

Calarco v Netherland Gardens Owners, Inc.
2013 NY Slip Op 32836(U)
September 16, 2013
Supreme Court, Westchester County
Docket Number: 51427/2012
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
ANTHONY CALARCO,

Plaintiff

DECISION and ORDER

Index No. 51427/2012
Motion Date: Sep 16, 2013
Seq. Nos. 2, 3

-against-

NETHERLAND GARDENS OWNERS, INC.,

Defendant

-----X
LEFKOWITZ, J.

The following papers were read on: (1) the motion by plaintiff for an order directing defendants to comply with this Court's order dated June 13, 2013, and with his three notices to produce dated March 1, 2013, June 26, 2013, and August 2, 2013, respectively, by a date certain, and compelling defendant to produce board member Jose Morales for a deposition; and (2) the motion by defendant for a protective order striking plaintiff's notice to produce dated June 26, 2013, and denying, limiting, conditioning or regulating plaintiff's further demands:

- Plaintiff's Order to Show Cause dated August 12, 2013
- Affirmation in Support
- Exhibits A-J
- Affirmation in Opposition
- Exhibits A-G

Defendant's Order to Show Cause dated August 12, 2013¹

¹By Notice of Motion dated July 18, 2013, defendant moved for an order granting it a protective order pursuant to CPLR 3103, striking plaintiff's discovery demand dated June 26, 2013. Defendant now notes, and court records indicate, that insofar as that application (Seq. No.

Affirmation in Support
Exhibits A-E

Upon the foregoing papers and upon oral argument heard on September 16, 2013, these motions are determined as follows:

This is an action for personal injuries allegedly sustained by plaintiff on May 25, 2011, while employed as a superintendent, when a section of a wall collapsed on him while he was in the boiler room of the premises known as Netherland Gardens located at 2 Soundview Avenue in White Plains, New York. The action was commenced on or about January, 2012. Plaintiff has served defendant with three notices to produce dated March 1, 2013, June 26, 2013 and August 2, 2013, respectively. Plaintiff presently seeks an order, among other things, compelling defendant to comply with his notices to produce and with this Court's compliance order dated June 13, 2013. Plaintiff also seeks costs and sanctions in this matter.

Defendant has responded to two of the three notices to produce by its responses dated March 26, 2013 and July 18, 2013, respectively. Defendant has also served several responses, all dated May 10, 2012, relating to plaintiff's several demands. These responses include, but are not limited to: (1) a statement that there are no witnesses to this incident other than plaintiff's wife; (2) defendant has not yet retained an expert but expects to retain a medical expert; (3) defendant's insurance information relating to this matter; (4) a copy of a building incident report dated May 25, 2011; (5) defendant's assertions that it is unaware of the existence of any photos, that it has not retained an economist, that it is not in possession of any statements, and that it is not in possession of any tapes, videotapes or video laser discs relating to this matter.

Plaintiff was deposed on June 25, 2013. He testified that he had several conversations with board member Jose Morales about the boiler room and that Mr. Morales inspected that room two or three times before the subject incident occurred and told plaintiff that the bad condition would be repaired.

On July 31, 2013, Milder Belalcazar was deposed. She testified that she lived in Netherland Gardens from May, 2008 to July, 2012, and that she became president of its co-op board in 2009. She testified that at the time she became president, an "assessment" was in the process because "they wanted to do some work with some of the walls in the building". The assessment was done in writing by Samson Management. An engineer and an architect reviewed the matter as part of the assessment process and they presented information to the city to get the appropriate permits.

1) was made in violation of DCM protocol, defendant was directed to re-file its application for the aforesaid relief by way of Order to Show Cause. In light of the present determination, this motion (Seq. No. 1) is denied .

Belalcazar further testified that every month the co-op board held meetings at which minutes were taken. If any construction was done, copies of invoices would be distributed at the meeting relating thereto. These invoices were kept by the management company which at one time was Samson Management and is now Gabriel Management. She knew that work had been done on the interior walls of the boiler room but wasn't certain if the work was done before or after the subject incident. She also testified that Shallu Construction did work at the subject premises, although she wasn't sure what type of work was done. The work it did was before the subject accident and its work was discussed at the board meetings. Casa Construction also did work on the wall at some point.

First Notice to Produce dated March 1, 2013

In his notice to produce dated March 1, 2013, plaintiff sought any and all records, documents and photos regarding the construction going on at defendant's building at the time of his accident, any and all records, photos and documents regarding any pre-accident problems, repairs, maintenance of the wall at issue, and any and all records, photos and documents regarding the collapse of the wall at issue including all post accident repairs and maintenance of the wall. By response dated March 26, 2013, in reference to plaintiff's first two requests, defendant referred plaintiff to its responses dated May 10, 2012, and stated that it was conducting a search for additional documentation. In reference to plaintiff's third request, defendant objected thereto insofar as the request sought information regarding remedial efforts engaged in by defendant. By compliance order dated June 13, 2013, this Court directed defendant to produce records referring to maintenance, repair or construction of the wall in the boiler room as per the notice dated March 13, 2013, and to include records three years prior to the incident. The Court noted that to the extent such records did not exist or were not in the possession or control of defendant or its agent, defendant was to provide a detailed affidavit within two weeks of the date of the order regarding those records, whether they existed, and in whose possession.

On or about June 26, 2013, defendant served plaintiff with its response to the Court's order of June 13, 2013, and a supplemental response to plaintiff's notice to produce dated March 1, 2013 (one document). In reference to plaintiff's first and second requests, defendant stated that no documents were available. In reference to plaintiff's third request, defendant stated that the court order of June 13, 2013, only called for the production of records from May 25, 2008 to May 25, 2011, and not for the production of non-admissible evidence of subsequent remedial measures taken.

In his affidavit dated June 26, 2013, Mitch Hochhauser, an employee of Gabriel Management, defendant's managing agent since December, 2011, stated that he conducted a good faith search to locate any records including documents and photos responsive to plaintiff's first two requests and for the three year period prior to May 25, 2011. He stated that he searched the physical and electronic files in possession and control of Gabriel Management with respect to the premises known as 2 Soundview Avenue in White Plains, New York, and did not locate any records responsive to plaintiff's request. He added that he was not aware of any other person or

entity that would be in possession, custody or controls of such records.

Presently, plaintiff seeks an order compelling defendant to comply with this notice to produce. Defendant opposes this part of plaintiff's motion.

Analysis as to the Notice to Produce dated March 1, 2013

The Court finds that defendant has failed to comply with the order dated June 13, 2013. In its order the Court directed defendant to state whether records exist and in whose possession or control they are in. The affidavit of Mr. Hochhauser is not an affidavit of defendant whereby it discusses the existence of records relating to the maintenance, repair or construction of the wall in the boiler room for the three year period before the subject incident on May 25, 2011. The Court notes that Mr. Hochhauser is an agent of defendant's current managing agent which agency took over the responsibilities for the property at 2 Soundview Avenue months after plaintiff's accident. Accordingly, the part of plaintiff's motion seeking to compel defendant to fully and adequately comply with the directive set forth in the order dated June 13, 2013, is granted. However, to the extent that defendant has not produced documents relating to all post accident repairs and maintenance of the wall, they are not discoverable in this matter where there is no issue of maintenance and control (*see Ramos v New York City Hous. Auth.*, 202 AD2d 563 [2d Dept 1994]; *Scudero v Campbell*, 288 NY 328 [1942]; 44A NY Jur 2d, Disclosure § 218).

Second Notice to Produce dated June 26, 2013

In his notice to produce dated June 26, 2013, plaintiff sought: (1) all documents regarding the construction done on the exterior wall of the boiler room prior to the subject incident; (2) all documents regarding the condition, damage and repairs to walls of plaintiff's old apartment and the two apartments above that; (3) all condo board meeting minutes for six months before and six months after the subject incident and all additional meetings regarding the boiler room in question; (4) all documents regarding all construction done at the building from 2010 to 2011 including all violations, suggestions and required building changes; (5) all engineer and appraisal documents regarding the building including any such documents associated with any sale and/or transfer of the property; (6) all photos attached to the building incident report; (7) all documents regarding inspections done by people or entities hired by defendant or on defendant's behalf regarding the structural integrity of the building; (8) all documents regarding inspections done by official entities such as the fire and building departments, including all violations, suggestions and required building changes. By response dated July 18, 2013, defendant made objections, among others, that: it had responded to some of these requests (#1, 2, 5, 6, 8); the terms in some of the requests were not defined, rendering the request vague and ambiguous (# 1, 2, 3, 4, 6, 8, 9); the requests were unintelligible (# 1, 2, 3, 4, 5, 6, 8, 9); and, that the requests were overly broad and burdensome and sought information that was neither relevant nor reasonably expected to lead to the discovery of admissible evidence (# 1-6, 8-9).

Both plaintiff and defendant have moved for relief regarding this notice to produce, dated June 26, 2013. While plaintiff seeks an order compelling defendant to comply therewith (which is opposed by defendant), defendant seeks a protective order striking the notice (as well as an order denying and limiting plaintiff's further demands). Plaintiff has not submitted written opposition to defendant's motion.

In its affirmation in support of its motion for a protective order, defendant asserts in regards to this notice to produce, that with it, plaintiff regurgitated previous demands for information. Defendant further states that the notice lacked specificity or, referring to those demands based on deposition references, was outright incorrect. Defendant further asserts that plaintiff continues to demand a vast array of records and that it has become a significant and growing expenditure of resources for defendant to review each demand.

Third Notice to Produce dated August 2, 2013

Following the deposition testimony of defendant's witness, plaintiff served his third notice to produce, dated August 2, 2013. Therein, plaintiff sought further documents including (1) all documents regarding the pre-accident assessment but not limited to engineer and architect reports; (2) all co-op board meeting minutes regarding the structural issues with the walls in the building; (3) all co-op board meeting minutes regarding plaintiff's accident; (4) all bills regarding Casa Construction as it relates to the walls at the subject building; (5) all bills regarding Shallu Construction as it relates to the walls at the subject building; (6) all violations regarding the walls of the subject building; and, (7) the last known addresses of several people (some of whom were identified by plaintiff and/or defendant's witness(es) at their respective deposition).

Presently, plaintiff seeks an order compelling defendant to comply with this notice to produce. Defendant opposes this part of plaintiff's motion.

This notice to produce was prepared and served upon defendant after the parties appeared for a conference in this matter as a result of which a briefing schedule for a discovery motion was prepared but before the instant Order to Show Cause was issued and filed. Defendant notes (in its counsel's affirmation dated August 26, 2013), that its time to respond to this notice has not yet elapsed and in any event, the notice asserts improper demands.

Analysis as to the Notices to Produce dated June 26, 2013 and August 2, 2013

CPLR 3103 provides that a court may at any time, on its own initiative, or on motion of any party or any person from whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts. Upon review of the notices to produce that plaintiff has served on defendant, along with defendant's responses thereto, the Court concludes that

defendant has failed to adequately comply with plaintiff's discovery demands.

With this in mind, in responding to the Notice to Produce dated June 26, 2013 defendant is directed, if it has not already done so, to serve a response that includes specific objections and individual responses to the items contained therein but to limit its responses to the period between May 25, 2008 and May 25, 2011, and to submit responsive documents relating to the subject boiler room. More particularly, defendant is to provide as to item # 1, all documents regarding the construction done on the exterior wall of the boiler room before the accident including all contracts, invoices, purchase orders, engineering reports, bills and cancelled checks; as to item # 3, all condo (or co-op) board meeting minutes for six months before the subject accident regarding the boiler room; as to item # 5, all documents regarding all construction done at the subject building in the boiler room; as to item # 6, all engineer reports regarding the subject boiler room; as to item # 8, all documents regarding inspections done by people or entities hired by defendant regarding the subject boiler room; as to item # 9, all documents regarding inspections conducted by official entities such as the fire and building departments, as well as any violations, suggestions and or required changes issued by these entities.

Furthermore, in responding to the Notice to Produce dated August 2, 2013, defendant is directed, if it has not already done so, to serve a response that includes specific objections and individual responses to the items contained therein but to limit its responses to the period between May 25, 2008 and May 25, 2011, and to submit responsive documents relating to the subject boiler room. More particularly, defendant is to provide as to item # 1, all documents regarding the pre-accident assessment including all engineering and architect reports; as to item # 2, all minutes from the co-op (or condo) board meetings where the subject boiler room was discussed; as to items # 3 and 4, all bills, invoices, purchase orders and cancelled checks regarding Casa Construction and Shallu Construction as they relate to the subject boiler room; as to item # 6, all fire and building violations issued regarding the subject boiler room; and, to reply to item # 7.

Deposition of Board Member Jose Morales

Plaintiff also seeks an order directing defendant to produce board member Jose Morales for a deposition. This part of plaintiff's motion is opposed by defendant.

Plaintiff asserts that it is board member Jose Morales who is most aware of the pre-accident issues regarding the subject wall. He was with plaintiff in the boiler room several times before the accident and discussed the situation with plaintiff. At the deposition of defendant's witness, Milder Belalcazar, plaintiff's counsel raised an objection noting his expectation that defendant would produce Morales as its witness. On or about August 5, 2013, plaintiff served defendant with a notice to take its deposition by Jose Morales on August 22, 2013. By letter dated August 21, 2013, defendant rejected the notice on the grounds that it violated CPLR 3107 and the basis of the sufficiency of Belalcazar's testimony. In opposition to the motion (dated August 26, 2013), defendant notes that it will produce its managing agent for deposition as it was directed to do so by Court order dated July 26, 2013.

CPLR 3101(a) requires full disclosure of all matter material and necessary in the prosecution or defense of an action. A party seeking disclosure must show that the method of discovery sought will lead to the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims (*Gomez v State of New York*, 106 AD3d 870 [2d Dept 2013]). For the purposes of a deposition, a corporate entity has the right to designate, in the first instance, the representative that will be examined (*see Schiavone v Keyspan Energy Delivery NYC*, 89 AD3d 916 [2d Dept 2011]). Furthermore, a party moving for additional depositions has the burden of demonstrating (1) that the representative already deposed had insufficient knowledge or was otherwise inadequate and (2) that there is a substantial likelihood that the person sought for a deposition possesses information which is material and necessary to the prosecution of the case (*Gomez v State of New York*, 106 AD3d 870 [2d Dept 2013]). Whether defendant had notice of the condition that allegedly caused plaintiff's injuries is material and relevant to one of the issues regarding liability in this case. Plaintiff has sufficiently demonstrated that the deposition testimony of defendant's previous witness was insufficient regarding the relevant issues in this case and that Mr. Morales likely possesses information that is material and necessary to the prosecution.

In light of the foregoing it is:

ORDERED that the branch of plaintiff's motion seeking an order compelling defendant to comply with this Court's order dated June 13, 2013, and with his three notices to produce is granted only to the limited extent that on or before October 9, 2013, defendant is directed, if it has not already done so, to serve its affidavit that clearly states whether documents regarding the maintenance, repair or construction of the wall in the boiler room for the time between May 25, 2008 to May 25, 2011, exist and if they do not exist or are not in its possession or control whether they did exist and the disposition thereof, as clearly set forth in the order of June 13, 2013, and to respond to plaintiff's Notices to Produce dated June 26, 2013, and August 2, 2013, respectively, as herein above discussed; and it is further,

ORDERED that the branch of plaintiff's motion seeking an order compelling defendant to produce Mr. Morales for a deposition is granted; and it is further,

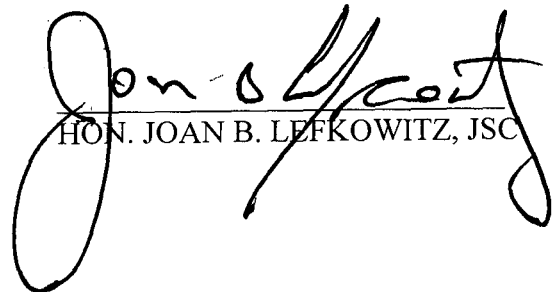
ORDERED that to the extent that it has not done so, on or before October 9, 2013, defendant is to produce Mr. Jose Morales and its managing agent for a deposition; and it is further,

ORDERED that the branch of plaintiff's motion seeking an order imposing costs and sanctions against defendant is denied; and it is further,

ORDERED that defendant's motion for a protective order striking the discovery demands dated June 26, 2013 is denied; and it is further,

ORDERED that the parties are directed to appear for a conference in the Compliance Part, Room 800, on October 23, 2013, at 9:30 AM

Dated: White Plains, New York
September 16, 2013



HON. JOAN B. LEFKOWITZ, JSC

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