

Manzanares v ATM Four LLC
2012 NY Slip Op 30998(U)
April 5, 2012
Supreme Court, Nassau County
Docket Number: 22952/10
Judge: Karen V. Murphy
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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 11 NASSAU COUNTY**

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

_____ x

EUGENIO MANZANARES,

Plaintiff(s),

-against-

**ATM FOUR LLC, ARTHUR MOTT, INC., n/k/a
ARTHUR MOTT REAL ESTATE, LLC d/b/a ATM
REAL ESTATE a/k/a ATM REALTORS,**

Defendant(s).

_____ x

Index No. 22952/10

**Motion Submitted: 2/10/12
Motion Sequence: 005, 006, 007**

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....XXX
- Answering Papers.....X
- Reply.....X
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's/Respondent's.....

This motion by the defendants ATM Four LLC, Arthur Mott, Inc., n/k/a Arthur Mott Real Estate, LLC d/b/a ATM Real Estate a/k/a ATM Realtors for an order pursuant to CPLR § 3124 compelling the plaintiff to provide additional discovery and to supplement his Bill of Particulars and an order pursuant to CPLR § 3126 precluding the plaintiff's expert Dr. Donald Greene from offering any evidence at trial or, in the alternative, an order pursuant to CPLR § 3124 compelling the plaintiff to supplement his expert disclosure is determined as provided herein.

This cross-motion by the plaintiff Eugenio Manzanares for an order pursuant to CPLR § 3103(c) granting him a protective order excusing further production of discovery regarding his expert Dr. Donald Greene's anticipated testimony; an order pursuant to CPLR § 3101,

3123 requiring the defendants to admit certain facts; an order pursuant to CPLR § 3043(3) deeming the plaintiff's discovery sufficient; and, an order striking the defendants' sixth affirmative defense pursuant to Article 16 of the CPLR is determined as provided herein.

This motion by the defendants ATM Four LLC, Arthur Mott, Inc., n/k/a Arthur Mott Real Estate, LLC d/b/a ATM Real Estate a/k/a ATM Realtors for an order pursuant to CPLR §§ 2305, 2307, issuing So-Ordered Judicial Subpoenas *Ad Testificandum* and *Duces Tecum* permitting non-party depositions of Police Officer Matthew Murphy and C.O. Susan Lund and securing certified copies of all of the Village of Hempstead's Police Department records referable to an incident involving Eugenio Manzanares on October 15, 2010 is determined as provided herein.

In this action, the plaintiff seeks to recover damages for personal injuries sustained on October 15, 2010 when he was assaulted in the lobby of an apartment building located at 271 Washington Street in Hempstead which was owned by the defendants. Numerous discovery issues have been raised via these motions.

In their Demand for a Verified Bill of Particulars, defendants sought, *inter alia*, "a description of the accident [including] a specific statement of each act or omission by the defendants that [the plaintiff] assert[ed] was negligent; and a statement as to the nexus between each asserted negligent act or omission by [them] and plaintiff Eugenio Manzanares' alleged injuries." If the plaintiff alleged that any dangerous or defective condition was caused or allowed to exist by them, the defendants demanded that the plaintiff state with particularity: "[t]he nature and extent of each dangerous or defective condition that [he] assert[ed] was caused by [them]; the nature and extent of each condition not caused by [them]; and [that he] state the nexus of each condition to [his] alleged injuries." The defendants also requested that if the plaintiff "allege[d] actual or constructive notice of any defect or dangerous condition, that [he] identify the condition and the date of the notice of actual, as well as the nature and substance of the actual and/or constructive notice, and the length of time that the defect or condition that the condition is alleged to have existed if constructive."

In his Verified Bill of Particulars, the plaintiff has asserted, *inter alia*, that the defendants were negligent in failing to heed prior complaints concerning the lack of security at the subject incident situs given the incidents of prior similar crimes at and around the subject incident situs; in failing to heed prior complaints and/or incidents of prior criminal acts within close proximity to the subject incident situs location; in causing, permitting and allowing the perimeter of the premises to be, become and remain open and not secure; in failing to secure the perimeter of said premises; and, in failing to provide a properly functioning intercom system. The plaintiff asserted that the particulars concerning notice

were an improper demand on the ground that notice is not a condition precedent to this action inasmuch as he claims that the defendants, their agents, servants and/or employees caused and/or created the defects and hazards complained of herein. The plaintiff maintained that in any event “actual notice is claimed in that the defendants, their agents, servants and/or employees knew of the defects and hazards complained of herein for a long time prior to happening of this incident [and that] constructive notice is claimed in that the condition complained of existed for such a length of time as the defendants, their agents, servants and/or employees knew, or in the exercise of reasonable care, diligence and timely inspections, could and should have known of the condition for a long time prior to plaintiff’s injuries.”

Via letters dated September 27, 2011 and October 25, 2011, the defendants sought, *inter alia*, supplemental Bills of Particulars regarding, *inter alia*, the plaintiff’s claim that the perimeter of the premises became/remained unsecured; what was improper about the intercom system; prior complaints made; and, actual and constructive notice. With the exception of stipulating that the intercom and door locks of the premises were not functioning properly on the date of the incident, the plaintiff refused to supplement. Defendants seek preclusion of any such evidence not produced or in the alternative to compel further discovery. (*CPLR §§ 3126, 3124*).

The plaintiff has not provided details of “a statement of when and to whom” actual notice was given. (*See, CPLR § 3043(a)[5]*). He is directed to do so within 20 days of service of a copy of this order upon it or be precluded from offering such evidence at trial. The plaintiff’s challenged responses otherwise comply with CPLR § 3043 and the defendants’ application to compel a supplemental bill of particulars or preclude evidence at trial is accordingly otherwise denied.

Via the aforementioned letters, the defendants sought further medical authorizations, many of which have been provided but some of which have not.

A notarized authorization for the release of the plaintiff’s New York State Department of Labor records has been produced, as has one for the plaintiff’s pharmaceutical records from Walmart Pharmacy. The plaintiff has also produced the last known address of non-party witness Faviola Farias, who resides at 2 “Deasy Lane,” thereby establishing that Deasy Lane is in fact not a non-party witness but a location.

In the Notice to Produce, the defendants sought HIPPA compliant authorizations for the medical providers who treated the plaintiff in regard to the February 2009 incident which involved another attack at the same location. The plaintiff’s hospital records from that hospitalization reflect that he in fact suffered a concussion with loss of consciousness and

a possible intracranial hemorrhage or injury. In this action, the plaintiff again alleges that he suffered a concussion and/or a traumatic brain injury. Contrary to the plaintiff's position, this demand is not overbroad and the plaintiff is hereby directed to comply with that demand within 20 days of service of a copy of this order. Similarly, while the plaintiff maintains via letter by counsel that "a HIPPA compliant authorization for the medical facility plaintiff treated at in Franklin Square" has been supplied, one has not been submitted. The plaintiff is also directed to provide that authorization.

As for plaintiff's expert disclosure, CPLR § 3101(a)(4)(d)(1)(i) requires a party to identify their expert and his qualifications and to disclose "in reasonable detail the subject matter"; as well as "the substance of the facts and opinions" on which he is expected to testify; and, a "summary of the grounds" for his opinion. The plaintiff has represented that Dr. Greene is expected to testify, *inter alia*, that the defendants were negligent "in failing to hire and employ adequate supervisory personnel; in failing to properly supervise, train and instruct security personnel; in failing to promulgate and enforce adequate and proper rules and regulations concerning security supervision of the premises; in failing to station security personnel at necessary locations on the premises including the incident situs so as to effectuate a reasonable level of safety and security therein; . . . in causing and creating a trap for the unaware, more particularly the plaintiff; . . . in causing, constructing, allowing and maintaining a trap for visitors to the premises; in failing to conduct a risk analysis; in failing to take corrective steps, measures or actions following prior similar incidents; . . . [and] in being negligent under the totality of the circumstances inasmuch as the site of the assault on the plaintiff was and is a site apt to be preferred as a crime target, which the defendants, their agents, servants and/or employees, created, caused, allowed, and failed to correct in that the defendants, their gents, servants and/or employees, knew or in the exercise of reasonable care could and should have known of the site's high potential for criminal activity. . . ."

It is this court's opinion that while no further disclosure regarding Dr. Greene's opinions, per se, is required, the plaintiff has not adequately provided "a summary of the grounds" for his opinion. Nevertheless, CPLR § 3101(d)(1)(i) only obligates a party to disclose that information "upon request" and the defendants' Demand has not been submitted herewith. This court is accordingly unable to evaluate whether the plaintiff has complied with the defendants' Demand. The defendants' application pursuant to CPLR §§ 3124, 3126 to compel the plaintiff to supplement discovery with respect to Dr. Greene's anticipated testimony or to preclude portions thereof is denied.

The plaintiff has requested that the defendants admit that "271 Washington Street, in the State of New York, County of Nassau, at the time of the incident was a commercial building"; that "271 Washington Street, in the State of New York, County of Nassau, at the time of the incident had over six apartment units"; and, that 271 Washington Street, in the

State of New York, County of Nassau, was at the time of the incident a “Multiple Dwelling”. With the exception of admitting that the building had over six apartments, the defendants have refused to admit any of these things on the grounds that the requested admissions involve interpretations of law and legal conclusions and were improper admissions beyond the purview of CPLR § 3123.

Dwelling Law Article 1 § 4 (7) defines a “multiple dwelling” to which the mandates of the Multiple Dwelling Law clearly apply. (*Multiple Dwelling Law Article 2 § 8*) Whether the building meets the statutory definition requires a legal determination rather than a factual one thus Defendant need not supplement the responses to the Notices to Admit (*Lolly v. Brookdale Univ. Hosp.*, 45 A.D.3d 537, 844 N.Y.S.2d 718 (2d Dept., 2007); *Gomez v. Long Is. R.R.*, 201 A.D.2d 455, 607 N.Y.S.2d 388 [2d Dept., 1994]).

As and for their sixth affirmative defense, the defendants have claimed the application of Article 16 of the CPLR. CPLR § 1602(2)(iv) provides:

The limitations set forth in this article shall: 2. not be construed to impair, alter, limit, modify, enlarge, abrogate or restrict (iv) **any liability arising by reason of a non-delegable duty or by reason of the doctrine of respondent superior.**

Section 78(1) of the Multiple Dwelling Law imparts a non-delegable duty on owners of multiple dwellings. It provides:

Repairs. 1. Every multiple dwelling, including its roof or roofs, and every part thereof and the lot upon which it is situated, shall be kept in good repair. **The owner shall be responsible for compliance with the provisions of this section;** but the tenant shall also be liable if a violation is caused by his own wilful act, assistance or negligence or that of any member of his family or household or his guest. Any such persons who shall wilfully violate or assist in violating any provision of this section shall also jointly and severally be subject to the civil penalties provided in section three hundred four (emphasis added).

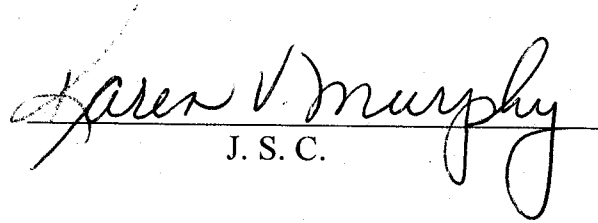
“There is no merit to the [plaintiff’s] assertion that CPLR § 1602(2)(iv) relating to a non-delegable duty on the part of a defendant, constitutes an exception to the rule of several liability of article 16.” (*Denio v. State of New York*, 283 A.D.2d 937, 723 N.Y.S.2d 914 (4th Dept., 2001), citing *Faragiano v. Town of Concord*, 96 N.Y.2d 776, 749 N.E.2d 184, 725 N.Y.S.2d 609 (2001); *Rangolan v. County of Nassau*, 96 N.Y.2d 42, 749 N.E.2d 178, 725 N.Y.S.2d 611 (2001)). The plaintiff’s motion to strike the defendants’ Sixth Affirmative

defense is denied.

Finally, the defendants' application for Judicial Subpoenas *Ad Testificandum* and *Duces Tecum* to authorize the non-party depositions of the Village of Hempstead Police Officer Matthew Murphy and C.O. Susan Lund is denied with leave to renew, by Order to Show Cause pursuant to CPLR § 2307. Any proposed subpoena offered for the Court's signature shall be submitted separately and not solely as an exhibit in support of the motion.

The foregoing constitutes the Order of this Court.

Dated: April 5, 2012
Mineola, N.Y.


J. S. C.

ENTERED
APR 10 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE