

Sternberg v Rosh

2020 NY Slip Op 32075(U)

June 26, 2020

Supreme Court, New York County

Docket Number: 158481/2014

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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BENJAMIN STERNBERG and DEBRA STERNBERG,

Index No. 158481/2014

Plaintiffs

- against -

DECISION AND ORDER

SUSAN ROSH, SALANTER AKIBA RIVERDALE
ACADEMY, S.A.R. ACADEMY, S.A.R. ACADEMY
HIGH SCHOOL, and SECURITY USA, INC.,

Defendants

-----x

SUSAN ROSH,

Third Party Plaintiff

- against -

SALANTER AKIBA RIVERDALE ACADEMY and
S.A.R. ACADEMY,

Third Party Defendants

-----x

LUCY BILLINGS, J.S.C.:

Plaintiffs move to compel production of documents by defendants Salanter Akiba Riverdale Academy and S.A.R. Academy, alternative names for a school in Riverdale, Bronx County, where plaintiff Benjamin Sternberg was a student April 26, 2012, when defendant Rosh's SUV struck him as he was exiting the school's driveway on his skateboard. C.P.L.R. § 3124. Plaintiffs seek documents requested August 20, 2019, related to the school's surveillance cameras. The S.A.R. defendants cross-move for a protective order against those requests. C.P.L.R. § 3103(a).

Plaintiffs do not claim that the S.A.R. defendants owed any

duty to maintain operative surveillance cameras. Nor did the S.A.R. defendants owe any duty to preserve surveillance camera footage until requested to do so or notified of a claim against them that implicated the footage as evidence. Malouf v. Equinox Holdings, Inc., 113 A.D.3d 422, 422 (1st Dep't 2014); Strong v. City of New York, 112 A.D.3d 15, 22 (1st Dep't 2014). Plaintiffs do not show that the S.A.R. defendants received any such request or notice until Rosh impleaded them in April 2016.

I. PRIOR AND POTENTIAL DEPOSITION TESTIMONY

Rafael Perez testified at his deposition that defendant Security USA, Inc., employed him as security guard at the school April 26, 2012, and previously. The S.A.R. defendants employed Security USA's security services at the school. Perez testified that the school front entrance camera was operating April 26, 2012, and it photographed the area directly outside the school's entrance doors. According to Perez, this camera might have captured where another Security USA security guard, Dennis Santiago, and an off-duty police officer, whose security services the S.A.R. defendants also employed, were stationed April 26, 2012. Plaintiffs have not sought to depose these two potential witnesses, to ascertain whether they were at that post when Benjamin Sternberg was exiting the school's driveway or were otherwise in a position to observe him and intervene as he exited. The June 3, 2019, deadline to conduct these depositions, set by a stipulated Order dated April 15, 2019, now has passed.

When plaintiffs sought to depose the S.A.R. employee most

knowledgeable about the surveillance system and the functioning of the front entrance camera April 26, 2012, the S.A.R. defendants responded by serving an affidavit by their facilities director Nick Fadda. He attests that a front entrance camera was broken April 26, 2012, and that the S.A.R. defendants have produced all the footage from all the cameras that depicted the school's front entrance and driveway during the period leading up to and including Benjamin Sternberg's exit from the school. Plaintiffs were entitled to depose Fadda, whom the S.A.R. defendants now have offered as a witness via his affidavit, but the January 31, 2019, deadline to serve a notice of his deposition and the April 2, 2019, deadline to conduct his deposition, set by an Order dated December 21, 2019, now have passed.

Nevertheless, plaintiffs still are entitled to depose the S.A.R. employee most knowledgeable about the surveillance system whom plaintiffs originally sought, if that employee is not Fadda. At such a deposition, plaintiff may inquire how Fadda determined that the front entrance camera was broken, how camera footage was preserved, how diligently the S.A.R. defendants searched for relevant footage, why more was not produced, and about the chain of custody, last possessor, and storage of the footage that was produced and any that was lost or destroyed. Plaintiffs also were entitled to depose the former S.A.R. employee, Gilad Mor, whom they claim was responsible for the surveillance system April 26, 2012, and stored and copied the footage that was produced to

plaintiffs, but the same deadlines for a notice of his deposition and his deposition also have passed. In any event, plaintiffs do not seek to compel production of any knowledgeable witness.

Of course plaintiffs are entitled to documents as well as testimony that bears on the above issues regarding what front entrance cameras were operating April 26, 2012, whether all camera footage depicting the school's front entrance and driveway at the relevant time has been produced, and whether any such footage was lost or destroyed since April 2016. Plaintiff's requests for production of documents dated August 20, 2019, however, which plaintiffs move to compel, extend far beyond that relevant inquiry. The claimed inconsistency between Fadda's affidavit and Perez's testimony, especially without examining Fadda to determine whether the inconsistency may be reconciled, is not a reason to assume that Fadda is untruthful or that front entrance camera footage that the S.A.R. defendants were obligated to preserve has been lost or destroyed.

In fact, Fadda attests that school front entrance cameras that, according to plaintiffs, captured where Security USA security guard Santiago and an off-duty police officer were stationed April 26, 2012, were operating on that day, and the S.A.R. defendants have produced the footage from those cameras. Specifically, Fadda attests that "the footage from the front of SAR ACADEMY is from a dome arrangement containing four cameras attached to the building." Aff. of Adam Drexler Ex. K ¶ 7. Although Fadda describes a "second dome camera located just below

the first one" that "was not operational in April 2012," he confirms that the footage produced "from that dome arrangement containing the four cameras captured . . . plaintiff BENJAMIN STERNBERG as he proceeded down the driveway on a skateboard."

Id.

To the extent that this footage does not capture Santiago and the off-duty police officer Belle, Perez explained that he did not know where they were standing: "All I know was under the covered area. I don't know. It's a big area so I don't know exactly where they were standing." Id. Ex. H, at 96.

Phillip Trice, another security guard whom Security USA employed at the school April 26, 2012, testified at his deposition that Santiago and Belle were "[n]ot necessarily" at the front entrance post when Benjamin Sternberg mounted his skateboard and proceeded down the driveway. Aff. in Opp'n of Adam Drexler Ex. B, at 91. Referring to Santiago, Trice testified: "I believe he would have been posted by . . . the field entrance an entrance where kids came and buses came to pick up kids. So he would have to have been at that post. That was the post at dismissal." Id. at 45.

II. MATERIAL AND NECESSARY DOCUMENTS

Of the 11 categories of documents plaintiffs request, the court grants their motion to compel production of the following documents from categories (1) and (4):

- (1) Documents that show the name, address, telephone number, and other contact information for the entities and

individuals responsible for maintaining the surveillance system and all cameras at the S.A.R. premises, 655 West 254th Street, Bronx, New York 19471, April 26, 2012, and (4) The latest contract drawings created before April 26, 2012, that show where all the surveillance cameras were placed at the S.A.R. premises on that date.

Documents showing the deficient functioning or the replacement, repair, or maintenance of the cameras for two years before April 26, 2012 [categories (2), (3), (6), (7), and (9)], are unnecessary to the inquiry of what front entrance cameras were operating April 26, 2012, whether all footage depicting the front entrance and driveway at the relevant time has been produced, and whether any such footage was lost or destroyed. All that is material or necessary is which cameras were functioning April 26, 2012. Documents reflecting modifications to the surveillance camera system before April 26, 2012 [category (5)], are similarly immaterial and unnecessary. All that is material or necessary is the system in place in that day. Pellot v. Tivat Realty LLC, 173 A.D.3d 498, 498-99 (1st Dep't 2019); Curran v. New York City Tr. Auth., 161 A.D.3d 649, 649 (1st Dep't 2018); Matter of Souza, 80 A.D.3d 446, 446 (1st Dep't 2011); Tomaino v. 209 E. 84 St. Corp., 68 A.D.3d 527, 530 (1st Dep't 2009).

Finally, documents showing the make, model, serial number, dates of purchase and installation, and location of the surveillance cameras currently at the S.A.R. premises are immaterial and unnecessary to an inquiry regarding the cameras in

place April 26, 2012. Plaintiffs were entitled to depose Fadda, Mor, Santiago, and Belle to obtain further evidence concerning the material issues within the deadlines for those witnesses' depositions and still are entitled to depose any other witness knowledgeable about those issues within the deadline for such a deposition.

III. CONCLUSION

Consequently, the court grants plaintiffs' motion to compel production by defendants Salanter Akiba Riverdale Academy and S.A.R. Academy of the documents as specified above and denies these defendants' cross-motion for a protective order against those specified documents. C.P.L.R. § 3124. The court otherwise denies plaintiff's motion and grants the cross-motion for a protective order against production of the remaining documents sought by plaintiffs' request dated August 20, 2019. C.P.L.R. § 3103(a). All parties shall convene for a Status Conference July 9, 2020, at 3:00 p.m., via telephone, to be arranged by the court.

DATED: June 26, 2020



LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C