Parkinson v Fedex Corp.
2021 NY Slip Op 31602(U)
May 10, 2021
Supreme Court, New York County
Docket Number: 158263/2015
Judge: Richard G. Latin

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. RICHARD G. LATIN** **PART** **IAS MOTION 46**

Justice

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MARK PARKINSON,

Plaintiff,

- v -

FEDEX CORPORATION, FEDERAL EXPRESS CORPORATION,

Defendant.

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INDEX NO. 158263/2015

MOTION DATE 5/3/2021

MOTION SEQ. NO. 006

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279

were read on this motion to/for DISCOVERY.

Upon the foregoing documents, it is ordered that plaintiff's motion to, inter alia, extend the deadline for its experts to conduct the inspection of the remaining Extendo conveyor belt and compel further depositions, and defendants' cross motion to dismiss the complaint as to FedEx Corp. are determined as follows:

Plaintiff, an employee for non-party ABM Facility Services, Inc., commenced the instant action to recover for injuries he allegedly sustained on July 21, 2015 at the Federal Express facility located at John F. Kennedy International Airport, Queens, New York. He claimed he was injured when one of defendants' employee activated the conveyor belt, where he was attempting to remove a mail bag that had become stuck. Since this matter's commencement, there has been no shortage of discovery motions, orders, conferences, and stipulations. Now, plaintiff seeks to hold another deposition of one of defendants' employees and to extend the deadline for his expert to conduct

an inspection of the remaining Extendo conveyor belt. Defendants' cross-move to dismiss the complaint as to defendant FedEx Corp.

The court has broad discretion in determining the scope and breadth of discovery as it supervises disclosure (*see 148 Magnolia, LLC v Merrimack Mut. Fire Ins. Co.*, 62 AD3d 486 [1st Dept 2009]). CPLR 3101 allows for the "full disclosure of all evidence material and necessary in the prosecution or defense of an action" (CPLR 3101[a]). What is material and necessary is to be interpreted liberally, to require disclosure "of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues" (*Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403 [1968]).

Here, plaintiff has previously sought disclosure of prior conveyor belt accidents at the subject facility pursuant to a June 5, 2019 notice to admit. In response, plaintiff was only given information concerning accidents involving defendants' employees. Thereafter, the court ordered defendants to provide an affidavit concerning, among other things, capabilities of their injury reporting system and information concerning conveyor belt accidents at defendants' facilities not relating to FedEx employees. When that order was not complied with, this direction was carried into a further status conference order. Defendants eventually provided the affidavit of Ms. Henry, however, it was insufficient so by status conference order dated March 5, 2020 the defendants were ordered to provide a supplemental affidavit. This directive again was not complied with and the directive was carried over into the September 18, 2020 status conference order, which reserved the right for plaintiff to conduct a further deposition of someone with this information if necessary. A supplemental affidavit was provided on or about October 15, 2020, however, the affidavit of Ms. Mosby was insufficient to establish that defendants and their agents are incapable of ascertaining whether there have been other conveyor belt accidents at the facility. Inasmuch as this

issue is still unresolved two years later, discovery on the subject is material and relevant, and no one has been deposed with knowledge of the subject matter, plaintiff should be permitted to depose Ms. Henry, Ms. Mosby, or another individual with knowledge in order to finally resolve this issue (*see Longo v Armor Elevator, Co., Inc.*, 278 AD 127 [1st Dept 2000]).

Further, in light of the passing of plaintiff's initial expert and defendants' mistaken replacement of the subject Extendo conveyor belt, plaintiff shall be permitted an extension of time to examine defendants' remaining Extendo (CPLR 3120). It is undisputed amongst the parties that plaintiff shall be permitted to inspect the second Extendo, including activation, de-activation, extension, and removal of guards for observation; walkthrough ABM's workshop/office area at the facility; inspect the entrance into the subject facility to observe the view from just inside the widows on the wall which separates the office space from the cargo sort area; inspect the activation and de-activation of the main sorter belt with the second Extendo activated and de-activated; and to inspect the extension of the second Extendo into an empty or near-empty trailer, to the extent such trailer is available. Nevertheless, defendants' object to, inter alia, any observation and testing at the facility during work operations, any measurement of the noise level inside the facility, any activation and de-activation of the exhaust fans.

Plaintiff and his expert maintain that given plaintiff's injury may have likely been caused by a miscommunication in hearing, that measurement of the ambient noise during defendants' sort operation is relevant. However, while plaintiff is entitled to examine and test the Extendo, he is not authorized to access defendants' facility for the purposes of conducting accident re-enactment six years after the subject incident (*see Madison v Spancrete Machine Corp.*, 288 AD2d 888 [4th Dept 2001]; *Santucci v Govel Welding, Inc.*, 168 AD2d 845 [1990]; *Grebyonkin v 2301 Ocean Ave. Owners Corp.*, 60 AD3d 808 [2d Dept 2009]). Thus, while plaintiff will be given an extension

of time to examine the Extendo, it will not be during work operations and will not consist of the measuring of ambient noise other than that of the exhaust fans, which some of defendants' employees testified made some noise. Whether such information is ultimately admissible at trial is immaterial as to whether it is discoverable (*see Fell v Presbyterian Hosp. in City of New York at Coumbia-Presbyterian Medical Center*, 98 AD2d 624 [1st Dept 1983]).

As to defendants' cross motion for summary judgment, it is well settled that "parent and subsidiary or affiliated corporations are, as a rule, treated separately and independently so that one will not be held liable of the obligations of the other absent a demonstration that there was an exercise of complete dominion and control" (*Sheridan Broadcasting Corp. v Small*, 19 AD3d 331 [1st Dept 2005]; *Billy v Consolidated Mach. Tool Corp.*, 51 NY2d 152 [1980]).

In support of the cross motion, defendants submit the affidavits of Keith Hefley, liability claims and litigation advisor in the risk management depart of Federal Express Corporation, and Shahram Elsami, staff vice president of securities and corporate law for FedEx Corporation. Hefley averred that plaintiff's injury took place at the facility leased to Federal Express from the Port Authority of New York & New Jersey and that plaintiff's employer was hired by Federal Express. He further stated that the subject Extendo conveyor belt involved in the incident was purchased by Federal Express. Hefley added that all of the cargo handlers present that day, sort managers, safety specialist, and senior managers were employees of Federal Express. He concluded that Federal Express is a separate and distinct company from all other FedEx affiliated companies with a separate human resources, legal, management, and claims department. Moreover, he alleged that FedEx Corporation does not direct, control, or otherwise manage the day-to-day operations of Federal Express at the JFK Cargo facility.

Eslami also testified that FedEx Corporation and Federal Express Corporation are not the same corporation. He averred that FedEx does not exercise control over the day-to-day business operations of its subsidiaries. FedEx Corporation is a holding company and does not engage in any transportation, shipping or distribution services for delivery of packages and freight. He also added that FedEx Corporation has separate boards of directors from its subsidiaries and have separate meetings from each other. They maintain distinct by-laws, corporate minute books, and records and have separate human resources and legal departments. He concluded that FedEx Corporation does not direct, control, or manage the day-ot-day operations of any of its subsidiaries. Thus, defendants' have met their prima facie that the two entities are not alter egos of one another and FedEx Corp. does not direct, control, or manage the day-to-day operations of Federal Express at the subject facility on July 21, 2015.

In opposition, the plaintiff highlights that all of the employees that Hefley holds out as employees of the Federal Express Corporation that were there on the date of the accident provide affidavits stating in support of the defendants that they are employees of FEDEX Corporation. Likewise, the OSHA inspection detail with respect to the instant action references Fedex Corporation as the relevant party. Therefore, plaintiff has raised a triable issue of fact as to who is the relevant party, precluding summary judgment.

Accordingly, plaintiff's motion is granted to the extent that plaintiff is permitted to depose an employee of defendants with knowledge regarding procedures for documenting and/or preparing accident reports for injuries to non-FedEx employees at the subject incident site; and it is further

ORDERED that plaintiff shall inspect the remaining Extendo at the subject facility on or before July 16, 2021 based on the terms allowed above; and it is further

ORDERED that plaintiff's expert shall not be permitted to measure the ambient noise at the site during work operation hours; and it is further

ORDERED that plaintiff is permitted activation and de-activation of the exhaust fans in order to measure the noise coming from them, if any; and it is further

ORDERED that plaintiff's motion is denied in all other respects; and it is further

ORDERED that defendants' cross motion for summary judgment is denied.

This constitutes the decision and order of this Court.

158263/2015

5/10/2021
DATE

RICHARD G. LATIN, J.S.C.

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