

DeLaCruz v New York Palace Hotel

2012 NY Slip Op 32309(U)

September 7, 2012

Sup Ct, New York County

Docket Number: 103034/10

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER

PART 15

Index Number : 103034/2010
DELACRUZ, FATIMA
vs
N.Y. PALACE HOTEL
Sequence Number : 007
PRECLUDE

Justice

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

FILED


SEP 07 2012

NEW YORK
COUNTY CLERK'S OFFICE

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 9/4/12



J.S.C.

HON. EILEEN A. RAKOWER

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X

FATIMA DE LA CRUZ,
Plaintiff,
- against -

Index No.103034/10

Decision and Order
Mot. Seq. 07

NEW YORK PALACE HOTEL, DORCHESTER
SERVICES, INC., ALLSTATE OVERHEAD
GARAGE DOORS, INC., ACME ROLLING STEEL
DOOR, CORP. ARCHDIOCESE OF NEW YORK,
Defendants.

-----X

AMEDEO HOTELS, LTD d/b/a NEW YORK
PALACE HOTEL,
Third-Party Plaintiff,
-against-

Third-Party Index No.:
590674/10

MICHAEL SKURNIK WINES, INC.
Third-Party Defendant.

-----X

ACME ROLLING STEEL DOOR CORP.,
Second Third-Party Plaintiff,
-against-

Second Third-Party
Index No.: 590835/10

FILED
SEP 07 2012
NEW YORK
COUNTY CLERK'S OFFICE

MICHAEL SKURNIK WINES, INC.
Second Third-Party Defendant.

-----X

AMEDEO HOTELS, LTD., d/b/a
NEW YORK PALACE HOTEL,
Third Third-Party Plaintiff,
-against-

Third Third-Party
Index No.:

FOND DU LAC COLD STORAGE, LLC,
Third Third-Party Defendant.

-----X

-----X
 AMEDEO HOTELS, LTD., d/b/a NEW YORK PALACE HOTEL, Fourth Third-Party
 HOTEL, Index No. 590202/12

Fourth Third-Party Plaintiff,

-against-

OTIS ELEVATOR COMPANY,
 Fourth Third-Party Defendant

-----X
 HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff Fatima De La Cruz brings this action to recover money damages for personal injuries allegedly incurred in a freight elevator accident at the New York Palace Hotel, located at 455 Madison Avenue in the County and State of New York, on November 6, 2007. Plaintiff claims that while in the course of her employment, she was making a delivery at the New York Palace Hotel, and that she sustained personal injuries when she was struck by a closing screen/gate as she entered the hotel’s freight elevator. It is alleged that Candelario Cruz, then a delivery person for Fond Du Lac Storage, LLC (“Fond Du”), was on the freight elevator, and pressed the “close” button as plaintiff was stepping on, and was negligent.

Defendants Amedeo Hotels, LTD d/b/a New York Palace Hotel (“Amedeo Hotels”) and Acme Rolling Steel Door Corp. brought a third-party action against Michael Skurnik Wines, Inc. Amedeo Hotel also brought a third-party action against Fond Du and a fourth-party action against Otis Elevators Company (“Otis”). The fourth party action against Otis was commenced by service of a fourth third-party summons and complaint, dated March 8, 2012.

Otis presently moves for an Order (1) pursuant to CPLR §§3126 and 3042(c) precluding plaintiff and Amedeo Hotels from offering any evidence at trial as to the items of Otis’ demands for verified bill of particulars dated March 26, 2012; (2) compelling disclosure of items demanded in its March 26, 2012 demands from plaintiff; (3) compelling disclosure of items demanded in its March 26, 2012 and April 2, 2012 demands from Amedeo Hotels; (4) compelling plaintiff and all defendants to respond to the April 2, 2012 demand for prior alleged complaints; and (5) compelling Fond Du to produce any statements taken from Cruz and certain identifying information concerning Cruz, including his last W-2 statement (with

dollar amounts redacted), and employment application, or alternatively, precluding the introduction of any testimony or evidence from Cruz, and further for an order determining that Cruz was operating the elevator in question at the time of the accident alleged by plaintiff and caused the cab gate and hoistway door closing process to commence.

Otis submits a good faith affirmation of John A. McCarthy in support of its motion. Plaintiff, Amedeo Hotels, and Fond Du oppose. Defendant Allstate Overhead Garage Doors, Inc. submits the attorney affirmation of Anthony J. Pagliuca in partial opposition to the extent that any relief by Otis sought applies to Allstate.

A. As to Plaintiff

Otis alleges in its moving papers that plaintiff failed to produce a bill of particulars and response to its combined demands and notices. The demand sought, among other items, medical/hospital/doctor authorizations. Plaintiff opposes and submits the attorney affirmation of Geoffrey F. Sasso. Sasso states that after Otis' motion was drafted but prior to its receipt by his office, Sasso's office had served a Verified Bill of Particulars with the attached authorizations and a response to Otis' Notice for Discovery and Inspection and Combined Demands with exhibits. Sasso states that in response to Otis' subsequent May 21, 2012 deficiency letter, it served a Supplemental Bill of Particulars by correspondence dated July 19, 2012. In its reply, Otis states that plaintiff's bill and supplemental of particulars and disclosure are deficient and fail to supply the requested particulars or disclosure.

First, Otis alleges that the authorizations initially supplied by plaintiff were defective because they were not Arons compliant. Otis alleges that although Sasso provided July 19, 2012 authorizations, the authorizations supplied were improperly limited to "cervical injuries and attendant complications sustained in the 11/6/2007." Plaintiff claims a number of injuries to body parts other than her cervical spine. Additionally, the authorizations unilaterally expire in one year. Otis states that it requested that plaintiff immediately provide replacement authorizations in proper format and without such limitations.

Second, Otis alleges that plaintiff's bill and supplemental bill of particulars fail to particularize the alleged negligence (§7), the alleged defective parts/components (§§ 10-11), the claim of negligence in maintenance or inspection (§§18-21), the

alleged statute or code violations (§§8,9), notice claims (§§12-16) special damages claims (§29), and the identity of doctors/medical providers (§34). Otis also states that plaintiff failed to identify an expert and provide required expert disclosure as requested in paragraph 13 of its initial disclosure demands despite the fact that Otis had been informed by Amedeo Hotels that plaintiff previously had an expert examine the elevator.

B. As to Amedeo Hotels

Otis alleges in its moving papers that Amedeo Hotels failed to provide a bill of particulars as demanded, respond to its notice for discovery and inspection, and respond to its April 2, 2012 notice for discovery and inspection. In Amedeo Hotels' opposition, as set forth in the attorney affirmation of Matthew F. Finkelstein, Amedeo Hotels states that it served a Bill of Particulars, a response to Otis' March 26, 2012 Notice for Discovery and Inspection, and a response to Otis' April 2, 2012 demand for prior Alleged Complaints within the time frame set forth in the parties' Compliance Conference Order. In its reply, Otis states that the Bill of Particulars served by Amedeo Hotels is deficient. Specifically, it states that Amedeo Hotels fails to provide a specific and particularized response to paragraphs 1-3 and 15-19.

C. As to Fond Du

Otis alleges in its moving papers that Fond Du failed to properly respond to paragraph 16 of its April 2, 2012 demand with respect to information concerning Cruz, who formerly worked for Fond Du and allegedly witnessed the incident. Otis states that while Fond Du provided the last known address for Cruz, it did not provide "other identifying information" concerning Cruz that was requested. Otis states that Cruz was not at the address supplied by Fond Du and that he did not appear at his EBT. In a April 19, 2012 letter, Otis' counsel expanded the request for disclosure to also include any statement taken from Cruz, or supplied by Cruz, as "special circumstances" clearly exist pursuant to CPLR §3101(d) including any accident reports prepared by Fond Du. In Fond Du's opposition, as set forth in the affidavit of Michael J. Dorry, Fond Du states that it responded to Otis' April 19, 2012 correspondence, setting forth that it did not prepare an accident report following the accident involving plaintiff; that one Renee Ramos, a Fond Du employee, was a helper on the truck with Cruz on the date of the accident but had not witnessed the incident, and that it no longer had access to Cruz's W-2. A copy of Cruz's

employment application with his last known address, telephone number, date of birth and Social Security number was provided to OTIS. Fond Du does not dispute that Cruz may be an important witness but states that it has provided all the information in its possession as to the whereabouts of Cruz. Fond Du states that while OTIS claims that it is entitled to any statement taken of Cruz because of “special circumstances” pursuant to CPLR §3101(d), Otis fails to identify those “special circumstances.”

Pursuant to CPLR §3126, a court may impose sanctions when a party willfully fails to disclose information which the court finds ought to have been disclosed. The sanction of striking a party’s answer is warranted when a party repeatedly and persistently fails to comply with several disclosure orders issued by the court. (*Yoon v. Costello*, 29 A.D.3d 407[1st Dept. 2006]). The moving party must show “conclusively that failure to disclose was willful, contumacious or due to bad faith.” (*Dauria v. City of New York*, 127 AD2d 416[1st Dept. 1987]).

CPLR §3124 states:

If a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article . . . the party seeking disclosure may move to compel compliance or a response.

Here, Otis has failed to demonstrate facts which warrant the sanction of preclusion. While Otis has raised issues as to the sufficiency of certain of the parties’ discovery responses, it has not shown that their actions were willful and contumacious, or otherwise motivated by bad faith.

Wherefore it is hereby

ORDERED that fourth third-party defendant Otis Elevator Company’s motion is granted to the extent that plaintiff Fatima De La Cruz is directed to provide Arons compliant authorizations without any imposed limitations, a verified Supplemental BP with respect to questions 7-16, 18-21, 29 and 34, and a response to paragraph 13 of Otis Elevator Company’s initial disclosure demands, within 20 days of receipt of a copy of this Order with Notice of Entry; and it is further

ORDERED that defendant/fourth third-party plaintiff Amedeo Hotels, Ltd, d/b/a

New York Palace Hotel, is directed to provide a verified Supplemental BP with respect to questions #1-3, 15-19 within 20 days of receipt of a copy of this Order with Notice of Entry.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED:



EILEEN A. RAKOWER, J.S.C.

FILED
SEP 07 2012

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