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Isidoro v Team Props. LLC

2022 NY Slip Op 30176(U)

January 20, 2022

Supreme Court, New York County

Docket Number: Index No. 450688/2020

Judge: Margaret A. Chan

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MARGARET CHAN PART 33

Justice

-----X

LEOPOLDO ISIDORO, JULIAN ISIDORO, FLORENCIO
MEJIA

Plaintiffs,

- v -

TEAM PROPERTIES LLC,

Defendant.

-----X

INDEX NO. 450688/2020

MOTION DATE 11/30/2021

MOTION SEQ. NO. 004

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106

were read on this motion to/for DISCOVERY.

In this action arising out of a dispute regarding the rent stabilized status of three apartments (the Apartments) where plaintiffs reside in a building located at 176 East 109th Street in Manhattan (the Building), plaintiffs move pursuant to CPLR 3124 for an order compelling the defendant building owner to (i) produce a Jackson affidavit with respect to plaintiffs' document requests, (ii) produce a privilege log pursuant to CPLR 3122(b) for all documents responsive to plaintiffs' document requests withheld on the basis of privilege, (iii) compelling defendant to issue supplemental responses with respect to these interrogatories, and (iv) extending the time for completion of discovery and the filing of note of issue. Defendant opposes the motion.

Plaintiffs' discovery motion will be addressed based on the following principles: CPLR 3101(a) provides that "[t]here shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action." The words "material and necessary" are "liberally interpreted to require disclosure, upon request, of any facts bearing on a controversy which will assist in sharpening the issue at trial" (*Roman Catholic Church of Good Shepherd v Tempco Systems*, 202 AD2d 257, 258 [1st Dept 1994]). Disclosure is thus not limited to "evidence directly related to the issues in the pleadings" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 408 [1968]). At the same time, "competing interests must always be balanced; the need for discovery must be weighed against any special burden to be borne by the opposing party" (*Kavanagh v Ogden Allied Maint. Corp.*, 92 NY2d 952, 954 [1998] [internal citation and quotation omitted]).

As to document discovery, plaintiffs note that aside from the documents submitted in support of their pre-answer motion to dismiss,¹ defendant has produced no documents in response to plaintiffs' document demands. Under these circumstances, plaintiffs argue that defendant should be required to provide a "Jackson affidavit" regarding the document requests.

In response, defendant assert that all documents in its possession and control were provided in support of its motion to dismiss, and submit the affidavit of defendant's managing agent, Derek Cohn (NYSCEF # 102). According to Cohn, when the Building was purchased by defendant in 1997, it was primarily controlled and operated by Morton Ross and Leonard Ross (the Rosses), who are now deceased, and as a minority member of the defendant he "did not assist with any due diligence, financing or details surrounding the Building's acquisition," which was handled by the Rosses with the assistance of Marvin Margolis,² who is also deceased (*id.*, ¶ 5).

Regarding plaintiffs' document demand, Cohn states that:

I reviewed the May 31, 2021 document demand and diligently searched all files and 20+ cabinets and drawers in my office for documents responsive to the demands. I also searched old boxes in the back of our office to see if any documents relating to the 1997 closing could be located—none were. I also searched my email address: acaronianasa@aol.com for any responsive documents and none were located. I admittedly do not use email very much. I did not exchange emails with the plaintiffs, or DHPD relating to the Building. I also asked my property manager, Jeremy Mack to check his email for any documents responsive to [the document] demands and none were located.

(*id.*, ¶ 9).

As for plaintiffs' assertion that a privilege log is required with respect to documents reflecting attorney-client communications or work product privilege, Cohn states that no documents are being withheld by defendant or its counsel on the basis of privilege (*id.*, ¶ 6).

¹ The documents submitted by defendant in support of its motion to dismiss are: (i) a copy of the deed to the Building, (ii) a copy of the DHPD registration to the Building, (iii) copies of all leases of Plaintiffs which Defendant had in its possession, (iv) a copy of the Building's I-Card, (v) copies of the notices of termination served upon plaintiffs, and (vi) copies of photographs of the Building. (NYSCEF #'s 2-6, 13, 14, 29, 30, 33, 40, 41, 42).

² Plaintiffs state that Margolis was a disbarred attorney (NYSCEF # 106-P1 reply Aff.at 4).

Cohn's affidavit is insufficient to comply with the requirements established in *Jackson v New York*, (185 AD2d 768, 770 [1st Dept 1992]) to demonstrate defendant's search was a "thorough one" and made in "a good faith effort to provide the necessary records." To comply with the requirements established by *Jackson*, a party must provide an affidavit showing "where the subject records were likely to be kept, what efforts, if any, were made to preserve them, whether such records were routinely destroyed, or whether a search had been conducted in every location where the records were likely to be found" (*id.*; see also *Dedushaj v 3175-77 Villa Ave. Housing Dev. Fund Corp.*, 135 AD3d 421 [1st Dept 2016]).

Here, while Cohn states that he searched files and boxes in his office, he does not indicate that these are the only locations where documents are likely to be found or what efforts were made to preserve records or whether records are routinely destroyed. And Cohn's statement as to documents potentially protected by privilege is similarly insufficient. As discussed during the September 9, 2021 status conference, the communications between defendant and defense counsel regarding this litigation are not at issue but rather potentially privileged materials/communications as to the legal status of the Building. Moreover, as noted by plaintiffs in reply, the described search for electronic records is deficient because it does not disclose the search terms used to search for relevant documents.

Next, with respect to the responses to interrogatories 1, 3, and 4, while the defendants initially objected to the interrogatories, including on the ground that the information sought was irrelevant to the rent stabilized status of the Building, defendant subsequently provided supplemental responses to the interrogatories. Plaintiffs now contend that the supplemental responses are inadequate, including because they fail to specifically state that defendant has no further information responsive to these interrogatories.

The first interrogatory asks defendant to "[i]dentify all persons (including but not limited to the Defendant's past and current members, employees, accountants, auditors, brokers, intermediaries, agents, representatives, or other persons acting on the Defendant's behalf, in the Defendant's employment, or under the Defendant's direction or control) who provided advice with respect to, led, assisted with, or otherwise participated in the Defendant's purchase of the Building, including but not limited to persons who took part in any due diligence surrounding the purchase." In response, defendant identified Marvin Margolis "as the sole professional who assisted with the acquisition," and that no brokers were used for the sale. In his affidavit, Mr. Cohn states that "this interrogatory asks for the names of individuals known to defendant who assisted with the acquisition---I answered this interrogatory to the best of my knowledge and I cannot recall additional names responsive to this demand" (NYSCEF # 102, ¶ 11). However, as plaintiffs point out, the first interrogatory does not ask only for those who assisted with the Building's acquisition. Accordingly, defendant shall provide a

supplemental response disclosing any further responsive information or provide a statement that defendant has no further responsive information to the interrogatory.

The third interrogatory asks for the identity of “all persons (including but not limited to the Defendant’s past and current members, employees, accountants, auditors, brokers, intermediaries, agents, representatives, or other persons acting on the Defendant’s behalf, in the Defendant’s employment, or under the Defendant’s direction or control) who provided advice with respect to, led, assisted with, or otherwise participated in efforts in obtain dismissal of HPD violations that were issued against the Building prior to the Defendant’s purchase of the Building.” In response, defendant identifies Cohn as the Building’s current managing agent and in his affidavit, Cohn states that “he would be the only one involved with any work to repair a condition to cure a DHPD violation” (*id.*, ¶ 12). As argued by plaintiffs, defendant’s response fails to respond to the question as to the identity of individuals who provided advice/assistance with the HPD violations prior to the Building’s purchase in 1997, and defendant’s supplemental response should respond to the interrogatory or specifically state that defendant has no responsive information.

The fourth interrogatory asks defendant to “identify all past and current members, agents, employees, attorneys or representatives of Defendant who: (i) visited the Building; (ii) lived in the Building; or (iii) interacted with the tenants or occupants of the Building.” In its supplemental response, defendant states that “Derek Cohn... is the managing member of the Defendant who primarily visits the Building and interacts with tenants. Additionally, the Building’s super is Geraldo (Gerry) Rivera and since 2017 Jeremy Mack was hired to assist in some property management at the Building.” Moreover, in his affidavit, Cohn states that he answered the interrogatory to the best of his knowledge (*id.*, ¶ 13). However, this statement is insufficient as it does not specifically state that there is no further responsive information and defendant is to supplement this interrogatory accordingly.

Conclusion

In view of the above, it is

ORDERED that plaintiffs’ motion to compel discovery is granted to the extent that within 20 days of entry of this Decision and Order, defendant shall provide a Jackson affidavit and further supplemental responses to interrogatory nos. 1, 3, and 4 consistent with this Decision and Order; and it is further

ORDERED that with regard to plaintiffs’ request to extend the time for discovery and the note of issue date, such dates shall be extended at a status

conference to be held by telephone on February 24, 2022 at 10:30 am using the call in information provided by the court for status conference held on September 9, 2021.

1/20/2022
DATE


MARGARET CHAN, 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