

**25 W. 26th St., Inc. v Claudia G. Andrei Psychologist
P.C.**

2024 NY Slip Op 34017(U)

November 7, 2024

Supreme Court, New York County

Docket Number: Index No. 656547/2020

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. DEBRA A. JAMES PART 59

Justice

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25 WEST 26TH STREET, INC.,

Plaintiff,

- v -

CLAUDIA G. ANDREI PSYCHOLOGIST P.C. d/b/a
CLAUDIA ANDREI PSYCHOLOGIST, P.C.,

Defendant.

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INDEX NO. 656547/2020

MOTION DATE 03/20/2024

MOTION SEQ. NO. 002 003 004

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 98, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 126, 134, 135

were read on this motion to/for AMEND CAPTION/PLEADINGS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 99, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 127, 128, 129, 130, 131, 132, 133

were read on this motion to/for STRIKE PLEADINGS.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148

were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE/JURY
DEMAND/FROM TRIAL CALENDAR.

ORDER

Upon the foregoing documents, it is

ORDERED that the motion of the plaintiff 25 West 26th Street, Inc., to amend the caption to add Jonathan Vermut, as defendant (mot seq no 002) is denied; and it is further

ORDERED that to the extent that it seeks an adverse inference at trial or upon any dispositive motion with respect to missing records of other tenants complaints to plaintiff about the

conditions upon which defendant bases its counterclaims for constructive eviction, the motion of defendant Claudia G. Andrei Psychologist, P.C. d/b/a Claudia Andrei Psychologist, P.C., (mot seq no 003) is granted; and it is further

ORDERED to the extent that its seeks to dismiss the complaint and strike plaintiff's verified reply to defendant's counterclaims, as penalty for plaintiff's failure to respond to defendant's discovery demands (mot seq no 003), the motion of defendant Claudia G. Andrei Psychologist, P.C. d/b/a Claudia Andrei Psychologist, P.C., (mot seq no 003) is denied; and it is further

ORDERED that to the extent that it seeks to extend the time to file dispositive motions, the motion of the defendant Claudia G. Andrei Psychologist P.C. d/b/a Claudia Andrei Psychologist, P.C., to vacate the note of issue (mot seq no 004) is granted, and the parties shall have ninety (90) days from service of the herein order with notice of entry to file dispositive motions; and it is further

ORDERED that the motion of the defendant Claudia G. Andrei Psychologist P.C. d/b/a Claudia Andrei Psychologist, P.C., to vacate the note of issue (mot seq no 004) is otherwise denied; and it is further

ORDERED that counsel shall appear via Microsoft Teams for oral argument of the future motion(s) for summary judgment on February 20, 2025.

DECISION

In this action, plaintiff-landlord 25 West 26th Street, Inc. (the "Landlord") seeks damages for a breach of its commercial lease with the defendant-tenant Claudia G. Andrei Psychologist P.C. d/b/a Claudia Andrei Psychologist, P.C. (the "Tenant") for a commercial space located at 25 West 26th Street, New York, New York (the "Premises").

Landlord's motion to amend the caption to include Jonathan Vermut, as Guarantor, must be denied, in light of Landlord's unexplained three-year delay in seeking such leave. See Pecora v Pecora, 204 AD3d 611, 611-12 (1st Dept 2022).

The Landlord alleges that it delayed its application to name the Guarantor, as defendant, due to the moratorium on enforcement of commercial lease personal guarantees during the COVID-19 pandemic under New York City Administrative Code § 22-1005 (the "Guaranty Law"). However, the Guarantor at bar was not protected by the Guaranty Law because his mental health services business was considered "essential" under Executive Order (A. Cuomo) No. 202.6 (9 NYCRR § 8.202.6), and therefore, the Guaranty Law did not apply. See 841-853 Fee Owner, LLC v Space Initiatives LLC, 227 AD3d 434, 436 (1st Dept 2024) and 75 Commercial, LLC v An, 209

AD3d 574, 574-575 (1st Dept 2022). As the Guaranty Law does not apply, it cannot constitute an explanation for the Landlord's three year delay. Moreover, such amendment would result in prejudice to the Guarantor, under his Good Guy Guaranty, as discovery with respect to whether and when Tenant surrendered the Premises, to which the Guarantor was not a party, has already taken place.

The court denies plaintiff's motion to amend its pleading for the additional reason that such motion fails to comply with CPLR 3025(b). Plaintiff's motion is not "accompanied by the amended or supplemental pleading clearly showing the changes or additions to be made to the pleading." See Cafe Lughnasa Inc v A&R Kalimian LLC, 176 AD3d 523, 524 (1st Dept 2019).

By counterclaims, the Tenant alleges that it was constructively evicted as a result of the landlord's failures with respect to maintenance and safety at the Premises, and argues that it is entitled, therefore, to an abatement of rent and other relief.

During the discovery phase of this case, Tenant sought to discover from Landlord e-mail communications from other tenants to the Landlord (the "Tenant Complaints") about the conditions that are the basis. The Tenant contends that the Landlord has failed to comply with several discovery conferences orders of this court directing Landlord to so disclose.

By affidavits, agents of Noam Management Group ("Noam"), the Landlord's managing agent, affirmed that after searching Landlord's records, all responsive documents were produced (NYSCEF Doc Nos 84 and 87).

However, during the course of discovery, the Tenant obtained Tenant Complaints sent to the Landlord from a non-party, i.e., Meller's, Inc., who counsel for Landlord represents in a separate pending lawsuit, wherein Meller's, Inc., as tenant of the Premises, complained about the various maintenance and safety issues on the Premises. Upon discovering that Landlord had not provided all such communications, the Tenant filed the instant motion to strike the Landlord's pleadings.

This court agrees with Tenant that the Landlord's first affidavit, by Solomon Gottlieb (NYSCEF Doc No 84), fails to give an account of the specific procedures undertaken in its search for responsive documents, as required under Jackson v City of New York, 185 AD2d 768 (1st Dept 1992). After the Tenant received the Tenant Complaints from non-party Meller's, Inc., a second search was conducted and Yecheskel Berman ("Berman") submitted an affidavit. In his affidavit, Berman states that additional documents were recovered, but does not provide an explanation as to why those documents were not disclosed initially. NYSCEF Doc No 87. In his second affidavit submitted in opposition to the herein motion, Berman states that the documents were not initially produced,

unintentionally, due to "an outsourcing of management positions" and "high rated of staff turnover". NYSCEF Doc No 113, p. 6, §§ 32-36.

"CPLR 3126 provides a range of options for a court to utilize in addressing a party's refusal to comply with a discovery order, or a willful failure to disclose information the court finds ought to have been disclosed. The drastic sanction of striking pleadings is only justified when the moving party shows conclusively that the failure to disclose was willful, contumacious or in bad faith, a burden borne by the movant (Orlando v Arcade Cleaning Corp., 253 AD2d 362). Generally, the sanction should be commensurate with the nature and extent of the disobedience (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3126:8, at 758).* * * In view of the absence of any demonstration of willful and contumacious conduct by [the non-disclosing party], this imposition of the harshest penalty available to the court was an improvident exercise of discretion. Rather, a more appropriate remedy under these circumstances would have been to preclude [the non-disclosing party] from offering into evidence any of the undisclosed documents (see, Summit Waterproofing & Restoration Corp. v Scarsdale Country Estates Owners, 228 AD2d 431, 433) or from calling as witnesses any employees whose identities or addresses were not provided (Schoffel v Velez, 118 AD2d 492)".

Christian v City of New York, 269 AD2d 135, 137 (1st Dept 2000).

Although the Landlord's initial disclosure was lacking, its subsequent conduct is sufficient to demonstrate that the spoliation was not willful and contumacious. While the affidavits of Landlord's agents were inaccurate, they nonetheless establish good faith attempts to comply with the discovery demands, albeit partially. However,

". . . [Landlord]'s reliance on its employees to preserve evidence 'does not meet the standard for a litigation hold' (. . .see also Einstein v 357 LLC, 2009 NY Slip Op 32784[U] [Sup Ct, NY County 2009][finding that the failure to suspend deletion policy or to investigate the basic was in which e-mail was stored constituted a "serious discovery default" rising to the level of gross negligence or willfulness entitling party to an adverse inference...)"

VOOM HD Holdings LLC v EchoStar Satellite, LLC, 93 AD3d 33, 44-45 (1st Dept 2012). Therefore, with respect to any missing Tenant's Complaints, at trial or upon any dispositive motion, the court will impose an adverse inference against the Landlord with respect to the existence of such complaints.

Finally, the Tenant's motion to vacate the note of issue shall be denied. In light of the denial of the Landlord's motion to amend the complaint to name an additional defendant, no further discovery is outstanding. See Tatis v Triborough Construction Services, Inc., 214 AD3d 467 (1st Dept 2023). However, in light of the stipulation of counsel that extended the time to file the note of issue, the court grants leave and extends the parties' time to file dispositive motions, for good cause shown pursuant to CPLR 3212(a).

Debra A. James

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<u>11/7/2024</u> DATE			<u>DEBRA A. JAMES, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE