SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. EMILY MORALES-MINERVA** **PART** **42M**

Justice

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INDEX NO. 451123/2022

THE CITY OF NEW YORK,

Plaintiff,

MOTION DATE 04/28/2024, 05/17/2024

MOTION SEQ. NO. 002 003

- v -

MOSHE PILLER, 172ND STREET REALTY LLC,A DAVIDSON LLC,DAVIDSON APARTMENTS LLC,155 LINDEN LLC,PARK AVENUE APARTMENTS LLC,17 ROSE ESTATES LLC,1025 BOYNTON AVENUE REALTY LLC,FAIRVIEW APARTMENTS LLC,125 EAST 18TH STREET LLC,PS MANAGEMENT LLC,PETER B. REALTY LLC,WADSWORTH REALTY LLC,ONE JACOBUS PLACE LLC,CONCOURSE APARTMENTS LLC,JACOB ESTATES LLC,SIGNATURE BANK, FLUSHING BANK, FIRST REPUBLIC BANK, THE REAL PROPERTY 1742-1758 EAST 172ND STREET (BRONX, BLOCK 3784, LOT 21), THE REAL PROPERTY 1775 DAVIDSON AVENUE (BRONX, BLOCK 2867, LOT 151), THE REAL PROPERTY 2501 DAVIDSON AVENUE (BRONX, BLOCK 3204, LOT 65), THE REAL PROPERTY 730-760 ROGERS AVENUE (KINGS, BLOCK 5084, LOT 61), THE REAL PROPERTY 4563-4575 PARK AVENUE (BRONX, BLOCK 3031, LOT 69), THE REAL PROPERTY 40 EAST 17TH STREET (KINGS, BLOCK 5077, LOT 17), THE REAL PROPERTY 1025 BOYNTON AVENUE (BRONX, BLOCK 3714, LOT 54), THE REAL PROPERTY 10-22 FAIRVIEW AVENUE (NEW YORK, BLOCK 2170, LOT 450), THE REAL PROPERTY 121-137 EAST 18TH STREET (KINGS, BLOCK 5099, LOT 74), THE REAL PROPERTY 554-558 WEST 191ST STREET (NEW YORK, BLOCK 2161, LOT 73), THE REAL PROPERTY 1-3 PINEHURST AVENUE (NEW YORK, BLOCK 2177, LOT 14), THE REAL PROPERTY 65-71 WADSWORTH TERRACE (NEW YORK, BLOCK 2170, LOT 410), THE REAL PROPERTY 1-9 JACOBUS PLACE (NEW YORK, BLOCK 2215, LOT 339), THE REAL PROPERTY 2874 GRAND CONCOURSE (BRONX, BLOCK 3305, LOT 21), THE REAL PROPERTY 10-18 JACOBUS PLACE (NEW YORK, BLOCK 2215, LOT 481)

Defendants.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 75, 80, 81, 82, 83, 84, 85, 86

were read on this motion to/for MISCELLANEOUS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 76, 77, 78, 79, 87, 88, 89, 90

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

APPEARANCES:

New York City Law Department, New York, New York (Bianca Chloe Isaias, Esq., of counsel) for plaintiff.

Herrick Feinstein LLP, New York, New York (Avery S. Mehlman, Esq., of counsel) for individual defendant, Moshe Piller.

Dechert LLP, New York, New York (Neil A. Steiner, Esq., of counsel) for entity defendants.

HON. EMILY MORALES-MINERVA:

In this action for declaratory and injunctive relief, defendants, owners of certain real properties in dispute, move, by notice of motion (seq. no. 002), for an order, pursuant to CPLR § 3124, compelling plaintiff THE CITY OF NEW YORK (the City) to (a) provide documents responsive to defendants' request for production, dated April 04, 2023, and to (b) produce for deposition one or more representatives to testify as to each of the topics identified in defendants' notice of deposition, dated December 08, 2023.

Defendant owners also move, by notice of motion (sequence no. 003), for an order vacating the note of issue and certificate of readiness for trial, contending that the subject discovery requests remain outstanding. The City opposes both motions.

As to the motion to compel, the City preliminarily argues that the deposition notice should be dismissed as untimely. Substantively, the City argues the court should deny the motion to compel as it provided defendants with sufficient responses, and otherwise, defendants seek information irrelevant to the claims or to any viable defense in this action.

As to the motion to vacate note of issue, the City argues it should be denied as no material misstatements exists therein.

For the reasons set forth below, the Court grants defendants' motion (seq. no. 002) to compel to the limited extent set forth below and grants defendants' motion (seq. no. 003) to vacate the note of issue in its entirety.

BACKGROUND

Defendants are owners of 15 residential properties with over 900 rent regulated units in New York City, including the boroughs of Brooklyn, the Bronx and Manhattan. It is alleged that they have accumulated over 1,900 code violations in their properties from numerous City agencies. These agencies include the Department of Housing and Development (HPD), the Fire Department of the City of New York (FDNY), the Department of Mental Hygiene (DOHMH), and the New York City Department of Sanitation (DSNY).

On or about March 31, 2022, plaintiff the CITY OF NEW YORK (the City) commenced this action for declaratory and injunctive relief, seeking an order, among other things, (1) declaring defendants failure to correct and comply with violations issued from 2010 to the date of the complaint; (2) directing defendants to comply with outstanding violations and to certify compliance within 30 days of the court's order, (3) enjoining defendants from performing any construction on subject premises without securing a permit from the Department of Buildings, (4) directing the entry of judgment in the amount of all City code penalties due and not previously docketed, and (5) imposing penalties pursuant to applicable codes of the City of New York.

The verified complaint alleges 12 causes of action, grounded in violations of various such codes, including the construction codes, the Multiple Dwelling Law and Housing Maintenance Code, the Fire Code, the Health Code, the Nuisance Abatement Law, and the prohibition against tenant harassment.

Defendants filed a verified answer, asserting predominantly denials or insufficient information to form a belief.[1] Therein, defendants also asserted the following affirmative defenses: no notice of alleged summonses, notices of violations, violations,

[1] The answer otherwise agrees to the addresses of the various subject premises.

and/or orders (first); no service of alleged summonses, notices of violations, violations and/or orders (second); defective summonses, notice of violations, violations and/or orders (third); prematurity as hearings on the alleged summonses, notices of violations, violations and/or orders remained outstanding (fourth); resolution of the alleged summonses, notice of violations, violations and/or orders as cured, corrected, vacated, closed, resolved and/or paid in full (fifth); failure to accept proof of defendants' compliance or correction of violations (sixth); tenants refusal to provide issuing departments access to their premises for purposes of confirming that violations are cured (seventh); other person, including tenants, occupants, the general public and the City of New York causes the violations (eight); reasonable efforts to cure violations (ninth); adequate and sufficient measures to prevent and control alleged violations prior to the issuance of summonses, notice of violations, violations and/or orders (tenth); duplicative violations (eleventh); failure to set forth claims for which relief may be granted (twelfth); doctrine of latches (thirteen); statute of limitations (fourteenth); unclean hands (fifteenth); relief impractical and/or physically impossible (sixteenth); improper joinder of unrelated defendants (seventeenth); and insufficient specificity (eighteenth).

The parties then engaged in some motion practice,[2] and the court (N. Bannon, J.S.C.) scheduled a preliminary conference. Following said conference, the same justice issued an order with a discovery schedule and date for a status conference (see NYSCEF Doc. No. 50, Preliminary Conference Order, dated March 2, 2023).

After said status conference, the Court (N. Bannon, J.S.C.) issued an order, finding that the parties met and conferred about discovery on July 11, August 08, and September 05, 2023, but that defendants "ha[d] not completed production without reasonable excuse" (NYSCEF Doc. No. 57, Status Conference Order, p 1). The order further directed completion of all examinations before trial by October 31, 2023, and of all discovery by December 28, 2023 (id.). The Court also scheduled another status conference for December 14, 2023, and marked final the date of December 29, 2023, for the filing of the notice of issue (id. at 2 [emphasis added]).

[2] By notice of motion (seq. no. 001), dated May 25, 2022, defendants SIGNATURE BANK, FLUSHING BANK, and FIRST REPUBLIC BANK, moved to dismiss the complaint and all claims against them. The motion settled on July 14, 2022, by which plaintiff voluntarily discontinued the action as against them (see NYSCEF Doc. No. 43, Stipulation of Partial Discontinuance). The court (N. Bannon, J.S.C.) then issued a Decision and Order on the motion (seq. no. 001), marking the motion withdrawn (see NYSCEF Doc. No. 46, Decision and Order, dated November 30, 2022).

Prior to the next status conference, defendants filed their notice of deposition. Said notice demands to depose the City through "one or more of its authorized or designated representatives," as follows:

> "(i) each inspector employed by the City of New York or any of its departments or agencies who conducted an inspection of any of the premises at issue in this litigation (the "Premises");
> (ii) a designated representative of the City of New York knowledgeable about communications between or among the City of New York's officials and inspectors who inspected the Premises concerning the Defendants; (iii) a designated representative of the City of New York knowledgeable about communications concerning the violations identified in the Complaint or on which Plaintiff intends to rely at trial; (iv) a designated representative of the City of New York knowledgeable about communications with any tenant at any of the Premises or concerning any of the Premises."

(see NYSCEF Doc. No. 68, exhibit E, Notice of Deposition, dated December 08, 2023, p 4).

The City did not comply with said demand and, on December 14, 2023, the parties appeared before the court (N. Bannon, J.S.C.) for the pre-scheduled status conference. Said court issued an order, finding that its second status conference order, dated September 12, 2024, "ha[d] not been complied with in that paper discovery and EBTS [examinations before trial]

were not completed without reasonable excuse" (NYSCEF Doc. No. 60, Status Conference Order, p 1 [emphasis added]). The same justice then (1) directed that, within 14 days thereafter, defendants produce the documents that the City previously demanded to the extent that defendants did not object to said production and (2) directed that "EBTS shall be completed by 2/28/24 or deemed waived" (id. [emphasis in original]). The same conference order marked "Final 2X" the date of April 30, 2024, for the filing of note of issue (id. [emphasis added]).

Thereafter, on or around March 2024, this matter was transferred to the undersigned. Accordingly, on April 15, 2024, this court held a status conference. All parties appeared, submitting a proposed order with new end dates for discovery and for the note of issue filing as "TBD [to be announced] following resolution of discovery disputes" (see NYSCEF Doc. No. 61, Proposed Order, p 5).

This proposed order came with no proffered excuse or reference to the conference order (Bannon, J.S.C.) discussed above, which held that "paper discovery and EBTS were not completed without reasonable excuse" (NYSCEF Doc. No. 60, Status Conference Order, p 1 [emphasis added]). Further, no party filed a motion to compel discovery and/or to vacate the note of

issue date. Therefore, the undersigned declined to sign the proposed order.

Two days prior to the notice of issue date, defendants filed the subject motion (sequence no. 002), for an order, pursuant to CPLR § 3124, compelling the City to produce documents as sought in defendants' request for production, dated April 04, 2023, and compelling the City to produce for deposition "one or more" representatives to testify as requested in the notice of deposition, dated December 08, 2023 (see NYSCEF Doc. No. 62, Defendants' Notice of Motion).[3]

The City filed opposition to said motion arguing, among other things, that the document demands are overbroad and unduly burdensome, that it previously provided "all responsive documents to the extent not objected to," and that defendants seek information "already publicly available" or irrelevant (NYSCEF Doc. No. 80, Plaintiff's Opposition).

Thereafter, the City filed a timely note of issue in accordance with the Status Conference Order (N. Bannon, J.S.C.), dated December 14, 2023 (see NYSCEF Doc. No. 60, Status Conference Order, and Doc. No. 73, Note of Issue).

[3] According to the Affirmation of Neil A. Steiner, Esq. (NYSCEF Doc. No. 63), the parties met and conferred on approximately four occasions prior to defendants' filing of the instant motion. Accordingly, the parties' papers are compliant with 22 NYCRR § 202.7.

In response, defendants filed motion (seq. no. 003), pursuant to Uniform Rules for New York State Trial Courts [NYCRR] § 202.21(e), for an order, vacating note of issue as discovery remains outstanding.

The City submits opposition, arguing that no material error exists in the note of issue and certificate of readiness. According to the City, discovery is complete given that the court (N. Bannon, J.S.C.) "deemed waived" all examinations before trial that did not occur by February 28, 2024 (see NYSCEF Doc. No. 60, Status Conference Order).

ANALYSIS

Motion to Compel (seq. no. 002)

The court first addresses defendants' motion for an order compelling the City to produce documents responsive to defendants' request for production of documents, dated April 04, 2023, and for an order compelling the City to provide representatives for deposition, dated December 08, 2023.

"There shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by (1) a party, or the officer, director, member, agent or employee of a party" (see CPLR § 3101 [governing the scope of disclosure] [emphasis

added]). What is "material and necessary" is left to the sound discretion of the lower courts (Andon ex rel. Andon v 302-304 Mott St. Assocs., 94 NY2d 740 [2000]). However, it is settled that parties seeking disclosure need not demonstrate "items [they have] not yet obtained contain material evidence" (Forman v Henkin, 30 NY3d 656, 664 [2018]).

Indeed, the "purpose of discovery is to determine if material relevant to a claim or defense exists" (id.), and its scope extends to matters that may lead to the revelation of admissible proof (id.; see also Matter of Kapon v Koch, 23 NY3d 32, 37 [2014]; Allen v. Crowell-Collier Publ. Co., 21 NY2d 403, 406 [1968]; Gerardo v Breton, 212 AD3d 461 [1st Dept 2023] [citing Allen, supra]).

A party objecting to certain disclosure "shall serve a response which shall state with reasonable particularity the reasons for each objection" (CPLR § 3122 [a]). Refusal to produce relevant and material documents based on an unsupported claim of undue burden or a general and unspecified assertion of "privilege" fails to meet section 3122(a)'s requirement of "reasonable particularity," and is insufficient as a matter of law (see Anonymous v High Sch. for Env't Stud., 32 AD3d 353, 359 [1st Dept 2006]).

Where an objecting party fails to respond to or comply with discovery, "the party seeking disclosure may move to compel

compliance or a response," pursuant to CPLR § 3214. The court may grant such a motion, after weighing "the need for discovery against any special burden borne by the opposing party" (Kavanagh v Ogden Allied Maint. Corp., 92 NY2d 952, 954 [1998] [internal quotation marks and citation omitted]; see also Valencia v City of New York, 188 AD3d 549, 550 [1st Dept 2020]) [providing that it is within the court's discretion to grant a motion to compel]).

"[W]hen courts are called upon to resolve a dispute, discovery requests 'must be evaluated on a case-by-case basis with due regard for the strong policy supporting open disclosure'" (Forman, supra, 30 NY3d at 662 [citation omitted]). "[I]n the event that judicial intervention becomes necessary, courts should first consider the nature of the event giving rise to the litigation and the injuries claimed, as well as any other information specific to the case, to assess whether the relevant material is likely to be found" (id. at 665).

"[I]f there is any possibility that the information is sought in good faith for possible use as evidence-in-chief or in rebuttal or for cross-examination, it should be considered evidence material ... in the prosecution or defense" (Matter of Arad 2 LLC v Hamo, 83 Misc3d 1291(A), *1-2 [Sup Ct, NY Cnty 2024] [Robert R. Reed, J.S.C.], quoting Allen, supra, 21 NY2d at 407; see also Kapon, supra, 23 NY3d at 38).

However, if "review of [a] document demand and interrogatories reveals that . . . a substantial portion [of the same] is overbroad, burdensome, or calls for irrelevant material or conclusion . . . , the remedy is vacatur of the entire demand and interrogatories" (Editel, New York v Liberty Studios, Inc., 162 AD2d 345, 346 [1st Dept 1990] [citations omitted]; see also Int'l Plaza Assocs., L.P. v Lacher, 104 AD3d 578, 578 [1st Dept 2013]; see also Rivera v New York City Hous. Auth., 2016 NY Slip Op 30804[U], *2 [Sup Ct, NY Cnty 2016] [Manuel Mendez, J.S.C.] [providing the proper remedy where discovery requests are overbroad or unduly burdensome is to vacate the entire demand "rather than to prune it"]). This is true even if "some of the information requested in [the demand and interrogatories] is necessary to defend the action" (id.).

Here, defendants' request for production of documents contain largely overbroad demands, using language without limitations to date, time, or alleged violations (see NYSCEF Doc. No. 66, Defendant's Request for Production, exhibit C, p 9, 10). Such expansive language includes, and is not limited to, requests for (1) "[a]ll documents and communications concerning any of the Properties," (2) "[a]ll communications with any Tenant of any of the Properties," (3) "[a]ll communications between and among the City, HPD, DOB, non-profit companies, and/or any tenant associations, tenant coalitions, and/or tenant

advocacy ground concerning the Defendants," (4) "[a]ll documents and Communications regarding any complaint made by any Tenant of any Property," (5) "[a]ll Documents and Communications regarding any work performed at any Property," (6) "documents sufficient to identify any building [in New York City] comparable to any of the Properties that has similar open façade violations" and (7) "[a]ll Documents and Communications concerning" or "relating" to each individual premises (id.).

Such broad requests take on an even more expansive scope when considering that the subject premises include 15 residential properties with over 900 rent-regulated units, and the City has allegedly issued 1,900 violations in said premises over periods beyond those in controversy here, dating prior to 2010.

Defendants' demand -- to depose "(i) each inspector employed by the City of New York or any of its departments or agencies who conducted an inspection of any of the premises at issue in this litigation (the 'Premises')" (see NYSCEF Doc. No. 68, Notice of Deposition, exhibit E) -- is similarly overly broad. It also is unlimited by date, period, or alleged violations.

The same is true of defendants' request (a) to depose "a designated representative of the City of New York knowledgeable about communications between or among the City of New York's

officials and inspectors who inspected the Premises concerning the Defendants" and (b) to depose "a designated representative of the City of New York knowledgeable about communications with any tenant at any of the Premises or concerning any of the Premises" (id. at 4).

Having found these demands overbroad, the remedy is vacatur of the entire demand not a judicial narrowing of the requests (Editel, New York v Liberty Studios, Inc., 162 AD2d 345, 346 [1st Dept 1990] [citations omitted]; see also Int'l Plaza Assocs., L.P. v Lacher, 104 AD3d 578, 578 [1st Dept 2013]; see also Rivera v New York City Hous. Auth., 2016 NY Slip Op 30804[U], *2 [Sup Ct, NY Cnty 2016] [Manuel Mendez, J.S.C.] [providing the proper remedy where discovery requests are overbroad or unduly burdensome is to vacate the entire demand "rather than to prune it"]).

In any event, the purpose of discovery is "to determine if material relevant to a claim or defense exists" (Forman, supra, 30 NY3d at 664). However, defendants explicitly state that they, instead, make these demands to "aid [their] understanding [of] the documents [already] produced" in discovery (see NYSCEF Doc. No. 72, Defendant's Memorandum of Law in Support, p 9).

Finally, defendant misplaces its reliance on Administrative Code § 28-202.4 to argue that the subject depositions are necessary to mitigate against certain civil penalties. Section

28-202.4 governs the "[m]aximum civil penalty for immediately hazardous violations of chapter 33 of the New York city building code that results in death or serious physical injury" (emphasis added).[4] In this action, there appears to be no allegation of death or serious injury resulting from the violations.

However, defendants final demand -- to depose "a designated representative of the City of New York knowledgeable about communications concerning the violations identified in the Complaint or on which Plaintiff intends to rely at trial" -- is sufficient for purposes of a motion to compel (see NYSCEF Doc. No. 68, Notice of Deposition, exhibit E [emphasis added]). Said demand is narrowed to the allegations in this complaint and clearly sought in good faith for possible use in rebuttal and/or cross examination (Matter of Arad 2 LLC v Hamo, 83 Misc3d 1291(A), *1-2 [Sup Ct, NY Cnty 2024] [Robert R. Reed, J.S.C.];

[4] NYC Administrative Code § 28-202.4 provides, in full: "Notwithstanding any inconsistent provision of this article an immediately hazardous violation of a provision of chapter 33 of the New York city building code that results in death or serious physical injury, as such term is defined in article 10 of the New York state penal law, shall be punishable by a civil penalty of not more than $500,000, or not more than $150,000 if such violation is issued to an individual, which may be recovered in a civil action brought by the corporation counsel in the name of the city in any court of competent jurisdiction where:
1. There was a substantial probability that the violating condition would cause death or serious physical injury, as such term is defined in article 10 of the New York state penal law;
2. The defendant knew, or with reasonable diligence should have known, (i) of the existence of such violation and (ii) was in a position to remedy such violation or lessen the danger posed thereby; and
3. Such violation resulted in the death or serious physical injury, as such term is defined in article 10 of the New York state penal law, of a person."

see also Allen, 21 NY2d at 407; see also Kapon, 23 NY3d at 38 [2014]).

Therefore, the court grants defendants' motion (seq. no. 002) to the limited extent of compelling compliance with this single demand and otherwise denies defendants' motion entirely.

Motion (seq. no. 003) to Vacate Note of Issue

Pursuant to 22 NYCRR § 202.21(e), a party that timely moves to vacate a note of issue need show only that a "material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements" of section 202.21 in some material respect (Vargas v. Villa Josefa Realty Corp., 28 AD3d 389, 390 [1st Dept 2006]; quoting 22 NYCRR § 202.21[e]). When a certification erroneously states, as here, that "discovery has been completed," the "note of issue should be vacated" (Ruiz v. Park Gramercy Owners Corp., 182 AD3d 471, 471 [1st Dept 2020]); see also NYSCEF Doc. No. 73, Note of Issue, dated April 30, 2024][certifying discovery was complete when the motion to compel was pending and parties failed to complete depositions as directed in the court's December 15, 2023 status conference order]).

While the City was compelled to file note of issue, pursuant to the order of the court, defendants' motion to compel

discovery was pending at the time. Yes, as the City points out, the order of the court (N. Bannon, J.S.C.), dated December 14, 2023, provides that examinations before trial not completed before February 28, 2024 are "deemed waived" (see NYSCEF Doc. No. 60, Status Conference Order, p 2). However, the same order provides -- in bold type -- that the dates set forth therein may be extended or adjourned with "advance[d] approval of the court" (id.). In filing their motion to compel prior to the note of issue date, defendants were seeking such approval.

Accordingly, it is

ORDERED that defendants' motion (seq. no. 002) to compel is granted to the limited extent that plaintiff THE CITY OF NEW YORK shall provide for deposition "a designated representative of the City of New York knowledgeable about communications concerning the violations identified in the Complaint or on which Plaintiff intends to rely at trial;" it is further

ORDERED that defendants' motion (seq. no. 002) is otherwise denied in its entirety; it is further

OREDERED that the parties shall schedule and complete such deposition by March 19, 2025, and such deposition shall not be stayed pending any outstanding motions; it is further

ORDERED that defendants' motion (seq. no. 003) is granted and that the note of issue date is vacated; and it is further

ORDERED that the new note of issue date shall be June 19, 2025; and it is further

ORDERED that the parties shall appear for a virtual status conference on January 8, 2025 at 11:30AM.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

11/21/2024
DATE

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

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