Gray v Stahl
2018 NY Slip Op 30222(U)
February 5, 2018
Supreme Court, New York County
Docket Number: 110738/11
Judge: Anthony Cannataro

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART [redacted] 41

----------X

BRIAN GRAY,

Index No. 110738/11

Plaintiff,

DECISION and ORDER

-against-

STANLEY STAHL, et al.,

Defendants.

----------X

Anthony Cannataro, J.:

This is a personal injury action arising out of a trip and fall on a loading dock sounding in common law negligence and violations of Labor Law §§ 200 and 241(6). Owner defendants Stanley Stahl d/b/a Stahl Park Avenue Company, 277 Park Avenue LLC, Cassidy Turley New York, Inc. and Stanley Stahl Management Inc. (collectively referred to as Stahl) move for a protective order precluding depositions of 277 Park Avenue employees Jerry Rodriguez and David Kramer. Third-party defendant Knoll. Inc. and defendant JPMorgan Chase both cross-moves to compel production of outstanding discovery including deposition of Rodriguez and Kramer and pre-accident and post-accident records reflecting inspection, maintenance and repair of the subject loading platform and/or to preclude the Stahl defendant or alternatively to strike the answer of the Stahl defendants.

Stahl contends that there is no basis for additional post-note of issue depositions of Stahl employees. In addition, Stahl contends that no pre-accident records of inspection, maintenance and repair of the loading dock exist and that no basis exists for disclosure as to post-accident repairs as Stahl has acknowledged ownership and control of the loading dock. Defendants Knoll, JPMorgan Chase and Evensonbest, LLC argue that a post-note of issue deposition of former Stahl employee James Perry, the building manager at the time of the accident, conducted pursuant to stipulation, revealed new information about regular inspections of the subject loading dock conducted by Stahl employees Jerry Rodriguez and David Kramer, warranting the further depositions of those individuals, and disclosure of related documents.

CPLR 3101 (a) provides for "full disclosure of all matter material and necessary in the prosecution ... of an action." The phrase "material and necessary" is to be liberally and broadly interpreted (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406, 407 [1968]). The test is "one of usefulness and reason" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d at 406; *accord Matter of New York County DES Litig.*, 171 AD2d 119, 123 [1st Dept 1991]). A trial court must use its sound discretion in resolving discovery disputes (*see Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 745 [2000]), and may issue a protective order denying disclosure "to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person" (CPLR 3103 [a]; *Cascardo v Cascardo*, 136 AD3d 729 [1st Dept 2016]). In order to obtain post-note of issue discovery, a party must either timely move to vacate the note of issue or show unusual or unanticipated circumstances that developed subsequent to the filing of the note of issue that would cause substantial prejudice if the discovery was not permitted (see 22 NYCRR 202.21[d] and [e]; *Schroeder v IESI NY Corp.*, 24 AD3d 180, 181 [1st Dept 2005]).

Here, a timely motion to strike the note of issue was made that was withdrawn after the parties entered into a so ordered stipulation at a January 17, 2017 compliance conference allowing for a post-note of issue deposition of James Perry, among other thing. Perry's deposition disclosed for the first time that regular inspections of the loading dock for defects were conducted by cleaning supervisor Rodriguez and maintenance supervisor Kramer to assess the need for resurfacing and that Rodriguez and Kramer would know more about paperwork generated in connection such repairs. A so ordered stipulation entered into at a March 7, 2017 compliance conference allowed, notwithstanding the filing of the note of issue, for post-deposition discovery demands following Perry's deposition and provided 30 days to serve notices for further party deposition. Pursuant to the that stipulation, the subject depositions were timely noticed.

Given the January 17, 2017 and March 7, 2017 stipulations providing for post-note of issue discovery, there was no need to show unusual and unanticipated circumstances to warrant depositions of additional Stahl witnesses, but merely the normal showing "that the knowledge of the proffered official [was] insufficient to produce testimonial and documentary evidence 'material and necessary' to the prosecution of the action" (*Colicchio v City of New York*, 181 AD2d 528, 529 [1st Dept 1992]; *see also Ayala v City of New York*, 169 AD2d 530, 531 [1st Dept

1991]). Such a showing has been made here based upon Perry's testimony that regular inspections were made for defects by the witnesses sought (*see Saiia v City of New York*, 3 AD3d 397 [1st Dept 2004]; *Longo v Armor El., Co.*, 278 AD2d 127, 128–29 [1st Dept 2000]; *Tolliver v New York City Hous. Auth.*, 225 AD2d 412, 412 [1st Dept 1996]).

While earlier testimony of Stahl witness Paul Greene, the current property manager, may have indicated that Stahl routinely repaired defects that were identified, it did not indicate that regular/annual inspections were conducted and by whom. To the contrary, Greene testified there was no formal routine for conducting inspection. Rodriguez may have been previously identified as a *cleaning* supervisor in charge of porters, but there was no suggestion that he was involved in regular inspections for defects. Similarly, the fact that Greene testified that the maintenance department made repairs and that David Kramer was offered by movants' EBT clerk as a substitute witness when Perry was temporarily unavailable, does not change the fact that new information about regular inspections came out at Perry's post-note of issue deposition and the parties stipulated to allow for post-deposition demands and further deposition notices.

Given Perry's testimony about maintenance and repair record for the accident site and the so ordered March 17, 2017 stipulation allowing for post-deposition discovery demands, Knoll and JPMorgan Chase were within their rights to renew their requests for maintenance and repair record for the accident site. However, evidence of post-accident repairs is not admissible or discoverable (*see Hualde v Otis El. Co.*, 235 AD2d 269, 270 [1st Dept 1997]) except if there is an issue as to ownership or control (*see Klatz v Armor El. Co.*, 93 AD2d 633, 637 [1st Dept 1983]) or to determine the condition of the defect at the time of the accident (*see Mercado v St. Andrews Hous. Dev. Fund Co.*, 289 AD2d 148 [1st Dept 2001]). To the extent that Stahl's witnesses have acknowledged ownership and control of the loading dock and the condition of the loading dock at the time of the accident has been documented with photographs and video, there is no basis to compel production of records of post-accident repairs (*see Stolowski v 234 E. 178th St. LLC*, 89 AD3d 549, 549–50 [1st Dep t 2011]; *Klatz v Armor Elevator Co.*, 93 AD2d 633, 637 [1st Dept 1983]). Further, Stahl maintains that no additional responsive pre-accident records have been located, notwithstanding Perry's testimony suggesting additional records may exist.

Accordingly, it is

ORDERED that the motion for a protective order is denied, and it is further

ORDERED that the cross motions are granted only to the extent that defendants Stanley Stahl d/b/a Stahl Park Avenue Company, 277 Park Avenue LLC, Cassidy Turley New York, Inc. and Stanley Stahl Management Inc. are directed to produce Jerry Rodriguez and David Kramer for depositions within 30 days of service of a copy of this order.

ENTER:

Dated: New York, New York
February 5, 2018

HON. ANTHONY CANNATARO
J.S.C.