

Sheehan v Pantelidis
2004 NY Slip Op 30078(U)
March 5, 2004
Supreme Court, New York County
Docket Number: 0112555/2555
Judge: Rosalyn H. Richter
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Richter
Justice

PART 24

JOSEPH E. SUREHAN

INDEX NO. 112 JSS/00

- v -

MOTION DATE _____

George Lawrence

MOTION SEQ. NO. 017

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 3/8/04

Richter
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

FOR THE CLERK OF THE COURT

Supreme Court of the State of New York
County of New York: Part 24

Joseph E. Sheehan and Rosa M .Sheehan,

Plaintiffs,

-against-

Decision & Order
Index No. 112555/00
Motion Sequences 17,18 & 19

George Pantelidis,

Defendant-Third Party Plaintiff

George Pantelidis,

Third-Party Plaintiff

-against-

Joe L. Masonry Construction, Inc.
Creative Living Enclosures, inc., dba Crystal Co.,
Arista Iron Works, Inc., Socrates Restoration, Inc.,
Verrazano Flooring Co., Inc., Mascon Restoration Inc.,
S & J Iron Works, Inc., William F. Savino & William F.
Savino Architects, Jemco Electrical Contractors, Inc., Elvera
Service Inc., **space** Air Conditioning & Joseph Kreisel,
DbA ABC Chimney & Fireplace Company,

Third-Party Defendants

Richter, J.:

Plaintiffs' motion in limine is denied. Plaintiffs' objections to the evidence concerning the party wall that is not the central focus of this litigation are unpersuasive, and, in any event, involve issues that should be resolved by the jury at trial. Although plaintiffs argue that there are differences between the walls and that different Building Codes apply, such arguments go to the weight of any such evidence, but do not make it inadmissible, especially if defendant's expert can establish that the unaltered wall is

* 3] .

appropriate for comparison to the party wall at issue here. Plaintiffs' claims that the danger of a chimney collapse is too speculative does not require preclusion of this evidence, but raises questions for the trier of fact. Moreover, plaintiffs' motion in limine acknowledges that evidence on both the issues could be introduced if it relates to alleged damages caused directly to defendant's property; therefore, no basis exists to preclude all such testimony at this time.

The Court does not understand the exact nature of plaintiffs' motion relating to the counterclaim for malicious prosecution since plaintiff acknowledges that evidence of specific written complaints would be admissible. Plaintiffs do not clearly specify any evidence on this counterclaim that it wishes to preclude, and, of course, plaintiff always has the right to object to any evidence at trial. Finally, plaintiffs seek preclusion of any evidence of alleged alterations prior to the entry of judgment in a decision rendered by Justice Baer. However, defendant persuasively argues that some evidence as to the history of the property is relevant, and this Court's summary judgment decision mentioned some of these issues. Plaintiffs correctly note that Justice Tompkins, in an order dated Oct. 10, 2002, held that defendants **cannot** seek to enforce the previous judgment in this proceeding, and thus defendant cannot seek to enforce that earlier judgment here. However, Justice Tompkins did not rule that all evidence as to the condition of the premises prior to or at the time of that judgment would be inadmissible at the trial of this case.

Defendant's motion in limine also is denied. The plaintiffs have indicated that Nora Devancy will not be called as a witness on the plaintiffs' direct case and therefore this aspect of the preclusion motion is moot. The Court need not address the motion to

* 4]
preclude her testimony on rebuttal since it is not clear whether she will actually be called in this trial. The Court denies this aspect of defendant's motion without prejudice to their right to renew it if plaintiff presents her as a rebuttal witness.

The motion to preclude the testimony of Richard Adams is rejected. It is axiomatic that an expert witness cannot be compelled to submit to a deposition absent a finding of special circumstances. See *King Elec. of Graham Ave. v. American Natl. Fire Ins. Co.*, 232 A.D.2d 273 (1st Dept. 1996); *232 Broadway Corp. v. N.Y. Property Ins. Underwriting Assn.*, 171 A.D.2d 861 (2d Dept. 1991). "This issue was the subject of a ruling by Justice Tompkins, who quashed a subpoena for a deposition of Mr. Adams. That ruling is law of the case *and* defendant offers no persuasive reason to reconsider it. In any event, defendant incorrectly argues that Mr. Adams is really a fact witness because he is going to testify about his observations and therefore no basis exists to conclude that he should have been deposed in this case. See generally *Anderson v. Kamalian*, 231 A.D.2d 659 (2d Dept. 1996) (non-party witness who operated on plaintiff and who was trial expert not subject to deposition); *Michalak v. Venticinque*, 222 A.D.2d 1060 (4th Dept. 1995) (treating physician not subject to deposition absent special circumstances).

Finally, defendant objects to the introduction of any evidence as to *damages* that were compensated by insurance. However, as plaintiff correctly notes, defendants may seek to reduce the amount of damages by the amount of such insurance payments, but plaintiffs are not precluded by introducing evidence as to the total amount of damages at trial. See generally *Fisher v. Qualico Contracting Corp.*, 98 N.Y.2d 534 (2002); *Lowit v. Consolidated Edison*, 234 A.D.2d 2 (1st Dept. 1996).

This constitutes the decision and order of the Court.

March 5, 2004

Rosalyn Richter
Justice Rosalyn Richter