

DiBenedetto v Zboyan
2013 NY Slip Op 32770(U)
August 26, 2013
Sup Ct, Westchester County
Docket Number: 56383/12
Judge: Joan B. Lefkowitz
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

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
VINCENT DIBENEDETTO,

Plaintiff,

DECISION & ORDER

-against-

Index No. 56383/12
Motion Date: August 26, 2013

STEVEN ZBOYAN,

Seq. No. 1

Defendant.
-----X

LEFKOWITZ, J.

The following papers were read on this motion by plaintiff for a protective order precluding the depositions of Lena DiBenedetto and Francis Phu and quashing the subpoenas served upon them pursuant to CPLR 2304 and 3103. Plaintiff seeks costs and sanctions against defendant and defendant's counsel pursuant to 22 NYCRR 130-1.1(c).

- Order to Show Cause - Affirmation in Support - Exhibits
- Affidavits of Service
- Affirmation in Opposition - Exhibits

Upon the foregoing papers and the proceedings held on August 26, 2013, this motion is determined as follows:

Plaintiff seeks to recover damages for injuries allegedly sustained in a trip and fall while working as a U.S. Postal Service letter carrier. On March 15, 2010, he allegedly fell in a hole created by the defendant in the lawn on defendant's property while covering another worker's route. It is alleged defendant created a dangerous and hazardous condition on his property by removing trees or bushes (Defendant's Exhibit B, Response to Demand for Bill of Particulars).

Defendant served nonparty subpoenas dated July 1, 2013 on Lena DiBenedetto and Francis Phu. Plaintiff argues neither of the nonparties are witnesses. Plaintiff argues Lena DiBenedetto is plaintiff's wife and there has been no showing that she has information relevant to the allegations in the action. Plaintiff has no information regarding who Francis Phu is or the basis for his testimony. The subpoenas served on the witnesses are defective, failing to give notice of the circumstances or reasons the depositions are sought (CPLR 3101[a]).

In opposition, defendant argues Francis Phu is the letter carrier who delivered mail to defendant's residence prior to and after the alleged incident. Defendant identified Mr. Phu during his deposition (Defendant's Exhibit D, p. 46). Defendant seeks to depose Mr. Phu regarding his observations of the location of the alleged incident. Defendant contends that Mr. Phu is "in an excellent position" to see and know the location of the alleged hole since he delivered mail to the address for five years prior to the alleged incident. Defendant argues plaintiff did not use the concrete walkway, but walked on the lawn and the practices of another letter carrier at the same location are relevant to the defense (Affirmation of Dennis Krolan, p. 2, 3). Defendant served a demand for a copy of plaintiff's postal employee manual and handbook, and plaintiff responded he is unable to locate any employee manual or handbook that may have been issued to him (Defendant's Exhibits E, G). Defendant seeks to depose Mr. Phu regarding any employee rules and post office procedures pertaining to letter carriers. Defendant argues the deposition of plaintiff's wife is relevant to plaintiff's alleged injuries and loss of earnings claim.

Pursuant to CPLR 3103[a], "[t]he court may at any time on its own initiative, or on motion of any party... make 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." A party seeking disclosure from a nonparty pursuant to CPLR 3101[a][4] must demonstrate the nonparty discovery sought is material and necessary and must state the circumstances or reasons warranting discovery from such nonparty witness (*Kondratick v Orthodox Church in America*, 73 AD3d 708 [2d Dept 2010]; *Tenore v Tenore*, 45 AD3d 571 [2d Dept 2007]; *Smith v Moore*, 31 AD3d 628 [2d Dept 2006]; *Matter of Lutz v Goldstone*, 31 AD3d 449 [2d Dept 2006]). "A motion to quash is properly granted where the party issuing the subpoena has failed to show that the disclosure sought cannot be obtained from sources other than the nonparty" (*Kooper v Kooper*, 74 AD3d 6 [2d Dept 2010]). "As a matter of policy, nonparties ordinarily should not be burdened with responding to subpoenas for lawsuits in which they have no stake or interest unless the particular circumstances of the case require their involvement" (*Kooper v Kooper*, 74 AD3d 6 [2d Dept 2010]). Whether a discovery demand is appropriate is a matter within the sound discretion of the court, which must balance competing interests (*Kavanagh v Ogden Allied Maintenance Corp.*, 92 NY2d 952 [1998]; *Kooper v Kooper*, 74 AD3d 6 [2d Dept 2010]).

Defendant fails to demonstrate the deposition of Mr. Phu is material and necessary to the defense of this case (CPLR 3101[1], *Dicenso v Wallin*, — AD3d —, 2013 NY Slip Op 5612 [2d Dept 2013]). On May 17, 2013, defendant testified a tree was removed on the property twenty-five years ago, he filled in the space periodically for the last twenty five years, and he planted grass in the area which was six to eight inches wide (Defendant's Exhibit D, Zboyan tr at 30, 32). There is no showing on this motion that Mr. Phu has any information pertaining to the alleged hole at the property or postal employee procedures that cannot be obtained from other sources. Plaintiff's counsel's conclusory assertion that Mr. Phu can provide testimony relevant to the issue of liability is insufficient to warrant a nonparty deposition.

Defendant has demonstrated Lena DiBenedetto has information pertaining to plaintiff's alleged injuries that is material and necessary to the prosecution of this action and this

information is otherwise unobtainable (*Thorson v New York City Tr. Auth.*, 305 AD2d 666 [2d Dept 2003]). Plaintiff alleges he sustained personal injuries to his body and psyche and is totally disabled from work (Defendant's Exhibit A, Verified Complaint, p. 4; Defendant's Exhibit B; Response to Demand for Bill of Particulars, p. 4). Mrs. DiBenedetto can provide testimony pertaining to plaintiff's alleged injuries and the loss of earnings claim. However, defendant fails to demonstrate on this motion that the subpoena was properly served on Mrs. DiBenedetto, as an affidavit of service was not submitted on the motion. Plaintiff is directed to serve Lena DiBenedetto with a new subpoena in the manner prescribed in CPLR 2303[a] and the subpoena shall set forth the circumstances or reasons her deposition is sought (CPLR 3101[a][4]).

In view of the foregoing, it is

ORDERED that plaintiff's motion for a protective order is granted to the extent that defendant is precluded from taking the deposition of Francis Phu and the subpoena served on Francis Phu is quashed; and it is further

ORDERED that the branch of the motion seeking an order precluding defendant from taking the deposition of Lena DiBenedetto is denied. Defendant is directed to serve Lena DiBenedetto with a new subpoena in the manner prescribed in CPLR 2303[a] on or before September 9, 2013, and the subpoena shall set forth the circumstances or reasons her deposition is sought; and it is further

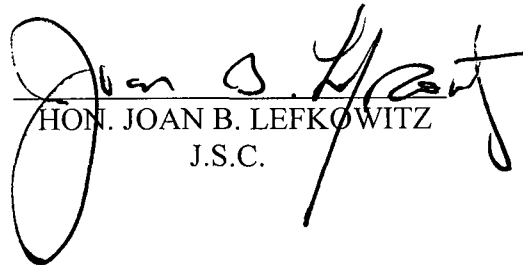
ORDERED that Lena DiBenedetto shall appear for a deposition on or before October 7, 2013; and it is further

ORDERED the branch of plaintiff's motion seeking an award of costs and attorney's fees is denied, as plaintiff has failed to demonstrate that defendant's conduct was frivolous (22 NYCRR 130-1.1[c]); and it is further

ORDERED that all parties are directed to appear for a conference in the Compliance Part, Courtroom 800, on October 15, 2013 at 9:30 a.m.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
August 26, 2013


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

TO: Law Office of Paul G. Gargiulo (BY NYSCEF)
199 Main Street
Suite 901
White Plains, New York 10601

Law Offices of Safranek, Cohen & Krolian (BY NYSCEF)
One Water Street
4th Floor
White Plains, New York 10601

Francis Phu
294 Mile Square Road
Yonkers, New York 10701

Francis Phu
236 Jessamine Avenue
Yonkers, New York 10701

Lena DiBenedetto
19 Luddington Court
Carmel, New York 10512

cc: Compliance Part Clerk