

Deal v Wood

2008 NY Slip Op 33214(U)

December 1, 2008

Supreme Court, Seneca County

Docket Number: 33029

Judge: W. Patrick Falvey

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STATE OF NEW YORK
SUPREME COURT COUNTY OF SENECA

Douglas W. Deal and Leesa M. Deal,
Plaintiffs,

-vs-

INDEX NO. 33029

James Wood, an individual d/b/a/
Woody's Pro-Clean Services,
Defendant.

APPEARANCES: Stephen R. Ricci, Esq.,
Attorney for Plaintiffs,

Hiscock & Barclay, LLP,
(Robert M. Shaddock, Esq., of Counsel)
Attorneys for Defendant.

MEMORANDUM-DECISION AND ORDER

W. Patrick Falvey, A. J.S.C.

Plaintiffs move by Order to Show Cause, pursuant to CPLR 3126, to strike the defendant's answer due to the defendant's willful and bad faith failure to disclose the name of an employee of defendant that was an eye witness to the events on August 3, 1999 which caused plaintiff Douglas Deal's injuries. [CPLR 3126(3)]. The matter was made returnable December 1, 2008, the day before the trial is scheduled to commence.

Plaintiffs served the defendant with the summons and complaint January 8, 2002. Plaintiffs on May 21, 2002, served interrogatories on defendant, in which plaintiffs demanded the names of defendant's employees who may have been present at the Hampshire Chemical site, Douglas Deal's employer and work site on August 3, 1999, when he was injured from falling

down stairs due to water located at the top thereof. Defendant supplied an answer to plaintiffs' interrogatories on January 8, 2003. Defendant therein identified four employees that were present, to wit: Allen Larsen, Debbie Bishop, Ron Steele and Tracy Kosowski. Defendant subsequently served an amended answer to plaintiffs' interrogatories on April 5, 2005, which eliminated Allen Larsen from the list of employees present.

Defendant served a second amended answer to plaintiffs' interrogatories on November 14, 2008, which added the name of Karen Kime as a witness to the accident.

On November 25, 2008 defendant, for the first time, acknowledged that another employee, Tammy Bishop, was present on the day of the accident. A third amended answer to plaintiffs' interrogatories was served November 25, 2008 at 4:00 PM stating the name in writing for the first time.

Plaintiffs had deposed one Debbie Bishop June 1, 2005. On the day of the accident, her name was Debra Larsen. At any rate, when deposed, she did not name Tammy Bishop. It is not clear whether she is related to Tammy Bishop, but plaintiffs assert that it may be potentially perjurious that she did not disclose Tammy Bishop's name at the time of the deposition.

The current disclosure of Tammy Bishop occurred only when plaintiffs' attorney asked defense counsel about another potential witness, which he had learned of two weeks prior through his own private investigator. Plaintiffs served their objection to this late notice by fax (Ex F)

Plaintiffs ask the court to strike the answer due to the extreme prejudice to them on the eve of trial, of learning of a potentially key witness to the case, who was an employee of defendant, and who defendant should have disclosed when the first interrogatories were served in

2003.

Plaintiffs cite Hill v Oberoi, 13 AD 3d 1095, 4th Dept, 2004 where the court found plaintiff met her burden of showing that a failure to comply with discovery was in bad faith, thus shifting the burden to defendant to show reasonable excuse. When defendant failed to do so, it was proper to strike the answer. Plaintiffs also cite Osterhoudt v Wal-Mart, 273 AD 2d 673 in support of their position.

Defendant, in response, provides his affidavit stating that he answered the January 3, 2002 interrogatories based on his memory concerning the day of the accident. He did not use daily or weekly time cards for each of the locations cleaned and the payroll records did not distinguish the location where his workers worked. He had other crews working the day of the accident at other locations and gave his best memory of who was at Evans (*sic*).

Defendant was advised on November 13, 2008 that Tracy Kozowski had named Tammy Bishop as also working on the day of the accident. He then reviewed his payroll records from Paychex which showed that a Tammy Bishop was in his employ from April 25, 1999 - September 29, 1999; but had no memory that Tammy Bishop was working at Evans (*sic*) that day. His only knowledge of this is from Tracy Kozowski's recent statement. Defendant does not know Tammy Bishop's current address nor does he know whether or not she has any knowledge of the accident, since the building is large and she could have been working in some other area at the time. Defendant stated that he was not trying to hide the names of employees. He asserts this was just an oversight.

The plaintiffs' interrogatories, served in 2003, asked among other things:

2. Identify every person known to you who has knowledge of facts

relating to the allegations asserted in P's complaint.

3. Identify every person known or reported to you who witnessed the incident referred to in the complaint.
4. Referring to the date of the accident identify all persons responsible for cleaning the floor in the area where the accident occurred.
5. Referring to the date of the accident alleged in the complaint identify all persons responsible for cleaning or maintaining any portion of the facilities of the Hampshire Chemical Corp.
26. State the name, address and job classification of the person or persons employed by you or acting on your behalf who were responsible for cleaning and/or maintaining the floors at the Hampshire Chemical Corp on 8/3/99.
28. State the name and address of each person claimed to witness the occurrence alleged in the complaint or any acts, omissions or conditions which existed at the time and place of the occurrence alleged in the complaint. If no such witnesses are known to the defendant, so state in the reply hereto. The undersigned will object upon trial to the testimony of any witness not so identified.

Based on these questions, the name of Tammy Bishop certainly should have been disclosed.

It is in the Court's sound discretion which remedy to impose for a failure to disclose. Under CPLR 3126, the court may order that the issues to which the information is relevant be deemed resolved in accordance with the plaintiffs' claims, or prohibit the disobedient party from opposing the plaintiffs' claims, or deny the defendant introducing the testimony of Tammy Bishop, or the court may strike the pleadings on a finding of wilfulness or bad faith on the part of the defendant. However, "Although the nature and degree of a sanction for a party's failure to comply with discovery generally is a matter reserved to the sound discretion of the trial court, the

drastic remedy of striking an answer is inappropriate absent a showing that the failure to comply is willful, contumacious, or in bad faith." Green v Kingdom Garage, 34 AD 3d 1373.

Plaintiffs have the initial burden of showing wilfulness or bad faith, and upon a prima facie showing the burden shifts to defendant to offer a reasonable excuse. Given the timely and specific requests by plaintiffs for the information and defendant's failure to provide Tammy Bishop's name until a week before trial, the plaintiffs have met their initial burden. The affidavit of the defendant is that this was an oversight, and not a willful failure to disclose. It should be noted that Tammy Bishop was a short term employee of defendant, only working for him for five months, including the date of the accident. But, as plaintiffs pointed out at oral argument, the plaintiffs were entitled to rely on the answers made to their interrogatories. The defendant did not offer in response to question "5" above, that he was answering it based on his best recollection, that he did not have any written records to confirm who of the ten employees he employed on that day were working at the Hampshire facility. Instead, he answered simply, with no qualifications, stating the names of four persons. If he had stated the qualifications to his answer that he now offers, the plaintiffs would have been able to seek further information, for example, asking for his complete employee roster of ten people, and they could have made timely investigation of their own. Instead, as stated in oral argument today, neither side has any current information about Tammy Bishop's whereabouts.

The Court reserved decision. However, while deliberating, the Court conducted a telephone conference with counsel wherein the Court was advised that defendant's investigator had just located Tammy Bishop who is living in the Village of Waterloo, County of Seneca.

Based on the entire record, the defendant's lack of disclosure was not wilful. Therefore,

striking the answer is too drastic a remedy. But, the Court must fashion a remedy to best serve the plaintiffs for this late disclosure.

IT IS THEREFORE,

ORDERED that the trial scheduled to commence with jury selection on December 2, 2008 is adjourned to Monday, March 30, 2009 at 9:00 A.M. so that the plaintiffs may depose Tammy Bishop and conduct any further investigation, and it is further

ORDERED that the defendant shall pay 1) the expense of any deposition of Tammy Bishop by plaintiffs; 2) costs, disbursements and plaintiffs' counsel fees for this motion; and it is further

ORDERED that plaintiffs' counsel shall submit an affidavit of legal services with the proposed order.

The foregoing constitutes the Opinion, Decision and Judgment of this Court.

SO ORDERED.

Dated: December 1, 2008

W. Patrick Falvey
Acting Justice Supreme Court
Seneca County