SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE BLUTH** **PART** **14**

Justice

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JANET BARBIERE, ELLIOTT KROLL,

Plaintiffs,

- v -

175 WEST 12TH STREET CONDOMINIUM, CRAIG RAIA, ARLINE RUBIN, PETER BONNEY, SARAH MURRAY, ADELE BILDERSEE, DAVID ALANI, WILLIAM WEST, JONATHAN WEST, MARK PERLBINDER, MARK FREYBERG, THE FREYBERG LAW GROUP, CHARLES H. GREENTHAL MANAGEMENT

Defendants.

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INDEX NO. 653461/2019

MOTION DATE 05/31/2022

MOTION SEQ. NO. 006 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 200, 201, 211

were read on this motion to/for STRIKE PLEADINGS.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 202, 203, 204, 205, 206, 207, 208, 209, 210,

were read on this motion to/for DISCOVERY.

Motion Sequence Numbers 006 and 007 are consolidated for disposition. The motion (MS006) by plaintiffs to compel defendants 175 West 12th Street Condominium and Charles H. Greenthal Management to identify and present a witness pursuant to Rule 11-f, imposing sanctions on defendants and counsel due to spoliation and compelling defendants to provide a Jackson affidavit and/or perform a further search of documents by reason of spoliation is denied. The motion (MS007) to impose sanctions on defendants for intentional, willful and/or grossly negligent spoliation and to compel defendants to provide a Jackson affidavit and/or do another search for documents because the alleged spoliation is denied.

Background

Plaintiffs, attorneys representing themselves, bring this case against the condo board for the building in which they live, the individual board members, the attorney for the condo, his law firm, and the management company. They claim that they bought two apartments in the building, 18CD and 18B, with the intention to combine these units into one apartment. Plaintiffs assert numerous problems with certain actions (and inactions) taken by the condo board, including but not limited to issues with the renovation of their apartments, delays in construction, new windows, a grill and a fire pit. Plaintiffs contend that defendants acted in bad faith to deprive all unit owners and plaintiffs of their rights under the bylaws and violated their fiduciary duties. They complain defendants have not been transparent about other issues including the maintenance of the building's brick façade and cavity wall and have taken advantage of the fact that about 60 percent of the occupants are renters.

MS006

In this motion, plaintiffs contend they sought "11-f" witnesses on February 6, 2021. They claim that defendants agreed to provide a witness but no dates have been provided despite many emails with counsel for defendants.

With respect to spoliation, plaintiffs claim that defendants initially failed to produce all relevant documents and improperly claimed privilege. They insist they "remained concerned from their review of Defendants' 3 separate document productions that material, relevant documents had yet to be produced by Defendants" (NYSCEF Doc. No. 178 at 3). Plaintiffs detail that at certain depositions of defendants, these witnesses did not receive, did not recall, or comply with litigation hold notices and, consequently, their emails were not searched as required. Plaintiffs point to the depositions of defendants Rubin, Bildersee and Murray.

In opposition, defendants point out that plaintiffs' motion far exceeds this Court's page limits for discovery motions and argue that any discovery that arises from a deposition should be handled by a post-EBT demand rather than a sanctions motion. Defendants reiterate that they have made good faith efforts to fulfill their obligations under the CPLR. They point out they have provided over 15,000 pages of discovery and there are no outstanding documents that are relevant. Defendants argue that even if plaintiffs are right that they have not been provided every email from three of the nine Board members, they emphasize that the decisions of the Board are made by majority rule and so they have substantially complied with Court orders. Defendants insist that discovery, at this point, has reached the point where it amounts to harassment rather than legitimate areas to explore.

In reply, plaintiffs contend that defendants have failed to contest any of plaintiffs' factual arguments and ignored the Rule 11-f witness issue. They insist that three of the defendants' testimonies reveal that documents were deleted and therefore spoliations are appropriate.

The Court denies the branch of the motion that seeks sanctions arising out of spoliation. With respect to defendant Bildersee, the Court observes that this witness' deposition testimony reveals that she deleted emails from her Gmail account but there is no testimony that she deleted material and relevant emails (NYSCEF Doc. No. 181 at 178-79). Instead, it appears that plaintiffs want the Court to sanction Bildersee because she deleted emails (any emails) from her Gmail account. In other words, plaintiffs seek sanctions because this witness deleted some number of emails in the nearly three years this case has been pending. That this witness did not recall whether a hold notice was ever sent to her is also not a basis to find that sanctions are appropriate under these circumstances, especially because plaintiffs cannot point to any specific evidence about what emails they expect to exist but have not yet received.

Similarly, the deposition of defendant Rubin does not provide a basis to issue sanctions. She admits that she deletes emails so that she doesn't have more than a hundred "gmails" in her inbox (NYSCEF Doc. No. 182 at 24-25). And defendant Murray testified that she thought emails about the case were being saved elsewhere and so she deleted emails so that it did not clog up her computer (NYSCEF Doc. No. 183 at 27).

There is no doubt that, standing alone, a witness admitting that she has deleted emails is concerning. But to jump to plaintiff's conclusion that this somehow constitutes spoliation requires the Court to ignore the entire context of this case. Plaintiffs seek damages arising out of the conduct of the Condo Board. As defendants point out, the Board acts with majority rule and so discovery of every email from every Board member is not a basis for sanctions arising out of spoliation. This is not a situation where defendants have not produced anything or failed to produce documents about actions taken by the Board as a whole. Employing scorched-earth litigation tactics, plaintiffs now want sanctions against volunteer board members, non-attorneys, who cleaned out their inboxes in the normal course of their lives. The board members' actions are perfectly understandable, and, because there was a professional managing agent, that is even more of a reason why volunteer non-attorney board members would assume that the managing agent would keep a record of whatever was necessary and that they did not have to personally save every single personal email.

Because the Board acts as a whole, what matters are Board minutes, contracts signed by the Board and communications from the Board as a collective. Individual emails from individual Board members are unlikely to produce relevant documents. The Court does not conclude that individual Board members' emails are wholly irrelevant. Rather, the Court finds that these circumstances suggest that defendants have substantially complied with plaintiffs' discovery

requests. Certainly, if plaintiffs can point to something specific that they believe defendants deleted or have not produced, they can seek sanctions for spoliations. But, here, it seems that plaintiffs got certain witnesses to admit that they deleted emails from their personal accounts and now plaintiffs want sanctions regardless of whether the emails deleted were related to this case or whether they were the only copies of those emails.

The Court also observes that defendants are correct that given the number of defendants and the number of emails that defendants received (these appear to be their personal email accounts for the individual defendants), it is impossible to see the instant motion as anything other than an effort to harass defendants.

The Court also denies the branch of the motion that seeks to compel defendants to produce a Rule 11-f witness. The rule cited by plaintiffs in its moving papers (22 NYCRR 202.70-11-f) is a rule applicable to the Commercial Division of the Supreme Court. This case is not pending in the Commercial Division and so the Court declines to enforce a rule that is inapplicable.

MS007

In this motion, plaintiffs seek sanctions arising out of the deposition of defendant Jonathan West, a board member at the building. Plaintiffs contend that Mr. West testified that no one ever searched his records or the complete records of defendant Greenthal in connection with this case. They claim Mr. West was not told about a litigation hold and that his answer, along with the answer of defendant Greenthal should be stricken.

In opposition, defendants contend that despite Mr. West's testimony, they conducted an exhaustive search of Greenthal's database. They attach the affidavit of Mr. Ramon Reynoso (NYSCEF Doc. No. 207), who works in Greenthal's IT department, who explains how the search

for documents was conducted. Mr. Reynoso points out how he included search terms to find relevant documents and that he produced over 7,000 documents totaling more than 50,000 pages (*id*. at 2).

The Court did not consider plaintiffs' reply as they were not entitled to file one for this motion. The notice of motion set a return date only eight days after the motion was filed (CPLR 2214[b]).

The Court denies the motion. Mr. Reynoso detailed the efforts made to satisfy defendants' discovery demands and the Court is satisfied that defendants have substantially complied with plaintiffs' discovery demands. That compels the Court to deny plaintiffs' motion for sanctions.

Summary

Given plaintiffs' numerous claims in this action and the number of defendants in this case, it is likely that plaintiffs will be able to identify many, many areas where they believe defendants' responses are deficient. But the process of discovery is not intended to compel parties to conduct an indefinite search for documents in the hope that there might be something relevant. CPLR 3101(a) requires that there be full disclosure of all matter "material and necessary." Plaintiffs failed to meet their burden to show what exactly they are still seeking from defendants. They do not point to a specific document they expected to receive but has not yet been produced nor do they explain why the emails of the individual board members are so important.

The Court questions why plaintiffs did not simply make post-EBT demands instead of making motions immediately after these depositions. The fact is that this Court views sanctions as a drastic remedy and, here, plaintiffs did not show that any relevant evidence was actually

destroyed. Moreover, even if some of the emails from individual Board members were relevant and were destroyed, plaintiffs did not show that any of these emails constitute "key evidence" (*Delmur, Inc. v School Constr. Auth.*, 174 AD3d 784, 786, 106 NYS3d 146 [2d Dept 2019]). Plus, this Court has discretion to determine what, if any, sanction should be imposed (*id.*). Nothing on this record demonstrates that defendants intentionally (or even negligently) sought to get rid of relevant evidence.

Rather, it seems that plaintiffs, in their endless search for documents, found out that certain volunteer, non-attorney board members deleted emails from their personal accounts as was their routine practice. That is not enough for the Court to issue sanctions based on spoliation nor is it a basis to find that defendants must, yet again, conduct another search for documents. Plaintiffs have already received thousands of documents from the professional managing agent; without being able to point to a specific reason for more, this Court finds that defendants have, to date, complied enough.

Of course, plaintiffs' post-EBT demands (and defendants' responses) as well as future depositions might change the Court's view of defendants' conduct during discovery. But there is nothing here sufficient to impose sanctions.

Accordingly, it is hereby ORDERED that the motions (MS006) and (MS007) by plaintiffs for various discovery relief are denied.

The Court adjourns the conference to July 28, 2022 at 12 p.m.

By July 21, 2022, please upload one of the following:

1. A fully executed discovery stipulation. If you timely upload this, it will be reviewed; if the court finds it satisfactory, then it will be so-ordered and uploaded. There will be no need for you to attend the above-scheduled conference and we will set the date for the next conference. If it is not satisfactory (such as being a repeat of the prior conference order), then the conference may be held or adjourned, as the Court deems appropriate.

2. A stipulation of partial agreement. Parties must stipulate to what they can agree and leave blanks for what they cannot. Parties must then submit a written explanation as to the disagreed portions. The Court will either decide the issue based on your written explanations, hold the conference or approve what you have agreed and instruct you to make a motion as to the disputed matters.

3. A letter indicating why you cannot agree to anything and identifying the areas in dispute.

If nothing is timely submitted, then the conference will be adjourned. If you fail to timely submit one of the above for three consecutive conferences, your case will be dismissed

6/2/2022
DATE

ARLENE BLUTH, J.S.C.

CHECK ONE:		**CASE DISPOSED**		[X]	**NON-FINAL DISPOSITION**		
	[ ]	**GRANTED**	[X] **DENIED**	[ ]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**