

Tabor v 148 Duane LLC

2023 NY Slip Op 33624(U)

October 16, 2023

Supreme Court, New York County

Docket Number: Index No. 156655/2018

Judge: Leslie A. Stroth

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LESLIE A. STROTH PART 12

Justice

-----X

TIMOTHY TABOR, AKIKO TABOR,
Plaintiff,

- v -

148 DUANE LLC,
Defendant.

INDEX NO. 156655/2018
MOTION DATE 06/13/2023,
06/13/2023
MOTION SEQ. NO. 015 016

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 015) 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 429, 430

were read on this motion to/for LIQUIDATE APPEAL BOND

The following e-filed documents, listed by NYSCEF document number (Motion 016) 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427

were read on this motion to/for QUASH SUBPOENA, FIX CONDITIONS

Plaintiffs Timothy Tabor and Akiko Tabor (plaintiffs or tenants) bring this action seeking declaratory judgment and injunctive relief. In their summons and complaint, plaintiffs allege that their landlord 148 Duane LLC (defendant or landlord) refused to provide them with, *inter alia*, shelter from the elements, elevator service, fire safety precautions, air conditioning, or adequate heat. Plaintiffs allege causes of action for breach of the warranty of habitability, breach of the covenant of quiet enjoyment, breach of contract, and attorneys' fees.

Plaintiffs move to liquidate an appeal bond and for the entry of a new judgment and order. Defendant opposes. Additionally, non-party Kawana Mills moves to quash a subpoena and/or for a protective order, which plaintiff opposes. The motions are consolidated for disposition.

I. Relevant Procedural History

This action has a lengthy procedural history. On August 1, 2019, on the record before Justice Barbara Jaffe, plaintiffs agreed to relocate from their apartment for one year for defendants to make renovations (temporary relocation agreement). *See* NYSCEF doc. no. 379. In the event the relocation exceeded a year due to defendant's failure to complete construction, the parties agreed to a per diem penalty of \$500.00 for every day that plaintiffs could not return to their unit after the one-year period. Defendant also agreed to pay \$25,000.00 per month for comparable housing, one hundred percent of plaintiff's moving costs, storage costs, and any brokerage commission. *Id.*

Plaintiffs moved for summary judgment on their breach of contract claim and for defendant's breach of the temporary relocation agreement,¹ seeking rent arrears, a brokerage commission, and per diem expenses due and owing. On September 1, 2021, Justice Jaffe granted plaintiff's motion, and the county clerk entered a judgment against defendant for \$197,633.30 on November 15, 2021 (the judgment). *See* NYSCEF doc. nos. 381, 380. Defendant filed a notice of appeal of the judgment on December 11, 2021. *See* NYSCEF doc. no. 370.

On February 10, 2022, plaintiffs moved for the entry of a new judgment due to defendant's alleged willful disobedience of the judgment entered in November 2021. Plaintiffs alleged that they remained out of possession due to defendant's delay in completing construction on the building, that they were obliged to enter a one-year renewal lease through September 2022 at a monthly rate of \$21,000.00, and that plaintiffs had only recovered \$4,056.29 of the \$193,607.01 owed (the total amount of the ongoing monthly rent differential and the money judgment previously entered).

¹ Plaintiffs amended their pleadings to include a cause of action for breach of the temporary relocation agreement. *See* NYSCEF doc. no. 200.

On May 9, 2022, Justice Jaffee granted plaintiffs' motion and directed plaintiffs to submit a proposed order providing for the vacatur of the prior judgment and reflecting the new full balance owed. *See* NYSCEF doc. no. 372. No proposed order was submitted until the filing of the instant motions. On August 18, 2022, defendants filed an appeal bond in the amount of \$237,160.00. *See* NYSCEF doc. no. 369. As of June 13, 2023, construction on plaintiffs' home has not yet been completed.

II. Motion to Liquidate Appeal Bond

Under motion sequence 015, plaintiffs seek to recoup the judgment amount and to enforce the temporary relocation agreement by moving to vacate the appeal bond dated August 19, 2022.

The appeal bond provides:

SURETEC INSURANCE COMPANY, duly licensed to transact business in the State of New York and having an office and principal place of business at 5555 Garden Grove Blvd, Suite 275, Westminster, CA, 92683, as Surety, does hereby, pursuant to the statute in such case made and provided, undertake that if the Judgment so appealed from, or any part of it, is affirmed, *or the appeal is dismissed*, the Appellant, 148 DUANE LLC, shall pay to the Plaintiffs, TIMOTHY TABOR and AKIKO TABOR, the sum directed to be paid by this Judgment plus interest and costs or the part of it as to which said Judgment is affirmed.

Provided however this bond is hereby fixed in the amount of TWO HUNDRED THIRTY SEVEN THOUSAND ONE HUNDRED SIXTY AND 00/100 (\$237,160.00) DOLLARS. NYSCEF doc. no. 368 (Emphasis added).

An appeal bond issued by a surety automatically stays the enforcement of a judgment, pending the appeal thereof. *See* CPLR 5519 (a) (2). A surety's "obligation upon its undertaking is defined solely by the language of the bond." *Tornatore v Cohen*, 185 AD3d 1394, 1396 [4th Dept 2020], quoting *Stapley v U.S. Cas. Co.*, 260 NY 323, 325 (1932) (citations omitted). A party may move the Court to liquidate the appeal bond to lift the stay. *See Agai v Liberty Mut. Agency Corp.*, 118 AD3d 830, 832 (2d Dept 2014); *Tornatore v Cohen*, 185 AD3d 1394 (4th Dept 2020). Further, pursuant to rule 1250.10 of the Appellate Division, First Department, an appeal that is not perfected within six months of the date of the notice of appeal is deemed dismissed.

Defendant partially opposes. Defendant does not object to the liquidation of the appeal bond and payment by the surety to satisfy the existing judgment, nor does defendant object to the release of any excess funds to satisfy its obligations for the per diem fee and accruing rent differential per the May 9, 2022 order. However, defendant maintains that plaintiff cannot both receive payment of the judgment from the appeal bond and request the relief of the entry of a new judgment, which it asserts is inconsistent relief. Additionally, defendant argues that plaintiffs abandoned claims for a new judgment because they failed to submit a proposed order within 30 days, pursuant to 22 NYCRR 202.48.

Plaintiffs contend that that the additional payment plus the bond do not satisfy the unpaid rent differential and per diem fees from the post-judgment period. Plaintiffs also argue that they did not submit a proposed order to the Court for good cause because they had been attempting to resolve the issues with the Court's assistance.

At the outset, the Court notes that defendant has not made a "motion with such notice to other persons as the court may require" for a satisfaction of judgment, and, thus, no satisfaction has been requested nor can it be granted. *See* CPLR 5021 (a) (3), *see also* CPLR 5021. Moreover, although 22 NYCRR 202.48 provides that proposed orders must be submitted within 60 days of the signing and filing of the decision directing such submission, an exception exists for "good cause shown." Plaintiffs have demonstrated good cause for their failure to timely submit their proposed order, in that they had been in communication with the Court and their adversary with respect to defendant's continuing obligations. Plaintiffs have not abandoned their claim and have exhibited a clear intent to fully prosecute this matter.

Additionally, the parties have made extended efforts to resolve the issue during the pendency of this motion. The parties were unable to agree as to how the monies in the appeal bond

would be applied (i.e. to the money judgment or the per diem and monthly rental fees) and whether the judgment would be deemed satisfied by the liquidation of the appeal bond.

With respect to the liquidation of the appeal bond, defendant has still not perfected its appeal dated December 12, 2021. Accordingly, such appeal is deemed dismissed. Here, the language of the appeal bond states that it was posted to secure payment of the November 2021 order and judgment, and that if the appeal is dismissed, the monies shall be paid to plaintiffs. In fact, defendant consents to applying the liquidated appeal bond to the monies owed to plaintiffs. Rather, plaintiffs and defendant disagree as to the import of liquidating the appeal bond. Defendant asserts that the liquidation of the bond necessitates satisfaction of the judgment. Plaintiffs argue that the judgment contains continuing directives for payment of the ongoing fees which preclude deeming the judgment satisfied.

Given the continuing payment obligations of the judgment and order, and the fact that plaintiffs have not yet been restored to their home, it defies logic to deem the judgment satisfied before plaintiffs are restored to possession with all payments made through the date of restoration. Therefore, the Court grants plaintiff's motion to liquidate the appeal bond and orders the proceeds to be turned over to plaintiffs, as per the language of the appeal bond, and declines to deem the judgment satisfied at this time.

III. Motion For Entry of a New Order and Money Judgment

Through motion sequence 015, plaintiffs also seek to vacate the judgment dated November 15, 2021; to enter a new judgment in the sum of \$167,595.87, which includes a directive for prospective payments; and order a hearing on attorneys' fees. Defendant opposes the entry of a new judgment, as it asserts that it tendered \$156,408.69 prior to the filing of its opposition and that its obligations are satisfied through the liquidation of the appeal bond.

Given the number of monetary obligations that continue to accrue, the matter is referred to a referee, on the Court's own motion, to determine the amount of money owed to plaintiffs after crediting the liquidation of the appeal bond.

With respect to the claim for a hearing on legal fees, such request is premature as various issues remain to be adjudicated and no prevailing party can yet be determined. Therefore, plaintiffs' motion seeking the entry of a new judgment is granted to the extent of referring the matter to a court attorney referee to hear and determine the remaining amounts owed. Although the Court declines to set a hearing at this time, such denial is without prejudice to the prevailing party to move at the appropriate juncture.

IV. Motion for Order Quashing Subpoena and/or a Protective Order

In an attempt to enforce the judgment, plaintiffs served a subpoena duces tecum and ad testificandum dated December 6, 2022, upon Ms. Kawana Mills, the administrative assistant of Ken Swig, a member of defendant 148 Duane LLC.² Plaintiffs seek to depose Ms. Mills about the money judgment issued by the Court in this action, although she is not a party to this action. The subpoena directs Ms. Mills to appear for a deposition "concerning all matters relevant to the satisfaction of the judgment" issued in this matter. *See* NYSCEF doc. no. 403. It further directs Ms. Mills to produce 19 categories of documents related to defendant.

² In fact, plaintiffs commenced an enforcement proceeding against 148 Duane LLC and its member, Kent Swig, seeking to hold Mr. Swig in contempt for "failing to respond and appear for deposition after being duly served with an information subpoena, subpoena duces tecum and deposition subpoena" in aid of enforcing the judgment. *See* NYSCEF doc. no. 416, index number 151945/2022. Similarly, in that proceeding, plaintiffs sought to depose Ms. Mills. Her motion to quash the subpoena in that matter will be addressed in a separate decision and order.

Non-party Ms. Mills³ moves to quash the subpoena on the grounds that it seeks to involve her unnecessarily, it is burdensome and harassing, and the requested information is overbroad.⁴ Plaintiffs oppose and cross-move to compel Ms. Mills' deposition. Plaintiffs argue that Mr. Swig's deposition and responses were plainly inadequate and that he deferred to Ms. Mills with respect to the information sought by plaintiffs.

Plaintiffs argue that Ms. Mills has relevant and material information as to the adequacy of Mr. Swig's production, the steps that were taken in the search for the requested documents (both of which are at issue in the separate contempt proceeding under index number 151945/2022, and the instructions that Mr. Swig gave her in performing the task of searching for the requested documents. Plaintiffs contend that they have established a compelling need for Ms. Mills' deposition and document demand due to her involvement in Mr. Swig's deficient response to the subpoenas issued to him.

CPLR 3101 (a) provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." Pursuant to CPLR 3101 (a) (4), disclosure may be sought from a non-party "upon notice stating the circumstances or reasons such disclosure is sought or required." CPLR 3103 (a) permits "any person from whom or about whom discovery is sought," i.e., a nonparty, to move for "a protective order denying, limiting, conditioning or regulating the use of any disclosure device." Further, "[t]he delicate balance between allowing liberal disclosure and protecting the parties from unnecessary intrusions, is left to the sound discretion of the lower courts." *Sgambelluri v Recinos*,

³ Ms. Mills is seemingly employed by "Swig Entities, LLC," not 148 Duane LLC, and is therefore not a party to this action.

⁴ Ms. Mills also argues that the subpoena would be rendered academic should this Court deem the judgment satisfied. As the Court has declined to so do, it turns to the merits of her arguments.

192 Misc 2d 777, 779 (Sup Ct, Nassau County 2002), citing *Andon ex rel. Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 745 (2000).

Given New York's policy to allow liberal discovery, Mr. Swig's deference to Ms. Mills throughout his deposition testimony, and the numerous failed attempts by plaintiffs to obtain information from the party defendants (including the commencement of a separate contempt proceeding for failure to comply with discovery obligations), the Court finds that the subpoena served upon Ms. Mills is relevant and necessary. Ms. Mills has not articulated significant prejudice that would require the subpoena to be quashed nor a protective order entered. Further, the information sought from Ms. Mills is in her employment capacity, and she has not alleged any confidentiality issues. The documents requested are relevant to the issues underlying this action and the companion contempt proceeding, and defendant seeks to elicit testimony as to the enforcement of the judgment entered in this matter, which has not yet been deemed satisfied. Plainly, her testimony is relevant, and the documents requested by plaintiffs may be within her control. Moreover, plaintiffs properly notified Ms. Mills as to the purpose and intent of the subpoenas pursuant to CPLR 3101 (a) (4).

Therefore, Ms. Mills' motion to quash the subpoena and/or for a protective order is denied, and plaintiffs' cross motion to compel her compliance with the subpoena dated December 6, 2022 is granted.

V. Conclusion

Accordingly, it is

ORDERED that plaintiffs' motion to liquidate the appeal bond filed August 18, 2022 is granted (motion sequence 015), with an order to follow; and it is further

ORDERED that this matter having come on before this court on June 13, 2023, on motion of the plaintiffs for vacatur of the judgment dated November 15, 2021 and entry of a new judgment, and, pursuant to CPLR 4212, the court having on its own motion determined to consider the appointment of a referee to hear and report, and it appearing to the court that an exceptional condition requiring said appointment in this case, it is now hereby

ORDERED that a Judicial Hearing Officer (“JHO”) or Special Referee shall be designated to hear and report to this court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose: the issue of amounts due and owing pursuant to the November 15, 2021 order and judgment that are not extinguished by the liquidation of the appeal bond, including the issue of the amount of any changes in the monthly rental rate; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that counsel shall immediately consult one another, and counsel for plaintiff/petitioner shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by e-mail an Information Sheet (accessible at the “References” link on the court’s website) containing all the information called for therein and that, as soon as practical thereafter, the Special

Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the "References" link on the court's website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules); and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; and it is further

ORDERED that, unless otherwise directed by this court in any Order that may be issued together with this Order of Reference to Hear and Report, the issues presented in any motion identified in the first paragraph hereof shall be held in abeyance pending submission of the Report of the JHO/Special Referee and the determination of this court thereon; and it is further

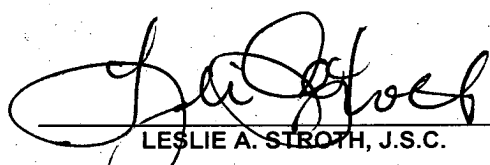
ORDERED that the motion of non-party Kawana Mills to quash is denied, and the cross-motion of plaintiffs to compel is granted (motion sequence 016); and it is further

ORDERED that Kawana Mills shall produce to plaintiffs on or before December 1, 2023 the documents listed in the subpoena duces tecum dated December 6, 2022 (*see* NYSCEF doc. no. 403); and it is further

ORDERED that defendant shall, within 30 days from production of the aforesaid documents, produce Kawana Mills for deposition, at the office of counsel for plaintiffs, on a date and at a time convenient for the parties.

The foregoing constitutes the decision and order of the Court.

10/16/2023
DATE


LESLIE A. STROTH, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input checked="" type="checkbox"/>
					OTHER
					REFERENCE