

McDonough v 50 E. 96th St., LLC
2022 NY Slip Op 31361(U)
May 19, 2022
Supreme Court, Broome County
Docket Number: Index No. EFCA2020001541
Judge: Eugene D. Faughnan
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Broome County Courthouse, Binghamton, New York, on the 11th day of March, 2022, conducted by virtual oral argument

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT: COUNTY OF BROOME

KEVIN F. MCDONOUGH and PATRICIA ANN
KENNEDY,

Plaintiffs,

-vs.-

DECISION AND ORDER

Index No. EFCA2020001541

50 EAST 96TH STREET, LLC, SUCCESSOR IN
INTEREST TO THE RIGHTS OF PAYSON
ESTATES INC. and A. RUTH & SONS
REAL ESTATE, JOSH RUTH, LEE RUTH
and PHILLIP F. RUTH,

Defendants.

APPEARANCES

Counsel for Plaintiffs:

Kevin F. McDonough, Esq.
McDONOUGH & ARTZ, P.C.
49 Court Street, Suite 237
PO Box 1740
Binghamton, NY 13902-1740

Counsel for Defendants:

Adam Michael Levy, Esq.
ADAM MICHAEL LEVY, P.C.
11 Broadway, Suite 615
New York, NY 10004

EUGENE D. FAUGHNAN, J.S.C.

This matter is before the Court upon the motion for partial summary judgment filed by Defendants 50 East 96th Street, LLC, Successor in Interest to the Rights of Payson Estates Inc. (“Landlord”), A. Ruth & Sons Real Estate, Josh Ruth, Lee Ruth and Phillip F. Ruth (collectively, “Defendants”), with respect to their counterclaims against Plaintiffs, Kevin F. McDonough (“McDonough”) and Patricia Ann Kennedy (“Kennedy”). The parties appeared for oral argument, which was conducted virtually by Microsoft Teams on March 11, 2022. After due deliberation, this Decision and Order constitutes the Court’s determination with respect to the pending motion.¹

BACKGROUND FACTS

The underlying facts of this landlord-tenant dispute are more fully set forth in this Court’s Decision and Order dated September 24, 2021, and will only be highlighted as necessary in this Decision and Order. Kennedy and Landlord entered into a lease agreement in September 2016 for certain residential premises in New York City. McDonough, who is Kennedy’s father, signed a Guarantee of payment of the lease for Kennedy. There were three one-year extensions executed between Kennedy and Landlord, but McDonough but did not sign any Guarantee with respect to three subsequent one-year leases.

Kennedy fell behind on rent payments, and the landlord gave her a 14-day notice in December 2019. McDonough provided money to cover rent payments for November and December 2019 and January 2020. However, Defendants claim that Kennedy again fell into arrears on rent, and due to the late payments, Defendants advised Kennedy that they would not be renewing her tenancy at the end of the lease term on September 30, 2020.

Plaintiffs filed a Summons and Complaint on August 6, 2020 (even before the lease ended), and filed an Amended Complaint on March 2, 2021 listing six causes of action. Defendants filed an Answer to the Amended Complaint with Counterclaims on October 4, 2021. The Counterclaims against Kennedy were based on the alleged unpaid rents, damages and attorneys’ fees. Defendants also asserted a Counterclaim against McDonough under the Guarantee.

¹ All the papers filed in connection with the motion and opposition are included in the NYSCEF electronic case file, and have been considered by the Court.

In March 2021, Defendants made a motion to dismiss, which resulted in a lengthy Decision and Order dated September 24, 2021, wherein the Court granted dismissal of some of Plaintiffs' claims but denied the Defendants' motion as to other claims. In particular, the motion to dismiss was denied with respect to Plaintiffs' claims for Breach of Warranty of Habitability and Breach of Contract. The Decision and Order also granted dismissal of all causes of action set forth by McDonough as guarantor under the lease agreement due to lack of standing, but noted that McDonough would still be permitted to raise defenses as to the Guarantee, including a defense of lack of consideration.

Defendants' current motion seeks summary judgment in favor of the Landlord against McDonough, essentially contending that the Landlord has set forth evidence of the unpaid rents, repair costs, and that McDonough is liable as a guarantor for those payments. Plaintiffs have opposed the motion, and noted that discovery is not complete. In particular, Plaintiffs point out that, prior to Defendants' motion, Plaintiffs had sent out discovery demands but they have not received full and adequate responses.

LEGAL DISCUSSION AND ANALYSIS

When seeking summary judgment, "the movant must establish its prima facie entitlement to judgment as a matter of law by presenting competent evidence that demonstrates the absence of any material issue of fact" *Lacasse v. Sorbello*, 121 AD3d 1241, 1241 (3rd Dept 2014) *citing Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986) and *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985) (other citation omitted); *see Amedure v. Standard Furniture Co.*, 125 AD2d 170 (3rd Dept. 1987); *Bulger v. Tri-Town Agency, Inc.*, 148 AD2d 44 (3rd Dept. 1989), *app dismissed* 75 NY2d 808 (1990). Such evidence must be tendered in admissible form. *Zuckerman v. City of New York*, 49 NY2d 557 (1980); *Friends of Animals, Inc. v. Associated Fur Mfrs.*, 46 NY2d 1065, 1067-1068 (1979). Furthermore, CPLR 3212 (f) states that "should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just."

Plaintiffs oppose Defendants' motion for summary judgment, citing the aforementioned outstanding discovery requests. The procedural history of this case is relevant on the discovery issue. Following the September 24, 2021 Decision and Order, the Court held a discovery conference with the parties on October 28, 2021 and issued a Scheduling Order, directing paper discovery to be completed by January 31, 2022, and depositions by May 2, 2022. Plaintiffs served a Demand for Discovery and Inspection on December 3, 2021, well within the time deadline in the Scheduling Order. Prior to responding to the discovery requests, Defendants filed this motion for partial summary judgment on December 10, 2021. Subsequently, Defendants responded to some of the discovery demands, but Plaintiffs claim the responses are inadequate. Plaintiffs further assert that questions of fact with respect to the underlying Breach of Warranty of Habitability and Breach of Contract claims against Kennedy (which were not dismissed in the Court's prior Decision and Order) will necessarily be part of McDonough's defenses on the Guarantee issue, in addition to McDonough's defense of lack of consideration for the Guarantee.

Here, Plaintiffs served timely discovery demands, leaving plenty of time to obtain responses, and any follow up for resolution of disputes, prior to the expiration of paper discovery. However, Defendants essentially halted discovery by filing a summary judgment motion. While Defendants did provide responses on December 23, 2021, Defendants raised numerous objections to various demands, and also indicated that they would not respond further since discovery was stayed due to their pending motion (*see*, CPLR § 3214(b))

Defendants brought their summary judgment motion prior to the deadline for paper discovery, and before they had supplied responses to discovery demands they knew were outstanding. Plaintiffs' counsel even emailed Defendants' counsel on December 20, 2021 suggesting that the summary judgment motion be withdrawn without prejudice to re-filing after discovery was complete. Defendants' counsel did not reply to that suggestion, but instead, served responses on December 23, 2021, which Plaintiffs' claim was incomplete or inadequate. Having served timely discovery demands, Plaintiffs were entitled to responses prior to a summary judgment motion. "CPLR 3101 mandates full disclosure of all matter material and necessary in the prosecution or defense of an action.... The words, material and necessary, are to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial." *Harmon v. Diocese of Albany*, 2022 NY AppDiv LEXIS 2503, *3 (3rd Dept. 2022) [internal quotation marks and citations omitted].

Notably, Defendants never objected to the discovery requests, nor did they seek a conference with the Court to discuss any discovery disputes. Defendants also did not make any motion for a protective order under CPLR §3103. Even now, Defendants have not identified specific grounds that would support a refusal to supply responses to the discovery demands. On the contrary, Defendants claim that discovery is not needed on their summary judgment motion.

Defendants argue that lack of discovery, on its own, is not a basis to deny summary judgment. In essence, Defendants seek a determination that McDonough is liable under the Guarantee, without even looking into the merits of Kennedy's underlying claim, or McDonough's potential defenses including lack of consideration. In the Court's prior Decision and Order, McDonough's direct claims against Defendants were dismissed for lack of standing. However, the Court specifically noted that McDonough, as guarantor could assert defenses to the guarantee, and that a guarantor's liability is secondary to the default of the primary obligor in making the payments. It is dependent on the liability of the primary obligor, which liability on the counterclaims has not been established.

While it is true that in some instances discovery will not provide any additional relevant information, the Court is not persuaded that this is such a case. Plaintiffs are not seeking discovery just for the sake of delaying adjudication. Plaintiffs' discovery demands seek items such as: photographs and videos of the subject apartment both before and during Kennedy's tenancy; records pertaining to alleged scaffolding obstruction; records regarding repair work prior to, during and after Kennedy's tenancy; and any evidence regarding work performed by anyone to repair damages allegedly caused by Kennedy. These are reasonably related to the claim of Breach of Warranty of Habitability and Breach of Contract. Defendants' attempt to separate the underlying counterclaim from the Guarantee is not convincing. If Kennedy prevails on her claim against Defendants for Breach of Warranty of Habitability and/or Breach of Contract, then she might not owe any money to Defendants. In fact, she is seeking damages against Defendants for these alleged breaches. In that event, there would be no damages that McDonough would be liable for as a Guarantor. Moreover, McDonough has his own potential defenses against enforcement of the Guarantee. Since discovery was unilaterally shortened by Defendants' motion for summary judgment, the Court cannot speculate as to whether Plaintiffs may have made even more discovery demands relative to the Guarantee. However, there was still plenty of time left under the Court's scheduling Order, until Defendants' motion.

Plaintiffs have made a sufficient showing that the discovery requests are “reasonably calculated to yield material and necessary information.” *Harmon*, at *4 (citing *Catlyn & Derzee, Inc. v. Amedore Land Devs., LLC*, 166 Ad3d 1337, 1141 [3rd Dept. 2018]). They go to the issues of Warranty of Habitability and Breach of Contract. As such, the Court concludes that facts essential to justify opposition may exist but cannot be stated at this time due to Defendants’ failure to provide satisfactory responses to Plaintiffs’ demands, which justifies denial of Defendants’ motion for partial summary judgment.

In their opposition papers, Plaintiffs also requested costs, attorneys fees and sanctions. At this time, Plaintiffs’ request is denied without prejudice.

CONCLUSION

Based on the foregoing discussion, it is hereby

ORDERED, that Defendants’ motion for summary judgment is DENIED.

THIS CONSTITUTES THE DECISION AND ORDER OF THIS COURT.

ENTER:

Dated: May 19, 2022
Binghamton, New York


HON. EUGENE D. FAUGHNAN
Supreme Court Justice