Ahmad-Pai v South St. Seaport Ltd. Partnership
2016 NY Slip Op 31290(U)
July 8, 2016
Supreme Court, New York County
Docket Number: 158135/2013
Judge: Kelly A. O'Neill Levy
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

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ALI AHMAD-PAI,

Plaintiff,

-against-

SOUTH STREET SEAPORT LIMITED PARTNERSHIP, and THE HOWARD HUGHES CORPORATION,

Defendants.

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Index No. 158135/2013
Motion Seq. 002

DECISION & ORDER

HON. KELLY O'NEILL LEVY, J.:

Plaintiff Ali Ahmad-Pai moves for an order compelling defendants South Street Seaport Limited ("South Street Seaport") and the Howard Hughes Corporation ("HHC") to produce for examination before trial a witness or witnesses with knowledge of the design, operation, maintenance, control, repair, and use of the bicycle path at issue in this action. Defendants oppose the motion.

Plaintiff alleges that he was injured while riding a bicycle at a property owned by South Street Seaport and HHC. Plaintiff claims the condition of the path contributed to his injury and that South Street Seaport and HHC were negligent in their maintenance of the path. Plaintiff deposed an HHC employee that worked for the defendant at the time of the accident. Now, over a year later, he seeks to depose additional witnesses, claiming that the original deponent did not possess sufficient knowledge concerning the condition giving rise to the accident central to the cause of action and therefore additional discovery is warranted.

Defendants oppose the motion, claiming that the deponent originally produced was sufficiently informed about the bicycle path and that plaintiff failed to ask questions at the deposition that could have prompted answers providing the information now sought. Further,

they assert that producing the additional witnesses would be overly burdensome and producing the original witness again is not an option as he is now retired.

Discussion

The rules of disclosure in New York are illustrated in CPLR § 3101, which states "there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by . . . any other person, upon notice stating the circumstances or reasons such disclosure is sought or required."

Based on this statute and the First Department's construction of it, the plaintiff's motion to compel discovery is denied. Generally, to compel discovery, a party must make a "detailed showing of the necessity for taking additional depositions…demonstrat[ing] that the employees already deposed had insufficient information and there was a substantial likelihood that those sought to be deposed possess information necessary and material to the prosecution of the case." *Alexopoulos v. Metro. Transp. Auth.*, 37 A.D.3d 232, 233 (1st Dep't 2007) (granting plaintiff's motion to compel the deposition of additional employees, where a detailed showing of necessity was made); *see also Nunez v. Chase Manhattan Bank*, 71 A.D.3d 967, 968 (2d Dep't 2010) (holding that plaintiff's motion to compel additional depositions should have been granted as the witness initially produced lacked knowledge of the incident). Further, the First Department made clear in *Moroze & Sherman, P.C. v. Moroze*, 104 A.D.2d 70 (1st Dep't 1984), that discovery must be limited "by a test for materiality of usefulness and reason for the evidence and its need in good-faith preparation for trial." *Moroze* at 72.

Applying this standard to the instant motion, it is clear that the plaintiff's argument is insufficient. First, the plaintiff has not made a clear showing that the original deponent, Jay Pearly (HHC Associate General Manager), produced for examination before trial on December

16, 2014, lacked the information necessary for the case to proceed. *See Steadfast Ins. Co. v. Sentinel Real Estate Corp.*, 278 A.D.2d 157, 157-58 (1st Dep't 2000) ("Defendants' request for additional discovery was properly denied inasmuch as the materials relevant to the underlying claim have already been produced.") Plaintiff claims that the deponent was not familiar with the construction and maintenance of the path where the accident occurred. However, the transcript of the deposition indicates that very few questions were dedicated towards eliciting this information. Further, where plaintiff did inquire as to whether any area of the South Street Seaport Shopping mall was beyond the deponent's purview, he clearly stated "no." (Deposition of Jay Pearly, 16).

Similarly, the deponent clearly indicated that he was responsible for the "daily operations" of the mall. This contradicts plaintiff's assertion that Mr. Pearly was not familiar with the maintenance or upkeep of the path on which the accident occurred. (Deposition of Jay Pearly, 12). Plaintiff's counsel describes the bicycle path as "abutting and adjacent to the defendants' premises." (Aff. of Vito A. Cannavo at 5). At no point during the deposition did Mr. Pearly reject the notion that the mall was responsible for the path nor did he indicate that he could not answer questions about the incident.

Additionally, the movant does not specifically identify those he seeks to depose, but appears to implicitly request that the head of security for Summit Security (Frank Wilson) and Summit Security Sergeant Listhrop (who was first on the scene)[1] along with Damien Smeragliuolo, HHC Director of Operations, should be produced. However, the plaintiff never explicitly states that these are the additional witnesses he wishes to depose nor does he clearly state how they would help prove his case. It appears from Mr. Pearly's deposition that Wilson

[1] Mr. Pearly testified that South Street Seaport utilizes a private security company, Summit Security, to supply security for the shopping center. (Pearly Dep. at 23, 24).

and Sergeant Listhrop are only responsible for the security of South Street Seaport. There is no indication that they have any involvement with the maintenance or installation of the bike path. Nor is there any indication that Mr. Smeragliuolo's testimony would not be duplicative of that of Mr. Pearly. Moreover, plaintiff's counsel failed to ask questions at the deposition that could have elicited this information. (Deposition of Jay Pearly 36-37).

In addition, there is a question of whether plaintiff's request was timely. Plaintiff claims that it was during the deposition of Jay Pearly that he learned of the other two witnesses that might have relevant information. *See* Cannavo Aff. at 9. The issue is that the deposition referenced was conducted on December 16, 2014, but the motion to compel the additional depositions was not filed until well over a year later.

The only suggestion in the record that further deposition requests could be forthcoming was during a status conference on September 30, 2015. The conference order of that date indicates that plaintiff "reserve[d] his right to further EBT of defendant as to the design and construction of the subject bike path." However, this was still seven months before the motion was filed, and nine months after the original deposition took place.

Similar to the First Department, the Second Department's approach to determining whether to compel discovery is based on elements of necessity and sufficiency. In *Zollner v. City of New York*, 204 A.D.2d 626 (2d Dep't 1994), the court stated that:

> In order to show that additional depositions are necessary, the moving party must show (1) that the representatives already deposed had insufficient knowledge, or were otherwise inadequate, and (2) there is substantial likelihood that the persons sought for depositions possess information which is material and necessary to the prosecution of the case. *Id.* at 627.

Here plaintiff has failed to show that Mr. Pearly's testimony was inadequate because he was not sufficiently informed. In *Nunez*, supra, the court illustrates a situation in which further discovery is necessary because a witness is not sufficiently informed. The court noted that:

> The witness produced . . . testified at his deposition that he became responsible for the subject premises in 2006, three years after the accident, that he himself had absolutely nothing to do with the subject premises in 2003, and that he knew nothing about the accident. He also indicated that he had not reviewed any records concerning the accident, and that he had not spoken to anyone about the accident. Moreover, he did not know anyone who was connected with the subject premises at the time of the accident. In addition, he was unaware of which company was responsible for the maintenance of the elevators in 2003. Further, he had no knowledge concerning whether there had been any complaints involving the elevators before the accident, or whether they had ever been repaired or serviced before the accident. *Id.* at 968-89.

This is clearly a far cry from Mr. Pearly's deposition testimony. He not only worked at South Street Seaport at the time of the accident, but was in a management position with direct knowledge of the incident now being litigated.

Further, plaintiff has not made a showing that additional witnesses employed by South Street Seaport or HHC have knowledge as to the maintenance and construction of the bike path where the accident occurred.

Accordingly, it is hereby ORDERED that the motion to compel is denied.

This constitutes the decision and order of the court.

ENTER:

Dated: July 8, 2016

Kelly O'Neill Levy

Kelly O'Neill Levy, A.J.S.C.

HON. KELLY O'NEILL LEVY