Shrage v Con Edison Co.
2018 NY Slip Op 33813(U)
September 12, 2018
Supreme Court, Westchester County
Docket Number: 51604/2017
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

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ARI SHRAGE and ADINA SHRAGE,

Plaintiffs,

- against -

CON EDISON COMPANY, VERIZON NEW YORK, INC. and CABLEVISION OF WESTCHESTER, INC.,[1]

Defendants.

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DECISION AND ORDER

Index No. 51604/2017
Motion Ret. Date: 9.12.2018

Motion Seq. No. 2

LEFKOWITZ, J.

The following papers were read on this motion by plaintiffs for an order pursuant to CPLR 3124 and 3126 compelling defendant Con Edison Company to produce a third witness for deposition or, in the alternative, precluding such defendant from producing at trial any evidence and granting such additional and further relief in plaintiffs' favor as is just and proper:

Order to Show Cause, Affirmation in Support, Affidavit in Support, Exhibits A-F;
Affirmation in Opposition to Motion, Exhibit A; and
NYSCEF file.

This action commenced by plaintiffs sounding in trespass was commenced by the filing of a summons and complaint on February 3, 2017. Plaintiffs allege that they purchased a new home in a relatively current development in the City of White Plains, New York in which there are no overhead wires or utility poles; however, there are electric lines which are underground and "mini pads" ("service boxes") located in the common areas adjacent to each individual home which are above ground. It is undisputed that the pad and/or service box in question was present at all times during plaintiffs' purchase of the subject premises. Plaintiffs seek damages against defendant Con Edison Company for trespass due to its failure to timely remove such electrical equipment installed upon plaintiffs' property. Additionally, plaintiffs assert that defendant Con Edison prominently displayed a warning on its equipment to keep at least three feet away from such equipment. Plaintiffs complain that defendant's actions denied them the beneficial use of a significant portion of their

[1]By stipulation dated September 5, 2017, this matter has been discontinued with prejudice against defendants Verizon New York, Inc. and Cablevision of Westchester, Inc. with prejudice. NYSCEF Doc. No. 19.

property for six years and caused them to incur significant costs.

Plaintiffs assert that defendant Con Edison has produced two witnesses for depositions, but they argue that such witnesses did not have personal knowledge of the facts of this action. They point out that the first witness, Brooke Crea, had no connection to the placement of defendant's equipment and no personal knowledge of defendant's decision-making processes. Plaintiffs complain that the second witness knew defendant refused to relocate the equipment, but did not know why defendant later changed its position and moved its equipment. Plaintiffs now move for an order pursuant to CPLR 3124 and 3126 compelling defendant to produce a third witness for deposition or, in the alternative, precluding such defendant from producing at trial any evidence in defense of this action.

Defendant Con Edison Company opposes and counters, inter alia, that the documents it has produced and the testimony of the two witnesses it has previously produced provided the bases for its ultimate determination to relocate the service box. Moreover, it argues that plaintiffs are seeking a further deposition on an issue that is not in dispute. It asserts that there is no question that plaintiffs complained about its equipment and the placement thereof, and pursuant to plaintiffs' complaints, defendant relocated the service box and that such decision to move the service box is an exception to its normal practices. Defendant argues that a third deposition on the issue of defendant's "internal thinking processes" for an issue not in dispute is wholly without merit. This Court agrees.

As a preliminary matter, CPLR 2214(c) provides in relevant part that "[t]he moving party shall furnish all papers not already in the possession of the court necessary to the consideration of the questions involved" (*see Reyes v Eleftheria Rest. Corp.,* 162 AD3d 808 [2d Dept 2018]; *Deutsche Bank Natl. Trust Co. v Hounnou,* 147 AD3d 814 [2d Dept 2017]; *Aquatic Pool & Spa Servs., Inc. v WN Weaver4 St., LLC,* 2012 NY Slip Op 33811(U) [Sup Ct West Co]; *Specialized Realty Servs., LLC v Maikisch,* 2012 NY Slip Op 33743(U) [Sup Ct Orange Co]; *Kayel v El-Bab,* 2011 NY Slip Op 31522(U) [Sup Ct Suffolk Co]; *Bellofatto v Bellofatto,* 8 Misc 3d 1019(A) [Sup Ct Putnam Co 2005]). In this instance, plaintiffs have provided copies of only fifteen pages of one transcript of a deposition of one witness to support their application for an additional deposition of a third witness while concomitantly complaining defendant Con Edison has not provided a witness with sufficient knowledge of the facts of the case. Plaintiffs are responsible for assembling a complete set of papers documenting the procedural history of their application and providing a proper foundation for the relief requested, and in this instance, they have not done so. The absence of sufficient motion papers is reason enough for denial of the plaintiffs' motion (*see Roberts v Roberts,* 159 AD3d 932 [2d Dept 2018]; *Homar v American Home Mtge. Acceptance, Inc.,* 2012 Ny Slip Op 33724(U) [Sup Ct Orange Co 2012]).

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action." The phrase "material and necessary" is "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and

reason" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). Although the discovery provisions of the CPLR are to be liberally construed, "a party does not have the right to uncontrolled and unfettered disclosure" (*Foster*, 74 AD3d at 1140; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531 [2d Dept 2007]). The party seeking disclosure has the burden to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims (*Foster*, 74 AD3d at 1140). The court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*Mironer v City of New York*, 79 AD3d 1106, 1108 [2d Dept 2010]; *Auerbach v Klein*, 30 AD3d 451, 452 [2d Dept 2006]).

It is undisputed that defendant Con Edison has produced all records pertaining to the communications between the parties regarding plaintiffs' complaints about the existence of the "mini pad" and/or service box and the efforts undertaken by defendant to placate the plaintiffs. Interestingly, plaintiffs' complaint that defendant has not provided them with the rationale behind defendant's decision to ultimately relocate the equipment is, in fact, addressed in the documentation attached to their moving papers. It is also uncontraverted that defendant Con Edison has produced two separate witnesses for depositions that responded to plaintiffs' inquiries on these issues. Although the Court does not have copies of the transcripts as discussed above, defendant asserts that Ms. Crea testified that based on a survey performed by defendant, the subject "mini pad" was located on public property just at the edge of plaintiffs' property line. Nevertheless, due to plaintiffs' dissatisfaction, the pad was physically removed and placed underground in the roadway. Defendant produced a second individual for deposition, Mr. Graziadi, who it is undisputed was the individual who personally interacted with plaintiffs during the process of having the mini pad and/or service box physically removed. Mr. Graziadi testified that the relocation of such service box was an exception to defendant's policy as such service boxes are usually kept above ground for maintenance purposes, and he conceded that the service box in question encroached upon plaintiffs' property approximately one inch.

Plaintiffs' reliance on *Walsh v Liberty Mut, Ins. Co.*, 289 AD2d 842 [3d Dept 2001] is entirely misplaced. In that case involving an insurance company's refusal to pay plaintiff's no-fault benefits following a motor vehicle accident, the Appellate Division affirmed the lower court's refusal to order the defendant insurance company to turn over its no-fault files to plaintiff. It did, however, permit plaintiff to depose the claims supervisor who directly participated in the denial of plaintiff's no-fault benefits in an effort to learn the basis for such denial. Here, defendant has provided documentary evidence in addition to the testimony of two witnesses to identify several reasons that promulgated defendant's determination to relocate the service box.

Accordingly, it is

ORDERED that, plaintiffs' motion is denied in its entirety; and it is further

ORDERED that, defendant shall serve notice of entry of this order on plaintiffs within five

(5) days of entry; and it is further

ORDERED that, the parties are directed to appear for a conference in the Compliance Part, Courtroom 800, on September 20, 2018 at 9:30 A.M.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
September 12, 2018

HON. JOAN B. LEFKOWITZ, J.S.C.

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