| **Sackas v 240 E. 46th St. Condominium** |
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| 2020 NY Slip Op 33135(U) |
| September 25, 2020 |
| Supreme Court, New York County |
| Docket Number: 160714/2016 |
| Judge: Gerald Lebovits |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. GERALD LEBOVITS** **PART** **IAS MOTION 7EFM**

***Justice***

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KATHERINE SACKAS,

Plaintiff,

- v -

240 E. 46TH STREET CONDOMINIUM, ANDREA BUNIS MANAGEMENT, INC., KEY REAL ESTATE ASSOCIATES, LLC, and PABLO GUZMAN,

Defendants.

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**INDEX NO.** 160714/2016

**MOTION SEQ. NO.** 004

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86

were read on this motion for DISCOVERY.

*Ressler & Ressler*, New York, NY (Bruce J. Ressler of counsel), for plaintiff.
*Law Offices of Margaret G. Klein & Associates* (Patrick J. Corbett of counsel), for defendants 240 East 46th Street Condominium and Key Real Estate Associates, LLC.
No appearance for defendant Pablo Guzman.

Gerald Lebovits, J.:

This tort action arises from the sexual assault of plaintiff by one of the doormen then working in the apartment building in which plaintiff was living as a subtenant (defendant 240 East 46th Street Condominium). Plaintiff now seeks to compel defendants to (i) supplement two written discovery responses provided in February 2020; (ii) produce three additional witnesses for deposition. The motion is granted.

*First*, plaintiff seeks to compel production of a statement that might have been taken from the perpetrator (Guillermo Vega) by representatives of defendant Key Real Estate Associates, LLC (the building's management company). The building's superintendent testified at his deposition that he believed that Vega had been interviewed shortly after the assault occurred by a Key Real Estate employee. Plaintiff served a demand for a "[c]opy of the statement taken" by the employee on the date of the interview. (NYSCEF No. 79 at 1.) Defendants Key Real Estate and 240 East 46th initially objected to this demand as "vague, overbroad and burdensome." (NYSCEF No. 82 at ¶ 2.) Plaintiff moves to compel production of the statement; these defendants oppose through an affirmation of counsel. (*See generally* NYSCEF No. 85.)

Counsel's affirmation states that (i) the superintendent's deposition testimony relied upon by plaintiff did not reflect whether Vega's interview had been reduced to writing; and (ii) "upon

information and belief, a search undertaken by these documents revealed no such document in possession of these defendants." (*Id.* at ¶¶ 6-7.) Counsel argues, "[t]hus, that portion of the plaintiff's motion should also be denied in its entirety." (*Id.* at ¶ 7.) This court disagrees. A factual statement about the (non)existence of a document made solely by counsel, and made "upon information and belief" rather than on first-hand knowledge, is not a sufficient basis to deny a motion to compel.

Key Real Estate and 240 East 46th must supplement their response to this document demand. If Vega's statements during his interview were reduced to writing and the writing is in the possession of these defendants, they must produce it within 30 days of entry of this order. If the interview was not reduced to writing, defendants must within 30 days provide plaintiff with an affidavit on first-hand knowledge that so states. If the interview was reduced to a writing that is no longer in the possession of these defendants, they must within 30 days provide plaintiff with an affidavit describing the diligent search they undertook for the interview statement and explaining how the statement came no longer to be in their possession.

*Second*, plaintiff seeks to compel production of the application that she submitted to 240 East 46th for permission to sublet an apartment in the building from defendant Pablo Guzman. 240 East 46th's initial response stated that "[a] search is underway" for the application, and that a "supplemental response to this notice will be prepared if and when the document is located." (NYSCEF No. 82 at ¶ 4.) Plaintiff moves to compel on the ground that the terms of the application "will help determine the scope of defendant['s] duties to plaintiff." (NYSCEF No. 76 at ¶ 9.) 240 In opposition, 240 East 46th argues—again, solely through an affirmation of counsel—that plaintiff "has failed to show that there is such a document," that "this document is in possession of these defendants," or, if it exists, "the relevance of this demand to the subject action." (NYSCEF No. 85 at ¶¶ 4-5.) This court again disagrees.

240 East 46th must supplement its response to this document demand. If an application by plaintiff exists and is in possession of 240 East 46th, it must be produced to plaintiff within 30 days of entry of this order. If, to the best knowledge of 240 East 46th, plaintiff never filed such an application, defendants must within 30 days provide plaintiff with an affidavit on first-hand knowledge that so states. If plaintiff filed the application but 240 East 46th is no longer in possession of the application, it must within 30 days provide plaintiff with an affidavit describing the diligent search they undertook for the interview statement and explaining how the statement came no longer to be in their possession.

*Third*, plaintiff seeks to compel the deposition of three doormen who were employed by the building at or near the time of the assault underlying this case. Vega assaulted plaintiff after coming up to her apartment to drop off food that she had ordered and entering the unlocked apartment while she was asleep. The building superintendent testified at his deposition that in his extensive experience at the building, doormen would not accept food deliveries for tenants and then bring the deliveries up to tenants themselves; but instead that tenants would have to come down to the lobby to pick up food orders (or other packages). (*See* NYSCEF No. 76 at ¶ 10.) But the superintendent also testified he had been told by plaintiff that Vega had previously come up to her apartment to drop off food orders. (*See id.* at ¶ 11.)

Plaintiff, arguing that this seemingly conflicting testimony goes to the significant question of the scope of employment of doormen at 240 East 46th, seeks deposition testimony on this point of the other doormen then employed by the building.[1] 240 East 46th raises two principal objections; neither is persuasive.

240 East 46th argues first that plaintiff's statement to the superintendent about Vega's previous food deliveries is "hearsay" rather than "competent evidence." (NYSCEF No. 85 at ¶ 11.) The question on this motion, though, is not whether plaintiff's statement to the superintendent is itself admissible evidence, but whether that statement provides reason to believe that the further depositions sought by plaintiff would lead to the discovery of relevant and admissible evidence. And testimony that the on-the-ground custom of doormen in the building with respect to food deliveries conflicted with the building's rules on paper would seem to be relevant to the scope of the doormen's employment.

On that point, 240 East 46th argues that "no evidence or testimony in this case" supports plaintiff's putative position that "the depositions of any of the three doormen will elicit testimony to refute the fact that doorman Vega acted outside the scope of his employment to bring the delivery of food to plaintiff's apartment" the night he assaulted her. (*Id.*) But the testimony of these doormen would be relevant and admissible on the issue of their scope of employment regardless. Plaintiff is not required to demonstrate before deposing a witness that the witness's testimony will support her legal arguments.

Defendants must therefore ascertain whether the three doormen identified in plaintiff's motion to compel are still employed by the defendants. If they are no longer so employed, defendants must within 30 days provide plaintiff with their last known addresses. If they are employed, defendants must produce them for deposition, limited to the issue of their practices with regard to tenant deliveries. The parties shall meet and confer to arrive at reasonable on-or-before dates for plaintiff to take these depositions (or for plaintiff to take one or more of the depositions on a non-party basis), and on the manner of the deposition. To the extent that the parties are unable to agree on the time and manner of the depositions, they shall notify this court of the disagreement by email to mhshawha@nycourts.gov.

Accordingly, for the foregoing reasons, it is hereby

[1] 240 East 46th suggests that plaintiff is seeking the deposition of these doormen out of a mistaken belief that they were *on duty* at the time that plaintiff was assaulted. (*See* NYSCEF No. 85 at ¶¶ 8-9.) In context, though, the basis for plaintiff's request for these individuals' testimony is that they were employed by the building around the time of the assault, and thus would have relevant knowledge about the customs and practices that existed at the time—not that they were in the building when the assault occurred.

ORDERED that plaintiff's motion to compel is granted as described above.

9/25/2020
DATE

HON. GERALD LEBOVITS
J.S.C.

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| CHECK ONE: | | CASE DISPOSED | | | X | NON-FINAL DISPOSITION | |
| | X | GRANTED | | DENIED | | GRANTED IN PART | OTHER |
| APPLICATION: | | SETTLE ORDER | | | | SUBMIT ORDER | |
| CHECK IF APPROPRIATE: | | INCLUDES TRANSFER/REASSIGN | | | | FIDUCIARY APPOINTMENT | REFERENCE |