2022-05-03

Reilly v. 5504-301 E. 21st St. Manhattan LLC

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SABRINA KRAUS** **PART** **57TR**

Justice

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PATRICK REILLY, JOSHUA PINKELMAN

Plaintiff,

- v -

5504-301 EAST 21ST STREET MANHATTAN LLC,

Defendant.

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INDEX NO. 159490/2019

MOTION DATE 04/13/2022

MOTION SEQ. NO. 004 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 72, 73, 81, 82, 83, 84, 87, 88, 89, 90, 91, 92, 93, 102, 103

were read on this motion to/for QUASH SUBPOENA, FIX CONDITIONS.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 74, 75, 76, 77, 78, 79, 80, 85, 86, 94, 95, 96, 97, 98, 99, 100, 101

were read on this motion to/for PRECLUDE.

BACKGROUND

This is an action for rent overcharge brought based upon plaintiffs' tenancy at 301 East 21st Street, Apartment 16L, New York, New York 10010 (Subject Premises).

Defendant is the owner of 301 East 21st Street, New York, New York 10010, pursuant to a deed dated May 8, 2015.

Plaintiffs allege that defendant and/or the prior owner of the building improperly treated the Subject Premises as deregulated, increased the rent unlawfully after its allegedly last valid legal rent in 2000, and failed to register the Subject Premises properly as rent stabilized at the proper rent with DHCR.

Defendant responded to these claims by asserting a defense that the Subject Premises had been owner occupied at some point between 2000 and plaintiffs' tenancy, leaving the Subject

Premises temporarily exempt from rent regulation. Defendant further asserted that the prior owner had performed improvements to the Subject Premises, which when combined with proper application of rent guideline and vacancy increases served to permanently deregulate the Subject Premises once the unit was no longer owner-occupied.

Since the pleadings were filed, the parties have commenced discovery. As part of that discovery, on or around March 1, 2022, defendant submitted a *Jackson* Affidavit, stating that it has already produced all documents it possessed over to plaintiffs.

As explained in the *Jackson* Affidavit, defendant asserts they lack documentation of any leases or occupancy of the Subject Premises prior to May 8, 2015, the date defendant took ownership of the building. Defendant's knowledge of the prior occupancy of the Subject Premises comes solely from the statements of Henry Vukelj, the superintendent of the building both before and after defendant purchased the building.

THE PENDING MOTIONS

On April 12th, 2022, plaintiffs moved for an order quashing a subpoena to Con Edison and seeking related relief.

On March 23, 2022, plaintiff moved for an order striking defendant's answer pursuant to CPLR §3126.

On April 13, 2022 the motions were submitted to this court for determination.

The motions are consolidated herein and denied for the reasons set forth below.

Plaintiffs' Motion to Quash the Subpoena is Denied

Plaintiffs' lack the standing to challenge a subpoena that is neither directed at plaintiffs nor seeks to obtain information belonging to or about the plaintiffs themselves. "(A) subpoena may only be challenged by the person to whom it is directed or by a person whose property

rights or privileges may be violated." *Matter of Selesnick*, 115 Misc.2d 993 (Sup. Ct., Westchester County 1982), (*cited with approval by the Appellate Division in 38-14 Realty Corp. v New York City Dept. of Consumer Affairs*, 103 A.D.2d 804 (2nd Dep't, 1984)).

The First Department has held similarly in cases involving third-party subpoenas. In cases in which bank customers attempted to quash subpoenas seeking their records from their banks, the First Department has made clear that the bank customers lack standing to challenge a third-party subpoena. *See Norkin v Hoey*, 181 A.D.2d 248 (1st Dep't, 1992); *Shapiro v Chase Manhattan Bank*, 53 A.D.2d 542 (1st Dep't, 1976); *Democratic County Committee of Bronx County v Nadjari*, 52 A.D.2d 70 (1st Dep't, 1976).

The subpoena at issue seeks records from Con Edison for the period of time between 2001 and 2014, a time period prior to plaintiffs' occupancy of the Subject Premises. As such, the subpoena does not seek any information either provided in confidence by plaintiffs to Con Edison or of which plaintiffs have any conceivable property interest.

Additionally, plaintiffs have failed to show that the subpoena seeks irrelevant information or that it is overbroad.

It is well established that "[a]n application to quash a subpoena should be granted "[o]nly where the futility of the process to uncover anything legitimate is inevitable or obvious." *Anheuser-Busch, Inc. v Abrams*, 71 N.Y.2d 327 (1988). The burden of showing such futility is borne by the party seeking to quash a subpoena. *See Kapon v Koch*, 23 N.Y.3d 32 (2014) .

In support of their application to quash, plaintiffs argue that the information sought by the subpoena is not relevant because defendant argues in its answer that this action is limited to an examination of the rental history from only the four years prior to this action's commencement. Plaintiffs also argue that the information that would be obtained from such

records would merely show who was billed for the services provided and not the amount of rent paid.

However, plaintiffs' claims for rent overcharge stem from events dating back to 2000, which is when they allege the Subject Premises had its last valid rent. Defendant's defenses include an allegation that the Subject Premises was owner-occupied and renovated at some point between 2000 and the date in which defendant took ownership of the Premises in 2015. As such details of the occupancy of the Subject Premises between the years of 2001 and 2014 are relevant in this action

As asserted in the *Jackson* Affidavit, defendant does not have the documentary records as to the occupancy of the Subject Premises prior to taking ownership of the Building in 2015 and therefore served the subpoena upon Con Edison seeking information about the Premises during that period of time: 2001-2014 to substantiate its defense that the Subject Premises was once owner-occupied

This information could also be relevant to defendant's claim that the Subject Premises was renovated by showing the periods of time in which no electrical service was being rendered to any tenant in the Subject Premises.

Plaintiffs argue that the subpoena is overbroad as it seeks unspecified records and bills "going back for the last (20) years". However, "[a] subpoena is not rendered invalid merely because it requires production of a substantial number of documents. '[R]elevancy, and not quantity, is the test of the validity of a subpoena.'" *American Dental Co-op, Inc. v Attorney General of State of N.Y.*, 127 A.D.2d 274 (1st Dep't, 1987).

Based on the foregoing, the motion to quash the subpoena is denied.

Plaintiffs Have Failed to Meet Their Burden For Relief Pursuant to CPLR §3126

Plaintiffs have failed to meet the burden required to seek relief pursuant to CPLR §3126. "A Court may strike an answer only when the moving party establishes 'a clear showing that the failure to comply is willful contumacious or in bad faith"'. *Reidel v Ryder TRS, Inc.*, 13 A.D.3d 170 (1st Dep't, 2004).

Preclusion and striking of an answer are extreme measures only warranted in the face of clear bad faith conduct. As held by the Appellate Division in *Villega v New York City Housing Authority*, 231 A.D.2d 404 (1st Dep't, 1996):

> Although trial courts are afforded wide latitude in supervising pretrial discovery, preclusion, like the striking of an answer, is an extreme and drastic measure to be invoked only where the refusal to obey an order for disclosure or failure to disclose is clearly contumacious or deliberate.

The court finds defendant's *Jackson* affidavit to be satisfactory, and defendant shows a concerted effort to resolve the issues with plaintiffs without motion practice which plaintiffs essentially ignored. Defendant has substantially complied with plaintiffs' discovery demands, tendering all responsive documents it has in its own possession and explaining in the *Jackson* affidavit why it has found no other documents responsive to plaintiffs' requests.

Based on the foregoing, plaintiffs' motion for relief pursuant to CPLR §3126 is denied, any remaining discovery requests can be addressed at a status conference between the parties and the court.

CONCLUSION

WHEREFORE it is hereby:

ORDERED that Motion Sequence Nos 4 & 5 are denied in their entirety; and it is further

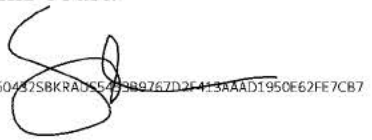
ORDERED that the parties appear for a virtual status conference on June 30, 2022 at 12 pm; and it is further

ORDERED that, within 20 days from entry of this order, defendants shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh);]; and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.



5/3/2022
DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE