

Bruce v Solny

2023 NY Slip Op 34070(U)

October 3, 2023

Supreme Court, Kings County

Docket Number: Index No. 510162/20

Judge: Lawrence Knipel

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At an IAS Term, Part FRP3 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 3rd day of October, 2023.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

-----X

JANET BRUCE,

Plaintiff,

-against-

Index No. 510162/20

SANFORD SOLNY, SHANDELLE SOLNY IN HER PERSONAL CAPACITY, SHANDELLE SOLNY IN HER CAPACITY AS PRESIDENT OF A TO Z MANAGEMENT I. CORP., E 29 ST REALTY INC., A TO Z MANAGEMENT I CORP., ABRAHAM HOSCHANDER, ABRAHAM HOSCHANDER & ASSOCIATES PLLC, AVINOAM ROSENFELD, and THE ROSENFELD LAW OFFICE PLLC,

Defendants.

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The following e-filed papers read herein:

NYSCEF Nos.:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and

Affidavits (Affirmations) Annexed _____ 434-435, 444-445, 453-454, 464-465, 499-500, 518, 535-536

Opposing Affidavits (Affirmations) _____ 517, 520, 536, 559, 564, 571, 573 _____

Affidavits/ Affirmations in Reply _____ 574, 576, 580, 581, 582, 584, 586 _____

Other Papers: Affidavit/Affirmation in Support 520 _____

Upon the foregoing papers, defendants Sanford Solny, Shandelle Solny in her personal capacity, Shandelle Solny in her capacity as President of A to Z Management I. Corp., E 29 St Realty Inc. and A to Z Management I Corp. (Solny Defendants) move (in

Motion Sequence [MS] # 19) for an order, pursuant to CPLR 3103, granting defendants a protective order striking the Notices of Discovery and Inspection (NDI), the Demand for a Verified Bill of Particulars (VBP Demand) and Demands pursuant to CPLR 3118 (3118 Demands), served by plaintiff. Defendants Abraham Hoschander, Abraham Hoschander & Associates PLLC (Hoschander Defendants), Avinoam Rosenfeld and The Rosenfeld Law Office PLLC (Rosenfeld Defendants)(collectively, H&R Defendants) move (in MS # 20) for an order, pursuant to CPLR 2004, to extend the time to allow the H&R Defendants to serve their Notice to Produce Documents (Document Demand) upon plaintiff. The H&R Defendants cross-move (in MS # 21) for an order, pursuant to CPLR 3103, granting a protective order striking the NDIs served upon them by plaintiff. The Solny Defendants cross-move (in MS # 22) for an order, a) pursuant to CPLR 2004 and 3124, extending discovery deadlines and compelling plaintiff to respond to the several discovery demands served on April 26, 2023 and rejected by plaintiffs on April 27, 2023; b) pursuant to CPLR 3126, issuing a conditional order penalizing plaintiff for refusal to comply with her discovery obligations; and c) pursuant to CPLR 3123, issuing a conditional order deeming all allegations in the Notice to Admit dated April 26, 2017 and purportedly rejected by plaintiff on April 27, 2023 admitted unless plaintiff serves a sworn denial in compliance with CPLR 3123 by May 16, 2023. Plaintiff moves (in MS # 23) for an order, pursuant to CPLR 3103 (a), 1) striking items 4-9, and 29-34 from the Notice to Admit, filed on April 28, 2023 and ordering that plaintiff need not respond to these items; 2) requiring complete copies of the incomplete documents referred to in paragraphs 19-20 and 27-28 of the Notice to Admit to be offered as evidence at trial; 3)

concerning Exhibits A to M of the Notice to Admit, requiring the removal of the NYSCEF date-stamp in the top margin of these documents before they are offered at trial. Plaintiff cross-moves (in MS # 24) for an order, 1) pursuant to 22 NYCRR Part 130-1.1, imposing costs and sanctions on the Solny Defendants' attorneys Zvi Storch and Binyomin Bendet for filing motions based on false statements unless they correct or withdraw their affirmations in support of MS ## 19 and 22 before the return date of June 22, 2023; 2) pursuant to CPLR 3124 and 3126, a) compelling the Solny Defendants to respond to plaintiff's 3118 Demands within ten days or face sanctions, b) compelling the Solny Defendants to provide the insurance information required by the Preliminary Conference (PC) Order within ten days or face sanctions and c) compelling defendants E 29 Realty Inc. and A to Z Management I. Corp. to respond to plaintiff's NDI, within twenty days or face sanctions such as preclusion pursuant to CPLR 3126; 3) pursuant to CPLR 3042 (d), compelling the Solny Defendants to provide a VBP in response to plaintiff's VBP Demand, dated October 28, 2022, within thirty days, or face sanctions; 4) penalizing the Solny Defendants for failing to comply with the PC Order; 5) pursuant to CPLR 3124 and 3126 and the PC Order, precluding the Solny Defendants from offering all of the items required by the PC Order at trial, including statements of opposing parties, photographs, video recordings, witnesses and surveillance films, and striking their NDIs and their Notices for Discovery of Party Statements dated April 26, 2023; and/or 6) in the alternative, pursuant to CPLR 3103, issuing a protective order striking or modifying the Solny Defendants' NDI to plaintiff and striking or modifying the Solny Defendants' VBP Demand. Plaintiff cross-moves (MS # 25) for an order, a) pursuant to

CPLR 3103 and the PC Order, issuing a protective order and striking the H&R Defendants' Document Demands as untimely, overbroad, and improper; b) pursuant to CPLR 3124 and 3126, compelling the H&R Defendants to respond to plaintiff's NDI to the Hoschander Defendants and plaintiff's NDI to the Rosenfeld Defendants within 20 days or face sanctions, including preclusion of any items not already precluded by the August 24, 2022 decision and order which dismissed all of the H&R Defendants' affirmative defenses with prejudice and precluded the H&R Defendants from offering evidence concerning the items listed in plaintiff's VBP Demands; c) pursuant to 3124 and 3126 and the PC Order, precluding the H&R Defendants from offering as evidence at trial any of the items listed in the PC Order to the extent these are not already precluded by the August 24, 2022 dismissal and preclusion order; d) pursuant to CPLR 3124 and 3126 and the PC Order, requiring the H&R Defendants to provide their insurance information to plaintiff within 10 days, including any malpractice insurance, commercial general liability insurance, and umbrella insurance or face sanctions; and e) pursuant to 22 NYCRR Part 130-1.1, imposing costs and sanctions on the H&R Defendants' attorney, Susie Chovev, for filing motions based on false statements unless she corrects or withdraws her affirmations in support of MS ## 20 and 21 before the return date of June 22, 2023.

Background

Plaintiff commenced this action to set aside a deed and recover damages as the result of a fraudulent "foreclosure rescue" scheme allegedly perpetrated by defendants. In sum and substance, plaintiff alleges that she was facing foreclosure of her residence at

161 E. 29th Street in Brooklyn when she was introduced to Sanford Solny, who promised to arrange a short sale of the property, thereby extinguishing plaintiff's mortgage debt with the mortgagee. Plaintiff alleges that Sanford Solny, along with the other Solny Defendants, induced plaintiff to transfer title of her property for a paltry consideration but did not thereafter arrange a short sale or otherwise pay off the mortgage debt. Plaintiff contends, in essence, that the Solny Defendants had no intention of satisfying the mortgage (leaving plaintiff liable for the underlying debt), but instead embarked on a plan to prolong the foreclosure proceedings as long as possible in court while collecting rental income from tenants placed at the property. Plaintiff maintains that the H&R defendants were the attorneys who were retained by the Solny Defendants during the course of the foreclosure action to intentionally delay and prolong the proceedings in court, falsely and fraudulently representing to the court that they represented plaintiff.

Plaintiff filed her amended complaint on January 11, 2021. On March 23, 2021, the H&R Defendants filed a verified answer setting forth several affirmative defenses with a cross claim. On May 5, 2021, the Solny Defendants filed a verified answer setting forth affirmative defenses and counterclaims. Extensive motion practice has been undertaken thus far in this matter, including motions for dismissal and discovery-related relief. By order dated December 6, 2021 (Hon. Loren Baily-Schiffman, J.), the court largely granted plaintiff's motion for dismissal of the Solny Defendants' affirmative defenses and counterclaims. By order dated February 10, 2022 (Hon. Robin K. Sheares, J.), the court granted a conditional order of preclusion against the H&R Defendants unless they submitted VBPs in proper form by a date certain. On August 24, 2022,

Justice Sheares issued a decision and order dismissing all of the H&R Defendants' affirmative defenses with prejudice, and precluding the H&R Defendants from offering any evidence at trial concerning the items listed in plaintiff's VBP Demand. This decision was upheld on a subsequent motion to reargue. On October 14, 2022, this court issued a PC Order, in the boilerplate form used by the PC (Intake) Part. The order form directs typical items of discovery to be exchanged by dates certain, including insurance information, bills of particulars, authorizations, statements of witnesses, photographs and video recordings, and accident reports. Throughout the course of this action, the parties served upon each other various notices and demands for discovery. The several demands and notices have, for the most part, been rejected by the parties, resulting in the seven motions herein.

CPLR 3101 (a) (1) provides that “[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action.” “The words, ‘material and necessary,’ are . . . to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason” (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]; see *Forman v Henkin*, 30 NY3d 656, 661 [2018]; *Cajamarca v Osatuk*, 163 AD3d 619, 620 [2d Dept 2018]; *Montalvo v CVS Pharmacy, Inc.*, 81 AD3d 611, 612 [2d Dept 2011]). At the same time, however, the principle of “full disclosure” does not give a party the right to uncontrolled and unfettered disclosure (see *McAlwee v Westchester Health Assoc., PLLC*, 163 AD3d 547, 548 [2d Dept 2018]; *Ramirez v New York City Tr. Auth.*, 132 AD3d 653, 654 [2d

Dept 2015]; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531, 531 [2d Dept 2007]). “It is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims” (*Crazytown Furniture v Brooklyn Union Gas Co.*, 150 AD2d 420, 421 [2d Dept 1989]; see *Beckles v Kingsbrook Jewish Med. Ctr.*, 36 AD3d 733 [2d Dept 2007]).

Where discovery demands are overbroad, lack specificity, or seek irrelevant or confidential information, they are palpably improper and may be stricken (see *Fox v Roman Catholic Archdiocese of N.Y.*, 202 AD3d 1061, 1062 [2d Dept 2022]; *Lombardi v Lombardi*, 190 AD3d 964, 966 [2d Dept 2021]). “The burden of serving a proper demand is upon counsel, and it is not for the courts to correct a palpably bad one” (*Fox*, 202 AD3d at 1062 [internal quotation marks omitted]; see *Lopez v Huntington Autohaus*, 150 AD2d 351, 352 [2d Dept 1989]). Thus, the appropriate remedy for an overbroad discovery demand is to vacate the entire demand rather than to prune it (see *Fox*, 202 AD3d at 1062; *Lombardi*, 190 AD3d at 966; *Bennett v State Farm Fire & Cas. Co.*, 189 AD3d 749, 750 [2d Dept 2020]). For a protective order to be issued, the party seeking such an order must make a “factual showing of ‘unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice’” (*Hartheimer v Clipper*, 288 AD2d 263, 263 [2d Dept 2001], quoting CPLR 3103 [a]; see *C.B. v Park Ave. Pub. Sch.*, 172 AD3d 980, 981 [2d Dept 2019]; *Cascardo v Cascardo*, 136 AD3d 729 [2d Dept 2016]). “Trial courts are vested with broad discretion to issue appropriate protective orders to limit discovery. . . . [T]his discretion is to be exercised with the competing interests of the

parties and the truth-finding goal of the discovery process in mind” (*Cascardo*, 136 AD3d at 729-730, quoting *Brignola v Pei-Fei Lee, M.D., P.C.*, 192 AD2d 1008, 1009 [3d Dept 1993]).

Turning first to the Solny Defendants’ motion for a protective order (MS # 19), the Solny Defendants do not articulate adequate grounds in their papers for a protective order with regard to plaintiff’s 3118 Demands. However, the Solny Defendants demonstrate that plaintiff’s NDIs are overly broad and would be unduly burdensome to comply with, thus entitling the Solny Defendants to a protective order striking the NDIs as they are presently composed (*see Greenman-Pedersen, Inc. v Zurich Am. Ins. Co.*, 54 AD3d 386, 387 [2d Dept 2008]). Many of the demands contain overbroad language seeking “all” documents from the Solny Defendants. The demands “failed to specify the documents sought with “reasonable particularity” (CPLR 3120 [a] [1] [i]; *see Fallon v CBS Inc.*, 124 AD2d 697 [2d Dept 1986]; *Ehrlich v Ehrlich*, 74 AD2d 519 [1st Dept 1980]), and without proper tailoring as to time, place and scope, they are palpably improper (*see Fascaldi v Fascaldi*, 209 AD2d 578, 579 [2d Dept 1994]; *Orange & Rockland Utils., Inc. v County of Rockland*, 206 AD3d 668, 668-669 [2nd Dept 2022]). “Lacking knowledge of the existence of specific documents, etc., proper procedure requires that the party seeking discovery and inspection pursuant to CPLR 3120 initially make use of the deposition and related procedures provided by the CPLR to ascertain the existence of such documents in order that they may be designated with specificity in a CPLR 3120 notice” (*Haroian v Nusbaum*, 84 AD2d 532, 533 [2d Dept 1981]; *see Rios v Donovan*, 21 AD2d 409 [1st Dept 1964]).

With respect to that part of the motion seeking a protective order against plaintiff's VBP Demand, the court agrees that the demand includes a number of improper requests for information of an evidentiary nature and is therefore improper. "The purpose of a bill of particulars is to amplify pleadings, limit proof, and prevent surprise at trial, not to provide evidentiary material" (*Toth v Bloshinsky*, 39 AD3d 848, 849 [2d Dept 2007]). Moreover, the court is not required to prune an improper VBP Demand (*see Haszinger v Praver*, 12 AD3d 485, 486 [2d Dept 2004]). Thus, that part of the Solny Defendants' motion seeking a protective order striking plaintiff's VBP Demand is granted. This determination is without prejudice to plaintiff to re-serve a proper VBP Demand and NDIs.

In response to plaintiff's contention that their Document Demands were untimely under the terms of the PC Order, the H&R Defendants move (MS # 20) for an extension of time to serve their Document Demands. Plaintiff consequently brought a cross motion (MS # 25) for a protective order striking the Document Demands. CPLR 2004 provides that except where otherwise expressly prescribed by law, the court "may extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed." However, assuming the H&R Defendants have good cause for an extension of time, a substantial part, if not most of the items demanded in the H&R Defendants' Document Demands are relevant only to potential affirmative defenses which may have been asserted against plaintiff at trial. Because the H&R Defendants'

affirmative defenses have been stricken with prejudice by the order of Justice Sheares, the Document Demands are rendered overbroad under the circumstances.

As a result, that part of plaintiff's motion (MS # 25) for a protective order striking the H&R Defendants' Document Demands is granted and the H&R Defendants' motion for an extension of time to serve the demands (MS # 20) is denied as moot.

The H&R's Defendants' motion (MS # 21) for a protective order striking plaintiff's NDIs dated January 18, 2021 and January 19, 2021 (NYSCEF Doc Nos. 113 & 114) is granted. A review of the NDIs served reveals that the numerous demands contained therein are overbroad and overly burdensome, as they include a request for the production of essentially "all records" from the "13th Ave. Office" allegedly used by the H&R Defendants. While plaintiff indicates in opposition papers that she withdraws certain demands in good faith, the court is not obligated to prune or otherwise rewrite an overbroad NDI (*see Fox*, 202 AD3d at 1062). Plaintiff may be granted leave to serve a new demand which seeks more specific and limited discovery requests (*see Accent Collections, Inc. v Cappelli Enters., Inc.*, 84 AD3d 1283, 1284 [2d Dept 2011]; *Merkos L'Inyonei Chimuch, Inc. v Sharf*, 59 AD3d 408, 410 [2d Dept 2009]), and the good faith withdrawal of any demands may be effectuated when plaintiff re-serves a new, appropriately tailored notice.

The Solny Defendants move (MS # 22) for an extension of discovery deadlines under the PC Order for service of their various demands upon plaintiff, which plaintiff had rejected. The court finds that the Solny Defendants have shown good cause for failure to comply with the time frame set forth in the PC Order, and plaintiff has not

shown any prejudice if time were extended, especially considering the complexity of this action and the fact that discovery is in its early stages. Accordingly, that part of Solny Defendants' motion (MS # 22) for an extension of time is granted.

With respect to the Notice to Admit, that part of plaintiff's motion (MS # 23) to strike paragraphs 4, 5-9, and 29-34 is granted and that part of the Solny Defendants' motion (MS # 22) to compel responses is denied. CPLR 3123 (a) provides, in relevant part, that "a party may serve upon any other party a written request for admission by the latter of the genuineness of any papers or documents . . . , or of the truth of any matters of fact set forth in the request, as to which the party requesting the admission reasonably believes there can be no substantial dispute at the trial and which are within the knowledge of such other party or can be ascertained by him upon reasonable inquiry." "The purpose of a notice to admit is only to eliminate from the issues in litigation matters which will not be in dispute at trial" (*Nacherlilla v Prospect Park Alliance, Inc.*, 88 AD3d 770, 771-772 [2d Dept 2011], quoting *DeSilva v Rosenberg*, 236 AD2d 508, 508 [2d Dept 1997]). "It is not intended to cover ultimate conclusions, which can only be made after a full and complete trial" (*Nacherlilla*, 88 AD3d at 772, quoting *DeSilva*, 236 AD2d at 508). "A notice to admit which goes to the heart of the matters at issue is improper" (*Nacherlilla*, 88 AD3d at 772, quoting *DeSilva*, 236 AD2d at 508). The paragraphs objected to requested admissions as to matters, such as the authenticity of a purported power of attorney and release, which were likely to be disputed by plaintiff at the trial of this matter.

With respect to the other items in the Notice to Admit, plaintiff submitted an affidavit in response to the Notice to Admit dated May 15, 2023. The remaining requests for relief regarding incomplete documents and NYSCEF stamps are denied at this juncture without prejudice. The Solny Defendants' motion to compel (MS # 22) is granted in all other respects. To the extent not done, plaintiff shall respond to the remainder of the Solny Defendants' April 26, 2023 demands within 60 days of the filing of this order with NYSCEF.

As addressed earlier, the VBP Demand served on the Solny Defendants improperly included requests for information of an evidentiary nature and was stricken accordingly. That part of plaintiff's motion (MS # 24) seeking a VBP is denied without prejudice to re-serve a new demand in proper form. The remainder of plaintiff's motion is granted to the extent that the Solny Defendants shall respond to all 3118 Demands and provide any other items directed to be exchanged by the PC Order (i.e., insurance information, including primary, excess, and umbrella policies; statements of opposing parties, photographs, video recordings, surveillance films, and the names and addresses of all fact witnesses; demands for a Bill of Particulars; and demands for Discovery & Inspection), to the extent not done, within 60 days of the filing of this order with NYSCEF.

That part of plaintiff's motion (MS # 25) for a protective order striking the H&R Defendants' Document Demands is granted as the court has herein determined the demands were overbroad given the striking of all H&R Defendants' affirmative defenses. As a protective order was granted herein to the H&R Defendants striking

plaintiffs' NDIs (NYSCEF Doc Nos. 113 & 114), that part of plaintiff's motion (MS # 25) to compel responses is denied. That part of plaintiff's motion to compel compliance with the PC Order is otherwise granted. The H&R Defendants shall provide any outstanding items directed to be exchanged by the PC Order (i.e., insurance information, including primary, excess, and umbrella policies; statements of opposing parties, photographs, video recordings, surveillance films, and the names and addresses of all fact witnesses; demands for a Bill of Particulars; and demands for Discovery & Inspection), to the extent not done, within 60 days of the filing of this order with NYSCEF.

Any relief not expressly granted herein, including CPLR 3126 sanctions, has been considered, and is denied at this juncture.

Accordingly, it is hereby

ORDERED that the part of the Solny Defendants' motion for a protective order (MS # 19) is granted to the extent that plaintiff's NDI and VBP Demand are stricken without prejudice to plaintiff to re-serve; and it is further

ORDERED that the part of the Solny Defendants' motion (MS # 19) is denied as to plaintiff's 3118 Demands; and it is further

ORDERED that the H&R Defendants' motion (MS # 20) for an extension of time to serve Document Demands is denied as moot; and it is further

ORDERED the H&R Defendants' motion (MS # 21) for a protective order striking plaintiff's NDIs is granted; and it is further

ORDERED that the NDIs served by plaintiff on the H&R Defendants are stricken without prejudice to re-serve in accordance with this decision and order; and it is further

ORDERED that the Solny Defendants' motion (MS # 22) for an extension of time to serve demands is granted; and it is further

ORDERED that, to the extent not otherwise stricken herein, plaintiff shall respond to the Solny Defendants' April 26, 2023 demands within 60 days of the filing of this order with NYSCEF; and it is further

ORDERED that the part of plaintiff's motion (MS # 23) for a protective order striking items 4-9 and 29-34 in the Solny Defendants' Notice to Admit is granted; and it is further

ORDERED that items 4-9 and 29-34 in the Solny Defendants' Notice to Admit are stricken; and it is further

ORDERED that the remainder of plaintiff's motion (MS # 23) is denied without prejudice; and it is further

ORDERED that the part of plaintiff's motion (MS # 24) to compel is granted to the extent that the Solny Defendants shall respond to plaintiff's 3118 Demands and comply with the PC Order within 60 days of the filing of this order with NYSCEF; and it is further

ORDERED that the part of plaintiff's motion (MS # 24) to compel a response to her VBP Demand is denied without prejudice to re-serve; and it is further

ORDERED that the part of plaintiff's motion (MS # 25) for a protective order striking the H&R Defendants' Document Demands is granted; and it is further

ORDERED that the Document Demands of the H&R Defendants served on plaintiff are stricken; and it is further

ORDERED that the part of plaintiff's motion (MS # 25) to compel responses to the NDIs served on the H&R Defendants is denied; and it is further

ORDERED that the part of plaintiff's motion to compel responses of the H&R Defendants as to the PC Order is granted; and it is further

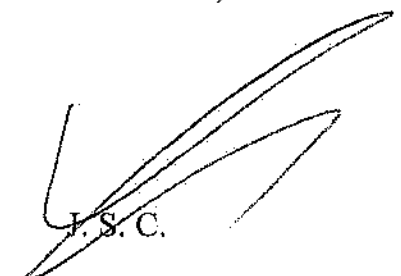
ORDERED that the H&R Defendants shall comply with the PC Order within 60 days of the date of the filing of this order with NYSCEF; and it is further

ORDERED that any relief not expressly granted herein, including CPLR 3126 sanctions, has been considered, and is denied at this juncture; and it is further

ORDERED that all parties shall comply with 22 NYCRR § 202.20-f requiring the parties to attempt a good faith effort to resolve discovery issues outside of court intervention.

The foregoing constitutes the decision and order of the court.

ENTER,



J. S. C.
HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE