

<b>Preferred Westchester Props., Inc. v Lipscomb</b>
2024 NY Slip Op 35071(U)
October 16, 2024
Supreme Court, Westchester County
Docket Number: Index No. 54296/2020
Judge: Alexandra D. Murphy
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER  
PRESENT: HON. ALEXANDRA D. MURPHY, J.S.C.**

----- X  
PREFERRED WESTCHESTER PROPERTIES, INC.,

Plaintiff,

Index No. 54296/2020

**DECISION & ORDER**

-against-

Motion Seq. No. 6

MILAGROS MORAN LIPSCOMB A/K/A MILAGROS  
ADELA MORAN A/K/A ADELA MORAN A/K/A  
MIMI LIPSCOMB and JOHN LIPSCOMB a/k/a  
JOHN MARSHALL LIPSCOMB,

Defendants.

----- X

In an action concerning real property located at 432 Riverdale Avenue, Apartment 3C, Yonkers New York 10704, the plaintiff moves to compel discovery pursuant to CPLR 3124 and 3126 or in the alternative strike the defendants' answers and/or preclude the defendants from presenting evidence and testimony at trial.

**Papers Considered**

**NYSCEF Doc. Nos. 150-164; 167-172; 175-177**

1. Notice of Motion and Affirmation of Kristen L. Abraham, Esq./Exhibits A-E;
2. Affirmation in Opposition of Jacqueline N. Boone, Esq.;
3. Notice of Rejection of Kristen L. Abraham, Esq.;<sup>1</sup>
4. Affirmation in Reply of Kristen L. Abraham, Esq.

**Factual and Procedural Background**

The plaintiff commenced this action on March 17, 2020, alleging breach of contract, fraudulent misrepresentation, fraudulent inducement, unjust enrichment, trespass, conversion, equitable estoppel, economic loss, and lost profits.

<sup>1</sup> This Court is not rejecting defendant Lipscomb's opposition due to the fact that the plaintiff initially complied with the June 12, 2024 order by filing its motion on July 19, 2024, but then amended its motion on July 23, 2024. Thus, the Court overlooks the purported delay of Defendant Lipscomb of August 2, 2024, to August 8, 2024.

*Preferred Westchester Properties, Inc. v Milagros Moran Lipscomb et. al.* Index No. 54296/2020

The plaintiff moves pursuant to the June 12, 2024, conference order (“the June Order”) which authorized the plaintiff to move to compel defendant Lipscomb to fully and completely respond to the plaintiff’s January 13, 2022, Initial Demands (“Initial Demands”).

This case has a lengthy history of discovery including three motions. On January 13, 2022, the plaintiff served its Initial Demands on the defendants. On or about February 13, 2022, the defendants responded with objections. Dissatisfied with the response, the plaintiff sent two deficiency letters - one on May 24, 2022, and one on June 8, 2022 (NYSCEF Doc. No. 138). On July 18, 2022, the plaintiff filed a motion to compel a supplemental response to the Initial Demands. On August 22, 2022, the Court ordered defendant Lipscomb to serve a *Jackson* Affidavit by September 2, 2022 (NYSCEF Doc. No. 77). Having not received the *Jackson* Affidavit, the plaintiff filed a letter on September 9, 2022, advising the Court of the same. The Court then ordered defendant Lipscomb to file a *Jackson* Affidavit by September 27, 2022 (NYSCEF Doc. No. 86), which he timely did (NYSCEF Doc. No. 89).

The plaintiff moved to compel complete discovery responses again, and on January 11, 2023, the Court granted the plaintiff’s motion to compel the following discovery: (1) plaintiff’s demand for names and addresses of witnesses; and (2) the plaintiff’s demands for statements pursuant to CPLR 3101(e) regarding the occurrences set forth in the complaint or answer; and the plaintiff’s document demands [c], [h], [l-q] of the Initial Demands (NYSCEF Doc. No. 98). The plaintiff then filed correspondence on February 24, 2023, arguing that the defendants had not complied with the order (NYSCEF Doc. No. 108). As such, on March 17, 2023, the Court ordered compliance by April 28, 2023 (NYSCEF Doc. No. 110). Defendant Lipscomb timely provided his response (NYSCEF Doc. No. 152).

The plaintiff then moved to compel complete responses to its Initial Demands on May 17, 2023, but the motion was ultimately denied for failure to include a good faith affirmation (NYSCEF Doc. No. 130). In addition to the Initial Demands, the plaintiff filed Supplemental Demands related to its amended complaint (NYSCEF Doc. No.136). On January 12, 2024, the plaintiff sent a good faith correspondence seeking responses to the plaintiff’s Initial Demands and Supplemental Demands (NYSCEF Doc. No. 138). On January 31, 2024, the Court ordered the defendants to respond to the plaintiff’s good faith letter by February 2, 2024 (NYSCEF Doc. No. 142). On March 22, 2024, the plaintiff sent another good faith correspondence pertaining to the defendants’ failure to comply with the Court’s January 16, 2024, order and a subsequent Court order dated February 15, 2024, extending the time to answer the good faith correspondence to March 15, 2024 (NYSCEF Doc. No. 146).

On June 12, 2024, the Court granted the plaintiff permission to make a motion regarding “defendant John Lipscomb’s response to 2022 Initial Demands by 7/19/24.” The Court further instructed the plaintiff to file a deficiency letter as to the Supplemental Demands and request further permission to move by June 28, 2024. The plaintiff was not given permission to move as to: (1) any responses of defendant Moran; or (2) defendant

*Preferred Westchester Properties, Inc. v Milagros Moran Lipscomb et. al.* Index No. 54296/2020

Lipscomb's response to Supplemental Demands (NYSCEF Doc. No. 148). On June 21, 2024, defendant Lipscomb timely provided a response to the Supplemental Demands (NYSCEF Doc. No. 153).

On June 28, 2024, the plaintiff filed a deficiency letter as to defendant Lipscomb's response to the Supplemental Demands (NYSCEF Doc. No. 149). The plaintiff argued that: (1) if defendant Lipscomb is not in possession of any information or documents responsive to a demand, then he must produce an affidavit describing the steps taken to search and/or explaining why it was not in his possession; (2) the general objections put forth are not responsive to the demands; and (3) defendant Lipscomb's blanket objections to demands (a)-(j) are not valid in that he would be in possession of documents and correspondences between him and the plaintiff. The plaintiff sought a response from defendant Lipscomb by July 5, 2024 (NYSCEF Doc. No. 149).<sup>2</sup>

The plaintiff then filed this motion on July 19, 2024. In its motion, the plaintiff details the alleged deficiencies in the defendants' responses to the Initial Demands and the Supplemental Demands. The plaintiffs further argue that the fact that they have had to make three motions regarding failure to comply with discovery demands proves a pattern which warrants preclusion or striking the answer.

In opposition, defendant Lipscomb argues that this motion and the motions before it are a bad faith fishing expedition as defendant Lipscomb has repeatedly advised that he is not in possession of any responsive documents and has attested to the same in his *Jackson* Affidavit. Defendant Moran did not submit opposition.

## Discussion

As an initial matter, and as the parties in this case are well aware, a party is not permitted to make a discovery motion without explicit permission of the Court:

[n]o discovery-related motion (including a motion to dismiss predicated upon a discovery violation and including any discovery cross-motion) may be interposed and e-filed until a pre-motion conference has been requested and held...Motions filed before a pre-motion conference has been held may be denied unless there is shown good cause why such relief is warranted before the conference is held (22 NYCRR §202.12[h]).

(see Westchester Supreme Court Civil Case Management Rules).<sup>3</sup> Here, the plaintiff moved on three grounds: (1) defendant Lipscomb's response to the Initial Demands; (2)

---

<sup>2</sup> During the procedural history set forth above, there were two issues that led to some delays in the case. First, defense counsel successfully withdrew as counsel for defendant Moran who then continued pro se. Second, the plaintiff amended its complaint to include allegations of a fraudulent deed transfer during the pendency of the litigation (NYSCEF Doc. Nos. 102-111; 151 at p. 5).

<sup>3</sup> [WestchesterCivilRules.pdf \(nycourts.gov\)](#)

*Preferred Westchester Properties, Inc. v Milagros Moran Lipscomb et. al.* Index No. 54296/2020

defendant Lipscomb's response to the Supplemental Demands; and (3) defendant Moran's discovery responses. Despite the explicit instructions of the June 12, 2024, order that the plaintiff should "request further permission regarding John Lipscomb's supplemental demands" (NYSCEF Doc. No. 148), the plaintiff never sought that permission from the Court. Furthermore, it never even raised the issue of motion practice regarding defendant Moran to the Court. Therefore, the Court is only considering the issue for which the plaintiff had explicit permission to move: defendant Lipscomb's response to Initial Demands. In addition, the Court will address those issues regarding the Supplemental Demands that are directly connected to the Initial Demands.

Pursuant to CPLR 3124,

[i]f a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, except a notice to admit under section 3123, the party seeking disclosure may move to compel compliance or a response.

Similarly, pursuant to CPLR 3126,

"If any party...refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them:

1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or
2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or
3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

"Disclosure in civil actions is generally governed by CPLR 3101(a), which provides that there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action" (*Sereda v A.J. Richard & Sons, Inc.*, 219 AD3d 1458 [2d Dept 2023] [internal citations and quotations omitted]). Indeed, the Courts have "wide discretion" in determining what is "material and necessary" (*id.*). "Material and necessary" has been defined as "any facts bearing on the controversy which will assist preparation

*Preferred Westchester Properties, Inc. v Milagros Moran Lipscomb et. al.* Index No. 54296/2020

for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason.” (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 406 [1968]). “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, Inc. v Brooklyn Union Gas Co.*, 150 AD2d 420, 421 [2d Dept 1989]). Bare allegations as to relevancy do not suffice (*id.*). Furthermore, striking pleadings or preclusion is only appropriate when the party’s refusal to turn over material and necessary discovery is willful and contumacious (*Bermudez v Laminates Unlimited, Inc.*, 134 AD2d 314, 315 [2d Dept 1987]). Here, the plaintiffs have not established willful and contumacious behavior (*see e.g. Schneider v City of NY*, 217 AD2d 610, 611 [2d Dept 1995]). Thus, the Court focuses on the portion of the plaintiff’s motion seeking to compel defendant Lipscomb’s response to Initial Demands.

The plaintiff takes issue with the sufficiency of those responses, specifically:

m) Any and all documents relating to any and all mortgages, deeds, promissory notes, liens, encumbrances and other documents associated with any and all ownership or part ownership rights to any property located in the United States or any other country.

RESPONSE: OBJECTION. Plaintiff is not entitled to the documentation requested as same is not relevant to the within case.

n) Any and all documents, digital information and communications Defendants relied upon to support their basis for Defendants’ response to any and all allegations contained in Plaintiff’s Complaint.

RESPONSE: Defendant John Lipscomb shall rely upon all documents filed in the City Court of Yonkers bearing Index # LT 2785-12.

(o) Any and all documents, digital information and communication Defendants relied upon to support their basis for Defendants’ response to Plaintiff’s Demand for Verified Bill or Particulars.

RESPONSE: Defendant John Lipscomb shall rely upon all documents filed in the City Court of Yonkers bearing Index # LT 2785-12.

*Preferred Westchester Properties, Inc. v Milagros Moran Lipscomb et. al.* Index No. 54296/2020

(p) Any and all documents, digital information and communications Defendants relied upon to support their basis for Defendant's response to Plaintiff's Demand for Interrogatories.

RESPONSE: Defendant John Lipscomb shall rely upon all documents filed in the City Court of Yonkers bearing Index # LT 2785-12.

q) Copies of any and all documents' Defendants intends to rely upon at the time of trial

RESPONSE: Objection. Overbroad and unduly burdensome. Defendant John Lipscomb shall rely upon all documents filed in the City Court of Yonkers bearing Index # LT 2785-12.<sup>4</sup>

The plaintiff argues that to date they have "not received a single document from Defendant Lipscomb despite its numerous good faith efforts" (NYSCEF Doc. No. 151 at p. 9). Of the responses to demands above that the plaintiff takes issue with, all of defendant Lipscomb's responses pointed the plaintiff to the Landlord-Tenant file for relevant documents, with the exception of response (m).

Defense counsel affirms in opposition, "[i]t is also undisputed that Defendant John Lipscomb is the estranged husband of Defendant Milagros Lipscomb and has never resided at the subject premises...Plaintiff is well aware that John Lipscomb has never been an occupant of the subject unit and thus HAS NO DOCUMENTS TO PROVIDE. This is the reason a Jackson Affidavit was filed in September 2022" (NYSCEF Doc. No. 175 at p. 9) (emphasis in the original). Pursuant to the *Jackson* Affidavit dated September 26, 2022, John Lipscomb attested that "I have provided copies of all requested material that are in my possession" (NYSCEF Doc. No. 89 at p. 1).

Therefore, defendant Lipscomb is representing that he has no relevant documents in his possession and at the time of trial would only utilize those documents contained in the Landlord-Tenant file involving this property. Given that defendant Lipscomb has repeatedly advised the plaintiff that he has no relevant documents regarding Initial Demands N-Q and filed a *Jackson* Affidavit to the same effect in 2022, the plaintiff's motion seeking to compel further responses is denied.

Addressing Demand (m), while defendant Lipscomb initially responded that these documents were not relevant to the case, in a supplemental response, defendant Lipscomb clarified that "John Lipscomb is not in possession of any contract, lease or assignment between the Plaintiff and any other party herein regarding the subject

---

<sup>4</sup> The plaintiff also seems to be arguing that defendant Lipscomb's responses to demands C and H are deficient, however, the plaintiff does not acknowledge that defendant Lipscomb's Supplemental Response indicated that he is not in possession of documents responsive to the same.

*Preferred Westchester Properties, Inc. v Milagros Moran Lipscomb et. al.* Index No. 54296/2020

premises” (NYSCEF Doc. No. 153 at p. 7). However, defense counsel does not address Demand (m) of the Initial Demands at all.

Therefore, defendant Lipscomb shall provide all responsive documents to Demand (m) within thirty days of this order, or, in the alternative, provide an updated *Jackson* Affidavit indicating that he is not in possession, custody, or control of documents related to the amended fraudulent conveyance cause of action including but not limited to “[a]ny and all documents relating to any and all mortgages, deeds, promissory notes, liens, encumbrances and other documents associated with any and all ownership or part ownership rights to any property located in the United States or any other country”. The *Jackson* Affidavit must outline diligent search efforts for responsive documents (*Jackson v New York*, 185 AD2d 768, 770 [1st Dept 1992]).

New York law provides the *Jackson* Affidavit solution precisely for a situation such as the situation presented here. The plaintiff may be dissatisfied with defendant Lipscomb’s representation that he does not possess relevant documents but cannot force him to produce documents outside his possession, custody, or control or documents which do not exist. Similarly, defendant Lipscomb cannot shield disclosure with a *Jackson* Affidavit without also accepting possible consequences at trial should he attempt to introduce more documents despite such lengthy negotiations and motion practice.

As to the plaintiff’s arguments against defendant Moran, even if the Court were to consider this portion of the motion, it must be noted that at the conference on September 25, 2024, the plaintiff advised that defendant Moran has provided a response that was unlabeled and unorganized. However, defendant Moran advised that she would organize them according to demand. Should the plaintiff identify additional deficiencies with this updated response, the same will be addressed at the next discovery conference on October 23, 2024. That said, the plaintiff is reminded of the importance and requirements of meeting and conferring with the pro se defendant prior to turning to motion practice.

The Court has considered the remaining arguments, which are found to be without merit.

*Preferred Westchester Properties, Inc. v Milagros Moran Lipscomb et. al.* Index No. 54296/2020

Accordingly, it is

**ORDERED** that the plaintiff's motion to compel (motion sequence no. 6) is **DENIED** in all respects except that defendant John Lipscomb is to provide an updated *Jackson* Affidavit or responsive documents in accordance with this decision within thirty days of this order.

Counsel shall virtually appear for the previously scheduled in-person **Compliance Conference** on October 23, 2024, at **11:00 A.M.**

Dated:           White Plains, New York  
                  October 16, 2024

  
\_\_\_\_\_  
HON. ALEXANDRA D. MURPHY, J.S.C.