

Bligen v Markland Estates, Inc.

2003 NY Slip Op 30212(U)

October 6, 2003

Supreme Court, Queens County

Docket Number: 27758/1996

Judge: Polizzi

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE THOMAS V. POLIZZI IA Part 14
Justice

	x	Index
TYLER BLIGEN, an infant by his		Number <u>27758</u> 1996
mother and natural guardian,		Motion
DOMINIQUE BLIGEN, individually,		Date <u>June 17,</u> 2003
Plaintiffs,		Motion
-against-		Cal. Number <u>7</u>
MARKLAND ESTATES, INC., JAY SILVA		
AND U.S. MANAGEMENT, LLC,		
Defendants.	v	

The following papers numbered 1 to 16 were read on this motion by the defendants Markland Estates, Inc. and Jay Silva, pursuant to CPLR 2304, to quash subpoenas duces tecum served by the plaintiffs upon those defendants' non-party expert witnesses; and, cross motion by the plaintiffs, pursuant to CPLR 3126 and 3212, to strike the answer of the defendants Markland Estates, Inc. and Jay Silva, for failure to comply with an order of this court dated January 17, 2003 (Polizzi, J.), and for summary judgment on the issue of the liability of those defendants.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1-4
Notice of Cross Motion - Affidavits - Exhibits ...	5-8
Answering Affidavits - Exhibits	9-14
Reply Affidavits	15-16

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

I. The Relevant Facts

In this action, the plaintiff Tyler Bligen ("Bligen"), as the mother and natural guardian of her infant child Dominique Bligen ("the infant"), seeks damages for the alleged lead poisoning of the

infant during the time that they lived at a premises in Jamaica, Queens ("the premises"). The defendant U.S. Management, LLC ("Management") was the manager of the premises, the defendant Markland Estates, Inc. ("Markland") was the owner of the premises, and Jay Silva ("Silva") was Markland's agent. The premises has since been sold by Markland.

A. Prior Discovery and Order

On or about January 5, 1996, the Department of Health ("DOH") issued a violation to Markland and Silva as a result of lead poisoning suffered by the infant. On or about February 7, 1996, Markland, through Silva, informed the DOH that it intended to contest the violations and that it had contacted Professional Environmental Services ("PES") to make an appointment with the tenant to perform the necessary testing. A PES letter dated March 5, 1996, written by Michael Cassidy ("Cassidy"), indicated that all areas tested were below the relevant threshold, and annexed the test results from the various test sites. The test results indicated that they were sampled and recorded by "D. Greene" of PES. All of the documents and underlying test information and results were provided by Markland and Silva to the plaintiffs during the course of discovery.

By order dated January 17, 2003, this court (Polizzi, J.) directed Markland to, inter alia, provide a supplemental response to the plaintiffs' October 26, 1998 notice of discovery and inspection within 45 days of the date of the order. In particular, Markland and Silva were directed to:

(1) provide the addresses and phone numbers only, for all witnesses to the occurrence, condition and subject matter of the instant action, in response to demand no. 13;

(2) provide the names of tenants occupying the subject apartment for a period of 10 years prior to the plaintiffs' tenancy, in response to demand nos. 24 and 46;

(3) produce a copy of each management agreement between Markland and Management, in response to demand no. 26;

(4) produce a copy of each XRF test result, laboratory test result, paint sample and/or wipe test result of tests conducted by the defendants, their agents, servants and/or employees within the premises, in response to demand no. 40;

(5) produce the curriculum vitae of each medical, environmental, scientific, actuarial or any other expert retained

and/or consulted by the defendant in connection with the action, in response to demand no. 41; and,

(6) produce all records related to other incidents of lead poisoning at the premises, in response to demand no. 47.

To the extent that the requested information was not known, not within the defendants' custody, control or did not exist, Markland was to provide an affidavit to that effect by an individual with such knowledge. In addition, Markland, Silva and Management were to provide a supplemental response to item no. 5 of a so-ordered stipulation dated January 29, 2002, requiring the production of all relevant insurance policies and the service of CPLR 3101(d) responses.

B. Response by Markland and Silva and Issuance of Subpoenas

Markland and Silva responded, as follows:

(1) in response to demand no. 41 and the so-ordered stipulation, they disclosed the names of four experts, including Cassidy and Declan Greene ("Greene") of PES, provided a CPLR 3101(d) expert disclosure, the experts' curriculum vitae, and all relevant insurance policies;

(2) in response to demand no. 13, they identified witnesses, including Greene and Cassidy of PES, as well as two other witnesses, gave their addresses at PES or area of last known address and indicated where the information was unknown;

(3) in response to demands nos. 24, 26, 46 and 47, indicated that they were not in possession of the information sought, and provided an affidavit by Silva to that effect; and,

(4) in response to demand no. 40, stated that the only information they possessed was previously provided as an exhibit to their prior discovery response dated February 20, 2002, i.e., all documents relating to PES' 1996 testing that were previously discussed herein.

In his affidavit, Silva stated, inter alia, that he did not possess knowledge, information or documents which would provide the information sought by the plaintiffs.

The expert witness disclosures indicated that Cassidy, the President of PES, would testify about the testing equipment and procedures utilized by PES or the DOH in 1996, and the results of lead testing conducted by PES on the apartment on March 5, 1996,

the results of which were annexed. Another expert witness disclosure for Greene indicated that he would testify that all areas tested for lead levels in the apartment were below the threshold at the time of his testing, and about other information contained in a report previously provided.

Upon receipt of these responses, on or about April 14, 2003, the plaintiffs served judicial subpoenas on Cassidy and Greene, seeking to require them to provide, inter alia, the facts, records documents and other information upon which they would base their expert testimony.

11. Motion and Cross Motion

Markland and Silva move for an order pursuant to CPLR 2304 to quash the subpoenas seeking to depose non-party experts Cassidy and Greene.

The plaintiffs cross-move for an order striking the answer of Markland and Silva and for summary judgment on the issue of those defendants' liability, asserting that: (1) in response to demand no. 13, the witnesses' last known address or phone numbers were not provided; (2) in response to demand nos. 24 and 46, information or documents were not produced; (3) in response to demand no. 40, records of lead testing performed at the premises were not produced; (4) as PES conducted pre-litigation testing, the plaintiffs were entitled to conduct an examination before trial ("EBT") of Cassidy and Greene; and, (5) the affidavit by Silva was inadequate as it failed to indicate the possible location of any documents. Finally, the plaintiffs contend that they are entitled to summary judgment upon the striking of the answer of Markland and Silva, and on the merits.

Markland and Silva respond that: (1) they fully complied with this court's January 17, 2003 order; (2) Silva is the only person capable of executing an affidavit in compliance with that order, as he handled all operational matters for premises which had been sold, and the information sought by the plaintiffs was no longer in their control; (3) CPLR 3101 does not require an expert to submit to an EBT, and they disclosed all reports and other information related to those experts; and, (4) the plaintiffs are precluded by CPLR 3212[a] from seeking summary judgment on the merits, as their motion was served more than 120 days after the filing of the note of issue. Management also responds that it provided all supplemental discovery required by this court's order.

The plaintiffs reply that, at the very least, Greene and Cassidy should be precluded from testifying as to facts relating to

their prior inspections and tests, or their involvement with contesting the DOH violations.

111. Decision

Special circumstances must be shown to support discovery against a nonparty under CPLR 3101[a][4] (see, Brooklyn Floor Maint. Co. v Providence Washington Ins. Co., 296 AD2d 520). CPLR 3101[d][1][iii] requires a showing of special circumstances to warrant the deposition of a party's expert witness (see, Brooklyn Floor Maint. Co. v Providence Washington Ins. Co., supra). Although the "special circumstances" requirement of CPLR 3101[d][1][ii] is more than a nominal barrier to discovery, such circumstances exist where physical evidence is lost or destroyed or where some other unique factual situation exists, such as proof that the information sought to be discovered cannot be obtained from other sources (see, Brooklyn Floor Maint. Co. v Providence Washington Ins. Co., supra; Ruthman, Mercadante & Hadjis, P.C. v Nardiello, 288 AD2d 593).

Here, the plaintiffs have failed to detail any special circumstances other than the fact that PES performed testing at the premises prior to the commencement of this action. There is no dispute that the plaintiffs already possess information indicating the tests performed by PES in 1996, and the results of those tests. Markland and Silva have repeatedly indicated that they do not possess further information other than that already provided. The fact that Markland originally hired PES to investigate or refute the DOH violations rather than to provide expert testimony at trial neither deprives Cassidy or Greene of their status as experts nor relieves the plaintiffs of the burden of showing special circumstances warranting the EBTs of those expert witnesses (see, Russo v Quincy Mut. Fire Ins. Co., 256 AD2d 1164).

Thus, as the expert disclosure was otherwise reasonably detailed and no such special circumstances exist, the motion to quash the subpoenas is granted (see, Ruthman, Mercadante & Hadjis, P.C. v Nardiello, supra; Vogel v Benwil Indus., Inc., 267 AD2d 230; Russo v Quincy Mut. Fire Ins. Co., supra; Hallahan v Ashland Chem. Co., 237 AD2d 697; 232 Broadway Corp. v New York Property Ins. Underwriting Ass'n, 171 AD2d 861).

The plaintiffs' remaining contentions concerning the insufficiency of the responses by Markland and Silva lack merit. The plaintiffs have not demonstrated good cause for seeking leave to move for summary judgment on the merits more than 120 days after the filing of the note of issue (see, CPLR 3212[a]). As a result, the plaintiffs' cross motion is denied in all respects.

Conclusion

Accordingly, based upon the papers submitted to this court for consideration and the determinations set forth above, it is

ORDERED that the motion by the defendants Markland Estates, Inc. and Jay Silva to quash subpoenas duces tecum served by the plaintiffs upon those defendants' non-party expert witnesses is granted, and the subpoenas duces tecum are quashed; and it is further

ORDERED that the cross motion by the plaintiffs to strike the answer of the defendants Markland Estates, Inc. and Jay Silva for failure to comply with an order of this court dated January 17, 2003 (Polizzi, J.), and for summary judgment on the issue of the liability of those defendants, is denied.

Dated: October 6, 2003

J.S.C.