

Cioffi v S.M. Foods Inc.
2012 NY Slip Op 33236(U)
November 19, 2012
Sup Ct, Westchester County
Docket Number: 55391/2011
Judge: Joan B. Lefkowitz
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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

-----X
FREDERICK M. CIOFFI and ELISABETTA CIOFFI,

Plaintiffs,

-against-

S.M. FOODS, INC., GFI BOSTON, LLC, ATLANTA FOODS INTERNATIONAL, RUSSELL McCALL'S INC., RUSSELL McCALL'S INC. d/b/a SHEILA MARIE FOODS, SHEILA MARIE IMPORTS, DOUG JAY, RYDER TRUCK RENTAL, INC., PLM TRAILER LEASING and DANIEL E. BURKE,

Defendants.

-----X
S.M. FOODS, INC., GFI BOSTON, LLC, PLM TRAILER LEASING and DANIEL BURKE,

Third-Party Plaintiffs,

-against-

VILLAGE OF TUCKAHOE and VINCENT PINTO,

Third-Party Defendants.

-----X
LEFKOWITZ, J.

The following papers were read on these motions by: (1) defendants Atlanta Foods International, Russell McCall's Inc. and Doug Jay (together referred to as the "Atlanta defendants") for an order (a) precluding plaintiffs and plaintiffs' expert, Christopher Calabrese, from offering any evidence at trial with respect to issues set forth in plaintiffs' expert response dated September 24, 2012, and (b) pursuant to CPLR 3103 limiting the questioning by plaintiffs of defendant Doug Jay ("Jay") and any other witness concerning plaintiffs' most recent theories of liability; and (2) plaintiffs for an order for open commissions to conduct the depositions of various witnesses in Massachusetts.

Orders to Show Cause-Affirmations in Support - Exhibits
Affirmations in Opposition - Exhibits

DECISION & ORDER

Index No.:55391/2011
Motion Date: Nov. 19, 2012
Seq Nos. 8 & 9

Upon the foregoing papers and the proceedings held on November 19, 2012, these motions are decided as follows:

In this personal injury action, plaintiffs allege that on or about May 22, 2009, plaintiff Frederick Cioffi, a police officer for the Village of Tuckahoe, sustained serious personal injuries when he was struck by a tractor trailer while performing a routine vehicle stop. Plaintiffs allege that Mr. Cioffi was injured due to the negligence of defendants in the ownership, leasing, operation, control, management, maintenance and repair of the tractor trailer involved in the accident.¹

This action involves complex matters related to the ownership of the tractor trailer that struck the injured plaintiff, Mr. Cioffi. Plaintiffs allege that at the time of the accident, defendant Daniel E. Burke (“Burke”), who the driver of the tractor trailer, was on the payroll of GFI Boston LLC (“GFI Boston”), but believed his employer was “Sheila Marie.”² Furthermore, plaintiffs allege that defendant SM Foods leased the trailer, and that defendant GFI Boston rented the tractor portion of the tractor trailer from defendant Ryder Truck Rental, Inc. (“Ryder”).

Ryder moved for summary judgment on the basis that it was immune from liability pursuant to the Graves Amendment. On or about August 13, 2012, the court (Smith, J.) granted Ryder’s motion and dismissed plaintiffs’ claims against Ryder.

On or about September 24, 2012, plaintiffs submitted an expert witness disclosure from Police Captain Christopher Calabrese. The affidavit states that Captain Calabrese will testify concerning defendants’ acts of negligence, the criminal actions of defendants, and their various acts and omissions that constitute violations of federal and state law.

On or about October 8, 2012 plaintiffs moved for leave to amend their complaint. Plaintiffs’ proposed amended complaint asserts additional allegations against the defendants, including allegations relating to Ryder’s violations of state and federal law and agency, joint venture and criminal conduct by all defendants.

¹On or about August 7, 2009, plaintiffs filed the initial complaint in this action under a different index number. According to plaintiffs, during the course of discovery, they became aware of additional parties that should be named as defendants. Thus, on or about September 13, 2011, plaintiffs filed a new summons and complaint, bearing the current operative index number.

² In addition, plaintiffs assert that Sheila Marie is a trade name and key identifier for the business of defendant SM Foods, Inc., and that at the time of the accident, defendant Russell McCall’s Inc. had infused that company with capital and was paying all its bills.

The Atlanta Defendants' Motion

The Atlanta defendants argue that plaintiffs' expert, Captain Calabrese, should be precluded from offering any evidence at trial, and that this court should issue a protective order to deny the questioning by plaintiffs of defendant, Doug Jay, and other witnesses, at their depositions concerning the new claims asserted in plaintiffs' proposed amended complaint. The Atlanta defendants aver that plaintiffs' proposed amended complaint alleges claims of conspiracy and criminal conduct, even though plaintiffs had never raised these claims before, even in opposition to Ryder's summary judgment motion. These defendants claim that the violations alleged in the proposed amended complaint pertain to defendants' failure to comply with Department of Transportation ("DOT") regulations regarding placarding of the Ryder tractor which was involved in this accident and Federal Motor Carrier Safety Act ("FMCSA") regulations with respect to the training, supervision and regulating of drivers of interstate vehicles. Since plaintiffs' expert would testify concerning these topics, and the claims are not, at this point, included in the complaint, the Atlanta defendants argue that Captain Calabrese should be precluded from testifying at trial, and defense witnesses should not have to testify regarding these topics.

In opposition, plaintiffs argue that there is no reason to preclude plaintiffs' expert from testifying at trial given that discovery is still ongoing, and there is a motion to renew and reargue the order granting Ryder summary judgment currently pending. In addition, plaintiffs aver that there is no reason to preclude plaintiffs from questioning defendant Jay concerning any topics since he had complete control over all of the operations and records of defendant GFI Boston and discovery is ongoing. Also, plaintiffs state that there they should be permitted to ask defendant Jay questions concerning the rental agreements between defendants Ryder and GFI Boston, and compliance with the Code of Federal Regulations and FMCSA. Plaintiffs also argue that the scope of disclosure under CPLR 3101 is broad and that this motion is premature. Furthermore, plaintiffs argue that the Atlanta defendants should be sanctioned for making a frivolous motion.

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action." The phrase "material and necessary" is "to 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. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 288 NYS2d 449 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139, 902 NYS2d 426 [2d Dept 2010]). However, "a party does not have the right to uncontrolled and unfettered disclosure." (*Merkos L'Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 408, 873 NYS2d 145 [2d Dept 2009]; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531, 845 NYS2d 124 [2d Dept 2007]). CPLR 3103(a) provides the Court may issue a protective order "denying, limiting, conditioning or regulating the use of any disclosure device" to "prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts."

Here, plaintiffs' proposed amended complaint contains new allegations against defendants including that they violated state and federal law and engaged in criminal conduct. However, since these allegations are not part of the current operative complaint, any testimony regarding these issues would not be material and necessary to the claims at issue in this litigation at this time. Accordingly, the Atlanta defendants' motion is granted with leave to vacate the preclusion of plaintiffs' expert, Christopher Calabrese, from offering any evidence at trial with respect to issues set forth in plaintiffs' expert response, in the event that plaintiffs' motion for leave to amend the complaint is granted.

Plaintiffs' Motion

Plaintiffs move for an order to obtain an open commission for plaintiffs to conduct depositions and obtain documents from individuals who they argue were involved in the operations of defendant SM Foods and GFI Boston in Massachusetts. These individuals include: corporate officers who have knowledge of the corporate structures of SM Foods and GFI Boston, Valerie L. Pawson, Maureen Gamble, Nancy J. Greeley, Anthony De Marco, and three employees of Ryder. Plaintiffs argue that the depositions of each of these individuals is material and necessary.

Defendants/third-party plaintiffs SM Foods, GFI Boston, PLM Trailer Leasing and Burke (together referred to as the "SM Foods defendants") oppose this motion on the grounds that plaintiffs have not satisfied the requirements that are necessary to grant the relief requested. For example, the SM Foods defendants aver that plaintiffs have not demonstrated that the information sought is material and necessary, that a voluntary appearance is unlikely or that discovery cannot be obtained by stipulation or cooperation.

The Atlanta defendants also oppose plaintiffs' motion. These defendants argue that the depositions are not material, necessary or relevant to the issues in this case.

An open commission may be issued where necessary or convenient for the taking of a deposition outside of the state (*see* CPLR 3108). A party seeking an open commission must demonstrate not only that the information sought is necessary to the action, but also that the proposed deponent(s) would not cooperate with a notice of deposition or would not voluntarily come within the State. Under such circumstances, the movant demonstrates that the judicial imprimatur accompanying a commission will be necessary or helpful when seeking the assistance of the foreign court in compelling the witness to attend the examination (*Sorrentino v Fedorczuk*, 85 AD3d 759 [2d Dept 2011]; *Reyes v Riverside Park Community (Stage I), Inc.*, 59 AD3d 219 [1st Dept 2009]).

Here, plaintiffs seek an open commission to obtain the testimony of various witnesses. Insofar as the present application is devoid of information concerning efforts, if any, made by counsel for plaintiffs to obtain the cooperation and voluntary appearance of these witnesses, it must be denied (*see 2000 Arthur Avenue Corp. v Nancy Hard, et al.*, 2009 WL 8396845 (NY

Sup Trial Order, Westchester Co, Scheinkman, J.). Furthermore, plaintiffs have not shown that the witnesses requested would provide testimony that is necessary to this action.

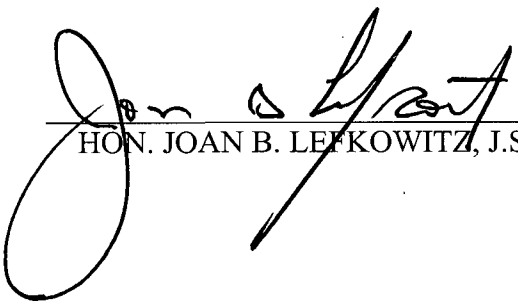
In view of the foregoing, it is

ORDERED that the Atlanta defendants' motion is granted in its entirety with leave to vacate the preclusion of plaintiff's expert in the event plaintiffs' motion for leave to amend the complaint is granted; and it is further

ORDERED that the branch of plaintiffs' motion is denied in its entirety; and it is further

ORDERED that the parties shall appear for a Compliance Conference in Courtroom 800 at 9:30 a.m. on December 4, 2012.

Dated: White Plains, New York
November 19, 2012


HON. JOAN B. LEFKOWITZ, J.S.C.

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