Hyman v Downtown Brooklyn Partnership
2022 NY Slip Op 30695(U)
February 25, 2022
Supreme Court, Kings County
Docket Number: Index No. 500254/12
Judge: Lawrence Knipel
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At an IAS Term, Part NJTRP of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 25th day of February, 2022.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

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RONALD HYMAN,

Plaintiff,

- against -

DOWNTOWN BROOKLYN PARTNERSHIP, THE CITY OF NEW YORK, BR BURGERS MERGER LLC, BR BURGERS LLC AND COHOFF, LLC,

Defendants.

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DECISION AND ORDER

Index No. 500254/12

Motion Sequence 18

The following e-filed papers read herein:	NYSCEF Doc Nos:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	381-397
Affirmation (Affidavit) in Opposition and Exhibits Annexed	422-425; 444-445

Defendant, The City of New York (City), moves for an order, pursuant to CPLR 2221, granting renewal of the plaintiff's motion and, upon renewal, vacating the rulings in this court's order dated March 8, 2021 (March 2021 Order), compelling the City to produce discovery enumerated in plaintiff's demand dated June 25, 2018 and denying entirely plaintiff's motion to strike the City's answer, or, in the alternative, extending the City's time to comply with the March 2021 Order pursuant to CPLR 2004.

Background and Procedural History

Plaintiff Ronald Hyman (plaintiff) commenced this action to recover for personal injuries allegedly sustained when he was caused to fall over a raised brick in front of the premises known as 1-9 Flatbush Avenue a/k/a 556 Fulton Street in Brooklyn, New York.

The incident occurred on October 17, 2011.

On or about February 10, 2012, plaintiff commenced this action against defendants SOUNDVIEW CHICKEN, INC. (hereinafter Soundview), KANSAS FRIED CHICKEN, INC., (hereinafter Kansas) and the City. On or about April 10, 2013, Soundview and Kansas served a Third-Party Summons & Verified Complaint on DOWNTOWN BROOKLYN PARTNERSHIP, INC. (hereinafter DBP). On or about April 30, 2013, plaintiff served DBP with a Supplemental Summons & Amended Verified Complaint. All defendants and third-party defendants timely interposed answers.

After initial discovery revealed the existence of additional potentially responsible parties, plaintiff commenced a separate suit against FB BURGERS LLC d/b/a FIVE GUYS BURGERS AND FRIES (hereinafter FB Burgers), BR BURGERS CORP., BR BURGERS MERGER LLC, BR BURGERS LLC and COHOFF, LLC under Kings County Supreme Court Index #503223/2014 (hereinafter Second Action). On or about July 9, 2014, FB Burgers served its Answer in the Second Action. Defendants BR BURGERS CORP., BR BURGERS MERGER LLC, BR BURGERS LLC and COHOFF, LLC (hereinafter collectively referred to as the Defaulting Defendants) failed to answer and, on August 14, 2014, a default judgment was granted against them. On the same date, the court consolidated the Second Action with the instant action under Index #500254/2012.

By order dated August 7, 2015, summary judgment was granted to FB Burgers, Soundview and Kansas.

On June 25, 2018, plaintiff served a Notice for Discovery & Inspection (June 2018

D&I) seeking, among other things, correspondence between the City and each of the following entities: Soundview, Kansas, FB Burgers, and the Defaulting Defendants.

Upon a motion filed by plaintiff to strike the City's answer for its failure to provide discovery, by short-form order dated March 13, 2019, the court directed the City to respond to plaintiff's June 2018 D&I "within 60 days" (see NYSCEF Doc No. 300). The City having failed to comply with said order, plaintiff moved again to strike the City's answer. By short form order dated October 23, 2019, the court declined to strike the City's answer but directed the City to "search for and provide documents as specifically requested in plaintiff's Notice for Discovery and Inspection dated 6/25/18 including but not limited to contracts, proposals, agreements, correspondence from 2005 to 2011 (DOA) and will provide records w/in 90 days" (NYSCEF Doc No. 334). The City, again, failed to comply. Plaintiff thereafter filed another motion to strike the City's answer. This motion resulted in the March 2021 Order which declined to strike the City's answer, but ordered the City to:

> "[N]o later than May 7, 2021, provide a further supplemental response to plaintiff's demand dated June 25, 2018. The further supplemental response shall be itemized according to the demand. Any objection that the City has previously asserted in response to the demand dated June 25, 2018, relating to privilege, overbreadth, burden or relevance, is overruled. If an itemized response indicates that documents responsive to the demand have not been found, the response shall include an affidavit (so-called Jackson) of a record keeper who avers to their position and experience as a record keeper, where searches were done, and where such documents are usually kept. The City is precluded from offering testimony or introducing evidence at trial unless the above is

timely complied with" (NYSCEF Doc Nos. 379, 385).

Now, with the instant motion, the City moves to renew and upon renewal, seeks, in essence, to vacate the March 2021 order. The City argues now, via a motion filed on May 7, 2021, that the discovery sought in plaintiff's June 2018 D&I would not further any cause of action against the City because the only remaining defendants in this case are the City and DBP. Thus, that only discovery pertaining to the City and DBP would be relevant. The City states that it failed to mention this argument previously because it did not anticipate, "at this stage in ligation" and "considering the remaining causes of action," that the court would order the City to turn over records that do not bear on the City's liability (see NYSCEF Doc No. 382, ¶¶ 15-16). According to the City, the discovery sought in paragraphs 4-10 of plaintiff's June 2018 D&I are not "material and necessary" in the prosecution of plaintiff's case against the City, or even DBP, and as such, the City contends that it should not be compelled to bear the undue burden of searching for and producing these records, to the extent such records exist.

If the court denies renewal and/or vacatur of the March 2021 Order, the City requests an extension of time to comply with the order. The City states that due to the broad and expansive parameters of the search as well as the general restraints faced by the Department of Transportation (DOT) during this "unprecedented" time, additional time is needed to comply with the court's directive.

Both plaintiff and DBP oppose the City's motion. They argue that the City's

motion to renew is defective since the City fails to present new facts or a change in law for the court to consider.

In addition, DBP emphasizes that the City's motion ignores the fact that the discovery at issue was requested in June of 2018 and was ordered to be produced on at least two prior occasions. In this regard, DBP contends that the City fails to explain what steps, if any, that it took to provide the discovery between June 2018 and March 2020, before the pandemic began. Further, DBP contends that the City is now precluded from offering any evidence having violated the March 2021 Order. DBP argues that the City should not be granted an extension to comply with the March 2021 Order since the City's failure to comply results from its own lack of diligence.

Plaintiff adds that the City has demonstrated a complete disregard of the court's orders, which is evident by the fact that counsel for the City emailed plaintiff's counsel a mere two days before the deadline imposed by the March 2021 Order to request information to begin the search. Plaintiff further argues that the City's assertion that it should only be required to produce discovery related to the City and DBP is absurd since (1) the City asks the court to pass on the relevance of discovery which it refuses to produce; and (2) communications that the City had with defendants who were granted summary judgment can still be relevant to many issues, such as notice to both the City and DBP, the nature of the defect, the involvement of co-defendant DBP, and the actions or inactions of both remaining defendants. Plaintiff stresses that the history of the City's failure to respond to discovery and the delay caused by its noncompliance is staggering.

Specifically, that this matter has been litigated since 2012, during which time plaintiff has been required to bring eight discovery motions against the City due to the City's refusal to comply with court orders.

Discussion

"A motion for leave to renew or reargue is addressed to the sound discretion of the Supreme Court" (*Central Mtge. Co. v McClelland*, 119 AD3d 885, 886 [2d Dept 2014] [citations omitted]). A motion for leave to renew must "be based upon new facts not offered on the prior motion that would change the prior determination" and must "contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221 [e] [2], [3]).

Here, as asserted by plaintiff and DBP, the City has not met the requirements for an application to renew since the City fails to proffer any new fact or change in law, let alone one that would change the court's prior determination. Thus, the City's motion to renew must be denied.

Even if this court were to grant renewal, the City's newly proffered argument that it should not be burdened with producing records that it has been ordered to produce multiple times because the discovery is irrelevant is bumptious and frivolous. First, the court has already passed on the issue of the records' relevance at least twice, having ordered the City to produce the records requested in plaintiff's June 2018 D&I on October 23, 2019 and March 8, 2021. Secondly, that the City and DBP are the only remaining defendants in this case is not a new circumstance—they have been the only defendants

since summary judgment was granted to FB Burgers, Soundview and Kansas on August 7, 2015, more than six years ago. Plaintiff's June 2018 D&I requesting documents concerning parties that are no longer active in the case was served nearly three years thereafter, in June 2018. To argue now and in the face of a court order that already decided the issue in 2019 that it should not be required to produce records concerning these parties on the basis of relevance strains the court's credulity. Moreover, the City's assertion that its communications with parties that have been adjudicated not liable is irrelevant for purposes of determining the City's own liability (or DBP's) is unsupported and without any basis in reason. Thus, upon renewal, the court would have adhered to its original decision.

Turning then to the City's request for alternative relief, an extension of time to comply with the March 2021 Order, the court denies the City's request. While the phrase "enough is enough" would be particularly apt here, had the City demonstrated its good-faith efforts to provide the discovery, such as a partial production or anything to indicate that it meaningfully endeavored to comply with the March 2021 Order, the court would consider an extension. However, the City provides no such evidence here. Instead, there is indication that the City waited until two days prior to the deadline to attempt to comply and then filed the instant motion on the day that compliance with the March 2021 Order was due. The City also fails to specify, by way of an affidavit or other evidence, what difficulties DOT is facing during this "unprecedented" time that is making it impossible for DOT to assist in providing discovery that has been ordered to be produced since 2019.

Based on the foregoing, the court can only conclude that the City's failure to comply with multiple court orders regarding the subject discovery was willful and contumacious (*see Crupi v Rashid*, 157 AD3d 858, 859 [2d Dept 2018]).

Accordingly, the City's motion seeking renewal of the March 8, 2021 Order is denied in its entirety.

This constitutes the decision and order of the court.

ENTER,

J. S. C.

HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE