

PWV Acquisition Owner, LLC v Lerner

2023 NY Slip Op 34396(U)

December 14, 2023

Supreme Court, New York County

Docket Number: Index No. 157331/2020

Judge: Paul A. Goetz

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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. PAUL A. GOETZ PART 47

Justice

-----X

PWV ACQUISITION OWNER, LLC

Plaintiff,

- v -

SHIMON LERNER,

Defendant.

-----X

INDEX NO. 157331/2020

MOTION DATE 10/12/2023

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 74, 75, 76, 77, 78, 79, 80, 81

were read on this motion to/for MISCELLANEOUS

In this residential landlord-tenant action, by decision and order dated September 22, 2021 (NYSCEF Doc No 61), plaintiff landlord’s motion for a preliminary injunction was granted to the extent that upon certain prior notice, plaintiff was allowed access to defendant’s apartment to repair an alleged water leak and cure an alleged “Colliers” condition. The September 22, 2021 order also granted defendant’s cross-motion to dismiss in part, leaving only plaintiff’s cause of action for a permanent injunction requiring defendant “to both cease his violative conduct and allow necessary access to his apartment” and its cause of action for attorneys’ fees and costs (id., see complaint, NYSCEF Doc No 1).

Defendant now moves for a protective order, pursuant to CPLR § 3103, to prevent plaintiff from pursuing disclosure; or in the alternative, for an order, pursuant to the Americans with Disabilities Act (ADA), for a reasonable accommodation by limiting questioning of defendant to written interrogatories (NYSCEF Doc No 75). Defendant asserts that such an order is warranted due to defendant’s documented mental health issues which, according to his

attending social worker, are likely to be exacerbated by the stress of being deposed. Defendant questions plaintiff's need for a deposition of defendant, especially considering that plaintiff only has one remaining cause of action (with the exception of its contingent claim to an award for attorney's fees) for a permanent injunction. Defendant also notes that plaintiff has not taken advantage of its opportunity to access the apartment for cleaning, despite the court affording it this opportunity more than two years ago, and that plaintiff has not sought any document production from defendant. Plaintiff has not filed an opposition to defendant's motion.

CPLR § 3103 permits the court to "make a protective order denying, limiting, conditioning or regulating the use of any disclosure device" in order to "prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts." The court's discretion under the statute is broad, permitting it to fashion a remedy that balances the parties' competing interests, as well as the truth-finding goal of the discovery process (*Lipin v Bender*, 84 NY2d 562, 570 [1994]; *Brignola v Pei-Fei Lee, M.D., P.C.*, 192 AD2d 1008, 1009 [3d Dept 1993]). "The test concerning discovery is one of 'usefulness and reason' and as such should lead to disclosure of admissible proof" (*Carr v Bovis Lend Lease*, 2012 NY Slip Op 33171[U], *2 [SC NY Co 2012]). At the same time, CPLR § 3103 affords the court "powers to prevent the occasional abuse which may arise in a system of liberal disclosure" (*Wahrhaftig v Space Design Group, Inc.*, 33 AD2d 953, 953 [3d Dept 1970]).

Defendant has shown sufficient cause for granting a protective order limiting the methods of discovery available to plaintiff. In his affidavit, defendant explains that he suffers from mental health conditions, including anxiety, which have been exacerbated by the COVID-19 pandemic and the litigation surrounding his housing situation, as well as physical afflictions, including major hearing loss (NYSCEF Doc No 28). The affidavit of Max Uhlenbeck, a social worker who

began working with defendant in November of 2019, states that defendant “suffers from several overlapping mental health conditions,” including “acute generalized anxiety” and depression, and that defendant’s personal history leads him to believe that sitting for a deposition “would be very likely to cause decompensation.” The affidavit of Heather Kramer, a mental health counselor who is treating defendant, corroborates defendant’s assertion that he suffers from mental health conditions which have been exacerbated by the litigation (NYSCEF Doc No 79), and the affidavit of defendant’s doctor, Raphael Kellman, M.D., attests to defendant’s “anxiety, depression, and chronic fatigue” (NYSCEF Doc No 80).

In light of these affidavits, a protective order is warranted to the extent that plaintiff will be prevented from deposing defendant. Plaintiff may, however, seek disclosure by way of written interrogatories, as this “avoids direct confrontation between the parties but still allows disclosure on the merits” (*Holmes v Holmes*, 157 AD2d 896, 897 [3d Dept 1990]). Such a remedy is appropriate where, as here, a deposition would cause the deponent unnecessary distress and alternative methods of discovery are available (*Button v Guerri*, 298 AD2d 947, 2 [4th Dept 2002] [finding the trial court abused its discretion in denying a protective order “where defendants submitted the uncontroverted affidavit of defendant’s psychiatrist stating that she had treated defendant since 1999 for ‘psychiatric symptoms from his [PTSD,] anxiety disorder and depression’ and that in her opinion ‘if [defendant] was required to participate in a deposition, it would be dangerously deleterious to his emotional state’” and noting “the availability of other disclosure devices to which defendant may be subjected without endangering his emotional state”]; *Guthartz v First Wall St. Secs. of N.Y.*, 2008 NYLJ LEXIS 3731 [SC Nassau Co 2008] [granting motion for a protective order so that party could be deposed by written interrogatory rather than be subjected to the stress of oral deposition in light of her numerous illnesses,

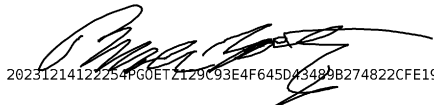
including clinical depression]). Written interrogatories are also the more appropriate method of disclosure considering defendant’s hearing impairments.

Accordingly, based on the foregoing, it is,

ORDERED that defendant’s unopposed motion for a protective order is granted to the extent that plaintiff is barred from orally deposing defendant; and it is

ORDERED that plaintiff may seek testimony from defendant by way of written interrogatories, provided such interrogatories are served on defendant by 5:00 p.m. on January 5, 2024;

ORDERED that the parties shall appear for a status conference on January 11, 2024 at 9:30 a.m.¹



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12/14/2023

DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE

¹ Parties requested an adjournment of the December 14, 2023 status conference.