

Zimmerman v 410-57 Corp.

2024 NY Slip Op 31813(U)

May 23, 2024

Supreme Court, New York County

Docket Number: Index No. 653569/2020

Judge: Dakota D. Ramseur

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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. DAKOTA D. RAMSEUR **PART** **34M**

Justice

-----X

BETSY ZIMMERMAN, EDWARD ZIMMERMAN,

Plaintiffs,

- v -

410-57 CORPORATION, THE BOARD OF DIRECTORS OF
THE 410-57 CORPORATION, JOSHUA FORMAN,

Defendants.

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INDEX NO. 653569/2020

MOTION DATE 05/24/2023

MOTION SEQ. NO. 011

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 011) 495, 496, 497, 498, 499, 500, 501, 502, 503, 518, 539, 540, 541, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 610

were read on this motion to/for ORDER OF PROTECTION.

Plaintiffs, Betsy Zimmerman and Edward Zimmerman (plaintiffs) commenced this action for, among other claims, breaches of proprietary leases and breach of fiduciary duty, against defendants, 410-57 Corporation (Corporation), The Board of Directors of the 410-57 Corporation (Board), and Joshua Forman (Foreman) (collectively, defendants). Defendants now move pursuant to CPLR 3103 for a protective order against certain requests contained in plaintiffs’ second set of requests for admissions served on April 17, 2023 and motion sequence 010,¹ and pursuant to CPLR 3103 and 22 NYCRR 130-1.1 for sanctions. The motion is opposed. For the following reasons, the motion is granted in part.

Plaintiffs are the proprietary lessees of the cooperative apartments known as Penthouse AB and Penthouse C (premises) in the building located at 410 East 57th Street, New York, New York (Building). The Corporation is the owner of the Building. The Board is the Board of Directors of the Corporation. According to the complaint, the Board manages, controls and oversees the affairs of the Building and the Corporation. Forman has acted as the president of the Board since June 2018. Plaintiffs allege that defendants breached the proprietary leases by, among other things: unreasonably withholding consent to plaintiffs’ proposed alterations to the premises; placing unreasonable conditions and terms upon plaintiffs proposed alterations to the premises; unreasonably delaying the application process for plaintiffs’ proposed alterations; imposing unreasonable conditions on the approval of plaintiffs’ proposed alterations to the premises; issuing preliminary approval for plaintiffs’ proposed alterations, only to claim no such prior approval had been granted; concealing test results and reports that established non-code-

¹ Motion sequence 010 was resolved pursuant to this Court’s decision and order dated May 24, 2024.

compliant water pressure; unjustifiably charging plaintiffs for roof, window, and structural reports; and failing to correct and repair the deficient water pressure in the premises.

In support of their motion to strike plaintiffs' second set of interrogatories and for a protective order, defendants first argue that the subject notice to admit and motion sequence 010 violate this Court's orders entered on August 9, 2022 and on October 19, 2022. A review of both orders reveals that neither precluded plaintiffs from serving the subject notice to admit, nor filing motion sequence 010, which sought the production of certain discovery. The August 9, 2022 order, directed that plaintiffs "[s]hall provide a detailed list outlining all outstanding discovery, including the names of the class of individuals they seek text messages from and the texts depicting the alleged discrepancies" (NYSCEF doc. no. 502). The October 19, 2022 order states that "[p]laintiff shall serve a supplemental demand within twenty (20) days, or waived" (NYSCEF doc. no 503). A plain reading of both orders do not suggest that either order imposes a time limit, or any other limitation, for plaintiffs to serve the subject notice of admit, but instead defines the scope of discovery for plaintiffs to comply with. Further, the orders do not prohibit plaintiffs from moving to compel, whether the discovery was previously ordered or not.

Defendants next argue that the notice to admit is improper, in that it "[f]ail[s] to comply with CPLR [§] 3123." 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 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. It is not intended to cover ultimate conclusions, which can only be made after a full and complete trial" (*Ramcharran v New York Airport Servs., LLC*, 108 AD3d 610, 610 [2d Dept 2013] [internal citations omitted]). "[T]he purpose of a notice to admit is not to obtain information in lieu of other disclosure devices, such as the taking of depositions before trial" (*DeSilva v Rosenberg*, 236 AD2d 508 [2d Dept 1997]).

Here, defendants fail to establish that the second notice to admit seeks an admission of material issues or ultimate facts at issue in the action. Defendants do not make substantiative arguments specifying how each notice to admit is improper. Instead, defendants simply argue that request numbered 4-10, 15-52, 54-63, 65-67, 75-88, 90-93, 96-101, 106, and 108-121, should be stricken "as they are substantively improper and fail to comply with CPLR [§] 3123." Without a substantive basis connecting the responses sought in the second notice to admit to the claims and defenses alleged, the Court is unable to determine whether the questions go to the heart of the controversy or are otherwise improper.

In any event, plaintiffs demonstrate that many of the admissions sought by the subject notice to admit are not in controversy. For instance, requests 4-10 seek the authentication of the alteration agreement, a form for alterations proposed to be made at the subject building by defendant 410-57 Corporation and its shareholders or lessees. The admissions sought in requests

4-10—which specifically seeks admissions as to when the alteration agreement was signed by plaintiffs, whether defendant Corporation signed it, and the scope of what the agreement covered—are not in substantial dispute (CPLR 3123[a]). By way of another example, requests 15-52 seek admissions related to the proprietary leases in connection with plaintiffs’ apartments and the rights and obligations of the parties that flow therefrom, but do not otherwise seek admissions that go to the heart of the controversy. Requests 96-101 seek the authentication of an email to defendant Board of Directors, confirming receipt and that the email notified the Board to return signed conflicts disclosures, and confirming that Board members did not return signed conflicts disclosures. Again, these requests seek admissions that are not ultimate facts in controversy, and seek information that is not in dispute.

Defendants also contend that the requests concerning the proprietary leases seek legal conclusions. A notice to admit “[i]s inappropriate as a vehicle for asking a party to interpret the law or someone else’s compliance therewith” (*Villa v New York City Hous. Auth.*, 107 AD2d 619 [1st Dept 1985]; see *Kimmel v. Paul, Weiss, Rifkind, Wharton & Garrison*, 214 AD2d 453, 453 [1st Dept 1995]). Defendants have not identified specific requests for admission numbers that seek a legal interpretation, and thus, defendants’ request is denied to the extent they seek a protective order as to specific requests. In any event, the requests concerning the proprietary leases do not call for legal conclusions, but rather seek admissions concerning uncontroversial features of those documents, the features of plaintiffs’ premises, and whether the documents have been modified.

Defendants next argue that the notice to admit seeks admissions that are obtainable through other discovery devices. Defendants cite to plaintiffs’ request for admission as to water pressure records, and more specifically, “water pressure evaluations [and] verification of a non-party’s handwritten notes.” Requests 79 and 81-85 essentially seek discovery—not to establish undisputed facts—in that it seeks admissions that concern a level of detail improper for a notice to admit (*Hodes v City of New York*, 165 AD2d 168, 170 [1st Dept 1991] [“the purpose of a notice to admit is to crystallize issues and to eliminate from trial those that are easily provable or not really in dispute”]). Accordingly, as requests 79 and 81-85 are improper for a notice to admit, defendants demonstrate their entitlement to a protective order concerning those requests.

Lastly, defendants argue that the requests seeking admissions as to the apartment units occupied by the Coop’s board members, form agreements that were utilized ten years ago, including work done in board members’ apartments, actions taken by shareholders regarding other apartments in the Building, are irrelevant. As above, defendants do not identify specific requests or describe how those requests are irrelevant. In any event, those requests seek admissions directly related to plaintiffs’ claims that defendants treated plaintiffs’ requests for alterations different than Board members’ requests and defendants’ obligations to make certain repairs.

In light of the above determination granting in part defendants’ motion for a protective order, the branch of defendants’ motion for sanctions pursuant to CPLR 3103 and 3123 and 22 NYCRR 130-1.1 is denied.

Accordingly, it is hereby,

ORDERED that defendants motion for a protective order is granted as to requests numbered 79 and 81 through 85, and otherwise denied. Defendants shall respond to the balance of the notice to admit within thirty (30) days; and it is further

ORDERED that plaintiffs shall serve a copy of this decision and order upon defendants, with notice of entry, within ten (10) days of entry.

This constitutes the decision and order of the Court.

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5/23/2024
DATE

DAKOTA D. RAMSEUR, 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