

<b>Abel v 158-60 Stanton St., LLC</b>
2019 NY Slip Op 33356(U)
November 8, 2019
Supreme Court, New York County
Docket Number: 158776/2016
Judge: Gerald Lebovits
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. GERALD LEOVITS PART IAS MOTION 7EFM

Justice

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INDEX NO. 158776/2016

MONICA ABEL

MOTION DATE 10/22/2019

Plaintiff,

MOTION SEQ. NO. 002

- v -

158-60 STANTON ST., LLC,

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43

were read on this motion to STRIKE PLEADINGS

*Law Offices of Christopher C. Thaens, PC* (Christopher Thaens of counsel), for plaintiff.

*Wilson Elser Moskowitz Edelman & Dicker, LLP* (Nicholas R. Napoli of counsel), for defendant.

Gerald Lebovits, J.:

This case is a personal-injury action arising from an incident in which plaintiff alleges she was injured when she tripped and fell over a cellar door at 160 Stanton Street in New York County. Plaintiff sued the building's owner, defendant 158-60 Stanton St., LLC. During discovery in the action, plaintiff deposed Nelson Colon, an employee of defendant who helped manage 160 Stanton Street. In April 2019, plaintiff served post-EBT demands relating to Mr. Colon's deposition, to which defendant failed to respond.

Plaintiff now moves to strike defendant's answer; or, in the alternative, to compel production of responsive information and documents. Plaintiff also requests in the alternative an order requiring defendant to designate a physician to conduct an independent medical examination who practices in New York County (where plaintiff lives), rather than in Nassau County. And plaintiff seeks to extend the deadline for filing her note of issue.

Plaintiff's motion to strike is denied. Plaintiff's motion to compel production of post-EBT documents and information is granted in part and denied in part, as discussed further below. Plaintiff's motion to compel defendant to designate a New York County physician to conduct the IME is granted. Plaintiff's request to extend the note of issue deadline is granted, and the note of issue is hereby extended until March 16, 2020.

### A. Post-EBT Demands

As an initial matter, after plaintiff moved to strike defendant produced documents and information in response to plaintiff's post-EBT demands. The court denies the branch of plaintiff's motion asking this court to strike defendant's answer. Plaintiff contends, though, that some of defendant's responses to the demands are inadequate. This court therefore addresses below plaintiff's alternative request to compel, but only as to the disputed responses.

**Demand No. 2:** Plaintiff seeks production of "[a]ny and all of Gilman Mangement's . . . records regarding the Building from May 29, 2014 to December 31, 2016." (NYSCEF No. 32, at 3.) Defendant objects on the ground that it is "overbroad to such an extent that the defendant cannot reasonably respond." (NYSCEF No. 37.) The court does not agree that this request, in the context of Mr. Colon's deposition testimony regarding these records (*see* NYSCEF No. 43, at Tr. 32-33), is too vague and overbroad to permit an adequate response. However, plaintiff has not sufficiently articulated why it is entitled to defendant's entire file records for the building during the specified period. Additionally, defendant represents in its response that it included a range of relevant records for the building in its July 6, 2018, discovery responses.

This court holds, therefore, that plaintiffs must, within 14 days, specify particular categories of records from within the building's record file that plaintiff believes to be (i) relevant, (ii) within the specified time period (*i.e.*, May 29, 2014, to December 31, 2016), and not already produced in defendant's July 6, 2018, discovery response. Defendant must respond to any such particularized document demand within 21 days of receipt.

**Demand No. 3:** Plaintiff seeks "[a]ny and all records generated or existing regarding Mr. Colon's . . . contact with, or in regards to, the Building from the time he was first assigned to the Building to present." (NYSCEF No. 32, at 3.) Defendant objects to this demand as "overbroad, ambiguous and vague." (NYSCEF No. 31, at 2.) This court agrees with defendant that "contact with, or in regards to, the Building" is too vague a description to permit a meaningful response. To the extent that plaintiff wishes to issue a clearer and more specific demand on this topic, any such demand must be served within 14 days. Defendant must respond to any such particularized demand within 21 days of receipt.

**Demand No. 4:** Plaintiff seeks "any and all records maintained by Gilman Management . . . including but not limited to[] a printout of all the properties Nelson Colon managed on May 29, 2018." (NYSCEF No. 32, at 3.) Defendant objects to the demand as overbroad; or, as narrowed to the list of properties managed by Colon, objects to the demand as "palpably improper" and "not seek[ing] relevant and admissible evidence." (NYSCEF No. 37, at 2.)

This court agrees. To the extent that the demand is read according to its literal terms to request "any and all records maintained by Gilman Management," it is plainly overbroad. If limited to the list of properties maintained by Mr. Colon, the demand is not overbroad—but plaintiff has not sufficiently explained why a list of properties managed by Colon *other than* the

building at issue here would be relevant information in the case.<sup>1</sup> Defendant may decline to produce the list of properties.

**Demand No. 5:** Plaintiff seeks the full names and addresses of all building superintendents and/or employees working at the building on the date of the accident, including but not limited to two individuals specifically identified by Mr. Colon at his deposition. (See NYSCEF No. 32, at 2.) In response, defendant represents that it “will conduct a reasonable search” for the names and (if necessary) the last-known addresses of supers employed at the building from the date of the accident to the present. (NYSCEF No. 32, at 3.)

This response is insufficient in multiple respects. First, as plaintiff correctly points out, the search that defendant says that it will now conduct could—and should—have been conducted in April 2019 when plaintiff first served this demand. Second, plaintiff has not requested the names of any “superintendent employed at the subject building from May 29, 2016, to the present” (*id.*), but the names of any superintendent and/or *any other employee* working at the building on May 29, 2016 (*see* NYSCEF No. 32, at 2).

This court directs defendants to produce within 14 days (i) the names of all individuals responsive to this request; (ii) information on whether those individuals are still employed by defendant or Gilman Management; and (iii) for those individuals who are no longer employed by defendant or Gilman Management, their last-known addresses.

### **B. IME Designation**

It was previously agreed that plaintiff was to appear before a physician designated by defendant for an orthopedic independent medical examination. The physician that defendant has designated now conducts IMEs only in Hempstead, in Nassau County. Plaintiff argues that since she is a resident of New York County, it is unreasonable to expect her to travel out to Hempstead for an IME, and that defendant’s failure to designate a New York County physician constitutes a waiver of the IME. Defendant argues that the physician in question previously performed IMEs in New York County, and that any travel-related inconveniences are merely the product of an extended delay by plaintiff’s counsel in producing plaintiff for an IME.

Defendant’s delay-related argument has some force. Certainly the court is disinclined to deem the IME waived altogether. That said, at this point the court sees little benefit in forcing plaintiff to considerable inconvenience merely because the doctor whom defendant originally designated now conducts IMEs only in Nassau County. The court therefore directs defendant within 45 days to designate a physician in New York County to conduct the IME.

Accordingly, it is

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<sup>1</sup> The court notes that Mr. Colon already testified at his deposition to the number and general location of other properties for which he was responsible in addition to the subject building. (See NYSCEF No. 43, at Tr. 27-29.)

ORDERED that the branch of plaintiff's motion seeking to strike defendant's answer is denied; and it is further

ORDERED that the branch of plaintiff's motion seeking in the alternative to compel responses to plaintiff's post-EBT demands is granted to the extent that defendants must produce the names (and, if necessary, last-known addresses) of employees working at the building on the date of the accident as described above; and it is further

ORDERED that the branch of plaintiff's motion seeking to compel responses to plaintiff's post-EBT demands is otherwise denied, without prejudice to plaintiff serving more particularized post-EBT demands as described above; and it is further

ORDERED that the branch of plaintiff's motion requesting that defendant be deemed to have waived its right to an independent medical examination is denied; and it is further

ORDERED that the branch of plaintiff's motion requesting in the alternative that defendant be required to designate a new physician located in New York County to conduct the IME is granted as described above.

11/8/2019

DATE

GERALD LEBOVITS, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: