

Welsh v 12 E. 86th St. LLC

2023 NY Slip Op 33918(U)

November 2, 2023

Supreme Court, New York County

Docket Number: Index No. 154120/2020

Judge: Mary V. Rosado

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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. MARY V. ROSADO PART 33M

Justice

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SALLY KATHLEEN WELSH,

Plaintiff,

- v -

12 EAST 86TH STREET LLC, BRODSKY ORGANIZATION,
LLC

Defendant.

-----X

INDEX NO. 154120/2020

MOTION DATE 05/04/2023

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63

were read on this motion to/for

DISCOVERY

Upon the foregoing documents, Plaintiff Sally Kathleen Welsh's ("Plaintiff") motion for a protective order pursuant to CPLR 3101(a), is denied.

I. Background and Procedural History

This action stems from a landlord-tenant dispute involving a construction project in Plaintiff's residential apartment building (NYSCEF Doc. 2). Plaintiff is a tenant in a residential apartment building located at 12 East 86th Street in Manhattan (the "Premises") (NYSCEF Doc. 44 at p. 2). Defendant 12 East 86th Street, LLC is the owner of the Premises (NYSCEF Doc. 51 at p. 5). Defendant Brodsky Organization, LLC is the Property Manager for the Premises (NYSCEF Doc. 51 at p. 5).

On June 9, 2020 Plaintiff filed a Summons (NYSCEF Doc. 1) and Complaint (NYSCEF Doc. 2) asserting causes of action for, *inter alia*, breach of warranty of habitability, breach of contract, breach of lease, constructive eviction, negligence, and intentional infliction of emotional distress (NYSCEF Doc. 44 at p. 2). Specifically, Plaintiff's Complaint alleges that "in

violation of the terms of the lease and in breach of their duties, Defendants permitted extensive demolition and construction to occur in a manner that caused major damage to Plaintiff's apartment and adjoining terrace...produced intolerable conditions of dust, noise, debris, and other harm," which ultimately forced Plaintiff to vacate her apartment (NYSCEF Doc. 44 at p. 3). Plaintiff's Complaint asserts that Defendants' conduct caused Plaintiff to suffer, *inter alia*, "severe psychological and emotional distress," which necessitated Plaintiff to seek treatment for "anxiety, insomnia, depression, and a sense of worthlessness caused by her homelessness and deterioration of her financial condition" (NYSCEF Doc. 2 at ¶22).

Defendants have served discovery requests on Plaintiff that seek documents including Plaintiff's physical health records from several practitioners, as well as her therapy notes (NYSCEF Doc. 44 at p. 3). Plaintiff asserts that her psychotherapy records "discuss in great detail the debilitating consequences of Defendants' actions on her mental and physical health, and private relationships with her friends and family," and that public disclosure of such records would create "unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice" to Plaintiff (NYSCEF Doc. 44 at p. 7).

Although Plaintiff asserts that she "has no intention of withholding or seeking exclusion from discovery of [these] records," (NYSCEF Doc. 44 at p. 3) on May 4, 2023 Plaintiff brought the instant motion for entry of a protective order pursuant to CPLR 3101(a) (NYSCEF Doc. 43). Plaintiff claims that her Proposed Protective Order (NYSCEF Doc. 48) is "narrow in scope in terms of material covered, requirements, and limitations" (NYSCEF Doc. 44 at p. 5). Specifically, Plaintiff contends that the Proposed Protective Order (1) "seeks confidentiality protections only as to Plaintiff's health and medical information"; (2) "requires individuals and entities receiving Plaintiff's medical and health information that has been designated confidential

(which designation the receiving party may challenge) to solely use such information in connection with this legal action, to destroy documents containing the information within 60 days after the action is resolved (or to return such documents, if the receiving party prefers), and to alert the producing party to any subpoenas or production request for the materials emanating from matters outside the subject litigation, so that the producing party can respond accordingly”; and (3) “requires the receiving party of the confidential information to temporarily file documents containing the confidential information under seal or provide seven days’ written notice to the producing party of its intent to file such materials with the Court in this action, thus enabling the producing party to file an Order to Show Cause to seal such confidential material, if warranted, with the receiving party retaining the right to challenge such a request” (NYSCEF Doc. 44 at pp 5-6).

On May 25, 2023 Defendants filed an Affirmation (NYSCEF Doc. 50) and Memorandum of Law (NYSCEF Doc. 51) in opposition to Plaintiff’s motion. Defendants’ opposition papers argue, *inter alia*, that “[s]ealing or restricting relevant and material discovery of plaintiff’s medical treatment under lock and key is clearly contrary to CPLR §3101, CPLR §3120 and 22 NYCRR §202.17 which allow for broad disclosure of a plaintiff’s medical condition after a plaintiff places her medical condition into controversy” (NYSCEF Doc. 51 at p. 7). Defendants further argue that Plaintiff is attempting to “weaponize her position as both a shield and a sword, never allowing the other side the opportunity to fairly evaluate discovery that she claims proves her case” (NYSCEF Doc. 51 at p. 7).

II. Discussion

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.” The Court of Appeals has held that “[w]hat

is ‘material and necessary’ is left to the sound discretion of the lower courts” (*Andon v 302-304 Mott St. Assocs.* 94 NY2d 740 [2000]). When determining what information is “material and necessary,” the Court of Appeals has further held that “[t]he test is one of usefulness and reason” (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]).

Pursuant to CPLR § 3103(a) the Court “may at any time on its own initiative, or on motion of any party or of any person from whom or about whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or to the courts.” Further, “[i]n exercising its discretion regarding whether and to what degree a protective order under CPLR 3103 should issue, a court must strike a balance by weighing [the] conflicting interest in light of the facts of the particular case before it” (*Cynthia B. v New Rochelle Hospital Medical Center* 60 NY2d 452, 461 [1983]).

Here, Plaintiff contends that public disclosure of her medical records would “cause [her] additional harm, including embarrassment, retaliation, and prejudice in [her] private life and work pursuits, and... would negatively impact [her] mental distress” (NYSCEF Doc. 63 at ¶11). Defendants contend that Plaintiff’s Proposed Protective Order “severely prejudices the Defendants by preventing the Defendants, their experts, and unknown potential evaluators from having full access to plaintiff’s medical records and testimony, brought by a plaintiff claiming personal injuries, while permit[ing] plaintiff’s counsel to designate and seal documents at their discretion as ‘confidential’” (NYSCEF Doc. 51 at p. 5).

Given that Plaintiff in this case has placed her medical condition at issue through her claims of psychological and emotional distress, Plaintiff has waived her right to privilege with

respect to the corroborating medical records (*Cynthia B.* at 461-462). While Plaintiff claims that public disclosure of her records would cause her harm including embarrassment and exacerbation of her mental distress, the Court finds that any potential prejudice suffered by Plaintiff in the absence of the Proposed Protective Order is outweighed by the prejudice Defendants would suffer if the Proposed Protective Order was granted; namely, the impediment of Defendants' ability to evaluate efficiently Plaintiff's claims in preparation of their defense. This is especially so considering Plaintiff's waiver of her right to claim privilege with respect to the records in question.

Accordingly, it is hereby,

ORDERED that Plaintiff Sally Kathleen Welsh's motion for a protective order pursuant to CPLR 3101(a), is denied; and it is further

ORDERED that on or before December 12, 2023, the parties shall submit a proposed Status Conference Order via e-mail to SFC-Part33-Clerk@nycourts.gov. If the parties are unable to agree to a proposed Status Conference Order, the parties are directed to appear for an in-person status conference on December 13, 2023 at 9:30 a.m. in Room 442, 60 Centre Street, New York, New York; and it is further

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ORDERED that within 10 days of entry, counsel for Plaintiff Sally Kathleen Welsh shall serve a copy of this Order, with notice of entry, on all parties to this action; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

<u>11/2/2023</u> DATE		<u>Mary V Rosado JSC</u> HON. MARY V. ROSADO, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> GRANTED IN PART
	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> REFERENCE