

Asare v Port Auth. of N.Y. & N.J.

2008 NY Slip Op 33725(U)

August 5, 2008

Supreme Court, New York County

Docket Number: 106194/2005

Judge: Michael D. Stallman

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

9

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7**

-----X

PHILOMENA ASARE,
Plaintiff,

- against -

Index No. 106194/2005

THE PORT AUTHORITY OF NEW YORK AND NEW
JERSEY, T.U.C.S. CLEANING SERVICE, INC.,

Decision and Order

Defendants.

-----X

THE PORT AUTHORITY OF NEW YORK AND NEW
JERSEY,

Plaintiff,

- against -

T.U.C.S. CLEANING SERVICE, INC.,

Defendant.

-----X

FILED
AUG 11 2008
COUNTY CLERK'S OFFICE
NEW YORK

HON. MICHAEL D. STALLMAN, J.:

In this action, plaintiff claims that, during a rainy morning on May 11, 2004, she slipped and fell while traversing the World Trade Center PATH station, which had been rebuilt after September 11, 2001. Plaintiff was allegedly walking down a ramp within the PATH station, intending to go the R train, when her left slipped and she fell down on her left foot. Corchia Affirm., Ex L, [Plaintiff EBT], at 16. Defendant The Port Authority of New York and New Jersey (Port Authority) impleaded T.U.C.S. Cleaning Service, Inc. (TUCS). Plaintiff thereafter amended the complaint to add TUCS as a direct defendant.

According to TUCS, the Port Authority has failed to disclose records relating to construction, maintenance, and repair of the premises where plaintiff fell and records relating to water leaks. EBT

001

testimony indicated that rain water would seep into the World Trade Center PATH station and drip from the ceilings. John Reidy, the general maintenance supervisor for the PATH station, testified at his EBT that he “was aware at the time that there were leaking issues from the roof at the World Trade Center.” Corchia Affirm., Ex M, at 14. TUCS moves for an order striking the third-party complaint.

TUCS has shown that the Port Authority has consistently failed to respond or belatedly responded to prior so-ordered stipulations as to discovery. Pursuant to prior so-ordered stipulations dated June 14, 2007, October 11, 2007, and January 24, 2008, the Port Authority agreed "to identify the contractors involved in the construction/repair associated with re-opening of the station, as well as repair records concerning a leak or other defective condition responsible for water leakage at or about subject station" Corchia Affirm., Exs Q, R, S. The June 14, 2007 so-ordered stipulation and order put Port Authority on notice that "All dates are firm date[s] & may not be adjourned absent leave of this Court. Non-complying parties may be subject to appropriate sanctions. Id., Ex Q. Similarly, the January 24, 2008 so-ordered stipulation and order stated, “In this 2005 person[al] inj. action, failure to comply with the terms contained herein may result in the imposition of sanctions.” Id., Ex S. The Port Authority waited until this motion to identify the contractors involved, without any explanation whatsoever why it had not complied with the deadlines set in prior so-ordered stipulations.

The preliminary conference order, dated November 30, 2005, directed the Port Authority to provide inspection reports/maintenance Reports for the area at issue. It was not until this motion, almost two and half years after the preliminary conference order, that the Port Authority responded, “The Port Authority has no inspection or maintenance reports for the area of this accident.” Calamia

Affirm., Ex D. Pursuant to so-ordered stipulations and orders dated October 11, 2007, and January 24, 2008, the Port Authority agreed to provide “records of complaints of water leaking at or about the subject station.” Corchia Affirm., Exs Q, S. For the first time, a Chief Maintenance Supervisor of the Port Authority states, “I have been specifically asked to locate records concerning a ramp which connected the World Trade Center Concourse with the entrance to the ‘R’ train downtown. I have found no records covering the maintenance of that ramp which was opened to the public for a short time after 9/11/01 and was then closed, and remains closed to this day.” Calamia Opp Affirm., Ex A [Burkhard Aff.] ¶¶ 3-4.

Both responses are inadequate. Given the lengthy delay in its response to this discovery demand, the Port Authority should have provided an affidavit that the search conducted for the records “had been a thorough one, or that it had been conducted in a good faith effort to provide these necessary records to plaintiff.” Jackson v City of New York, 185 AD2d 768, 770 (1st Dept 1992). Burkhard's affidavit, similar to the affidavit criticized in Jackson, “made no showing as to where the subject records were likely to be kept, what efforts, if any, were made to preserve them, whether such records were routinely destroyed, or whether a search had been conducted in every location where the records were likely to be found.” Ibid.

In addition, the Port Authority has yet to produce a copy of the accident/police report of plaintiff's accident (if it exists), which was directed in prior so-ordered stipulations of June 14, 2007, October 11, 2007, and January 24, 2008. At her EBT, plaintiff testified that police came and spoke to her for several minutes, but she was unsure whether the police were Port Authority police or NYPD. Plaintiff EBT, at 21. The Port Authority's response on this motion is “there are no police reports of any **other** accidents occurring at the location in question.” Calamia Opp. Affirm. ¶ 5

(emphasis added).

TUCS sent the Port Authority several letters, beginning in March 2007 until January 2008, which repeatedly asked for the accident/police report, identification of the contractors involved, and records of complaints of water leaking, with no response. See Corchia Affirm., Exs U-Z.

Lastly, as TUCS indicates, the Port Authority's belated response to TUCS's notice for discovery and inspection was more than 2 months overdue. The Port Authority's response does not include a response to Item # 7 of TUCS's notice, which sought "any written memoranda memorializing the ongoing leak situation at the World Trade Center temporary PATH station." Corchia Affirm., Ex T. The Port Authority also objected to Items # 1-3 as overly burdensome and overly broad, even though more than 60 days had passed after its response was due. Thus, the Port Authority had waived its right to object to TUCS's notice. However, the Court agrees that item #1 in TUCS's notice was palpably improper on its face as overly broad and burdensome, because it demanded "contracts for reconstruction of the World Trade Center Path station after September 11, 2001." Corchia Affirm., Ex T.

The Port Authority's bill of particulars to TUCS's demand is inadequate. Although the demand was sent in October 2006, it was only in opposition to this motion that the Port Authority provided a bill of particulars, which is incomplete. Item # 6 of the Demand for Bill of Particulars asked the Port Authority, among other things, if the alleged contract was oral or in writing, and asked the Port Authority to set forth all of the terms of the agreement or contract and to attach a copy of the contract if it were a written contract. Pursuant to the so-ordered stipulation dated January 25, 2007, "[defendants were] to provide copy of contracts between PA and TUCS [within] 30 days." Corchia Affirm., Ex O. The Port Authority responded only to demand for bill of particulars, stating,

“Yes, a written contract.” Calamia Opp. Affirm., Ex C. Item # 7 of the Demand for the Bill of Particulars demanded “what acts or omissions constituted the breach of the contracts or of agreement of [TUCS].” Corchia Affirm., Ex F. The Port Authority responded, “To be provided.” Ibid.

Although a willful failure to disclose can be inferred from long noncompliance with several so-ordered stipulations directing document production, coupled with inadequate excuses for these defaults (see Glasburgh v Port Auth. of NY & NJ, 193 AD2d 441, 441 [1st Dept 1993]), neither the drastic remedy of striking the Port Authority's third-party complaint nor an order of preclusion, which was granted in Glasburgh, are appropriate here. The Port Authority's claims against TUCS sound in breach of contract, in that TUCS was allegedly “obligated to rope off and clean unsafe areas and place appropriate warning signs to prevent accidents from occurring when unsafe floor conditions, due to construction, wetness, spillage, sickness and other types of hazards occurred.” Corchia Affirm., Ex D [Third Party Complaint] ¶ 5. Notwithstanding the Port Authority's belated compliance and non-compliance with prior discovery demands, the discovery sought would neither aid nor prejudice TUCS's defense to the Port Authority's claims against it. If anything, the existence of records which could corroborate testimony that the Port Authority had notice of a recurring condition benefits the plaintiff, not defendants.

Plaintiff is willing to proceed to trial on the discovery already exchanged and is not joining in enforcement of the so-ordered stipulations as to discovery. At this late stage of the litigation, it appears that the Port Authority has no clear factual theory of TUCS's liability, because it otherwise would have included a copy of the contract that the Port Authority claimed TUCS had breached, and would have alleged the provisions of the contract which were allegedly breached.

Accordingly, the appropriate remedy for the Port Authority's discovery lapses is to sever and

stay prosecution of the third-party claims until the Port Authority provides the outstanding discovery. See CPLR 3126 (3). If plaintiff does not prevail against defendants at trial based on the evidence already exchanged during discovery, then much of the discovery which TUCS seeks now becomes irrelevant to the Port Authority's claims of indemnification against TUCS. If plaintiff prevails against the Port Authority, the need for much of the discovery would still be rendered academic, insofar as much of the outstanding discovery which TUCS seeks would have gone to proving that the Port Authority had notice of an ongoing leak where plaintiff allegedly fell. Should the Port Authority fully comply with outstanding discovery prior to trial of the main action, then the Port Authority may make an application for the third-party claims and cross claims against TUCS to be rejoined with the trial of the main action.

CONCLUSION

In sum, the Port Authority has not provided the following: 1) a copy of the police report/incident report of plaintiff's accident; 2) an adequate affidavit of search for records of complaints of water leaking at or about the location where plaintiff fell, from the date when the location was re-opened until the date of plaintiff's accident, and an adequate affidavit of search for complaints of leaks in the area; 3) production of the written agreement or contract with TUCS that was allegedly breached; and 4) responses to items #2 and 3 of TUCS's notice for discovery and inspection.

Accordingly, it is hereby

ORDERED that the motion to strike the third-party complaint by T.U.C.S. Cleaning Service, Inc. is denied; and it is further

ORDERED that the third-party action is hereby severed, and trial of the third-party claims

and cross claims against T.U.C.S. Cleaning Service, Inc. is stayed until defendant Port Authority of New York and New Jersey provides the outstanding discovery.

Dated: 8/5/08
New York, New York

ENTER:



J.S.C.

BY MICHAEL D. STALLER

FILED
AUG 11 2008
COUNTY CLERK'S OFFICE
NEW YORK