Rivera v Roman Catholic Diocese of Brooklyn & Queens
2017 NY Slip Op 31633(U)
June 16, 2017
Supreme Court, Queens County
Docket Number: 5090/2015
Judge: Leslie J. Purificacion
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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE LESLIE J. PURIFICACION IA Part 39
Justice

JOSHUA RIVERA, an infant by his father and guardian, HERNANA RIVERA, and HERNANA RIVERA, Individually,

Plaintiff,

-against-

ROMAN CATHOLIC DIOCESE OF BROOKLYN AND QUEENS, ST. STANISLAUS ROMAN CATHOLIC CHURCH d/b/a ST. STANISLAUS R C CHU and SAINT STANISLAUS KOSTKA SCHOOL,

Defendants.

Index Number 5090 / 2015

Motion Date 09/15/ 2016

Motion Seq. No. 1

FILED
JUN 22 2017
COUNTY CLERK
QUEENS COUNTY

The following papers numbered 1 to 12 read on this motion by plaintiff to strike defendants' answer for failure to comply with discovery demands, and alternatively, to compel defendants to provide the evidence listed below by a date certain or to be precluded from offering evidence of the same at trial; and cross motion by defendant for a protective order against the production of the names and addresses of certain witnesses, pursuant to CPLR 3103, and to compel plaintiffs to produce the mother of the infant plaintiff for examination before trial, pursuant to CPLR 3124.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	1 - 4
Notice of Cross Motion - Affidavits - Exhibits.....	5 - 8
Answering Affidavits - Exhibits	9 - 10
Reply Affidavits	11-12

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

This is an action arising from a slip/trip and fall accident at a school. The accident occurred on February 3, 2015, within the building known as St. Stanislaus Kostka Catholic

School located at 57-15 61st Street, in Queens, New York. More specifically, the accident occurred on an interior stair case located to the right side of the school (if facing the premises). As a result of the subject accident, plaintiff fractured his left wrist.

A preliminary conference was held on October 29, 2015, wherein the court ordered defendants to provide discovery responses to the outstanding demands. It is alleged that although the court ordered defendants to provide certain discovery, defendants failed to fully comply with the order. Specifically, plaintiffs sought pictures, documents and information related to subsequent repairs performed on the subject staircase where the accident occurred. Plaintiffs attempted to explain that such information is not privileged and is discoverable as the information sought was requested to help prove causation, maintenance and control. Defendants, on the other hand, objects to discovery of the same and contend that there is no issue of maintenance and control. Nonetheless, the said discovery remains outstanding, and plaintiff moves for, inter alia, discovery of evidence of the post accident repairs. Defendants oppose the motion and cross move for a protective order of other items sought to be discovered. Plaintiffs oppose the cross motion.

Discussion

The branch of the motion which seeks to strike defendants' answer for failure to comply with discovery demands, is denied. A court may strike an answer as a sanction if a defendant "refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed" (CPLR 3126; *see Thompson v. Dallas BBQ,* 84 A.D.3d 1221, 923 N.Y.S.2d 357; *Mazza v. Seneca,* 72 A.D.3d 754, 899 N.Y.S.2d 294). However, the drastic remedy of striking an answer is inappropriate absent a clear showing that the defendant's failure to comply with discovery demands was willful or contumacious (*see Polsky v. Tuckman,* 85 A.D.3d 750, 924 N.Y.S.2d 830; *Moray v. City of Yonkers,* 76 A.D.3d 618, 906 N.Y.S.2d 508; *Pirro Group, LLC v. One Point St., Inc.,* 71 A.D.3d 654, 896 N.Y.S.2d 152; *Dank v. Sears Holding Mgt. Corp.,* 69 A.D.3d 557, 892 N.Y.S.2d 510). Here, the plaintiffs failed to make such a showing. The record indicates that defendants, in their combined response to plaintiffs' demands, dated November 12, 2016, provided post-accident photographs of the steps, which were taken March 31, 2015. Defendants also informed plaintiffs that no photographs of the staircase from prior to the incident were in existence. In addition, as per the same response, defense counsel allowed plaintiffs' counsel to personally inspect and take photographs of the current condition of the steps, which occurred on May 31, 2016. It appears that plaintiffs were provided with everything that could reasonably qualify as "after" pictures of the staircase. Thus, defendants have fully responded to this demand.

As to the demand for post accident repair records, defendants properly contend that the same are not discoverable. While CPLR 3101[a] provides that "[t]here shall be full

disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof" (*see Giordano v. New Rochelle Mun. Hous. Auth.*, 84 A.D.3d 729, 922 N.Y.S.2d 518; *Kooper v. Kooper*, 74 A.D.3d 6, 901 N.Y.S.2d 312), "evidence of subsequent repairs is not discoverable or admissible in a negligence case" (*Klatz v. Armor El. Co.*, 93 A.D.2d 633, 637, 462 N.Y.S.2d 677; *see Del Vecchio v. Danielle Assoc., LLC*, 94 A.D.3d 941, 942 N.Y.S.2d 217; *McConnell v. Santana*, 30 A.D.3d 481, 816 N.Y.S.2d 372; *Orlando v. City of New York*, 306 A.D.2d 453, 761 N.Y.S.2d 528). An exception to this rule applies if a defendant's maintenance of, or control over, the subject instrumentality is at issue (*see Del Vecchio v. Danielle Assoc., LLC*, 94 A.D.3d at 942, 942 N.Y.S.2d 217; *Watson v. FHE Servs.*, 257 A.D.2d 618, 684 N.Y.S.2d 283; *Angerome v. City of New York*, 237 A.D.2d 551, 655 N.Y.S.2d 990). Here, plaintiffs moved to compel production of post-accident repair records of the stairs. Yet it is undisputed that the defendants exercised maintenance and control over the stairs. Accordingly, the branch of plaintiffs' motion which seeks post-accident repair records is denied, as such evidence is not discoverable and is not admissible at trial (*see Graham v. Kone, Inc.*, 130 A.D.3d 779, 779–80 [2d Dept. 2015]; *Del Vecchio v. Danielle Assoc., LLC*, 94 A.D.3d at 942, 942 N.Y.S.2d 217; *McConnell v. Santana*, 30 A.D.3d at 482, 816 N.Y.S.2d 372; *Orlando v. City of New York*, 306 A.D.2d at 454, 761 N.Y.S.2d 528).

The branch of the motion which is for copies of video and or surveillance video of the incident, is moot as defendants in their response to plaintiffs' demand dated November 15, 2015, indicated that there is no video and/or surveillance video of the incident and also provided all of the pictures within defendants' possession.

The branch of the motion which seeks the names and addresses of student-witness, is granted. At issue here is whether disclosure of this material is barred by 20 USC § 1232g, commonly known as the "Buckley Amendment", which directs the Federal Government to withhold funds from educational institutions which permit disclosure of "education records" without complying with its provisions. "Education records" are defined in 20 USC § 1232g as "information directly related to a student" maintained by the educational institution or its agent (20 USC § 1232g [a] [4] [A] [I]; 34 CFR 99.3). The Buckley Amendment was intended to protect records relating to an individual student's performance (*see, Red & Black Publ. Co. v Board of Regents*, 262 Ga 848, 427 SE2d 257; *Bauer v Kincaid*, 759 F Supp 575, 589), without a demonstrated need for disclosure (*see, Rios v Read*, 73 FRD 589). It does not apply to records compiled to "[m]aintain the physical security and safety of the agency or institution" (34 CFR 99.8 [a] [1] [ii]; 99.3).

Thus, the names and addresses of the student-witnesses do not fall within the definition of "education records" contained in the Buckley Amendment itself. Accordingly, denial of disclosure based upon that provision is improper (see *Culbert v. City of N.Y.*, 254

A.D.2d 385, 387, 679 N.Y.S.2d 148 [2d Dept. 1998]). A party is generally entitled to disclosure of the names and addresses of witnesses and to his or her own statements (*see,* CPLR 3101 [g]; *Skowronski v F & J Meat Packers,* 210 AD2d 392; *Zayas v Morales,* 45 AD2d 610). Accordingly, the motion to disclose the names and addresses of these potential witnesses is granted and the cross motion for a protective order against disclosure of the same, is denied.

The branch of the motion which seeks a 90-day extension of the time to depose Steven Berardi, is moot as such time has since expired.

The branch of the cross motion which seeks an Order compelling plaintiff to produce Monica Burlacu, is denied as defendant may properly subpoena this witness to appear for examination before trial.

Conclusion

The branch of the motion which seeks to strike defendants' answer for failure to comply with discovery demands, is denied.

The branch of the motion which seeks discovery of the post accident repair records, is denied.

The branch of the motion which seeks the names and address of the minor-aged witnesses and their addresses, is granted. The branch of the cross motion which seeks a protective order regarding this evidence, is denied.

The branch of the motion which is for copies of video and or surveillance video of the incident, is denied as moot.

The branch of the motion which seeks a 90-day extension of the time to depose Steven Berardi, is denied as moot.

The branch of the cross motion which seeks an Order compelling plaintiffs to produce Monica Burlacu, for examination before trial is denied. Defendants may subpoena this witness to appear for deposition.

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Dated:

JUN 16 2017

Hon. Leslie J. Purificacion, J.S.C.