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2022-10-17

2986 BRIGGS LLC v. EVANS

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CIVIL COURT OF THE CITY OF NEW YORK
BRONX COUNTY: HOUSING PART C/Room 590

-----X

L&T Index # 308118/21

2986 BRIGGS LLC,

Petitioner-Landlord,

-against-

DECISION & ORDER

ROBERT EVANS; "J. DOE #1"; "J. DOE #2",
Respondents-Occupants.

-----X

Hon. Diane Lutwak, HCJ:

Recitation, as required by CPLR Rule 2219(a), of the papers considered in determining Respondent’s motion pursuant to CPLR § 408 for discovery (motion sequence #6):

<u>Papers</u>	<u>NYSCEF Doc #</u>
Notice of Motion	60
Attorney’s Affirmation in Support	61
Respondent’s Affidavit in Support	62
Exhibits A-C in Support	63-65
Petitioner Memorandum of Law in Opposition	68
Attorney’s Affirmation in Reply	60

BACKGROUND

In this licensee holdover proceeding, now pending before the court is respondent-occupant Robert Evans’ motion pursuant to CPLR § 408 for discovery on his second affirmative defense that petitioner’s refusal to accept his “CityFHEPS” voucher constitutes source of income discrimination in violation of NYC Administrative Code § 8-107(5)(a)(1). Respondent also has raised this claim in a declaratory judgment action he filed against petitioner in Bronx County Supreme Court earlier this year, *Robert Evans v 2986 Briggs LLC et al*, Bx Co Sup Ct Index # 807072/2022E. After filing that action respondent filed an Order to Show Cause in that case seeking a preliminary injunction staying this holdover proceeding pending the outcome of the Supreme Court action. Supreme Court Justice Guzman signed that Order to Show Cause on May 10, 2022 and temporarily stayed this proceeding pending the hearing and determination of respondent’s motion. By Decision/Order dated August 1, 2022, Justice Guzman denied respondent’s motion for a preliminary injunction, noting that respondent could raise his source of income discrimination cause of action as a counterclaim in this Housing Court proceeding, which she found to be “the preferred forum for this matter.”

Shortly after Justice Guzman issued her Decision/Order petitioner moved to restore this holdover proceeding to the court's calendar for trial and respondent cross-moved for leave to file a late answer. The parties agreed to settle both motions in a written stipulation dated August 25, 2022 which deemed respondent's proposed answer to be served and filed *nunc pro tunc* and restored the case to the court's calendar for an in-person pre-trial conference on September 29, 2022 at 2:30 p.m. Respondent filed his motion for discovery pursuant to CPLR § 408 on September 21, petitioner filed opposition on September 26 and respondent filed reply on September 28. The motion was adjourned to October 12, 2022 to give the parties further time for settlement negotiations and then marked submitted, decision reserved.

DISCUSSION

In summary proceedings a party requesting discovery must obtain leave of court, CPLR § 408, and, to obtain such leave, must demonstrate "ample need." *Hartsdale Realty Co v Santos* (170 AD2d 260, 565 NYS2d 527 [1st Dep't 1991]); *Mautner-Glick Corp v Higgins* (64 Misc3d 16, 18, 101 NYS3d 810, 812 [AT 1st Dep't 2019]); *Antillean Holding Co v Lindley* (76 Misc2d 1044, 1047, 352 NYS2d 557 [Civ Ct NY Co 1973]). In determining whether a party has established "ample need", courts consider a number of factors, not all of which need to be present in every case, including whether the movant has asserted facts to establish a claim or defense; whether there is a need to determine information directly related to the claim or defense; whether the requested disclosure is carefully tailored and likely to clarify the disputed facts; whether prejudice will result from granting leave to conduct discovery; and whether any prejudice caused by granting a discovery request can be diminished by an order fashioned by the court for that purpose. *See New York University v Farkas* (121 Misc2d at 647, 468 NYS2d 808 [Civ Ct NY Co 1983]), *citing Antillean Holding Co v Lindley, supra*.

Here, respondent has demonstrated "ample need" for discovery in the form of a deposition of petitioner's agent in order to obtain more information about his defense that petitioner's refusal to accept his CityFHEPS voucher is due to unlawful source of income discrimination. While petitioner asserts that it has other reasons for refusing to accept respondent as a tenant, respondent states his belief that those reasons are pretextual and seeks an opportunity to question petitioner's agent prior to trial on this question. Respondent's discovery demand is directly related to his defense and seeks information within petitioner's exclusive control and/or knowledge. The proposed deposition is not unduly burdensome as it is narrow in scope, the parties through counsel can schedule it promptly and, as per respondent's counsel, Attorney's Affirmation at ¶ 24, it is likely to be completed in a half day. The information respondent obtains upon deposing petitioner's head officer and managing agent is likely to clarify the disputed facts as to the reasons for petitioner's refusal to accept respondent's CityFHEPS voucher and thereby promote either settlement or a more efficient trial.

Petitioner's objection that respondent waived any further pre-trial motion practice in the parties' August 25, 2022 stipulation is not borne out by that agreement, which did not include any such waiver and instead simply set the case down for a pre-trial conference. One of the issues generally reviewed at such a pre-trial conference in a Housing Court Resolution Part is whether there are any further pre-trial motions to be made before transferring the case to Part X to await assignment to a Trial Part; rather than waiting, respondent filed his discovery motion far enough in advance that it was fully briefed by the date of that conference.

Petitioner's objection that respondent should seek discovery in his Supreme Court action, rather than here in Housing Court, ignores Justice Guzman's decision which points to Housing Court as "the preferred forum" for this matter. Regarding petitioner's assertion that use and occupancy should be ordered if discovery is granted, petitioner can seek this relief in a motion pursuant to RPAPL § 745(2)(a). Petitioner's objection that granting respondent's motion will result in further delay in this proceeding which has been pending since July 2021 will be addressed by setting a tight timeline for scheduling the deposition and then re-calendaring the case for a pre-trial conference.

CONCLUSION

For the reasons stated above, it is hereby ORDERED that respondent's motion is granted; the deposition notice is deemed served; petitioner's managing agent and head officer Gjergji Cotaj shall sit for a deposition prior to November 21, 2022 on a date and at a time and location to be arranged between the parties' counsel; and the proceeding is restored to the Court's calendar for an in-person, pre-trial conference on **December 15, 2022 at 9:30 a.m.** This constitutes the Decision and Order of this Court, which is being uploaded on NYSCEF.



Diane E Lutwak, HCJ

Dated: Bronx, New York
October 17, 2022

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