

Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS Part 19

Justice

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ANITA BRYANT,

Plaintiff,

-against-

Index No.: 25563/05
Motion Date: 5/28/08
Motion Cal. No.: 7
Motion Seq. No.: 4

LEHMAN BROTHERS HOLDING INC.,
HENEGAN CONSTRUCTION CO., INC., 1301
PROPERTIES, L.L.C. and EQUITY OFFICE
PROPERTIES MANAGEMENT CORP.,

Defendants.

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LEHMAN BROTHERS HOLDING INC.,
HENEGAN CONSTRUCTION CO., INC., 1301
PROPERTIES, L.L.C. and EQUITY OFFICE
PROPERTIES MANAGEMENT CORP.,

Third-Party Plaintiffs,

-against-

UNITY ELECTRIC CO., INC.,

Third-Party Defendant.

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The following papers numbered 1 to 15 read on this motion for an order striking the answer of defendants/third-party plaintiffs, compelling defendant/third-party plaintiff 1301 Properties, LLC to appear for a deposition on a date certain, compelling defendants/third-party plaintiffs to produce additional witnesses for deposition by a date certain, directing defendants/third-party plaintiffs to respond to all outstanding discovery by a date certain, and costs and sanctions; and on this cross-motion by defendants/third-party plaintiffs Lehman Brothers Holding Inc., Henegan Construction Co., Inc., 1301 Properties, L.L.C. and Equity Office Properties Management Corp., striking plaintiff's note of issue, directing plaintiff to appear for a further examination before trial subsequent to the exchange of authorizations to obtain the records and documents pertaining to plaintiff's two prior motor vehicle accidents, as well as her subsequent motor vehicle accident on May 10, 2005,

and for sanctions for plaintiff's frivolous motion practice with regard to witness production on behalf of plaintiff's order to show cause.

	<u>PAPERS</u> <u>NUMBERED</u>
Notice of Motion-Affidavits-Exhibits.....	1 - 4
Notice of Cross-Motion-Affidavits-Exhibits.....	6 - 11
Answering Affidavits-Exhibits.....	12 - 14
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Upon the foregoing papers, it is hereby ordered that the motion and cross-motion are disposed of as follows:

This is an action for personal injuries allegedly sustained by plaintiff during the course of her employment as an electrician for third-party defendant Unity Electric on April 26, 2005, as a result of a construction accident occurring on the fourth floor renovation project at 1301 6th Avenue, in New York, New York. At the time of the accident, defendant/third-party plaintiff Henegan Construction was the general contractor on the project, defendant/third-party plaintiff 1301 Properties was the owner and defendant/third-party plaintiff Lehman Brothers was the tenant of the subject premises. By so-ordered stipulation of this Court dated December 21, 2007, plaintiff's motion for discovery was withdrawn and defendants were to provide, inter alia, full copies of their insurance policies, responses to the demands for a bill of particulars and depositions of the parties were to be conducted by February 29, 2008. It is upon the foregoing that plaintiff seeks an order striking the answer of defendants/third-party plaintiffs Lehman Brothers Holding Inc., Henegan Construction Co., Inc., 1301 Properties, L.L.C. and Equity Office Properties Management Corp. ("defendants"), compelling defendant/third-party plaintiff 1301 Properties, LLC ("defendant 1301") to appear for a deposition on a date certain, compelling defendants to produce additional witnesses for deposition and respond to all outstanding discovery by a date certain, and for costs and sanctions.¹ Defendants cross-move for an order striking plaintiff's note of issue, directing plaintiff to appear for a further examination before trial subsequent to the exchange of authorizations to obtain the records and documents pertaining to plaintiff's two prior motor vehicle accidents, as well as her subsequent motor vehicle accident on May 10, 2005, and for sanctions for plaintiff's frivolous motion practice with regard to witness production.

From the outset, it is noted that this Court is extremely dismayed by the representations of counsel with respect to the discovery process and whether material as elemental as authorizations have been exchanged. It is more than apparent to this Court based upon the current record, as well

¹ By conference on the record after the call of the calendar on April 23, 2008, this Court denied the portion of the motion seeking to strike the answer of defendants based upon the failure of defendant 1301 to produce a witness on its behalf. Thus, that branch of the motion hereby is denied as moot.

as the conferences had with the parties prior to the submission of the motion, that the interaction between counsel has been marked with acrimony and discord, and counsel have concerned themselves more with their personal animus rather than the zealous advocacy on behalf of clients whom they were retained to represent. By way of example, there has been a lack of professional courtesy extended in defense counsel refusing to reappear before this Court to address plaintiff's discovery motion at the conclusion of the April 16, 2008 calendar, upon plaintiff's lateness in appearing due to poor traffic conditions, notwithstanding the fact that defense counsel was still in the building when plaintiff arrived. Moreover, plaintiff disingenuously argues that there is no reason for the note of issue to be stricken, while in the same breath, requesting further discovery and the striking of defendants' answer, all while still owing discovery. Indeed, in their "Reply Affirmation to Plaintiff's Opposition to Defendants' Cross-Motion," defendants set forth a several page litany of discovery which they contend is outstanding, and plaintiff, by letter dated June 6, 2008, states that since the filing of their opposition, which is dated May 8, 2008, plaintiff has provided outstanding discovery. Nevertheless, the most telling example of the personal animus between counsel which has impaired their ability to resolve the most mundane of issues, comes by way of their discourse at the deposition of plaintiff in which Attorney Zweig, counsel for plaintiff, and Attorney Bonventre, counsel for defendants, sniped at each other on several occasions during the testimony. At pages 151-156 in the 538 page transcript, after several objections made by Attorney Zweig regarding the questioning of plaintiff concerning prior and subsequent accidents, the following exchange occurred:

Q. Describe the accident?

A. I don't recall.

Ms. Zweig: Objection, don't answer. She doesn't have to answer about how an accident took place.

Ms. Bonventre: She's involved in a motor vehicle accident, she is not required to explain how that happened?

Ms. Zweig: She said she didn't sustain any injuries.

Ms. Bonventre: She didn't say that at all. She said only her kids settled out, she didn't say anything about whether she sustained injuries in that accident.

Ms. Zweig: You can ask her if she injured her back or neck.

Ms. Bonventre: I'll be happy to.

Q. As a result of the accident did you sustain any injury?

Ms. Zweig: To your back or neck?

Ms. Bonventre: That's not my question.

Ms. Zweig: Don't answer the question.

Ms. Bonventre: Mark it please.

Ms. Zweig: Absolutely.

Q. Did you go to the hospital after accident occurred?

A. No, I didn't.

Q. Did you receive any treatment from any medical provider

after the accident occurred as a result of the accident?

Ms. Zweig: Objection, don't answer unless it's related to the back and the neck.

Ms. Bonventre: Mark it please.

Q. Did you receive any injury to your neck or your back as a result of that accident?

A. No.

Q. Did you have injury to any part of your body as a result of that accident?

Ms. Zweig: Objection. You answered.

Q. Aside from that did you ever commence any lawsuits aside from this one?

Ms. Zweig: Objection, don't answer that.

Ms. Bonventre: Why not?

Ms. Zweig: She is not obligated to tell you if she ever commenced a lawsuit, mark it for a ruling.

Ms. Bonventre: She is too obligated to tell me if she's commenced a lawsuit.

Ms. Zweig: For any reason, no, she's not.

Q. Have you ever commenced a personal injury lawsuit prior to this one?

Ms. Zweig: For herself, related to her back and neck?

Ms. Bonventre: Please counsel, I have asked a question, please don't interrupt before she gives her answer.

Ms. Zweig: I have a right to.

Ms. Bonventre: Don't speak if I start speaking.

Ms. Zweig: That's my direction. Go ahead.

Ms. Bonventre: She started her answer, please don't interrupt the witness in her answer.

Ms. Zweig: I am giving her advise [sic] as to whether she can or cannot answer that question.

Ms. Bonventre: You are obstructing the deposition, that's what you are doing.

Ms. Zweig: You are interfering with her right to counsel.

Ms. Bonventre: I'm not, you are sitting right here.

Ms. Zweig: If I can't speak then what's the point.

Ms. Bonventre: The CPLR says whether you are entitled.

Ms. Zweig: You are not the judge.

Ms. Bonventre: That's correct.

Ms. Zweig: We will mark them for ruling.

Ms. Bonventre: No, whatever is admissible is admissible at the time of trial and that's where the judge will make a ruling, as of right now I am entitled to ask the question.

Ms. Zweig: You can ask them if you want and I can direct anything I want and I can direct anything I want and a judge will arbitrate. Judge Ritholtz is in tomorrow.

Ms. Bonventre: I only hope you keep answering that way.

Moreover, at pages 326- 334, when plaintiff was being questioned regarding the debris upon which she allegedly tripped and fell, counsel further had this interaction:

Q. What I am asking you specifically and I asked you before was, did you ever point out specifically the debris that caused your accident to occur to anyone.

A. Yes.

Q. And was that Dennis?

A. Yes.

Q. Tell me when you showed him that specific debris.

A. I showed him debris other places in areas over on the fourth floor that could be a danger not to our trade but to other trades.

Q. I will move to strike. The question specifically is the debris

Ms. Zweig: I will stop this harassing thing.

Ms. Bonventre: We will go right now.

Ms. Zweig: She testified that the debris is all over. You will have to read back this whole colloquy here and we will go through the deposition.

Ms. Bonventre: We will see Judge O'Donohue, the assigned Justice for the judge. It is a direct question. I am looking for a direct answer. I don't want to hear debris everywhere. We heard that 15 times.

Ms. Zweig: That is the answer.

Ms. Bonventre: That is not.

Ms. Zweig: Let's go then.

At that point, Attorney Boyce, counsel for third- party defendant interjected, and asked plaintiff, "Did you show that specific debris to Dennis, yes or no?" To which, Attorney Zweig responded, "The specific piece of debris," and the following exchange occurred:

Ms. Bonventre: That question was asked five times—that question. This is where we went yesterday and

that is why this deposition is taking so long. The same question is coming out because you can't get an answer to the direct question. I will not be put off. I am entitled to the answer to that question. I will keep asking it that way or other ways in order to get the answer.

Ms. Zweig: Mark it.

Ms. Bonventre: No. We will go to the court now.

In response, plaintiff interjects and responds to Attorney Bonventre in the following manner, before her counsel, Attorney Zweig, continues:

Plaintiff: We can go. I don't have time for the bickering. This is very unprofessional for both parts. I know the judge—

Ms. Bonventre: Ma'am, you can have your opinion.

Plaintiff: My opinion is the same thing.

Ms. Bonventre: That may be your opinion, but this deposition needs to be completed.

Plaintiff: Ridiculous. It should have been completed on Friday or Tuesday.

Ms. Bonventre: You are directed to answer the questions directly.

Ms. Zweig: Read it back.

Ms. Bonventre: I need an answer to the question. If we have to see the judge we will.

Ms. Zweig: You have the transcript.

After a discussion off the record and an hour and one half recess, presumably to obtain a ruling from Justice O'Donohue, Attorneys Zweig and Bonventre continued to exhibit a lack of professionalism in their interaction:

Ms. Zweig: Would you like to state what happened with the Judge since you have been the one that requested that the deposition take an adjournment to get a ruling from the Judge? Would you like to discuss that issue?

Ms. Bonventre: We were there before the Court and he gave his direction.

Ms. Zweig: Would you like to go through that? I will make a statement.

Ms. Bonventre: I am not here to answer your questions. Please make your statement.

Ms. Zweig: Would you like to go first.

Ms. Bonventre: I am not here to answer your questions.

Ms. Zweig: Defendants' counsel has tried to run the clock in this deposition and stopped the deposition.

Ms. Bonventre: We will not do that on the record.

Ms. Zweig: I am making my statement on the record. I have a right to do so. I asked if you wanted to speak first. You said no. I am putting my statement on the record.

Ms. Bonventre: The implication was that you were going to memorialize the conference, not pontificate.

Ms. Zweig: I want to make a record.

Ms. Bonventre: We might have to have a referee sit in on the deposition.

Ms. Zweig: You can make any representation.

Ms. Bonventre: You are running the clock now. Do you want to continue with the deposition or do you want to talk.

Ms. Zweig: You will not direct me what to do and what not to do.

Thereafter, counsel utilized approximately the next ten pages bantering about alleged ex parte communications and whether Judge O'Donohue, who was the emergency judge, was the appropriate judge to make the deposition ruling due to this Court's unavailability, or if this Court's law secretary had authority to hear the matter. More pointedly, this Court is thoroughly convinced that if it unnecessarily exhausted its resources to conduct more than a cursory perusal through the aforementioned transcript, there would be many exchanges demonstrative of the apparent acrimony and contentiousness between counsel that is most troublesome to this Court.

Consequently, as allegations of impropriety abound, this Court expresses reticence to rely upon the representations asserted by the respective parties, and finds the unnecessary expending of judicial resources very disconcerting. Nevertheless, there has been a clear demonstration of an inability to fashion a resolution to this discovery dispute without the need for judicial intervention. Indeed, with few exceptions, this Court cannot discern from the papers what, if any, discovery is outstanding as the papers set forth diametrically opposing positions on essential every point of purportedly outstanding discovery. Notwithstanding the requests of counsel, and the volume of the submissions, the papers are bereft of supporting documentation which would sufficiently enable this Court to resolve the contradictions and misrepresentations presented in the supporting affirmations, based upon the aforementioned submissions. Thus, this Court is constrained to expend even more judicial resources to conduct a hearing on most of the issues presented, in order for this Court to make an informed determination based upon a trustworthy record, which appears to be lacking in the record submitted for decision.

Accordingly, those branches of the motion seeking an order directing defendants to respond to all outstanding discovery, including the production of insurance policies, and for costs and sanctions, as well as the branches of the cross-motion for an order striking the note of issue and for sanctions, hereby are set down for a hearing which shall be held before this Court in Part 19, Room 63, on September 24, 2008, at 10:30 a.m. Additionally, all other relevant issues raised by the papers, and not determined by this decision and order, will be addressed and resolved by this Court at such discovery hearing.

With respect that branch of the motion seeking the depositions of Michael Cohen, Hector LaPonte, Anthony Laiota and Fernandez Villa, employees of defendant/third-party plaintiff Henegan Construction, that branch is denied. It is well settled that in order for a plaintiff to make a proper showing of the necessity to compel a further deposition, the plaintiff must demonstrate that the witness already deposed on behalf of the defendant had insufficient knowledge of the facts therein, or was otherwise inadequate, or that the witness sought for a further deposition possessed information material and necessary to the prosecution of his case. See, Douglas v. New York City Transit Authority, 48 A.D.3d 615 (2nd Dept. 2008); Town of Brookhaven v. Liere, 24 A.D.3d 431 (2nd Dept. 2005); Brown v. Home Depot, U.S.A., 304 A.D.2d 699 (2nd Dept. 2003); EIFS, Inc. v. Morie Co., Inc., 298 A.D.2d 548 (2nd Dept. 2002); Pisano v. Door Control, Inc., 268 A.D.2d 416 (2nd Dept. 2000). Here, the record is insufficient for this Court to compel defendant/third-party plaintiff Henegan Construction “to produce an additional witness for deposition since plaintiff failed to make a detailed showing of the necessity for taking further depositions (citations omitted).” Byrne v. City of New York, 23 A.D.3d 422 (2nd Dept. 2005); see, Williams v. City of New York, 40 A.D.3d 847 (2nd Dept. 2007). Accordingly, that portion of the motion for an order compelling the employees of defendant/third-party plaintiff Henegan Construction to appear for further examinations before trial is denied.

Lastly, the branch of the cross-motion seeking a further deposition of plaintiff subsequent to the production and exchange of authorizations to obtain the records and documents pertaining to plaintiff’s two prior motor vehicle accidents, as well as her subsequent motor vehicle accident on May 10, 2005, hereby is granted. Despite plaintiff’s counsel contention to the contrary in a letter dated October 24, 2007, indicating that plaintiff was not involved in other accidents, plaintiff’s deposition certainly belies that assertion. Accordingly, plaintiff is directed to provide all documentary evidence pertaining to the aforementioned accidents within fifteen (15) days of service of a copy of this order with notice of entry, but no later than September 23, 2004. The date of the further deposition shall be set at the conclusion of the hearing on the other discovery matters in order to attempt to fashion a succinct resolution to this dispute without further motion practice and Court intervention.

Dated: August 15, 2008

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J.S.C.