SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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LETYS MEJIA,

Plaintiff,

-against-

SAMUEL DELGADO, JR. and KATIA J. DELGADO,

Defendants.

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Index No.: 157361/2014

DECISION AND ORDER

Motion Sequence 001

CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

In this personal injury action, Defendants Samuel Delgado, Jr. ("Samuel"); and Katia J. Delgado ("Katia") (collectively, "Defendants") move for summary judgment dismissing the Complaint of Plaintiff Letys Mejia ("Plaintiff"), who alleges that she was injured when an outdoor, second-story deck attached to Defendants' home collapsed.[1] Plaintiffs cross-move to stay the motion for summary judgment and compel further depositions of Defendants.

BACKGROUND FACTS

Defendants purchased their home on August 30, 2009, at which time the deck was already present. In the course of their ownership, Defendants did not make any repairs to the deck itself with the exception of replacing several steps leading from the deck down into the backyard.

On May 25, 2014, Plaintiff was attending a barbecue at Defendants' residence, where approximately 38 or 39 guests were present throughout the house and yard—similar in number to

[1] Defendants dispute the accuracy of the word "collapse," explaining that the deck merely detached and tilted inward toward the house (*Samuel Tr* 16). In contrast, Plaintiff testified that the deck completely detached and fell until it was completely on the ground (*Pl Tr* 24, 49). To the extent that the distinction does not affect the court's analysis, and to the extent that the facts must be viewed in the light most favorable to the non-moving party on summary judgment, the Court notes the dispute but uses the term "collapse" here for the sake of clarity.

previous parties held there. As Plaintiff stood on the deck (along with a grill, two tables with about ten chairs, and 16 other people), the deck collapsed. Prior to the collapse, Plaintiff did not recall wobbling, unsteadiness, or any other warning, nor had Defendants previously received any notices or complaints regarding the deck or noted any visible or audible defects despite hosting numerous gatherings of similar size.

In support of their motion for summary judgment to dismiss the Complaint, Defendants attach the Summons and Complaint (*Exh A*), Answer (*Exh B*), Plaintiff's Bill of Particulars (*Exh C*), and the deposition transcripts of Plaintiff (*Exh D*, "*Pl Tr*"), Katia Delgado (*Exh E*, "*Katia Tr*"), and Samuel Delgado (*Exh F*, "*Samuel Tr*").

Defendants argue that they are entitled to summary judgment because they did not create or contribute to any alleged defect leading to Plaintiff's injuries, and because they did not have notice of, or an opportunity to cure, any such defect. Defendants contend that the deck was built by prior owners, and that the only repair was to the deck stairs, which are irrelevant to the subject incident.

In opposition, and relying upon the same exhibits, Plaintiff argues that there is sufficient evidence to create an issue of fact as to whether the deck was in a dangerous or defective condition, and that Defendants had constructive notice of the dangerous condition based on their failure to conduct reasonable inspection of the deck. Plaintiff also invokes the doctrine of *res ipsa loquitur*.

In reply, Defendants argue that Plaintiff failed to raise a genuine, triable issue of fact, noting that Defendants' lack of knowledge as to any defect is evidenced by their own presence on the deck, as well as previous parties having been held there. Defendants also attach, for the first

time, a Town of Chester Building Department Certificate of Compliance (the "Certificate", *Exh G*) dated June 29, 2009, two months before Defendants purchased their home.[2] The Certificate states that the deck (and other items), built and installed by prior owners of the premises ("John and Patricia Foiles"), conformed to approved plans and legal requirements. Defendants also argue that *res ipsa loquitor* cannot apply because it was never pled in the Bill of Particulars.

In response, plaintiff cross-moves to stay the motion for summary judgment and re-open depositions, arguing that the belated production of the Certificate violated Defendants' continuing obligation to produce discovery after they had denied the existence of any other relevant documents (*Pl Affirm in Support* ¶¶ 10-11, *Exh 2*). Plaintiff also contends that the Certificate's existence contradicts deposition testimony by Defendants that no engineer or inspection reports were prepared or available to Defendants, and that further depositions are now necessary to probe Defendants' knowledge of the Certificate or other documents which may have been withheld, as well as other inspections that may have occurred.

In opposition to Plaintiff's cross-motion, Defendants argue that the stay for further discovery plaintiff seeks should have been brought by order to show cause as required. Substantively, Defendants argue that there was no duty to disclose the Certificate because it is a matter of public record. Defendants also argue that the deposition responses are not inconsistent with the existence of the Certificate inasmuch as the Certificate is merely an administrative

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[2] Though reply papers in further support of summary judgment are generally not permitted to introduce new arguments or grounds for relief, "this rule ... is not inflexible, and a court, in the exercise of its discretion, may consider a claim or evidence offered for the first time in reply where the offering party's adversaries responded to the newly presented claim or evidence (*Kennelly v Mobius Realty Holdings LLC*, 33 AD3d 380, 381–82 [1st Dept 2006]). Here, Plaintiff had the opportunity to reply (and, indeed, file a cross-motion challenging it on other grounds).

report noting the home's (and the deck's) compliance with the building code which has no bearing upon the relevant issue.

DISCUSSION

The Court addresses Plaintiff's cross-motion first because its resolution affects Defendants' motion for summary judgment. As an initial matter, Defendants provide no support indicating that Plaintiffs' application for a stay must be brought by Order to Show Cause (*see* Connors, Patrick M., *Practice Commentaries* ,CPLR 2201:12 ["The statute is silent as to the method to be employed to obtain a stay, which leaves us to conclude that the means should be by motion. That would normally require providing appropriate notice to all other parties, since as a general rule all would have an interest in whether the proceedings continue or suspend"); CPLR 2201:7) ["an order to show cause is merely a way of bringing on a motion, and its usual effect is to simply accelerate the return date by moving it up a few days from the minimum eight days required in CPLR 2214 [b]; *see also* CPLR 2103(e) (requiring that "[e]ach paper served on any party shall be served on every other party who has appeared..."]). If the motion seeks a stay of a prior order in the action, it generally must be made on notice to all parties (*see* CPLR 2221(a)), and plaintiff's choice to seek a stay *via* cross-motion provided Defendants with additional time to respond. In any event, CPLR 3212(f) explicitly grants the Court discretion to take appropriate action without mandating the manner in which the motion is initiated ("[s]hould it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, *the court may deny the motion or may order a continuance* to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just" [emphasis added]). Thus, the application for a stay brought by cross-motion is not

procedurally improper.

Turning to whether defendants' recent production of the Certificate violated their continuing obligation to produce discovery after they previously denied the existence of any other relevant documents, it is noted that parties to an action are not typically compelled to produce documents available as a matter of public record (*Abony v TLC Laser Eye Ctr., Inc.*, 44 AD3d 553 [1st Dept 2007], *citing Penn Palace Operating, Inc. v Two Penn Plaza Assoc.*, 215 AD2d 231, 231 [1st Dept 1995] (documents concerning Buildings Department violations); *accord Blagrove v Cox*, 294 AD2d 526 [2d Dept 2002] (documents from a previous action); *see also Vanderlofski v Nassau Reliance Fuel Corp.*, 59 AD2d 861, 861 [1st Dept 1977] (a disclosure proceeding should not be used as a substitute for independent investigation of the facts available to both parties, but disclosure is appropriate where equal access to discovery is not possible)). However, courts have found that the availability of information from an alternate source is not a sufficient reason, on its own, for preventing disclosure, even if the alternate source is a public document (*New York Neurology Assoc., PC. v Allstate Ins. Co.*, 2003 NY Slip Op 51297(U) [Civ Ct July 22, 2003] (compelling production of motor vehicle accident report/police report), *citing Albanos v. News Syndicate Co.*, 130 Misc 566, 224 NYS 331 [Sup Ct NY County 1927] (though subject matter of deposition might be a matter of public record, "[d]efendant is nevertheless entitled to the examination if only for the purpose of eliciting admissions from the plaintiff as to the contents of the records and thereby simplifying the trial")).

Here, Plaintiff's inquiries were aimed specifically at the existence of a document, such as the Certificate at issue:

Q: When you purchased the home did any kind of report or anything

else come along with that deck when you purchased it, anything in the contract of sale?

A: Besides the permit you need to have for the deck? I'm not understanding what you're asking?

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Q: Do you have anything in your possession at your home that you could provide to your attorney as to when the deck was built and who built it?

A: No.

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Q: With the contract of sale, are there any addendums relating to the deck in the contract?

A: Not for that deck.

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Q: Do you know if the Town of Chester requires a deck of the sort that you had in your backyard to be inspected?

A: Not that I know of.

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Q: When you purchased the home, you didn't order any inspection for the deck before you purchased it?

A: *The home was inspected and the deck was inspected as part of that inspection.*

(*Katia Tr* 6:5-11, 7:2-4; 7:24-8:3; 32:5-9 [emphasis added]).

Q: When you purchased the home, were there any documents pertaining to who had built the deck?

A: No.

Q: Do you have the documents in your possession for the purchase of the home?

A: Yes.

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Q: When you purchased the home, did the home come with any pamphlet or paperwork regarding the deck?

A: No.

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Q: Do you have anything at home in your possession that could

refresh your recollection as to when [the deck] was built?
[objections]
A: No.

(*Samuel Tr* 7:22-8:3; 9:4-7; 22:17).

The apparent discordance between the testimony (as well as Defendants' denial that they were in possession of any other "purchase documents" [*Pl Exh 2*]) and the Certificate's recent emergence is particularly important in light of CPLR 3101, which provides for "full disclosure of *all matter material and necessary* in the prosecution or defense of an action, regardless of the burden of proof." This has been liberally interpreted by our courts to include whatever is relevant (emphasis added, *see also Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 405 [1968]; *see also Siegel, N.Y. Prac.* § 343 [noting that today's liberal disclosure rules are an intended departure from the past, when "the game was for lawyers to keep their cards close to their vests until the trial, where they hoped to surprise their adversaries with a datum too late to meet or counter"]).

Utilizing the standards above, the availability of the Certificate as a public record – a fact which is unclear, given Defendants' ambiguous explanation of the Certificates' provenance[3] – is not enough, on its own, to justify denial of Plaintiff's right to re-depose the Defendants. Defendants' own submission of the Certificate as evidence that they had no notice of any defective condition underlines the Certificate's importance to this action. Thus, further depositions of both Defendants is warranted, to the extent that the depositions will be limited to questions regarding the Certificate as it relates to actual and constructive notice, as well as to any

[3] Defendants state only that "it was obtained by defendants' defense counsel," without explaining how or when (*Defs Aff in Opp* ¶ 5). Moreover, that the Certificate appears to have been faxed either to or from a recipient at UBS, Ms. Delgado's employer (*Exh E* 17:3-4) approximately one week after the subject incident merely clouds the matter further.

other documents that are produced pursuant to Defendants' continuing obligation to supplement its discovery responses in a manner consistent with this opinion (CPLR 3101 [h]). Because the depositions may produce additional evidence germane to summary determination, the appropriate remedy is not a stay, but dismissal without prejudice.

Conclusion

Based on the foregoing, it is hereby

ORDERED that Defendants' motion for summary judgment is denied without prejudice; and it is further

ORDERED that Plaintiff's cross-motion for a stay and to compel further depositions is granted to the extent that Defendants shall appear for further depositions within 45 days of this order, at a time and place agreed upon by the parties, and that no extensions of this deadline shall be granted without further order of the Court upon good cause shown; and it is further

ORDERED that said depositions shall be limited to questions regarding the Certificate (*Exh G*), and any other documents produced after the date of this Order and/or flowing from said deposition, as they pertain to the issue of actual or constructive notice of defects; and it is further

ORDERED that the deadline to file summary judgment motions shall be extended to 60 days following the conclusion of the further depositions; and it is further

ORDERED that plaintiff serve a copy of this order within 20 days of the date of this order.

This constitutes the decision and order of the Court.

Dated: September 23, 2016

Hon. Carol R. Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.