants. However, to the extent that Citibank provided records of defendants in response to the invalid subpoena served upon it, said documents produced by Citibank shall be forwarded to defendants' counsel forthwith. With regard to the ancillary relief requested, defendants have not provided a sufficient basis for same. In addition, defendants are not entitled to an award of attorneys' fees or costs, as same is not authorized by statute, court rule, or agreement between the parties (*see* ***Flemming v Barnwell Nursing Home***, 15 NY3d 375, 379, 912 NYS2d 504 [2010] *citing* ***Hooper Assoc. v AGS Computers,*** 74 NY2d 487, 491, 549 NYS2d 365 [1989]; *see also* ***Stein, LLC v Lawyers Title Ins. Co.,*** 100 AD3d 622, 953 NYS2d 303 [2d Dept 2012]; ***Kantrowitz v Allstate Indem. Co.,*** 48 AD3d 753, 853 NYS2d 151 [2d Dept 2008]) nor are they entitled to an award of sanctions (*see* 22 NYCRR 130-1.1 [a]; ***Berkowitz v 29 Woodmere Blvd. Owners' Inc.,*** 135 AD3d 798, 23 NYS3d 352 [2d Dept 2016]). In this regard, defendants have not demonstrated that plaintiffs have engaged in frivolous conduct (*see* 22 NYCRR 130-1.1 [a]).

With regard to the motion by defendants for an order striking plaintiffs' complaint pursuant to CPLR 3126, or in the alternative, for an order pursuant to CPLR compelling plaintiff Eliot Bloom to appear for a further deposition, same is denied, without prejudice to renewal. In connection with any motion relating to disclosure, the Uniform Rules for Trial Courts (22 NYCRR) 202.7 (a) provides that such a motion must be supported by an affirmation that counsel "has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion." The affirmation of good-faith "shall indicate the time, place, and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held" (Uniform Rules for Trial Courts [22 NYCRR] 202.7 [c]). Here, no affirmation of good faith was submitted by defendants' counsel in support of the motion pursuant to CPLR 3124 and 3126. Thus, the relief requested is unwarranted in the absence of compliance with 22 NYCRR 202.7 (*see* ***Bronstein v Charm City Housing, LLC,*** 175 AD3d 454, 106 NYS3d 331 [2d Dept 2019]). In any event, the Court notes that the preliminary conference stipulation and order, while so-ordered, is considered an agreement between counsel governed by general principles of contract law and is enforced according to its terms (*see* ***Daibes v Kahn,*** 116 AD3d 994, 983 NYS2d 898 [2d Dept 2014] and cases cited therein). Thus, defendants would only be entitled, in any event, to an order compelling plaintiff Eliot Bloom to appear for a further deposition to respond to material and relevant inquiries regarding this action. Indeed, relief pursuant to CPLR 3126 is premature in the absence of proof of a willful, deliberate, or contumacious refusal to comply with court-ordered discovery (*see* ***Kihl v Pfeffer***, 94 NY2d 118, 123, 700 NYS2d 87 [1999]; ***Household Finance Realty Corp. v Della Cioppa,*** 153 AD3d 908, 61NYS3d 259 [2d Dept 2017]). Here, the examinations before trial have not been court-ordered, and thus, defendants' request for relief pursuant to CPLR 3126 is denied, as premature.

Further, defendants are not entitled to an order pursuant to Judiciary Law 753 punishing plaintiffs for contempt and imposing costs and attorney's fees for violations of the order to show cause dated October 23, 2019. To punish a party for civil contempt, Judiciary Law §753 requires a finding, by clear and convincing evidence, that a lawful judicial order expressing an unequivocal mandate was disobeyed, that the alleged contemnor had knowledge of the order, and the rights of the moving party have been prejudiced (***El-Dehdan v El-Dehdan,*** 26 NY3d 19, 19 NYS3d 475 [2015]). Here, plaintiffs' counsel argues an interpretation of the order to show cause dated October 23, 2019 that cannot be considered unreasonable. Thus, defendants are not entitled to relief pursuant to Judiciary Law 753.

With respect to plaintiffs' motion for sanctions for defendants' alleged violation of the June 17, 2019 order, such relief also is not warranted. By order to show cause dated July 30, 2019, a stay of the enforcement of the June 17, 2019 order was granted. Moreover, defendants moved to vacate their default in opposing plaintiffs' application, which resulted

in the said June 17, 2019 order. At the time the order was sought to be enforced by plaintiffs no stay was in place. However, the subsequent stay issued by the Court in effect cured any alleged violation of same, inasmuch as the Court, by order to show cause dated July 30, 2019 found sufficient cause to stay the June 17, 2019 order. Plaintiffs' other purported requests for relief are insufficient and thus, denied.

Addressing next defendants' motion for partial summary judgment dismissing the complaint as against defendants James Alcus and Alcus Fuel Oil and Sons, Inc., it is well established that summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact *(see* ***Rotuba Extruders, Inc. v Ceppos***, 46 NY2d 223, 413 NYS2d 141 [1978]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Seidman v Indus. Recycling Props., Inc.,*** 52 AD3d 678, 861 NYS2d 692 [2d Dept 2010]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). To defeat a motion for summary judgment, a party opposing such motion must lay bare his proof in evidentiary form; conclusory allegations are insufficient to raise a triable issue of fact (*see* ***Friends of Animals, Inc. v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790; ***Burns v City of Poughkeepsie***, 293 AD2d 435, 739 NYS2d 458 [2d Dept 2002]). A motion for summary judgment should be denied where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility (*see* ***Chimbo v Bolivar***, *supra*; ***Benetatos v Comerford***, 78 AD3d 730, 911 NYS2d 155 [2d Dept 2010]).

To state a cause of action for replevin, a plaintiff must allege that it is lawfully entitled to possess certain property, and that the defendant has unlawfully withheld the property from plaintiff (*see* ***Khourey v Khourey***, 78 AD3d 903, 904, 912 NYS2dd 235 [2d Dept 2010]). A replevin action is possessory in nature and pursuant to CPLR 7102 © and (d) "on a motion for an order of seizure, 'a plaintiff must demonstrate a likelihood of success on its cause of action for replevin and the absence of a valid claim to its defense" (***Americredit Financial Services, Inc. v Decoteau,*** 103 AD3d 761, 762, 959 NYS2d 548 [2d Dept 2013]). "An order of seizure is not a final disposition of a matter but is a pendente lite order made in the context of a pending action where the movant has established, prima facie, a superior right to the chattel" (***Id.***).

By order dated December 29, 2020, this Court found that plaintiffs established their *prima facie* entitlement to seizure of the trailer. Defendants James Alcus and Alcus Fuel Oil and Sons, Inc. aver that they are not in possession of the trailer and thus no action for replevin can be stated against them. Defendants James Alcus and Alcus Fuel Oil and Sons, Inc. claim they are not in possession of the trailer based upon a sworn affidavit of plaintiff Eliot Bloom dated April 20, 2020, wherein plaintiff Bloom states that Eileen Alcus has had possession and still has possession of the trailer. That same affidavit, however, indicates that the trailer is located at 238 Broadway, Amityville, New York. No affidavit was submitted by defendants James Alcus and Alcus Fuel Oil and Sons, Inc. and no other documentary evidence provided to the Court to indicate whether they either own and/or control the subject premises where the trailer is located. Indeed, there are issues of fact regarding the identity of the person, persons, entity or entities who own and/or control the property located at 238 Broadway, Amityville, New York, where the trailer has been kept and "locked up" according to plaintiffs. In addition, defendants have not established that they do not have possession of the trailer based upon the affidavit of plaintiff Bloom. Thus, defendants have not established *prima facie* that they are not in possession of the trailer or that they do own and/or control the premises where the trailer is located. Because the defendant failed to meet its burden, the sufficiency of the plaintiff's opposing papers need not be considered (*see* ***Winegrad v New York University Medical Ctr.,*** 64 NY2d 851, 853, 487 NYS2d 316 [1985]; ***LaRosa v Town of Hempstead,*** 237 AD2d 579, 655 NYS2d 620 [2d Dept 1997]). Notwithstanding, plaintiffs have presented sufficient evidence of a question of fact regarding the ownership and/or control of the subject premises where the trailer is located and whether other parties other than Eileen Alcus have possession or control of the trailer. In addition, discovery is necessary to determine ownership and/or control of the subject premises and those who have possession and/or control of the trailer. Therefore, the motion by defendants James Alcus and Alcus Fuel Oil and Sons, Inc. for summary judgment dismissing the complaint as against them is denied.

Accordingly, the motion by defendants to quash the subpoenas directed to Eileen Alcus, Sean Alcus, John Callahan, James Citarella, and Citibank, which scheduled their depositions for October 24, 2019, is granted. The motion by defendants for an order pursuant to CPLR 3126 striking the complaint, or in the alternative, compelling plaintiff to appear for a continued deposition is denied. The motion by defendants for an order pursuant to Judiciary Law 753 punishing plaintiffs for contempt and imposing costs and attorney's fees is denied, and the motion by plaintiff for an order imposing sanctions against defendants for disobeying the Court's order dated June 17, 2019 is denied. The motion by defendants James Alcus and Alcus Fuel Oil and Sons, Inc. for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint is denied, without prejudice to renewal after the completion of discovery. All other requests for relief are denied as unwarranted due to a lack of a sufficient basis for same.

The foregoing constitutes the decision and Order of this Court.

Dated: February 10, 2021

HON. DENISE F. MOLIA A.J.S.C.