Short Form Order

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

Present: Hon. Carmen R. Velasquez **IAS PART 38**
Justice

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PATRICK MCCALL and DANA MCCALL,

Plaintiffs,

- against -

ALMA REALTY CORP. and NOUVEAU ELEVATOR INDUSTRIES, INC.,

Defendants.

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Index No. 701435/15

Motion Date: 7/10/17

Seq. #: 5

The following papers numbered EF 116-121, 123-127 read on this motion by plaintiffs for an order compelling defendant, Nouveau Elevator Industries, Inc., to produce Patrick McLoughlin for an additional deposition and directing him to answer questions objected to at his prior deposition.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	116 - 121
Ans. Affs. - Exhibits	123 - 126
Reply Affs.	127

Upon the papers filed in support of the within motion and the papers filed in opposition thereto, the within motion is determined as follows:

Plaintiff Patrick McCall alleges that on November 18, 2013, he was caused to sustain personal injuries, for which he now seeks to recover, when the doors of the elevator in which he was a passenger in the building at 175 Fulton Avenue, Hempstead, New York, closed on his hand.

On February 16, 2016, defendant Nouveau Elevator Industries, Inc. ("Nouveau"), the elevator company employed to perform monthly maintenance at the above-referenced location, produced Patrick McLoughlin ("McLoughlin") for a deposition, McLoughlin

being a 16 year employee of Nouveau, and the route mechanic charged with performing said monthly maintenance.

On 5 separate occasions during the course of McLoughlin's deposition he was instructed not to answer, defendant Nouveau claiming that the propounded questions were based on speculation and asked for expert opinion.

Plaintiffs now move to compel McLoughlin to appear for a further deposition, at which he should be required to answer the objected-to questions. Defendant Nouveau opposes.

Initially, it has been held that "the scope of examination on deposition is broader than what may be admissible on trial" (*White v. Martins*, 100 AD2d 307, 309 [1st Dept. 2003]; *see also St. Cloux v. Park S. Tenants Corp.*, 52 Misc3d 1222[A][Sup Ct NY Co. 2016]), and "[i]n conducting depositions, questions should be freely permitted unless a question is clearly violative of a witness' constitutional rights, or of some privilege recognized in law, or is palpably irrelevant" (*Barber v. BPS Venture, Inc.*, 31 AD3d 897 [3d Dept. 2006][citation omitted]; *Freedco Prods. v. New York Tel. Co.*, 47 AD2d 654 [2d Dept. 1975]; *see O'Neill v. Ho*, 28 AD3d 626, 627 [2d Dept. 2006]).

In addition, in an effort designed to combat obstructive behavior during a deposition, the Uniform Rules for Trial Courts were amended in 2006 to add Part 221, the Uniform Rules for the Conduct of Depositions. In this regard, 22 NYCRR 221.1 allows objections during a deposition with regard to those objections that would be waived if not interposed pursuant to CPLR 3115, while 22 NYCRR 221.2 requires a deponent to answer all questions, except where the objection is made to preserve a privilege or right of confidentiality or when the question is plainly improper and would, if answered, cause significant prejudice to any person. Lastly, section 221.2 further prohibits an attorney from directing a deponent not to answer, except in certain circumstances.

During the deposition, in answering questions referable to a video showing a broom being inserted through the elevator doors, and the doors being closed on the broom, McLoughlin was asked the following 2 questions, both objected to with an instruction not to answer, and marked for rulings:

"Q. I want to know if you have any explanation as to how that could happen?"[1]

"Q. Do you know what type of sensors would allow the doors to close with that

[1]Page 41, lines 8-9.

broom going through?"[2]

In each instance, defendant Nouveau objected to the questions as speculative and told plaintiffs to retain an expert.

In further questioning with regard to McLoughlin's servicing of the subject elevator, and whether same needed to be replaced, defendant Nouveau objected to plaintiff asking McLoughlin the following question:

"Q. In your opinion, were those problematic elevators?"[3]

Continuing on, during questions surrounding the actual operation and maintenance of the elevators, defendant Nouveau objected to McLaughlin being asked the following 2 questions:

"Q. Can you open the outside doors if the elevator cab is not there?"[4]

"Q. Is there any way for those outer doors to open independently, other than that cam you told me about?"[5]

As noted *supra*, defendant Nouveau's witness, Mr. McLoughlin, is an elevator mechanic with over 16 years of experience, he having obtained Local 3 union elevator training that consisted of a 4-year apprenticeship, together with 4 years of school that conferred him with a degree as a graduate of Local 3 elevator school.

Based upon his extensive experience with elevator repair and maintenance, Mr. McLaughlin is qualified to answer, and should have been permitted to answer the subject questions above referenced which call for his knowledge as to causes and avoidance of the alleged condition and his opinion as to whether this particular elevator was properly functioning (*see Zambanini v. Otis El. Co.* 242 AD2d 453 [1st Dept. 1997]).

The mere fact that defendant Nouveau has not noticed McLoughlin as an expert is

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[2]Page 41, lines 13-15.

[3]Page 45, lines 5-6.

[4]Page 50, lines 6-7.

[5]Page 51, lines 15-17.

without merit, as "[t]he scope of disclosure for employees of a party, whether noticed as experts or not, is defined by CPLR 3101 (a), rather than CPLR 3101 (d), which governs the parameters of disclosure where nonemployee expert witnesses are involved" (*id*). In this regard, CPLR 3101 (a) clearly states that "[t]here 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: (1) a party, or the officer, director, member, agent or employee of a party: .."

Furthermore, as pointed out above, a deponent must answer a question unless it is plainly improper and would, if answered, cause significant prejudice to any person (22 NYCRR 221.2). "Thus, it is not enough that a question is plainly improper; answering the plainly improper question must also cause *significant* prejudice in order to permit counsel to direct the witness not to answer" (*St. Cloux v. Park S. Tenants Corp.*, 52 Misc3d 1222[A][Sup Ct NY Co. 2016]). Notably, no argument of prejudice has been offered.

Accordingly, it is hereby

ORDERED that the within motion seeking to compel defendant, Nouveau Elevator Industries, Inc., to produce Patrick McLoughlin for an additional deposition and directing him to answer questions objected to at his prior deposition is granted; and it is further

ORDERED that said additional deposition shall be conducted at the offices of a court reporter located on Sutphin Boulevard, Jamaica, New York, within 45 days of service of the within order with notice of entry; and it is further

ORDERED that all other applications not specifically addressed herein are denied; and it is further

ORDERED that plaintiff shall serve all parties with a copy of this order, together with notice of entry, within 15 days of the filing of this order by the Queens County Clerk.

The foregoing constitutes the decision and order of this court.

Date: January 12, 2018

CARMEN R. VELASQUEZ, J.S.C.

FILED
JAN 25 2018
COUNTY CLERK
QUEENS COUNTY

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