

Hughey v RHM-88, LLC
2008 NY Slip Op 30227(U)
January 22, 2008
Supreme Court, New York County
Docket Number: 0115793/2004
Judge: Doris Ling-Cohan
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SUPREME COURT OF THE STATE OF NEW YORK- NEW YORK COUNTY
PRESENT: Hon. DORIS LING-COHAN, Justice

PART 36

KEITH HUGHEY and ZIPPORIA HUGHEY,
Plaintiffs,

- v -

RHM-88, LLC, PRITCHARD INDUSTRIES, INC., et al.,
Defendants.

INDEX NO. 115793/04
MOTION DATE
MOTION SEQ. NO. 004
MOTION CAL.NO.

The following papers, numbered 1 to 11 were read on this motion and cross motion to/for : compel disclosure from expert witness and vacate statement of readiness.

Papers

<u>Numbered</u>	
Notice of Motion/Order to Show Cause - Affidavits - Exhibits	_____ 1,2,3,4,5 _____
Notice of Cross Motion - Affidavits - Exhibits	_____ 6,7 _____
Answering Affidavits - Exhibits (Memo) _____	_____ 8,9 _____
Replying Affidavits (Reply Memo) _____	_____ 10,11 _____

Cross Motion: Yes No

FILED

Upon the foregoing papers, it is ordered that this motion is granted, as set forth below.

JAN 28 2008

Background

NEW YORK COUNTY CLERK'S OFFICE

Plaintiffs bring this action to recover damages for personal injuries allegedly sustained by plaintiff Keith Hughey when he slipped and fell on January 18, 2004 on ice on a sidewalk in front of One and/or Two United Nations Plaza, on East 44th Street in New York, New York.

Defendant/second third-party plaintiff One United Nations Plaza Condominium (UNPC) and third-party defendant/fourth-party plaintiff/second fourth-party plaintiff United Nations Development Corporation (UNDC) move for an order, pursuant to CPLR 3101 (a) (4), 3101 (d) (1) (i) and (iii), directing plaintiffs' expert witness, William Marletta, Ph. D., CSP, to appear for a deposition.

Fourth-party defendant Cushman & Wakefield (C&W), the former managing of the buildings at issue, cross-moves for similar relief. Defendants RHM-88, LLC and Pritchard Industries, Inc. join in the motion and the cross motion.

Discussion

The scope of disclosure from an expert witness is prescribed by CPLR 3101 (d) , which provides, in pertinent part:

“(d) Trial preparation.

(1) Experts. (i) Upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which the expert is to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert’s opinion. ...

(iii) Further disclosure concerning the expected testimony of any expert may be obtained only by court order upon a showing of special circumstances and subject to restrictions as to scope and provisions concerning fees and expenses as the court may deem appropriate...”.

Defendants assert that plaintiffs’ expert report for Dr. Marletta failed to comply with the requirements of CPLR 3101 (d) (1), as it failed to adequately specify the facts, exhibits and documents upon which his testimony was based, it utilized conclusory terms, did not explain the basis for his conclusions, nor did it specify the dates when he inspected the accident scene. Defendants further assert that the plaintiff’s supplemental expert report did not cure the defects of the original report. In opposition, plaintiffs assert, however, that defendants did not establish the “special circumstances” required for discovery from an expert witness pursuant to CPLR 3101 (d) (1) (iii).

This matter was conferenced on May 17, 2007, and all sides agreed that plaintiff would:

“provide supplemental expert disclosure w/in 30 days re: expert Marletta detailing specific facts relied upon, as well as the date and time of any alleged inspection & the photos, other discovery and any depositions used as a basis of his opinion. Expert to also detail the specific statutory & code section(s) for which expert claims were violated.”

(So Ordered Stipulation dated 5/17/07.)

The motion and cross motion were adjourned to 6/21/07, the date of the next compliance conference. On such date, all sides agreed to file supplemental papers as to the sufficiency of

plaintiff's supplemental expert disclosure.

The issue before the court is whether plaintiff's supplemental expert disclosure, dated May 24, 2007, complies with the stipulation of June 25, 2007. In essence, the May 17, 2007 stipulation requires plaintiff's expert to: 1/ detail "specific facts relied upon"; 2/ give the "date and time of any alleged inspection"; 3/detail the photos, other discovery and depositions used as a basis of his opinion"; 4/ "detail the specific statutory and code section(s) which expert claims were violated".

Plaintiff's supplemental expert disclosure falls short of complying with the stipulation in that it fails to 1/ give the time of his inspection; 2/ specify each photo relied upon (if he is relying on every photo exchanged at the deposition, he must so state; otherwise, he must be more specific as to which photos he relied upon or attach copy of the photo to his next supplemental expert report); 3/ specify the statutory and code sections which were allegedly violated.

Thus, plaintiff is ordered to supply a third supplemental expert disclosure within 20 days, which will provide answers to the three categories (as was agreed upon in the 5/17/07 so ordered stipulation), and delineated in the preceding paragraph by the court. Further, such third supplemental expert disclosure shall provide a response, under the following three headings to avoid confusion:

1/ time and date of inspection;

2/ specify each photo relied upon;

3/ specify the statutory and code sections which were allegedly violated.

To the extent that movants seek more detailed facts, CPLR 3101(d)(1)(i) merely requires "disclosure in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion". Here, the expert has supplied "in reasonable detail the subject matter" he is expected to testify, "the substance of the facts and opinions" on which he is expected to testify, his "qualifications... and a summary of the grounds for [his] opinion", sufficient to satisfy such statute. While movants seek more

excruciating detail, CPLR 3101(d)(1)(i) only requires the general “substance of the facts and opinions”. See *Krygier v. Airweld, Inc.*, 176 AD2d 700, 701 (2d Dept 1991) (“Fundamental factual information” or “facts and opinions” upon which an expert’s opinions were based need not be provided, only the “substance of those facts and opinions”); see also *Weininger v. Hagedorn & Co.*, 203 AD2d 208, 209 (1st Dept 1994) (“[A]ny additional disclosure of the subject matter thereof could lead to the divulgence of facts upon which his opinion is based, and therefore should not have been directed” [citing *Krygier v. Airweld, Inc.*, 176 AD2d 700 (2nd Dept 1991)]); *Nedell v. St. George's Golf and Country Club, Inc.*, 203 AD2d 121, 122 (1st Dept 1994)(Plaintiff's response to defendant's demand for expert witness testimony disclosing in reasonable detail the substance of the anticipated testimony sufficiently complies with CPLR 3101(d)(1)(i)).

Moreover, movants failed to show any special circumstances supporting a request for a deposition of plaintiff's expert. Cf. *Coello v. Progressive Ins., Co.*, 6 AD3d 282 (1st Dept 2004) (Deposition granted as to plaintiff's expert where expert “appears to be the only person ever to examine the automobile after its recovery and thus the only witness with personal knowledge of its condition at the relevant time” but deposition limited to factual issues as “[t]here are no special circumstances that justify deposing him as to his expert opinion, i.e., his conclusions”).

FILED

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COUNTY CLERK'S OFFICE

Accordingly, it is

ORDERED that plaintiff shall provide a third supplemental expert disclosure above within 20 days of service of a copy of this order, with notice of entry; it is further

ORDERED that the motion and cross motion of defendants to conduct a deposition of plaintiffs' expert witness, Dr. William Marletta is denied; it is further

ORDERED that, within 10 days of entry, movants on the motion and cross-motion shall serve upon all parties to this action a copy of this decision and order, together with notice of entry.

This constitutes the Decision and Order of the Court.

Dated: January 22, 2008



Doris Ling-Cohan, JSC

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check If Appropriate: DO NOT POST REFERENCE

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Motions\Hughey.RHM - expert disclosureDLC.wpd