

Ferone v I7 State St. LLC

2007 NY Slip Op 30249(U)

March 14, 2007

Supreme Court, New York County

Docket Number: 0106824

Judge: Eileen A. Rakower

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

PRESENT: RAKOWER
Justice

PART 5

Index Number : 106824/2004

INDEX NO. _____

FERONE, LILLIAN

MOTION DATE _____

vs

17 STATE STREET LLC

MOTION SEQ. NO. _____

Sequence Number : 006

MOTION CAL. NO. _____

CONSOLIDATION/JOINT TRIAL

FILED

this motion to/for _____

MAR 21 2007

NEW YORK COUNTY CLERK'S OFFICE

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause Affidavits — Exhibits ...

1
2
3, 4
5+6

Answering Affidavits — Exhibits _____

Replying Affidavits OSP _____

Cross-Motion: Yes No Reply

Upon the foregoing papers, it is ordered that this motion

~~... [scribbled out text] ...~~

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

Dated: 3/13/07

[Signature]

HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

[* 1]

Check if appropriate: DO NOT POST REFERENCE

FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

-----X
LILLIAN FERONE,

Plaintiff,

Index No.
106824/04

- against -

Decision
and Order

17 STATE STREET LLC., SAVANNAH TEACHER'S
PROPERTIES INC., INSIGNIA ESG INC., THE ROUSE
CORP., and THE CITY OF NEW YORK,

Defendants.
-----X

LILLIAN FERONE,

Plaintiff,

Index No.
101627/06

- against -

PERFECT BUILDING MAINTENANCE
RFR REALTY LLC,

Defendants.
-----X

HON. EILEEN A. RAKOWER

Plaintiff first brings an action for personal injuries which she allegedly sustained when she tripped on an unsafe sidewalk in front of 17 State Street Plaza in the County and State of New York on February 6, 2003. Defendant 17 State Street LLC ("State LLC") leased, controlled and maintained the premises and sidewalks outside the premises known as 17 State Street Plaza. Plaintiff discontinued with prejudice as against the defendant The Rouse Corp. pursuant to a stipulation filed May 3, 2005. The case was dismissed as against Savannah Teacher's Properties Inc.

on October 22, 2005. Insignia ESG Inc. has never appeared in this action. Plaintiff asserts that discovery revealed that Insignia ESG Inc. was not a proper party to this action and should be removed from the caption. Finally, by stipulation dated December 11, 2006, all claims and counterclaims as against the City of New York were discontinued with prejudice. Thus, the only remaining defendant in the first action, Index No 106824/04, is 17 State Street LLC.

Plaintiff brought a subsequent action as against RFR Realty LLC (“RFR”), the management company for the premises known as 17 State Street Plaza, and against Perfect Building Maintenance (“Perfect”), who was present at the subject premises pursuant to a contract with RFR. This action charged that on or about February 6, 2004¹ plaintiff tripped and fell on an unsafe sidewalk in front of 17 State Street Plaza.

Plaintiff moves to consolidate these actions pursuant to CPLR 602(a), amend the caption and direct a Joint Trial of these actions since “they arise out of the same occurrence on the same date, time and place.” Perfect cross moves to consolidate, adopting plaintiff’s affirmation in support of such relief, but also requests that the Note of Issue previously filed in the first action be vacated and that the matter be stricken from the trial calendar to allow Perfect to complete discovery. Further, Perfect seeks to have counsel for defendant State LLC, and who also represents RFR, disqualified inasmuch as the Law Office of Cartafals, Slattery, Turpin & Metaxas (“Cartafals”) produced a Perfect employee for a deposition in the first action and developed an attorney client relationship with that employee. Finally Perfect seeks to preclude the deposition testimony of that Perfect employee, Deloy Stoll, which Perfect alleges was obtained in an improper and irregular manner.

State LLC and RFR oppose the cross motion of Perfect insofar as it seeks to disqualify Cartafals. Plaintiff also opposes the cross motion insofar as it seeks to strike the matter from the trial calendar and preclude the deposition testimony of Deloy Stoll.

Perfect provides the deposition transcript of Deloy Stoll, which indicates, in

¹The court notes that the complaint in the second action specifies that the accident occurred in 2004, while the complaint in the first action specifies the accident happened in 2003. Compare paragraphs 15, 39, 64, 88, and 112 [paragraph 134 states 2004] of the complaint in the first action with paragraphs 17 and 41 of the complaint in the second action. The Verified Bill of Particulars does confirm the date of the accident was February 6, 2003.

pertinent part, the following:

- Q. Are you currently employed?
A. Yes.
Q. Who are you employed by?
A. R.F.R. Realty
Q. What type of business is R.F.R. Realty?
A. It's a management company.
Q. What do they manage?
A. 17 State Street.
Q. Is that the only property that they manage?
A. No.
Q. About how many properties do they manage?
A. I don't know.
Q. Is R.F.R. Realty a corporation?
A. L.L.C.
Q. What is your position with R.F.R. Realty?
A. Building manager.
Q. What building do you manage?
A. 17 State Street.
Q. How long have you held that position?
A. Since April.
Q. Of this year?
A. 2005.

page 6, line 12 continuing through page 7, line 11

- Q. Do you know who owned 17 State Street on February 6 of 2003?
A. The exact name of who owned it, no only because been there has been a lot of changes, and I am not sure that I followed it.
Q. This is just as best you know. We don't want you to guess at anything. If you have a partial name or you think you know the name?
A. I believe it was some part of R.F.R Realty. I came unprepared.

page 8, line 12 through line 21

- Q. Do you know who the building manager of 17 State Street was in February of 2003?

- A. Yes.
- Q. Who was that?
- A. Paul, P-A-U-L, Hudson, H-U-D-S-O-N.
- Q. Do you know who Paul Hudson was employed by in February of 2003?
- A. I believe Perfect Building Maintenance. Actually I am, now thinking this through, that is who I am employed by, sorry.
- Ms. Mota [Attorney for 17 State Street LLC]: Okay.
- A. All of a sudden it just came into my head. I am employed by Perfect Building Maintenance. That's where my checks come from, Perfect Building Maintenance.

page 9, line 1 through line 15.

- Q. Do you have an immediate supervisor?
- A. Yes.
- Q. Who is that?
- A. V.P. of operations.
- Q. What is his or her name?
- A. Walter Z-I-M-M-Y.

page 12, line 14 through line 19.

- Q. Is Walter Zimmy employed by Perfect Building Maintenance?
- A. I don't know.

page 13, line 2 through line 4.

- Q. Where did you work before working for Perfect Building Maintenance?
- A. Jamieson Insurance Group.
- Q. What capacity did you work for them?
- A. Receptionist, office manager.
- Q. How long did you do that?
- A. Two and a half years.

Page 13, line 11 through line 17

- Q. Who owns the sidewalks surrounding 17 State Street?
- A. I believe we own it to the property line.
- Q. When you say "we" who do you mean by that?

A. Sorry, R.F.R. Realty.

Page 14, line 10 though line 16.

Q. Do you know what the procedures were in February of 2003 with regards to cleaning the sidewalks?

A. I've observed them.

Q. In February of 2003?

A. Yes.

Q. How was it that you observed them in February of 2003?

A. Jamieson is located at 17 State Street.

Q. Okay. How often did you observe the porters cleaning the sidewalk at 17 State Street when you were – in February of 2003?

A. I would notice them on the plaza when I would go out to lunch or come in the morning.

Q. Did you see them on a daily basis?

A. Yes.

Page 18 line 3 though line 19

The court in *Jamaica Public Service Co. LTD. V. AIU Insurance Company, et al*, 92 N.Y.2d 631, found that there were three factors which must be satisfied in order to disqualify an attorney or law firm from representation:

A party seeking disqualification of its adversary's lawyer pursuant to DR 5- 108 (A) (1) must prove that there was an attorney-client relationship between the moving party and opposing counsel, that the matters involved in both representations are substantially related, and that the interests of the present client and former client are materially adverse. Only "where the movant satisfies all three inquiries does the irrebuttable presumption of disqualification arise. *Id.* at 636.

The court in that case reversed the lower courts decision to disqualify because it found that all three factors were not met. Further, the court discussed the basis for its decision and stated:

disqualification motions present competing concerns. Balanced against the vital interest in avoiding even the appearance of impropriety is concern for a party's right to representation by counsel of choice and danger that such motions can become tactical "derailment" weapons for strategic advantage in litigation. With these considerations in mind, it is

clear that a movant must offer more to justify disqualification. *Id.* at 638.

Perfect moves for disqualification based on Cartafals producing Ms. Stoll, actually an employee of Perfect, for a deposition in the first action as against State LLC. Cartafals, by attorney affirmation, asserts that the witness was most qualified to testify on behalf of 17 State Street LLC in the original action. Ms. Stoll originally represented that she was employed by then non-party RFR. Indeed, during the deposition, she was never asked to clarify which entity's records she kept, maintained or referred to. She merely stated that Perfect is "where my checks come from." She used the term "we" to refer to RFR. Finally, she could not state whether her immediate supervisor was employed by Perfect.

Perfect does not submit evidence beyond Ms. Stoll's testimony which would indicate that there was an attorney client relationship formed between Ms. Stoll and Cartafals. Significantly, there is nothing to indicate that Cartafals knew before deposition that Ms. Stoll was an employee of Perfect. The testimony demonstrates that the witness considered herself an employee of RFR and Perfect interchangeably. Further, she was not employed by either party at the time of this incident, but made observations as one who worked for a tenant of the building. Lastly, the witness conceded she "came unprepared."

Wherefore it is hereby

ORDERED that plaintiff's motion to consolidate is granted and the above-captioned action is consolidated in this Court with Lillian Ferone vs. Perfect Building Maintenance and RFR Realty LLC, Index No. 101627/06 under Index No. 106824/04, and the consolidated action shall bear the following caption:

LILLIAN FERONE,

Plaintiff,

-against-

17 STATE STREET, LLC., PERFECT BUILDING

MAINTENANCE and RFR REALTY LLC.,

Defendants.

And it is further

ORDERED that the pleadings in the actions hereby consolidated shall stand as the pleadings in the consolidated action; and it is further

ORDERED that upon service on the Clerk of the Court of a copy of this order with notice of entry, the Clerk shall consolidate the papers in the actions hereby consolidated and shall mark his records to reflect the consolidation; and it is further

ORDERED the cross motion by Perfect Building Maintenance to strike this consolidated matter from the trial calendar is granted; and it is further

ORDERED that all parties are to comply with outstanding discovery demands by a date no later than April 30, 2007, and Plaintiff is to file a new note of issue by a date no later than July 20, 2007; and it is further

ORDERED that the cross motion to disqualify the Law Firm of Cartafals Slattery Turpin & Metaxas and strike the deposition of Deloy Stoll is denied; and it is further

ORDERED that, in light of the stipulation releasing the City of New York from all claims and cross claims with prejudice, the Trial Support Office is directed to reassign this case to a non-City part and remove it from the Part 5 inventory. Plaintiff shall serve a copy of this order on all other parties and the Trial Support Office, 60 Centre Street, Room 158. Any compliance conferences currently scheduled are hereby cancelled.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: March 14, 2007


EILEEN A. RAKOWER, J.S.C.

FILED
MAR 21 2007
NEW YORK
COUNTY CLERK'S OFFICE