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| Thornton v Nassau Mall Plaza Assoc., LLC |
| 2018 NY Slip Op 30022(U) |
| January 8, 2018 |
| Supreme Court, New York County |
| Docket Number: 153209/2015 |
| Judge: Manuel J. Mendez |
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

CLAIRE THORNTON,
Plaintiff,
-against-

INDEX NO. 153209/2015
MOTION DATE 12/20/2017
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

NASSAU MALL PLAZA ASSOCIATES, LLC, THE FEIL ORGANIZATION, INC., JEFFREY MANAGEMENT CORP., BROADWALL MANAGEMENT CORP. and KINGS PARK CONTRACTING INC.,
Defendants.

The following papers, numbered 1 to 7 were read on this motion to strike the Answer.

| | <u>PAPERS NUMBERED</u> |
|---|------------------------|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | <u>1 - 3</u> |
| Answering Affidavits — Exhibits _____ | <u>4 - 6</u> |
| Replying Affidavits _____ | <u>7</u> |

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is Ordered that Defendants Nassau Mall Plaza Associates, LLC (“Nassau Mall”), the Feil Organization, Inc., Jeffrey Management Corp. and Broadwall Management Corp.’s (the “Moving Defendants”) motion to strike Plaintiff’s and Defendant King Park Contracting Inc.’s pleadings or in the alternative compel Defendant Kings Park Contracting Inc. to produce outstanding discovery and a further witness for an additional deposition pursuant to CPLR §3124, is granted to the extent of compelling Defendant King Park Contracting Inc. (“Kings Park”) to furnish outstanding discovery and produce an additional witness for further deposition pursuant to CPLR §3124. The remainder of the motion is denied.

On January 19, 2015 around 9:15am, Plaintiff alleges that she slipped and fell on snow and/or ice while walking in the parking lot of the premises located at 3601 Hempstead Turnpike, Levittown, New York (“Premises”). Defendant Nassau Mall owned the Premises. Defendant Kings Park performed snow and ice removal and daily general cleaning at the Premises pursuant to a Snow Removal Contract between the parties. On April 2, 2015 Plaintiff commenced this action for damages resulting from her injuries suffered after her slip/fall on the Premises.

On May 18 and June 28, 2017 the Moving Defendants served post-EBT Demands following the depositions of Plaintiff and John Bittoni, the president of Defendant Kings Park (Moving Papers Exs. A, B). On July 7, 2017 the Moving Defendants served a deposition notice on Kings Park to depose its vice president, Julie Smith (*Id* at Ex. C). Following a good faith letter sent by the Moving Defendants, Kings Park partially responded to the June 28, 2017 Discovery Demands on August 21, 2017 (*Id* at Ex. P).

The Moving Defendants now move for an Order striking Plaintiff and Defendant King Parks pleadings, or precluding them from offering evidence at the time of trial pursuant to CPLR §3126, or in the alternative, compel the Plaintiff and Kings Park to produce all outstanding discovery by a date certain and have Kings Park produce another witness for a deposition pursuant to CPLR §3124. Defendant Kings Park opposes the

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

motion.

On December 20, 2017 the Moving Defendants and Plaintiff agreed to a Stipulation resolving this motion as to Plaintiff's outstanding discovery (NYCSEF Docket No.: 81).

CPLR §3101(a) allows for the "full disclosure of all evidence material and necessary in the prosecution or defense of an action regardless of the burden of proof." CPLR §3126 grants the court the power to sanction a party that fails to comply with a court's discovery order. The nature and degree of the penalty to be imposed for a party's failure to comply with an order is a matter within the sound discretion of the court (CPLR §3126). The striking of a pleading is a drastic remedy and is only warranted where a clear showing has been made that the noncompliance with an order was willful, contumacious or due to bad faith (Mateo v City of New York, 274 AD2d 337, 711 NYS2d 396 [1st Dept. 2000]).

Pursuant to CPLR §3124, the court may compel compliance upon failure of a party to provide discovery. It is within the court's discretion to determine whether the materials sought are "material and necessary" as a legitimate subject of inquiry or are being used for purposes of harassment to ascertain the existence of evidence (Roman Catholic Church of the Good Shepherd v Tempco Systems, 202 AD2d 257, 608 NYS2d 647 [1st Dept. 1994]. "The words 'material and necessary' as used in section 3101 must be interpreted liberally to require disclosure" (Kapon v Koch, 23 NY3d 32, 11 NE3d 709, 988 NYS2d 559 [2014]). The trial court is given broad discretion determining the scope and breath of discovery and must set reasonable terms and conditions (Diaz v City of New York, 117 AD3d 777, 985 NYS2d 695 [2nd Dept. 2014]).

Defendant Kings Park has not willfully and contumaciously failed to comply with Court orders. The drastic measure of striking Kings Park's Answer is unwarranted. However, the discovery sought in the Moving Defendant's June 28, 2017 Discovery Demands are material and necessary.

Defendant Kings Park's president, John Bittoni, testified that Kings Park performs cleaning services at the Premises early in the morning and any large icy conditions should be reported to him. Based on this testimony the Moving Defendants are entitled to documents responsive to Discovery Demands Nos. 1-4 seeking: (i) a copy of the cleaning contract, (ii) the names and addresses of the Kings Park cleaners who performed work on the day of the incident, and (iii) any documents reflecting the hours that the Kings Park cleaning crew was on the Premises the morning of the incident (Moving Papers Ex. B). Mr. Bittoni later testified that he prepares documents to record the cleaning procedure in his composition "snow book" every time a call came from Defendant Nassau Mall. At his deposition, he provided counsel with a handwritten note that he originally testified that it came from his "snow book," but then subsequently submitted an errata sheet stating it did not come from his "snow book" because there was no snow event that day. The Moving Defendants are entitled to documents responsive to Discovery Demands Nos. 5-9 seeking: (i) an original copy of the un-redacted handwritten note that Mr. Bittoni produced at his deposition and the un-redacted purported first page of the note, (ii) a review of Mr. Bittoni's "snow book" for any and all entries made regarding January 19, 2015, and (iii) any documents reflecting the time that Mr. Bittoni's son was called to go the Premises on the date of the incident. If, as King Park contends, the documents sought that have not yet been provided do not exist, the Moving Defendants are entitled to an affidavit stating that a diligent search was made (describing

the places searched) and that the documents do not exist.

When moving for the production of additional witnesses, the party must make a detailed showing of the necessity for taking such depositions, and that the previously deposed witnesses had insufficient knowledge, the testimony was otherwise inadequate, or that the additional person sought for deposition possesses sufficient information (Hayden v City of New York, 26 AD3d 262, 809 NYS2d 75 [1st Dept. 2006]). The Moving Defendant have shown the necessity to depose Defendant Kings Park's vice president Julie Smith. Ms. Smith is in charge of the office and prepared the invoice that Mr. Bittoni claimed had a mistake regarding the time that Kings Park arrived at the Premises (Moving Papers Ex. K). Furthermore, Ms. Smith entered Kings Park into the indemnification agreement and the snow removal agreement with the Moving Defendants. The Moving Defendants are entitled to depose Ms. Smith as she has information "material and necessary" that was not provided by Kings Park's previous deponent.

Accordingly, it is ORDERED, that Defendants Nassau Mall Plaza Associates, LLC, the Feil Organization, Inc., Jeffrey Management Corp. and Broadwall Management Corp.'s motion to strike Plaintiff's and Defendant King Park Contracting Inc.'s pleadings or in the alternative compel Defendant Kings Park Contracting Inc. to produce outstanding discovery and a further witness for an additional deposition pursuant to CPLR §3124, is granted to the extent of compelling Defendant King Park Contracting Inc. to furnish outstanding discovery and produce an additional witness, Julie Smith, for further deposition, and it is further,

ORDERED, that within thirty (30) days from the date of service of a copy of this Order with Notice of Entry upon the parties, Defendant Kings Park Contracting Inc. shall fully respond to all of the Moving Defendants' Discovery Demands dated June 28, 2017 with a supplemental response, and it is further,

ORDERED, that if the documents sought by the Moving Defendants in the June 28, 2017 Discovery Demands do not exist, Defendant Kings Park Contracting Inc. must provide an affidavit indicating the manner and places searched and that the responsive documents do not exist, and it is further,

ORDERED, that Defendant Kings Park Contracting Inc.'s failure to fully respond to the June 28, 2017 Discovery Demands or provide an affidavit to the Moving Defendants within thirty (30) days of service of a copy of this Order with Notice of Entry shall result in Defendant Kings Park Contracting Inc. being precluded from presenting evidence at the time of trial of this action, and it is further,

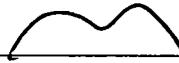
ORDERED, that Defendant Kings Park Contracting Inc. is to produce Julie Smith as a witness for a deposition within sixty (60) days of this Order, and it is further,

ORDERED, that the remainder of the motion is denied, and it is further,

ORDERED, that the parties appear for a Status Conference on March 21, 2018 at 9:30 a.m. in IAS Part 13 at 71 Thomas Street, New York, NY 10013.

ENTER:

**MANUEL J. MENDEZ
J.S.C.**



**MANUEL J. MENDEZ
J.S.C.**

Dated: January 8, 2018

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE