

Marino v Best Yet Mkt. of Farmingdale, Inc.
2012 NY Slip Op 31397(U)
May 9, 2012
Supreme Court, Nassau County
Docket Number: 6756/09
Judge: Michele M. Woodard
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

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UMBERTO M. MARINO and ELISABETTA MARINO,

Plaintiffs,

-against-

**MICHELE M. WOODARD
J.S.C.**

TRIAL/IAS Part 8

Index No.: 6756/09

Motion Seq. No.: 02

BEST YET MARKET OF FARMINGDALE, INC., BEST
YET MARKET, INC. and SID FARBER ENTERPRISES,
LLC,

Defendants.

DECISION AND ORDER

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Papers Read on this Motion:

Plaintiff's Notice of Motion	02
Defendant Best Yet's Opposition	xx
Defendant Sid Farber's Enterprises Opposition	xx
Plaintiff's Reply	xx

Plaintiffs move for an order pursuant to CPLR §3126 precluding defendants Best Yet Market, Inc. and Best Yet Market of Farmingdale, Inc. (hereinafter referred to jointly as "Best Yet") from offering the testimony of Walter Klatt, related to Klatt's January 12, 2009 observations of the condition of the subject ramp on which plaintiff Umberto M. Marino fell, and observations of and interactions with Umberto M. Marino. The plaintiffs also seek an order precluding the defendants from introducing or using on motion or at trial the recorded interview of plaintiff take on January 16, 2009. The defendants oppose the motion.

Plaintiff Umberto Marino tripped and fell while descending down a ramp in a parking lot abutting the Best Yet supermarket in Farmingdale, New York. Best Yet leased the store and parking lot from defendant Sid Farber Enterprises (hereinafter referred to as "Sid Farber"). As a result of Umberto Marino's fall, he suffered a broken nose and fractured right shoulder. He has undergone multiple surgeries related to his injuries. In this action, he seeks to recover monetary damages for his injuries, arguing that the defendants were negligent in the maintenance of the ramp.

The plaintiffs requested accident and incident reports from Best Yet prepared by its agents, servants, representatives or employees, on three separate occasions. The first time was by serving a Notice of Discovery and Inspection and Combined Demands, dated September 14, 2009, on the defendants. Best Yet served a response on December 14, 2009 to the combined demands wherein it

indicated that it was not in possession of any statements taken from the plaintiff. Best Yet did not respond to the demand regarding accident and/or incident reports. Best Yet responded to the plaintiffs' inquiry regarding whether a witness existed by replying that it was determining whether or not a witness exists. The second time was on March 10, 2012, by letter. The plaintiffs demanded any recorded or signed statement of Umberto Marino. Best Yet did not respond to the letter. The third time was on April 6, 2010, at the Preliminary Conference of the matter. The parties stipulated that any statements of the opposing party and accident reports prepared in the regular course of business were to be exchanged on or before May 15, 2010.

On June 3, 2010, Best Yet served a response related to the Plaintiffs' discovery demands. Best Yet disclosed the transcript of a recorded interview of plaintiff Umberto Marino taken over the phone by Best Yet's Insurance Carrier, Liberty Mutual Insurance Company. On June 8, 2010 Best Yet served an amended response to the combined demands indicating that it was conducting a search regarding witnesses to the accident and the existence of an accident report. On June 10, 2010, Best Yet served a response to the plaintiffs previously served discovery request indicating that it was not in possession of any incident or accident reports relating to the subject occurrence.

On November 4, 2010, Best Yet's store manager Walter Klatt's deposition was held. He testified that he prepared an accident report on either the day the accident occurred or the next day. Klatt testified that he spoke with the plaintiff Umberto Marino to obtain information necessary to complete the report and completed the digital report on a Best Yet computer in the Farmingdale store. Klatt testified that he completed the report as part of Best Yet's policy as to what to do so in the event of an accident/incident. He further testified that he had been trained by a Best Yet manger on how to complete the report. Klatt testified that he did not remember what information was requested in the report and that a representative from the insurance company called him after he submitted the report to ask him questions about the report. He testified that he did not print out a copy of the report. On March 10, 2011, the plaintiffs renewed their demand for a copy of the accident report. On March 14, 2011, at the Court Certification Conference, the Court directed that Best Yet provide the plaintiffs with a copy of the accident report by April 15, 2011. On March 14, 2011, Best Yet forwarded a letter to the plaintiffs indicating that its Insurance Company, Liberty Mutual Insurance Company, was not in possession of the accident report. The plaintiffs argue that not having access to the report generated by Klatt and sent to Liberty Mutual online immediately following the accident, deprives the plaintiffs of the opportunity to question Klatt regarding his contemporaneous observations of the location and

conditions surrounding plaintiff Umberto Marino's fall.

In opposition to the plaintiffs' motion, Best Yet argues that it provided the plaintiffs with a copy of the transcript from the audio tape of the plaintiff taken immediately after the accident within six months of the plaintiff's initial request. Regarding the accident report which Klatt testified to submitting on-line to the insurance company, Best Yet has submitted the affidavit of Liberty Mutual Claims representative Michael Morrissiey. Mr. Morrissiey indicates in his affidavit that he made inquiries about an accident report sent to Liberty Mutual by Best Yet and has been informed that no report exists.

Additionally, Best Yet argues that the audio tape of the plaintiff was turned over to the plaintiff as soon as it was discovered. Defendant Farber argues that in the event a report from Klatt to Liberty Mutual should manifest, Farber should not be precluded from using it at trial because Farber never had any control over the subject report and Farber did not deprive plaintiff of the opportunity to review said report. Farber argues that any adverse action against him related to the discovery sought by the plaintiff would be unwarranted, unjust and would be highly prejudicial to him as he has complied with plaintiff's demands as such demands refer to him in this matter.

If the report that Klatt made to Best Yet's Insurance Carrier existed, it would not be discoverable.

"There is a sharp distinction between accident reports which result from the regular internal operations of any enterprise, authority or business and those which are made or produced in connection with the report of an accident to a liability insurer. The latter constitute, at a minimum, material prepared for litigation which is conditionally exempt from disclosure under CPLR §3101[d] (*Williams v Metropolitan Transportation Authority*, 99 AD2d 530 [2d Dept 1984]; *Schneider v Schneider*, 94 AD2d 700[2d Dept 1983]; *Weiser v Krakowski*, 90 AD 2d 847 [2d Dept 1982]; *Vernet v Gilbert*, 90 AD2d 846[2d Dept 1982]).

The reports requested by the plaintiffs cannot be construed as being anything other than reports made by the defendants in this matter to its liability insurer and are thus, exempt from discovery. Based on the Court's determination that if the report existed, it not being discoverable, the plaintiffs' application to preclude Walter Klatt from testifying about his observations of the condition of the subject ramp where Umberto Marino fell and Klatt's observations of and interactions with the Umberto Marino is *denied*.

The delay in Best Yet providing the transcript of the plaintiff's interview was not so long as to

cause any prejudice to the defendants. Best Yet was in possession of the interview transcript well before the depositions of any parties in this matter, which allowed the plaintiffs adequate time to investigate the statements in the interview, prepare their witnesses and question the defendants from an informed position. Additionally, the defendants had substantially responded to the plaintiffs' other discovery demands with the exception of producing a copy of Umberto Marino's recorded interview. Furthermore, the defendants indicated that a search was in process for the information being sought. The plaintiffs did not demonstrate that the defendants' conduct in failing to provide certain information which was unavailable to it was willful, contumacious, or in bad faith to warrant any sanction from the Court (see, *Remuneration Planning & Servs. Corp. v. Berg & Brown*, 151 AD 2d 268 [1st Dept 1989]). Moreover, the defendants proffered a reasonable excuse, that it was conferring with its' insurance carrier, for the short delay in complying with the Preliminary Conference Order (see, *Cruzatti v. St. Mary's Hosp* 193 AD 2d 579 [2d Dept 1993]). As such, the plaintiffs' application to preclude Best Yet from using the recorded interview of the Umberto Marino at trial and directing a negative inference at trial is *denied*.

ORDERED, the parties are directed to appear before the undersigned on May 16, 2012 at 9:30 a.m. for a certification conference in this matter.

This constitutes the Decision and Order of the Court.

DATED: May 9, 2012
 Mineola, N.Y. 11501

ENTER: 
 HON. MICHELE M. WOODARD
 J.S.C.

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 MAY 14 2012
 NASSAU COUNTY
 COUNTY CLERK'S OFFICE