

Fiore v DeMarco
2025 NY Slip Op 35453(U)
February 28, 2025
Supreme Court, Nassau County
Docket Number: Index No. 618752/2023
Judge: Sarika Kapoor
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**SUPREME COURT: STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT: HON. SARIKA KAPOOR
ACTING JUSTICE OF THE SUPREME COURT

ROSEMARY FIORE,

Plaintiff,

- against -

ERNEST J. DEMARCO and RON-LYN AUTO BODY CORP.,

Defendants.

TRIAL/IAS PART 32
Index No.: 618752/2023

DECISION AND ORDER

Motion Seq. No.: 002
Motion Submission Date:
01/20/2025

NYSCEF docs. 17, 18, 41-76 were read and considered in deciding this motion.

Relief Requested

Plaintiff moves for an Order (1) pursuant to CPLR 3042(d) precluding the defendants from giving evidence at trial as to those matters which she claims were not adequately, properly and completely responded to pursuant to the demand for a verified bill of particulars dated January 8, 2024 (the “subject BOP”) (doc. 17); and, (2) pursuant to CPLR 3126, precluding the defendants from producing, offering into evidence, or presenting in any manner those particulars in support of the defendants’ counterclaims not responded to or not sufficiently responded to pursuant to the subject BOP, and imposing sanctions against the defendants for their failure to so respond. Defendants oppose.

Background

Briefly, on March 9, 2021, the defendants Ernest J. DeMarco and Ron-Lyn Auto Body Corp. signed a lease agreement with the plaintiff, as landlord, wherein the defendants became the tenants of the premises known as 73 Autumn Drive, Plainview, NY 11803 (“premises”). Pursuant to the lease agreement, the defendants promised to pay \$3,600 monthly rent on or before the 1st calendar day of each month. This was subsequently modified by the parties such that, for the lease term commencing on March 9, 2021 to March 8, 2022, it was agreed that the rent would be payable on or before the 9th calendar day of each month. Plaintiff claims that, by agreement, the defendants continued to remain in possession of the premises beyond March 8, 2022, as month to month tenants from March 9, 2022 through July 7, 2023, under the same terms and conditions. Plaintiff submits, however, that, “unbeknownst to her,” the defendants placed a “stop payment” on their rent payment checks commencing November 2022 through June 2023 (“the subject period”). Plaintiff submits that, despite due demand, the defendants have failed and refused to make payment

of the rent arrears for this period thereby breaching the lease agreement. Plaintiff submits that she is owed the sum of \$25,200 (\$3,600 for 7 months).

Based upon the foregoing, the plaintiff commenced an action in the District Court of the County of Nassau seeking a judgment of possession, a warrant to evict, and a monetary judgment for rent arrears due and payable for the subject period. However, on July 6, 2023, the parties, through their counsel, agreed to enter into a stipulation ("stipulation") to immediately vacate the premises and return possession of the premises to the plaintiff. The parties further stipulated to sever the causes of action in the landlord-tenant proceeding which sought monetary damages on behalf of landlord. Subsequent to entering into the stipulation, counsel for the parties commenced negotiations to settle the rent and other monies due and payable to the plaintiff. Plaintiff claims that although she has negotiated in good faith, the defendants continue to refuse to make payments to the plaintiff for the rent arrears due and payable to the plaintiff under the terms of the lease agreement since November 9, 2022. As such, plaintiff claims that she is damaged in the sum of \$28,800 together with interest, from November 9, 2022, due to the breach of the lease agreement by defendants.

On November 16, 2023, the plaintiff commenced this action asserting 6 claims including breach of contract and attorneys' fees. On December 13, 2023, the defendants answered the complaint denying the material allegations of the complaint and asserting 15 affirmative defenses and seven counterclaims; to wit, breach of contract, breach of warranty of habitability, breach of implied warranty of habitability, failure of duty to perform, constructive eviction, failure to negotiate, attorneys fees.¹

It is undisputed that, at this juncture, constructive eviction, breach of the warranty of the habitability, and attorneys' fees are the only claims that defendants wish to pursue.

The defendants assert that the plaintiff promised under the terms of the lease to render the premises in a habitable condition and to be responsible for certain repairs. However, the defendants claim, the plaintiff breached the contract in that the premises were not rendered habitable and the plaintiff did not repair damages to the premises all of which were reported to the plaintiff, who, told the defendants to inform her boyfriend, Richard Good ("Good") of any problems with the premises. Defendants claim that despite their timely notices to the plaintiff, the plaintiff did nothing to cure the defects and address the problems. The defendants claim that they duly and timely notified the plaintiff and Good of, inter alia, mold in several parts of the premises, a backed up toilet, a burnt out washer and dryer, a defective electric socket, no internet service in the premises, flooding of the second bathroom, and a defective ice machine. Defendants add that the

¹ At this juncture, counsel for the defendants assert that the only affirmative defenses it maintains are the following: (1) the plaintiff breached the warranty of habitability; (2) the plaintiff constructively evicted the defendants; (6) the plaintiff has no standing to sue since the plaintiff never dealt with the defendants and sent and relied upon her live in boyfriend, Richard Good, to speak with the defendants about any and all problems with the tenancy that arose; (9) the court lacks personal jurisdiction over the defendant (RPAPL §733); (11) the court lacks subject matter jurisdiction over this proceeding, and/or the Summons and Complaint fails to state a cause of action (RPAPL § 232-a, RPAPL § 735); (12) failure to state a cause of action; (13) the court lacks subject matter jurisdiction over this proceeding; (14) the court lacks subject matter jurisdiction over this proceeding and/or failure to state a cause of action (RPAPL §§711 and 735); (15) the plaintiff failed to properly demand the rent.

plaintiff further breached the contract in refusing to give the defendants a copy of the signed lease for more than three months after due demand for same.

On January 8, 2024, plaintiff served the subject BOP and a Notice of Discovery and Inspection upon the defendants. On February 4, 2024, the defendants filed their response to the subject BOP (doc. 18). On February 6, 2024 plaintiffs' counsel sent a good faith letter to defense counsel objecting to the responses to the subject BOP as insufficient, inadequate and spurious.

Motion Seq. 002

Upon the instant motion, the plaintiff seeks an order precluding the defendants from giving any evidence at trial of the items of which particulars have not been delivered pursuant to the plaintiff's demand and imposing sanctions against the defendants prohibiting them from introducing into evidence any information demanded within the subject BOP. In sum and substance, plaintiff claims that the defendants have failed to respond to certain particulars of plaintiff's demand and that those matters which were responded to, were inadequate, inappropriate, incomplete and insufficient as a matter of law. Counsel argues that the plaintiff must, and is entitled, to know the exact particulars of each alleged counterclaim presented, and without all of such particulars the plaintiff will be substantially prejudiced and unfairly precluded from eliciting from the defendants the alleged basis for each ground, counterclaim or assertion they provided in their pleadings, which would affect the plaintiff's ability to defend against each allegation and ultimately defeat the defendants' alleged claims. Plaintiff's counsel argues that the defendants' responses have continued to avoid full and material responses to the subject BOP.

In opposition, counsel for the defendants' attorney argues that the plaintiff's demands are unreasonable and frivolous. Counsel argues that the defendants have fully complied with the subject BOP and "[u]nfortunately, there is nothing the defendants can ever say or do that would ever satisfy the plaintiff's unreasonable demands or prevent this motion" (doc. 56, ¶4). Counsel adds that, in any event, no particulars need be answered for those affirmative defenses and counterclaims that have been withdrawn.

In reply, plaintiff's counsel argues that the when the court reviews the plaintiff's demand, "it will see, without any question, that the defendants have failed to properly answer any demand, providing nothing other than documents relating to discovery and inspection" (doc. 72, ¶1). Counsel argues that the plaintiff will be blindsided at trial without the particulars she has demanded and is entitled to.

Discussion

"The purpose of a bill of particulars is to amplify the pleadings, limit the proof, and prevent surprise at trial" (*L.R. v Evergreen Charter Sch.*, 232 AD3d 920 [2d Dept 2024] *quoting Jurado v Kalache*, 93 AD3d 759 [2d Dept 2012] [internal quotation marks omitted]; *see Jones v LeFrance Leasing Ltd. Partnership*, 61 AD3d 824, 825 [2d Dept 2009]).

CPLR 3042(a) states, in pertinent part, that "[w]ithin thirty days of service of a demand for a bill of particulars, the party on whom the demand is made shall serve a bill of particulars

complying with each item of the demand, except any item to which the party objects, in which event the reasons for the objection shall be stated with reasonable particularity. The assertion of an objection to one or more of the items in the demand shall not relieve the party on whom the demand is made from the obligation to respond in full within thirty days of service of the demand to the items of the demand to which no objection has been made.” Under CPLR 3042 (c), where a party fails to respond to a demand for a bill of particulars, the party seeking the bill of particulars may move to compel compliance. Further, if the failure to provide particulars is deemed to be willful, “the court may make such final or conditional order with regard to the failure or refusal as is just, including such relief as is set forth in [CPLR 3126]” (CPLR 3042[d]).

CPLR 3124 provides that “[i]f a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article ..., the party seeking disclosure may move to compel compliance or a response.” On a motion brought pursuant to CPLR 3124, the burden is on the party seeking the disclosure to establish a basis for the production sought (*see Foster v Herbert Slepoy Corp.*, 74 AD3d 1139, 1140 [2d Dept 2010] [“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.”]). “[T]he party challenging disclosure bears the burden of establishing that the information sought is immune from disclosure” (*Ambac Assur. Corp. v DLJ Mtge. Capital, Inc.*, 92 AD3d 451, 452 [1st Dept 2012]). Courts have found that a party is not required to respond to a discovery demand that is “palpably improper ... [in that it is seeking] irrelevant information, or [is] overbroad and burdensome” (*Montalvo v CVS Pharm., Inc.*, 102 AD3d 842, 843 [2d Dept 2013]).

“Pursuant to CPLR 3126, a court may impose discovery sanctions, including the striking of a pleading or preclusion of evidence, where a party ‘refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed’ ” (*Aha Sales, Inc. v. Creative Bath Prods., Inc.*, 110 AD3d 1019, 1019 [2d Dept 2013], quoting CPLR 3126). “The Supreme Court has broad discretion in making determinations concerning matters of disclosure, including the nature and degree of the penalty imposed under CPLR 3126” (*Arpino v F.J.F. & Sons Elec. Co., Inc.*, 102 AD3d 201, 209 [2d Dept 2012] [citations omitted]; *see Ozeri v Ozeri*, 135 AD3d 838, 839 [2d Dept 2016]).

Based upon the papers presented herewith, including the Demand For a Verified Bill Of Particulars (doc. 17) and Verified Answer To Demand For Bill Of Particulars (doc. 18), this Court finds that the defendants’ responses are adequate and proper. The responses are sufficient and the defendants are not required to provide further evidentiary detail

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Conclusion

Accordingly, it is hereby,

ORDERED that the motion is **DENIED in its entirety**.

The parties' remaining contentions have been considered and do not warrant further discussion.

Any application not specifically addressed is herewith **DENIED**.

This constitutes the decision and order of this Court.

Dated: Mineola, New York
February 28, 2025

ENTER:



HON. SARIKA KAPOOR, A.J.S.C.

ENTERED

Mar 03 2025

NASSAU COUNTY
COUNTY CLERK'S OFFICE