

Glenwild Assoc. LLC v Lew St. LLC

2023 NY Slip Op 33989(U)

November 9, 2023

Supreme Court, Kings County

Docket Number: Index No. 516444/2016

Judge: Leon Ruchelsman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMM PART 8

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GLENWILD ASSOCIATES LLC,

Plaintiffs,

Decision and order

- against -

Index No. 516444/2016

LEW STREET LLC, MANCHESTER CAPITAL LLC,
FAIRMONT CAPITAL LLC, THE FAIRMONT GROUP LLC,

Defendants,

November 9, 2023

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PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #10

The plaintiff has filed an order to show cause seeking to strike the defendant's answer for the failure to file a Jackson affidavit or alternatively for filing a false Jackson affidavit and for failing to provide court ordered discovery. The defendants oppose the motion. Papers were submitted by the parties and arguments were held. After reviewing all the arguments this court now makes the following determination.

Mr. Neil Frohlich an officer of defendant Fairmont Capital LLC and an officer of various other entities that are defendants in this action submitted a Jackson affidavit which stated that the defendant has no other documents in its possession that are responsive to plaintiff's discovery requests (see, Affidavit of Neil Frohlich, September 14, 2022 [NYSCEF Doc. No. 217]). The plaintiff asserts the deposition testimony of Mr. Frohlich exposes the falsity of the Jackson affidavit. This is true, argues the plaintiff, because in his deposition testimony he stated that he does not know anything about the entity, a

defendant herein, called The Fairmont Group LLC. Indeed, at his deposition he denied he was an officer of the Fairmont Group LLC (see, Deposition of Neil Frohlich, page 53 [NYSCEF Doc. No. 216]). The plaintiff argues the deposition testimony thus contradicts his affidavit wherein he asserted he was an officer of that entity. Therefore, the plaintiff has submitted either an insufficient Jackson affidavit or a knowingly false affidavit and consequently the court should strike the defendants answer. In addition, the plaintiff asserts the defendant has failed to provide other discovery.

Conclusions of Law

It is well settled that the trial court maintains broad discretion concerning the discovery process and any sanction for any violation (Bouri v. Jackson, 177 AD3d 947, 113 NYS3d 232 [2d Dept., 2019]). The severe sanction of striking a pleading is appropriate where it can be demonstrated that the failure to comply with discovery was the result of wilful and contumacious conduct (Rosenblatt v. Franklin Hospital Medical Center, 165 AD3d 862, 85 NYS3d 488 [2d Dept., 2018]). Such conduct may be inferred from a party's actions, specifically a long period of time passing without complying with the discovery coupled with the absence of any reasonable excuse to explain such failure to comply (Morson v. 5899 Realty LLC, 171 AD3d 916, 98 NYS3d 127 [2d

Dept., 2019)). Generally, the failure of either party to provide sought after discovery and to follow the express order of the court demonstrates a pattern of wilful default and neglect concerning the outstanding discovery (Espinal v. New York City Health and Hospitals Corp., 115 AD3d 641, 981 NYS2d 569 [2d Dept., 2014]).

Notwithstanding the dubious relevancy of any such contradiction, in fact no such contradiction exists. Mr. Frohlich submitted a supplemental affidavit wherein he explained that "there is no, and was no, such existing entity as "The Fairmont Group LLC". As such, there is no knowledge to have of the "Fairmont Group LLC". Indeed, and to reiterate, although plaintiff has named the "Fairmont Group, LLC" as a defendant in this action, there is no such existing entity. Rather, the "Fairmont Group" is in essence, a marketing name utilized to describe the various "Fairmont" entities that do in fact exist, but "Fairmont Group, LLC" does not exist. Thus, when I refer to myself in the "Jackson Affirmation" as an officer of the "various other defendants", my focus was, and is actually upon, the existing "Fairmont" entities, to which all such entities fall under the marketing description of the "Fairmont Group"" (see, Affidavit of Neil Frohlich, dated November 3, 2023 [NYSCEF Doc. No. 248]). The plaintiff has failed to present any evidence at all challenging the supplemental affidavit of Mr. Frohlich.

Therefore, there has been no discovery violation with respect to the Jackson affidavit at all and the motion seeking to strike the answer is denied.

Furthermore, the plaintiff has barely presented any arguments in support of any of the other stated grounds for the current order to show cause. Pursuant to 22 NYCRR 202.8-a when a motion is filed "the movant shall specify in the notice of motion, order to show cause, and in a concluding section of a memorandum of law, the exact relief sought" (id). Although the order to show cause lists nine overlapping forms of relief, in truth, the plaintiff only presented arguments about the Jackson affidavit. The plaintiff did argue the defendants have failed to produce discovery, however, that argument was only presented to buttress the assertion the Jackson affidavit is an unreliable expedient to avoid further discovery.

Moreover, the plaintiff did argue in conclusory fashion that the defendants have failed to provide any discovery pursuant to previous court orders. However, those assertions were so general and amorphous they can hardly serve as grounds upon which to grant any sanction. Notably, they were also essentially based upon the issue surrounding the Jackson affidavit. In addition, they are seriously disputed. Therefore, the plaintiff has failed to establish any wilful or contumacious conduct worthy of any sanction. Thus, based on the foregoing, the motion seeking any

sanctions for any discovery violations is denied in all respects.

So ordered.

ENTER:

DATED: November 9, 2023
Brooklyn, N.Y.



Hon. Leon Ruchelsman
JSC