Rosenfeld v 1407 Broadway LLC
2020 NY Slip Op 33964(U)
December 1, 2020
Supreme Court, New York County
Docket Number: 155121/2017
Judge: Gerald Lebovits
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

----------X

INDEX NO. 155121/2017

RITA ROSENFELD,

MOTION SEQ. NO. 004

Plaintiff,

- v -

1407 BROADWAY LLC, SHORENSTEIN PROPERTIES LLC, SHORENSTEIN REALTY SERVICES EAST LLC, SHORENSTEIN REALTY SERVICES, L.P., SHORENSTEIN MANAGEMENT, INC., and COLLINS BUILDING SERVICES, INC.,

DECISION + ORDER ON MOTION

Defendants.

----------X

The following e-filed documents, listed by NYSCEF document number (Motion 004) 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 97, 100, 101, 102, 103, 104

were read on this motion for DISCOVERY.

Grey & Grey, LLP, Farmingdale, NY (Sherman B. Kerner of counsel), for plaintiff.
Cartafalsa, Turpin & Lenoff, New York, NY (Anthony Orcel of counsel), for defendants 1407 Broadway LLC and the Shorenstein entities.
Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, New York, NY (Maria Miller of counsel), for defendant Collins Building Services, Inc.

Gerald Lebovits, J.:

This discovery motion arises in the context of a slip-and-fall personal-injury action. Plaintiff, Rita Rosenfeld, slipped and fell in the lobby of an office building located at 1407 Broadway in Manhattan, on what she alleges to have been a wet and slippery floor. The building is owned by defendant 1407 Broadway LLC. It is managed and operated by various defendant entities affiliated with defendant Shorenstein Properties LLC (collectively, Shorenstein).[1] Cleaning services for the building (including the lobby) are provided by defendant Collins Building Services, Inc.

In the course of discovery, Collins and 1407/Shorenstein have each produced a witness for deposition. 1407 Broadway now moves to compel Collins to produce additional witnesses for deposition. Collins cross-moves to compel Shorenstein to produce an additional deposition

[1] 1407 Broadway and Shorenstein are represented in this action by the same counsel, and the parties have treated them as united in interest.

witness, as well.[2] 1407 Broadway's motion is granted. Collins's cross-motion is granted only to the extent of permitting Collins to serve a limited number of interrogatories on Shorenstein on the subjects for which Collins is seeking an additional deposition.

DISCUSSION

A corporate entity has the right to choose whom it will produce for deposition in the first instance. (*See* CPLR 3106 [d].) Once the deposition of the party's designated witness(es) has been taken, additional depositions will be required only if the deposing party makes a detailed showing "that the employees already deposed had insufficient information and there was a substantial likelihood that those sought to be deposed possess information necessary and material to the prosecution of the case." (*Alexopoulos v Metropolitan Transit Auth.*, 37 AD3d 232, 233 [1st Dept 2007].)

I. 1407 Broadway's Motion to Compel an Additional Deposition

Collins previously produced a deposition witness named Wojciech Wisniewski. Wisniewski supervised Collins's operations at a number of buildings, including the office building where the accident in this case occurred. 1407 Broadway argues that Wisniewski was unable to provide sufficient information on key factual questions, warranting the deposition of additional witnesses from Collins. This court agrees.

To be sure, as Collins emphasizes (*see* NYSCEF No. 100 at 4), Wisniewski was able to give testimony on Collins's normal anti-slip protocols at 1407 Broadway during inclement weather—such as the placement of floor mats, yellow caution signs, and the like. (*See* NYSCEF No. 91 at Tr. 53-75, 83, 89-95, 100-102 [Wisniewski deposition transcript].) But Wisniewski was *not* able to provide details about whether and to what extent those protocols had been followed on the morning of Rosenfeld's fall.

Wisniewski's testimony reflected that his normal arrival time at 1407 Broadway (between 8:00 and 10:00 a.m.) was after the time of the accident (approximately 7:40 a.m. or slightly earlier). (*See id.* at 100; NYSCEF No. 102 at 53 [Quirke deposition transcript].) But he could not recall when he arrived at the building on the day of the accident or whether he had spoken to anybody at the building that morning; and he was somewhat equivocal about whether he had even entered the building on that particular day, as opposed to merely parking his car there. (*See* NYSCEF No. 91 at Tr. 22-26, 99.) He also stated that he had been told about the accident later in the day (rather than at or shortly after the time it occurred). (*See id.* at 23.)

Wisniewski thus lacked first-hand knowledge about the condition of the lobby floor when Rosenfeld fell, or the circumstances of her fall. Moreover, he could not provide information that he had gleaned from other sources, either. He said that he could not recall whether he had spoken with anyone who had observed the condition of the floor at the time of the accident, and if so what was said. (*See id.* at 79-81.) Wisniewski did not prepare a report about the accident, was

[2] Rosenfeld supports 1407 Broadway's motion. (*See* NYSCEF No. 95.) She has not taken any position on Collins's cross-motion.

doubtful that he had asked anyone else to prepare a report, and had not read a report from any source prior to being prepared for his deposition. (*See id.* at 27-29.) At most, Wisniewski said that he had "probably" asked Trevor Brantley (a Collins employee working in the building that morning) about the accident. (*Id.* at 33.) Wisniewski had not, however, asked Brantley to write down what he knew, and could not remember the substance of any oral conversation between them. (*See id.*) And Wisniewski said he did not know whether Jaime Rodriguez (the other Collins employee then present in the building) had used a mop that day on the lobby floor to keep it dry. (*See id.* at 102.)

In short, Wisniewski could not provide information on a significant question in this litigation—whether any Collins employee had taken measures to ameliorate any slipping hazard in the lobby resulting from due to inclement weather. But Wisniewski's deposition testimony did identify two Collins employees—Brantley and Rodriguez—who would be much more likely to be able to provide that information.

Nonetheless, in opposing the motion to compel, Collins heatedly asserts that the motion is "a fishing expedition" that is "seeking to harass [Collins] in retaliation" for the failure of settlement negotiations between Collins and 1407/Shorenstein. (NYSCEF No. 100 at 8.) This court disagrees.

Collins also argues that the testimony of Brantley and Rodriguez would be either cumulative or immaterial given that nothing indicates they witnessed Rosenfeld's fall or its immediate aftermath. (*See id.* at 5-7.) The basis for requiring Collins to produce Brantley and Rodriguez for deposition is not that they could testify to the circumstances of the accident itself, though. Rather, it is that they could provide necessary and material testimony about what steps, if any, they (and thus Collins) had taken earlier that morning to reduce the chances of someone's slipping and falling on the lobby floor. The likelihood that they can provide such testimony—coupled with the fact that Wisniewski could not—warrants their additional depositions.

II. Collins's Cross-Motion to Compel an Additional Deposition

1407 Broadway and Shorenstein previously produced a deposition witness named Kevin Quirke. Quirke is employed by a Shorenstein subcontractor (Quality Building Services) responsible for running the lobby desks and operating the building's freight elevators. (*See* NYSCEF No. 101-102.) Collins cross-moves to compel 1407/Shorenstein to produce another witness, arguing that this further deposition is warranted by material gaps in Quirke's testimony. This court finds Collins's argument unpersuasive.

Collins's cross-motion seeks testimony relating to the subject of the placement of wet-weather floor mats. It is undisputed that the lobby was being renovated when the accident in this case occurred, and that this renovation had entailed the placement of temporary walls in part of the lobby area. Collins asserts that Wisniewski's deposition testimony indicates that the placement of the temporary construction walls had led Shorenstein also to instruct Collins to change the configuration of the wet-weather floor mats in the lobby, reducing the number of mats in use; that uncovering more of the lobby floor may have contributed to Rosenfeld's fall; and that Shorenstein's witness Quirke had been unable to provide testimony about renovation-

related changes directed by Shorenstein. (*See* NYSCEF No. 100 at 9-11.) Therefore, Collins contends, 1407/Shorenstein should be compelled to produce an additional witness with knowledge about those changes. (*Id.* at 12.)

This contention faces multiple difficulties, however—both procedural and substantive. As a procedural matter, Quirke was deposed in July 2019 and Wisniewski in November 2019. (*See* NYSCEF No. 91 at 1; No. 102 at 1.) Thus, on Collins's own account, it would have been put on notice by November or December 2019 that further testimony was needed on a significant point in the case. But Collins did not move at that point to compel a further deposition. Indeed, even at a status conference held on February 26, 2020, in which the parties discussed 1407 Broadway's intention to move to compel a further deposition witness, Collins did not seek to reserve its right to file its own motion to compel—instead, it merely demanded a response to post-deposition demands it had previously served on 1407 Broadway. (*See* NYSCEF No. 96 [status conference order].)

At the very least, therefore, a substantial question exists whether Collins waived its right to seek a further deposition from 1407/Shorenstein.[3] Yet Collins's motion papers do not address the issue of waiver or explain its delay in moving to compel.

As a substantive matter, the transcript of Quirke's deposition shows that Collins's counsel did not ask him whether he had observed any change in the configuration or placement of wet-weather mats during or related to the lobby-renovation process. Nor did counsel ask Quirke whether a Shorenstein representative had (or likely would have) given Collins employees instructions about where mats should be placed in the lobby during construction.[4] (*See* NYSCEF No. 102 at 72-103, 114-115.) To be sure, as noted above, the deposition testimony from Collins's own employee Wisniewski on which Collins now relies was given in late November 2019, several months after Quirke's deposition. But this action was commenced in early June 2017, well before either deposition. It would seem unlikely that it took Collins's counsel that long to become aware of the possibility that Shorenstein had told Collins employees during construction to change their placement of the wet-weather mats. And Wisniewski's testimony was itself somewhat equivocal: He stated only that somebody at the building, *i.e.*, Shorenstein, "probably" indicated that the placement of the mats should change due to the lobby construction. (NYSCEF No. 91 at 69.)

In these circumstances, this court is disinclined to require 1407/Shorenstein to produce another witness for deposition. At the same time, the court recognizes that whether a Shorenstein representative directed Collins employees to rearrange the lobby's wet-weather mats due to the ongoing construction could be material in allocating liability among the defendants. This court

---

[3] 1407 Broadway's counsel also represents that Collins's counsel had never contacted him to *request* a further deposition prior to filing its cross-motion. (*See* NYSCEF No. 104 at ¶ 6.)

[4] Collins's cross-motion papers instead rely on, and quote, Quirke's evident difficulty at his deposition in visualizing the (re)configuration of the lobby doors during the construction process. (*See* NYSCEF No. 100 at 10-11.) Collins does not explain why Quirke's struggle to answer that set of questions necessarily shows that he could not have answered questions on other construction-related topics—had Collins asked those questions of him.

therefore grants Collins leave to serve a limited set of interrogatories regarding this topic on 1407/Shorenstein. The interrogatories must be served by January 8, 2021; responses and/or objections must be served by February 5, 2021.

Accordingly, it is hereby

ORDERED that 1407 Broadway's motion to compel the additional depositions of Collins's employees Brantley and Rodriguez is granted, and the depositions shall be conducted virtually on or before February 26, 2021, on dates mutually agreeable to the parties; and it is further

ORDERED that Collins's cross-motion to compel the additional deposition of a Shorenstein representative is granted only to the extent that Collins may serve limited interrogatories on 1407 Broadway and Shorenstein as described above, and is otherwise denied; and it is further

ORDERED that the parties shall appear for a telephonic status conference on March 8, 2021.

12/1/2020
DATE

HON. GERALD LEBOVITS
J.S.C.

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