SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 31

----------X

BEVERLY FUISZ, Individually and as Executor of the ESTATE OF ROBERT E. FUISZ,

Index No.: 153622/2012

Plaintiffs,

Decision & Order

- against -

Mot. Seq. 008, 009, 010, 011

6 EAST 72ND STREET CORPORATION, BOARD OF DIRECTORS OF 6 EAST 72ND STREET CORPORATION, JOSEPH K. BLUM CO., LLP, JAMES J. BLUM; GUMLEY HAFT, INC. and MYRNA RONSON,

Defendants.

----------X

MYRNA RONSON,

Third-Party Plaintiff,

- against -

UBERTO LTD.,

Third-Party Defendant.

----------X

KELLY O'NEILL LEVY, J.:

Motion sequences 008, 009, 010 and 011 are consolidated for disposition. In motion sequence 008, defendant/third party plaintiff, Myrna Ronson ("Myrna Ronson"), moves, pursuant to 22 N. Y. C. R. R. §202.21(e), vacating plaintiff's Note of Issue and Certificate of Readiness and striking the case from the Trial Calendar. In motion sequence 009, defendants 6 East 72nd Street Corporation (the "Coop") and Board of Directors of the 6 East 72nd Street Corporation (the "Board"; collectively, the "Coop Parties"), move to strike the jury demand set forth in plaintiffs' Note of Issue. In motion sequence 010, third-party defendant, Uberto Ltd., moves, pursuant to CPLR §§ 2221(d), for leave to reargue the Order dated January 29, 2020; Upon granting of re-argument, pursuant to CPLR §§ 3107, 3110, and 3113, compelling the deposition upon oral examination of defendant/third party plaintiff, Myrna Ronson, or an order

precluding her testimony. In motion sequence 011, defendants 6 East 72nd Street Corporation (the "Coop") and Board of Directors of the 6 East 72nd Street Corporation (the "Board"; collectively, the "Coop Parties"), move, pursuant to CPLR §§ 2304, 3101, and 3103 for a protective order quashing the subpoena duces tecum and ad testificadum issued by plaintiff Beverly Fuisz to non-party Roberta Amon.

Background

The instant case stems from renovation work performed in the apartment of Defendant, Myrna Ronson, in 2008-2010. Specifically, the action arises out of damage to the cooperative apartment (Unit 1B/2B) and personal property of Plaintiff, Beverly Fuisz, who lives below Myrna Ronson's cooperative apartment (Unit 3D/4D). Plaintiffs sued their Co-op, their Co-op Board, the building's engineer and managing agent, as well as upstairs neighbor Myrna Ronson for damages. Myrna Ronson subsequently brought a third-party action against Uberto, Ltd., the contractor which she hired to perform the renovations. The third-party action asserts causes of action in common law indemnification and contribution, contractual indemnification, breach of contract and failure to provide insurance and name Myrna Ronson as an additional insured on Uberto, Ltd.'s policy.

On December 11, 2019, at a compliance conference attended by counsel for all parties herein, issues were raised as to Myrna Ronson's ill health, including a representation that Myrna Ronson was a dialysis patient, as an excuse for Myrna Ronson's inability to submit to a deposition. Following this discussion, the Court issued an order directing that Myrna Ronson appear for deposition or produce a sworn letter from a physician that she is unable to testify, within forty-five (45) days. Following receipt of a letter, on January 29, 2020, the Court issued

an Order directing that in light of the medical information contained in Defendant / Third Party Plaintiff, Myrna Ronson's, physicians letter, she would be permitted to be deposed by written questions.

Motions 008 and 009: Note of Issue

"[A] note of issue should be vacated when it is based upon a certificate of readiness that contains erroneous facts." *Comer v. Yellen*, 268 A.D.2d 381, 381 (1st Dep't 2000). In this case, the Note of Issue is based on the Certificate of Readiness which states that discovery is complete with the exceptions of discovery items enumerated in the December 12, 2019 Compliance Conference Order. As the outstanding discovery is limited, the court denies the application to vacate the Note of Issue.

Motions 008 and 009: Jury Trial

"Issues of fact shall be tried by a jury…[in] an action in which a party demands and sets forth facts which would permit a judgment for the sum of money only." NY CPLR § 4101(1). The Plaintiff has advanced twelve causes of action, one of which, the ninth, requests equitable relief. The relief requested under the Plaintiff's ninth cause of action does not conclusively disqualify the remaining eleven causes of action from a jury trial, for "[a] jury trial is not waived merely by the inclusion of a claim for equitable relief." *Lipson v. Dime Sav. Bank of New York, FSB*, 203 A.D.2d 161, 163 (1st Dep't 1994). The Plaintiff's ninth cause of action under which she requests equitable relief is incidental to the remaining eleven causes of action under which she requests monetary relief; thus, the overall nature of this case is legal, not equitable, and the motion to strike the jury demand is denied. *See, e.g. Schlick v. Am. Bus. Press, Inc.*, 246 A.D.2d 450, 450 (1st Dep't 1998) ("Review of plaintiff's complaint reveals that the over-all nature and character of the case is legal and not equitable and that her request for [equitable relief] in her

prayer for relief was simply incidental to the money damages sought… plaintiff was entitled to a jury trial.")

Motion 010: Reargument

Third-Party Defendant, Uberto Ltd., moves, pursuant to CPLR Rule 2221(d) for leave to reargue the January 29, 2020 Order, which directed that in light of the medical information contained in Dr. Stuart Saal's letter, Defendant/Third-Party Plaintiff, Myrna Ronson, will be permitted to be deposed by written questions. "A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and may be granted only upon a showing 'that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision.' Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted. A motion to renew under CPLR 2221, on the other hand, is intended to draw the court's attention to new or additional facts which, although in existence at the time of the original motion, were unknown to the party seeking renewal and therefore not brought to the court's attention." *William P. Pahl Equip. Corp. v. Kassis*, 182 A.D.2d 22, 27 (1st Dep't 1992); *see also Anthony J. Carter, DDS, P.C. v. Carter*, 81 A.D.3d 819, 820 (2nd Dep't 2011). Here, Third-Party Defendant, Uberto Ltd., contends that the letter from Myrna Ronson's physician, Dr. Saal, is not in compliance with the December 12, 2019 Order, because Dr. Stuart Saal's letter is not sworn or affirmed to be true under the penalties of perjury pursuant to CPLR Rule 2106. Third-Party Defendant, Uberto Ltd., also contends that deposition on written questions is inapplicable to Myrna Ronson, and thus Third-Party Defendant, Uberto Ltd. should be permitted to take the deposition of Myrna Ronson upon oral examination. The court grants the application to reargue and vacates its order of January 29, 2020 without prejudice to Defendant

renewing the request by a sworn letter or affidavit from her physician within twenty (20) days of this Order. The Court notes, however, that should Myrna Ronson be unable to testify because of the stress of a deposition on her health, she will be precluded from testifying at trial.

Motion 011: Quash subpoena

Requested discovery from a nonparty must be "material and necessary" to the action before disclosure may be obtained pursuant to CPLR § 3101(a)(4). *Kapon v. Koch*, 23 N.Y.3d 32, 37 (2014). "The words 'material and necessary' as used in section 3101 must 'be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity.'" *Id.* at 38 (quoting *Allen v. Crowell-Collier Publ. Co.*, 21 N.Y.2d 403, 406 (1968)). Applying this liberal interpretation, the disclosure sought from Roberta Amon relating to her relationship with the Ronsons while she was acting in her capacity as a Board member during the relevant time period is "material and necessary," and the motion to quash the subpoena is denied.

The remaining limited discovery shall be complete within 45 days of this Order. This constitutes the decision and order of this Court.

Dated: August 5, 2020

New York, New York

Kelly O'Neill Levy

KELLY O'NEILL LEVY, J.S.C.

KELLY O'NEILL LEVY
JSC