

SF Consultants, LLC v 28 W. Group Corp

2024 NY Slip Op 34044(U)

November 14, 2024

Supreme Court, New York County

Docket Number: Index No. 158320/2022

Judge: Emily Morales-Minerva

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

PRESENT: HON. EMILY MORALES-MINERVA PART 42M

Justice

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SF CONSULTANTS, LLC,

Plaintiff,

- v -

28 WEST GROUP CORP and LAMIA FUNTI,

Defendants.

INDEX NO. 158320/2022

MOTION DATE 05/21/2024,
07/31/2024

MOTION SEQ. NO. 003, 004

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 41, 42, 43, 44, 45, 46, 57, 58

were read on this motion to/for EXTEND - TIME

The following e-filed documents, listed by NYSCEF document number (Motion 004) 62, 63, 64, 65, 66, 68, 70

were read on this motion to/for SUBPOENA

APPEARANCES:

Sacco & Fillas, LLP, Astoria, New York (Zachary S. Kaplan, Esq., of counsel) for plaintiff.

Herzfeld & Rubin, P.C., New York, New York (Michael Rowan, Esq., of counsel) for defendants.

HON. EMILY MORALES-MINERVA:

In this action for, among other things, breach of a sublease, plaintiff SF CONSULTANTS, LLC, moves, pursuant to CPLR § 2004, for an order extending both the note of issue date and discovery deadlines open-endedly. Defendants 28 WEST GROUP CORP and LAMIA FUNTI submit no opposition, and move, pursuant to CPLR § 2307, for a "so-ordered" subpoena duces tecum directed at non-

party New York City Police Department ("NYPD"). Neither plaintiff nor non-party NYPD submit opposition to the subpoena.

However, for the reasons set forth below, both plaintiff's motion (seq. no. 003) and defendants' motion (seq. no. 004) are denied in their entirety.

BACKGROUND

Plaintiff SF CONSULTANTS, LLC (sublessor) was a long-term tenant of a commercial space located at 129 West 28th Street, New York, New York ("premises") (see id., at ¶ 4). On or about October 11, 2019, sublessor and defendant 28 WEST GROUP CORPORATION (sublessee) entered into a sublease agreement for the same premises (see NY St Cts Elec Filing [NYSCEF] Doc No. 24, Complaint, ¶5, 6, 19, 24). Sublessee and defendant Lamia Funti intended to operate a restaurant therein, and sublessor contends that Lamia Funti acted as an individual guarantor of the sublease agreement.

The parties' arrangement eventually soured and, on or about November 07, 2022, sublessor commenced this action against sublessee and Lamia Funti, alleging breach of the sublease agreement for failure to pay rent and breach of the personal guarantee. Defendants filed a joint answer.

Among other things, they assert therein a denial of the

complaint's allegations and a host of counterclaims. These counterclaims include breach of the sublease, wrongful eviction, breach of implied covenant of good faith and fair dealing, breach of implied covenant of quiet enjoyment, unjust enrichment, conversion, and commercial tenant harassment.

Following a preliminary conference with the parties, the court (N. Bannon, J.S.C.) set a discovery schedule (see NYSCEF Doc No. 30, Preliminary Conference Order, dated June 8, 2023). At the subsequent compliance conference, the same court held that sublessor failed to comply with the court's order and failed to "timely serve demands" on defendants without excuse (NYSCEF Doc. No. 34, Compliance Conference Order, dated December 7, 2023). The court (N. Bannon, J.S.C.) explicitly held that sublessor provided "[n]o reason. . . for not having earlier served [discovery] demands in this 2022 case" (id.).

Accordingly, the court (N. Bannon, J.S.C.) issued a second court-ordered schedule for discovery, and directed the parties to file note of issue on March 29, 2024 (id.). The same court marked the note of issue deadline as "Final" with emphasis, including circling the word "Final" and directing that "**[a]bsent good cause shown, any discovery issues not raised herein will be deemed waived**" (id. [emphasis in original]).

Alas, the parties again failed to comply with the court-directed time frames. Further, neither sublessor nor defendants

sought an extension of the discovery deadlines or an extension of the note of issue date. Instead, they allowed all deadlines to expire, taking no substantive action.

Thereafter, due to a change of judicial assignments, court administration transferred this matter to the undersigned. This court scheduled a status conference, and all parties appeared.

They appeared with a jointly proposed order, extending the court-ordered discovery time frame and note of issue date as if a matter of course (see NYSCEF Doc. No. 39, Proposed Order).¹ In addition, defendants submitted a subpoena duces tecum directed at non-party New York City Police Department (NYPD) for the court's immediate signature.

The undersigned declined to sign the parties' proposed order, as the parties made no attempt to set forth good cause for their continued delay and made no attempt to address their failure to comply with the court order (N. Bannon, J.S.C.), dated December 07, 2023 (see NYSCEF Doc. No. 40, Non-Motion Order, dated April 15, 2024). However, the court informed the

¹ The parties' proposed status conference order, submitted prior to this motion, on or around April 15, 2024, sought an extension for document discovery from October 02, 2023 to August 02, 2024, an extension for depositions from March 01, 2024 to September 04, 2024, and an extension of all discovery from March 01, 2024 to November 02, 2024 (see NYSCEF Doc. No. 39, Proposed Status Conference Order). The parties also proposed in April 2024, prior to this motion, to extend the note of issue date from March 29, 2024 to November 13, 2024 (id.). However, they submit no end dates here.

parties that they may move, by notice of motion, upon good cause, to extend discovery and the note of issue date.

Sublessor then filed the instant motion (seq. no. 003), pursuant to CPLR § 2204, seeking an order vacating the note of issue, and extending both the discovery deadline and note of issue date open-endedly.² Sublessor reasons that non-party depositions and general discovery remain outstanding and that no prejudice exists to defendants.

Defendants submit no opposition, and move, by notice of motion (seq. no. 004), for a court-ordered subpoena duces tecum for purposes of also engaging in further discovery.³

ANALYSIS

Motion Sequence No. 003

At first glance, the issue presented appears to be simply one where the court is presented with parties agreeing to extend the note of issue date to engage in further discovery. However, the facts here are not that simple.

² Their application contains no proposed time frame for the completion of discovery.

³ On May 21, 2024, defendants initially filed their motion requesting a so-ordered subpoena duces tecum upon NYPD, which was subsequently withdrawn without prejudice on July 25, 2024 (see NYSCEF Doc. No. 61, Notice of Withdrawal).

The record reflects (1) that these parties twice failed to comply with a set of court-ordered deadlines, making no attempt at a satisfactory showing for their delay, and (2) that these parties waived the subject discovery, absent good cause shown, as it was not addressed in the order, dated December 07, 2023 (see NYSCEF Doc. No. 34, Compliance Conference Order, dated December 7, 2023 [providing, emphasis as in original, that "[a]bsent good cause shown, any discovery issues not raised herein will be deemed waived"])).

In making this application, sublessor merely asserts that, following the conclusion of party discovery, it is "now likely [that sublessor will] have to hire an expert in the area of accounting, forensic accounting, and/or business valuation or the like, or someone in the restaurant business" and that "several witnesses will now be needed" (see NYSCEF Doc. No. 42, affirmation in support of plaintiff's motion pursuant to CPLR § 2004, paragraphs 19 & 20 [emphasis added]). These indefinite statements alone do not provide a satisfactory explanation for the failure to comply with the court-ordered schedule for a second time. In other words, sublessor presents no good cause for a relief from the court-ordered time frame and for the setting of an open-ended extension of discovery.

Further, sublessor fails to allege how any deposition and/or document discovery from these unidentified persons is

material and necessary in this action. Again, sublessor concludes only that yet to be identified experts from various potential fields -- who have not been hired -- and "several [unidentified] witnesses" will likely be or are needed for deposition and document discovery (see NYSCEF Doc. No. 42, affirmation in support of plaintiff's motion pursuant to CPLR § 2004, paragraphs 19 & 20). These circumstances are clearly distinguishable from 361 Broadway Assoc. Holding, LLC v Foundations Group I, Inc. (210 AD3d 548 [1st Dept 2022]), where the governing Appellate Division found an abuse of discretion in the lower court's refusal to permit an extension of the note of issue for continued discovery where the parties agreed to the extension and no prejudice existed.

In 361 Broadway, the parties in agreement "demonstrated a need for additional discovery and [a need] to depose plaintiff's expert, who was [identified and] hired to calculate damages . . ." (id. [emphasis added])." That cannot be said on this record. Further, not anything in 361 Broadway, indicates that the parties there presented a court-order holding that additional discovery was waived absent a showing of good cause.

Here, finding "good cause" appears to require substituting it completely with a party agreement, despite repeatedly ignored court-ordered time frames and a court-ordered waiver of additional discovery. However, in the words of the Court of

Appeals, albeit spoken in the context of summary judgment procedure, "' [i]f the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity'" (Brill v City of New York, 2 NY3d 648, 652-653 [2004] [Kaye, Ch. J.], quoting Kihl v Pfeffer, 94 NY2d 118, 123 [1999] [affirming the dismissal of a complaint for failure to respond to interrogatories within court-ordered time frames]). Therefore, sublessor's application is denied.

Motion Sequence No. 004

Defendants motion, pursuant to CPLR § 2307, for a judicial subpoena duces tecum fails on similar grounds. Again, the court is inclined and leans toward liberal discovery and extensions of discovery for good cause shown (see generally Forman v Henkin, 30 NY3d 656, 661 [2018] [discussing the right to disclosure as broad, but not limitless]; see also CPLR § 3101 [governing full disclosure of all matter material and necessary]). However, defendants here present no excuse for their failure to address such discovery before the previous court and present no good cause upon which this court may rely to excuse the waiver of such discovery, as set forth in the order (N. Bannon, J.S.C.), dated December 07, 2023.

Accordingly, it is
 ORDERED that plaintiff SF CONSULTANTS, LLC's motion (seq.
 no. 003) is denied in its entirety; and it is further
 ORDERED that motion (seq. no. 004) of defendants 28 WEST
 GROUP CORP. and LAMIA FUNTI is denied in its entirety.

THIS CONSTITUTES THE DECISION AND ORDER OF THIS COURT.

11/14/2024
 DATE

Emily Morales-Minerva
 EMILY MORALES-MINERVA, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE