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

PRESENT: HON. ROLANDO T. ACOSTA Justice

PART 61

Palmer

- v -

HOME DEPOT

INDEX NO. 116991/05

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

MS 001
E 8-8-07

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	Sep attached
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 FOR THE FOLLOWING REASON(S):

SO ORDERED

Dated: 8/1/07

ROLANDO T. ACOSTA J.S.C.

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

Jeannine J. Palmer individually and as Executrix of of the Estate of Raymond Palmer (named herein as Raymond D. Palmer),

Plaintiff,

– against –

The Home Depot U.S.A., Inc., Schindler Elevator Corporation, Beacon Court Condominium, 731 Commercial LLC and Vornado Realty Trust,

Defendants.

DECISION/ORDER

Index No. 116991/05

Seq. Nos. 1 & 2

Present:

Rolando T. Acosta
Supreme Court Justice

Motion Seq. Numbers 1 and 2 are consolidated for disposition.

The following documents were considered in reviewing plaintiff's motion (Seq No. 1) to renew and reargue a Compliance Conference Order dated January 5, 2007, which states that plaintiff's expert must sign a hold harmless agreement and general release prior to inspecting the elevator, and upon renewal or reargument, deleting that provision in the order, permitting the inspection of the escalator in question without plaintiff's expert signing a waiver, compelling defendant Schindler to remove 2-3 steps in the middle of the escalator as well as agreed to maneuvers, compelling Schindler to answer plaintiff's Supplemental Notice for Discovery and Inspection pertaining to Schindler's witness dated May 2, 2007, and extending plaintiff's time to file the Note of Issue; and defendant Schindler's motion for a protective order striking plaintiff's Notice for Discovery and Inspection and Supplemental Notice for Discovery and Inspection dated April 24, 2007 and May 2, 2007 respectively, and for a protective order striking defendants Beacon Court Condominium, 731 Commercial LLC and Vornado Realty Trust's, First, Second and Third Post-Deposition Notices for Discovery and Inspection to Schindler dated April 17, 2007, April 26, 2007, and April 30, 2007, respectively:

Papers	Numbered
Plaintiff's Order to Show Cause (Seq 1), Affirmations & Memorandum of Law	**1-2 (Exhibits 1-13)**
Affirmation in Opposition	**3**
Reply Affirmation	**4**
Schindler's Order to Show Cause (Seq. No. 2) and Affirmations	**1 (Exhibits A-E)**
Plaintiff's Affirmation in Opposition	**2 (Exhibits 12a-19)**
Other Defendants' Affirmation in Opposition	**3 (exhibits A-C)**
Reply Affirmation	**4**

There are essentially two issues here. The first, whether the Court should strike the final paragraph of the Compliance Conference Order dated January 5, 2007, which states that plaintiff's expert must sign a hold harmless agreement and general release prior to inspecting the escalator in question. And, second, whether to allow document discovery regarding, inter alia, Charles Novak, a mechanic for Schindler who serviced the Home Depot, and who was terminated for sabotaging an escalator at a Queens location several weeks after the accident in the present case.

Hold Harmless Waiver

Although styled as a motion to renew or reargue pursuant to CPLR 2221, plaintiff is really seeking to vacate a paragraph from a "So Ordered" Stipulation between the parties. Specifically, the first paragraph on page three of the January 5, 2007 "So Ordered" Stipulation states, "[plaintiff's] expert to sign a hold harmless agreement and general release pertaining to any and all injuries to [plaintiff's] experts or any other individual or party, arising out of or related to [plaintiff's] expert inspection." According to plaintiff's counsel, she did not know that her expert would not sign a hold harmless agreement. She also thought that she had agreed to a hold harmless agreement which would have plaintiff's expert hold Home Depot only harmless if the expert was injured during the inspection. The indemnification agreement submitted by the Home Depot, however, required the expert to hold harmless all persons or parties damaged in the inspection.

There is no requirement in the CPLR that plaintiff or any member of his team sign a release prior to conducting an inspection. See O'Neil v. Seatrain Lines, Inc., 111 Misc. 2d 1003 (Sup. Ct. N.Y. Co. 1981); Melis v. Veritas S.S. Co., 23 Misc. 2d 45 (Sup. Ct. N.Y. Co. 1969); Hindle v. National Bulk Carriers, Inc., 18 F.R.D. 198 (1955)("[i]t is unnecessary to determine now the exact extent of the duty, if any, owed [to an expert] for the purpose of obtaining evidence pursuant to Court authority. The extent of that duty, whatever it is, is fixed by law." [Defendant], by permitting access, is not doing a favor and is no position to stipulate that, in the event of an accident, it shall receive treatment more favorable than to which it would be entitled by law."). Indeed, general waivers of liability are inconsistent with the legislative intent of liberal disclosure. O'Neil v. Seatrain Lines, Inc., supra, 111 Misc. 2d at 1003-1004. "For this reason [the court noted] the legislature when enacting the Civil Practice Law and Rules permitted greater disclosure than had previously been granted under the Civil Practice Act. . . Attempts therefore to thwart discovery should be discouraged and broad inquiry encouraged." Id.

That being said, however, parties are free to chart their own course by stipulation. CPLR 2104; Morretta v. Dyson, 173 A.D.2d 257, 258 (1st Dept. 1991)("It has long been recognized that parties 'may to a large extent chart their own procedural course through the courts' and 'by their stipulations may in many ways make the law for any legal proceeding to which they are parties, which not only binds them, but which the courts are bound to enforce'"). A stipulation, however, is a contract, and like any contract it can be invalidated on such grounds as fraud, collusion, mistake, accident or overreaching. Hallock v. State of New York, 64 N.Y.2d 224, 230 (1984). "A unilateral mistake can be the basis for rescission if failing to rescind would result in unjust enrichment of one party at the expense of the other (see Weissman v Bondy & Schloss, 230 A.D.2d 465, 469 [1st Dept. 1997]), and the parties can be returned to the status quo ante without prejudice (see Broadway-111th St. Assoc. v Morris, 160 AD2d 182, 184-185 [1st Dept. 1990])." Cox v. Lehman Bros., Inc, 15 A.D.3d 239.

The party seeking to undo a stipulation bears a heavy burden given that "[t]he courts have a strong interest . . .in enforcing . . . agreements ..., especially those made in open court (CPLR 2104) 'where strict enforcement not only serves the interest of efficient dispute resolution but also is essential to the management of court calendars and integrity of the litigation process.'" Morretta v. Dyson, supra, at 258 (quoting Hallock at 230). Although Morretta dealt with a stipulation of settlement, enforcing a stipulated discovery agreement is also essential to the management of the court calendars.

Here, plaintiff seeks to vacate the hold harmless paragraph in the parties' "So Ordered" Stipulation dated January 5, 2207, based on a unilateral mistake. Her claim that she did not realize that Home Depot's indemnification agreement would be as broad as it is,

is belied by the express language in the Stipulation.

Her only true mistake was that she did not realize on January 5th that her expert would not sign a hold harmless agreement. Plaintiff has satisfied her heavy burden to vacate a portion of the stipulation. Given that general waivers of liability are inconsistent with New York's liberal disclosure and that there is no requirement in the CPLR that an expert sign a waiver, it is difficult to imagine that any expert would sign Home Depot's indemnification agreement. This would create an unjust result for plaintiff since plaintiff needs an expert's testimony, and vacating the hold harmless paragraph would simply return defendants to the status quo ante without prejudice. Accordingly, plaintiff's motion is granted and her expert may inspect the escalator in question without signing Home Depot's or any other defendants' indemnification agreement.

Protective Orders

Defendant Schindler's witness, John Soutar, was deposed on March 13 and 14, 2007. During his testimony, he noted that the mechanic who regularly serviced the escalators at the Home Depot where the accident occurred was Charles Novak. It was further ascertained that Mr. Novak did not return to his employ with Schindler following a union lockout that took place a few weeks following plaintiff's accident because he was caught vandalizing Schindler escalators at a Queens location. During the deposition, this Court allow inquiry into Soutar's personal knowledge about the circumstances that led to Novak's termination.

Following the deposition, both plaintiff and the other defendants submitted post-deposition Notices for Discovery and Inspection requesting, inter alia, information regarding Novak. Although the Court had initially stated during a compliance conference that it would not permit document discovery regarding Novak, after careful consideration, the Court will permit such discovery as relevant to whether Novak vandalized the escalator in question. The fact that there is no evidence at this juncture that Novak vandalized the escalator in the Home Depot on Lexington Avenue is of no moment. Given that Novak was terminated for vandalizing, this request is not a fishing expedition, and discovery on this issue may turn up relevant evidence. Accordingly, Schindler Elevator's request for a protective order is DENIED.

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion (deemed by the Court as a motion to vacate a paragraph from a "So Ordered" stipulation is GRANTED th the extent that the first paragraph of page three of the January 5, 2007 Stipulation is deleted and her expert may inspect the escalator in question without a hld harmless agreement; and it is further

ORDERED that Defendant Schindler's motion for protective order is DENIED; and it is further

ORDERED that Defendant Schindler respond to the outstanding discovery request within 30 days of this Order; and it is further

ORDERED that a Status Conference is scheduled for September 27, 2007 at 10:00 a.m. in Part 61; and it is further

ORDERED that the Note of Issue is extended to October 12, 2007.

This constitutes the Decision and Order of the Court

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Dated: August 1, 2007

ENTER

SO ORDERED

Rolando T. Acosta, J.S.C.

ROLANDO T. ACOSTA
J.S.C.