

Bronstein v Charm City Hous., LLC
2022 NY Slip Op 32368(U)
July 19, 2022
Supreme Court, Kings County
Docket Number: Index No. 515432/15
Judge: Lawrence Knipel
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At an IAS Term, Part Comm 4 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 19th day of July, 2022.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

-----X

IRINA BRONSTEIN,

Plaintiff,

- against -

Index No. 515432/15

CHARM CITY HOUSING, LLC and AMOS WEINBERG,

Defendants.

-----X

The following e-filed papers read herein:

NYSCEF Doc. Nos.

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____

115-122 124-134 136-143

Opposing Affidavits (Affirmations) Annexed _____

125-134 137-143 146-147, 149

Reply Affidavits (Affirmations) Annexed _____

137-143

Upon the foregoing papers in this action to recover damages for breach of contract, unjust enrichment and fraudulent inducement regarding an investment agreement for the purchase and management of rental properties in Baltimore, Maryland, plaintiff Irina Bronstein (Bronstein) moves (in motion sequence [mot. seq.] nine) for an order restoring this case to the court's active calendar and scheduling a compliance conference.

Defendants Charm City Housing, LLC (Charm City) and Amos Weinberg (Weinberg) (collectively, defendants) cross-move (in mot. seq. 10) for an order, pursuant to CPLR 3126 (3), striking the amended complaint, with prejudice, for failure to comply

with court-ordered discovery.

Bronstein cross-moves (in mot. seq. 11) for an order: (1) imposing costs and sanctions on the defendants and/or their counsel, pursuant to 22 NYCRR § 130-1.1 (Part 130), and (2) granting her a protective order preventing defendants from obtaining her tax records, pursuant to CPLR 3103.

Background

In January 2018, Bronstein moved to consolidate this action with a related action against the same defendants. In March 2018, defendants cross-moved for an order, pursuant to CPLR 3126, to strike the complaint with prejudice based on Bronstein's failure to comply with an August 8, 2017 preliminary conference order and a December 15, 2017 compliance conference order, both of which directed Bronstein to respond to defendants' outstanding interrogatories and document requests.

By an April 27, 2018 order, the complaint was stricken and this action was dismissed because Bronstein "completely failed to respond to discovery ordered in [a] 12/15/17 order of this court and prior orders of this court." Defendants moved to re-settle the April 27, 2018 order to add "with prejudice," and Bronstein cross-moved to renew. By a June 15, 2018 order, this court granted defendants' motion and denied Bronstein's cross motion. Bronstein appealed from both the April 27, 2018 and June 15, 2018 orders.

On August 7, 2019, the Appellate Division, Second Department issued a decision and order in which it vacated the April 27, 2018 order because "the affirmation of good

faith submitted by the defendants' counsel in support of the cross motion for sanctions pursuant to CPLR 3126 failed to provide any detail of the claimed efforts to resolve the issues." The Second Department noted that "[w]hile the defendants' counsel asserted that he had conversations with the plaintiff's counsel, he did not identify the dates of such conversations or the name of the attorney with whom he conversed."

Bronstein's Motion to Restore

Consequently, based on the Second Department's decision and order, Bronstein now moves for an order restoring this action to the court's active calendar and scheduling a compliance conference. Bronstein's counsel asserts that Bronstein "stands ready to comply with Defendants' proper discovery demands and was only unable to do so because her prior counsel did not keep her apprised of the matters that were pending before this Court." Bronstein's counsel also affirms that Bronstein "will provide full responses to those demands that were properly made by Defendants and will prosecute this action in an expeditious manner."

***Defendants' Opposition and Cross Motion
To Strike Bronstein's Amended Complaint***

Defendants oppose the motion and cross-move to strike the amended complaint, with prejudice, based on Bronstein's "ongoing, willful and contumacious failure to comply with two court orders which direct that plaintiff serve responses to defendants' discovery demands." Defense counsel argues that "[d]espite the passage of over eight months since the Appellate Division's order dated August 7, 2019 reversed this Court's

April 27, 2018 order, plaintiff still remains in violation of the preliminary conference order and the compliance conference order.” Defense counsel asserts that “[p]laintiff has not served a single document as required by the discovery orders even though she was granted a reprieve by the Appellate Division on a procedural technicality.”

According to defense counsel, he made a good faith attempt to resolve the outstanding discovery dispute by sending Bronstein’s current counsel an April 15, 2020 letter requesting complete responses to defendants’ outstanding interrogatories and document requests. Bronstein’s counsel, in response, sent defense counsel an April 20, 2020 email advising him that:

“[O]ur office has been, and continues to be, closed in compliance with Governor Cuomo’s New York PAUSE executive order. I am currently working remotely out-of-state, however my ability to do so is limited.

“I will endeavor to provide responses as soon as possible, however, given the circumstances posed by the COVID-19 emergency, I cannot commit to a date certain by which that will be accomplished. As soon as it is safe and possible, I will be meeting with my client to obtain all appropriate documents in connection with the outstanding discovery demands and I will provide same as soon as it is feasible under the circumstances.

* * *

“With respect to the Plaintiff’s tax returns and documents, it was, and remains, the plaintiff’s position that tax returns are not discoverable absent a strong showing that the information is indispensable to the claim, cannot be obtained from other sources and that special circumstances exist that warrant the disclosure of tax returns, none of which are . . . present here.

...”

Defense counsel contends that Bronstein “agreed in the preliminary conference order and the compliance conference order to produce W-9s and tax returns as called for in defendants’ supplemental notice of discovery and inspection . . .” and, therefore, “plaintiff waived any objection to producing W-9s and the tax returns, which are highly relevant, material and necessary to defendants’ lack of standing defense.” Defendants contend that Bronstein’s unexplained failure to answer interrogatories and produce her W-9s and tax returns, as required by the preliminary conference and compliance conference orders, warrants an order striking the amended complaint. Defendants further contend that “there is no need for a compliance conference . . .” since “[p]laintiff remains in willful violation of the preliminary conference order and the compliance conference order.”

***Bronstein’s Opposition and Cross Motion
For Sanctions and a Protective Order***

Bronstein opposes defendants’ cross motion to strike the amended complaint and cross-moves for an order imposing Part 130 sanctions on defendants and/or their counsel and granting her a protective order, pursuant to CPLR 3103, preventing defendants from obtaining her tax records. Bronstein’s counsel affirms that “the motions before this Court are the direct result of Defendants or their counsel’s obstinate refusal to engage in good faith discussions concerning discovery in this matter.” Bronstein’s counsel asserts that defense counsel never responded to his April 20, 2020 email, and that dismissal of the

amended complaint is not warranted because defendants have not acted in good faith. Bronstein seeks an order imposing Part 130 sanctions on defendants and/or their counsel “[i]n light of the fact that Defendants’ counsel has categorically refused to engage . . . in any meaningful discussion concerning this action . . .” and has, instead, allegedly engaged in frivolous motion practice.

Bronstein’s counsel argues that the drastic remedy of striking the amended complaint is not warranted because “the Plaintiff has not willfully or contumaciously withheld information from the Defendants, and, to the contrary, has fully responded to the Defendants’ discovery demands with information that is in her possession.”

Bronstein’s counsel asserts that a protective order is warranted because defendants “are using the demand for tax records as an underhanded tactic to strong-arm the Plaintiff.” Bronstein’s counsel contends that defendants’ demands for tax records are palpably improper because tax records are not discoverable absent “special circumstances,” which are “patently missing here.” Bronstein’s counsel argues that defendants have failed to demonstrate special circumstances to warrant the production of tax records, and that “[p]laintiff’s financial well-being is simply not relevant to the dispute and therefore the requested discovery is clearly improper.”

Defendants’ Opposition

Defendants, in opposition, argue that Bronstein’s cross motion “should not be

entertained” because it “procedurally fails to comply with CPLR 2215 . . .” Alternatively, defendants argue that Bronstein’s cross motion for sanctions and a protective order “is nothing more than a transparent attempt to divert attention from [her] ongoing, willful and contumacious failure to comply with two court orders which direct that [she] serve responses to defendants’ discovery demands . . .”

Defendants argue that Bronstein’s failure to produce her tax records “has stymied defendants’ ability to establish their dispositive defense that [she] lacks standing to maintain this action.” Defendants explain that:

“The identity of the party or parties who made the investment and who received and declared the 8% interest payments at issue in this action is highly material and necessary to defendants’ sixth affirmative defense that plaintiff had and has no personal financial interest in any alleged investment in defendant Charm City and that she is not the party in whom any alleged investment was vested, paid, declared or owned. The checks produced by plaintiff to show her alleged investment in defendant Charm City are drawn on accounts in the names of ‘269 Meserole St. Realty LLC,’ ‘Vanguard Eastern LLC,’ ‘Lomdei Torah,’ ‘South Side Units LLC,’ ‘Adir Equity Holdings LLC,’ ‘Corporate Freight Inc.,’ ‘161 Maujer Inc.’ [and] ‘306 Jefferson Inc.’ Plaintiff has not produced any checks drawn on her account.”

Defense counsel explains that the investment agreement annexed to the complaint was not signed by Bronstein, and that the investment agreement required the name of the investor and the investor’s tax identification number. Defendants have thus requested the identity of each party who reported any of the 8% interest payments on their federal or state income tax returns and copies of the W-9s relating to those interest payments. Defense

counsel asserts that defendants' outstanding discovery requests for all W-9s and tax records which reflect the identity of the party or parties who received and declared the 8% interest payments are relevant and necessary to verify that Bronstein was an actual investor in Charm City. Defense counsel contends that such information is not available from other sources.

Discussion

This court's April 27, 2018 order striking the amended complaint, pursuant to CPLR 3126, was vacated on appeal in August 2019 because the Second Department held that defense counsel's affirmation of good faith was inadequate. Specifically, the Second Department held that defense counsel's affirmation "failed to provide any detail of the claimed efforts to resolve the issues[,]” including the dates of communications with Bronstein's counsel and "the name of the attorney with whom he conversed.” The Second Department did not, however, reach the merits of the CPLR 3126 motion.

Although this court's April 27, 2018 order was vacated, this court's finding in that order that Bronstein "completely failed to respond to discovery ordered in [a] 12/15/17 order of this court and prior orders of this court” remains true today. To date, Bronstein has failed to respond to defendants' outstanding discovery requests, despite numerous court orders. While this court is sympathetic to professional and personal hardships arising from the COVID-19 pandemic in 2020, Bronstein has failed to produce the requested documents and answer defendants' interrogatories since 2018. Given the

difficulties relating to the COVID-19 pandemic, and the change of Bronstein's counsel, this court will provide Bronstein with one last opportunity to produce the outstanding discovery, including any relevant tax records.

Defendants are entitled to documents reflecting the identity of all parties who reported 8% interest payments concerning an alleged investment in Charm City on their federal or state income tax returns and the W-9s relating to those interest payments, as requested in their supplemental notice of discovery and inspection. However, all portions of those documents other than the 8% interest payments reported and the identity of the investor may be redacted. Defendants have demonstrated that the production of such tax records are relevant and necessary here since defendants have challenged Bronstein's standing as an investor in Charm City. Thus, there are special circumstances that warrant the production of such records. Furthermore, Bronstein was ordered to produce such documents in the August 8, 2017 preliminary conference order and the December 15, 2017 compliance conference order and she failed to challenge defendants' discovery requests at that time. Accordingly, it is hereby

ORDERED that Bronstein's motion (in mot. seq. nine) is granted, the action is restored to the court's active calendar and a compliance conference will be scheduled, as specified herein; and it is further

ORDERED that defendants' cross motion (in mot. seq. 10) seeking to strike the amended complaint, with prejudice, is granted, as requested, unless Bronstein produces

all outstanding discovery within 60 days after service of this order with notice of entry thereof; and it is further

ORDERED that the parties shall resolve any remaining discovery issues by motion before the Centralized Compliance Part; and it is further

ORDERED that Bronstein's cross motion (in mot. seq. 11) for Part 130 sanctions and a protective order preventing defendants from obtaining her tax records is denied.

This constitutes the decision and order of the court.

E N T E R

J. S. C.

HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE