

Terzi v Fortune Home Bldrs., LLC

2009 NY Slip Op 30871(U)

April 8, 2009

Supreme Court, New York County

Docket Number: 111163/07

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**

OZKAN TERZI & SEYHAN TERZI,
Plaintiffs,
- against -

FORTUNE HOME BUILDERS, LLC,
Defendant.

DECISION/ORDER

INDEX NO. 111163/07
MOTION DATE
MOTION SEQ. NO. 004
MOTION CAL.NO.

The following papers, numbered 1 to 4 were considered on plaintiff's motion to compel a further deposition of defendant's witness.:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion/Order to Show Cause - Affidavits - Exhibits.....	1, 2
Answering Affidavits - Exhibits	3
Reply Affirmation.....	4

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APR 20 2009
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NEW YORK

Cross-Motion [] Yes [X] NO

Upon the foregoing papers, plaintiff's motion to compel a further deposition of defendant's witness Chris Munich is granted, as detailed below.

This labor law action was commenced by plaintiffs to recover damages for personal injuries sustained by plaintiff Ozkan Terzi, while he was employed as a construction worker taper at a premises under construction at 2 Whippoorwill Road, Sutton Farm Drive, in Chappaqua, New York. Plaintiff has moved to compel a further deposition of Chris Munich, an employee of defendant produced for deposition upon consent, during the course of discovery.

According to plaintiff, a further deposition of Mr. Munich is necessary, since defendant's counsel refused to allow the witness to answer questions posed regarding the construction management contract entered into by defendant and with respect to defendant's duties and responsibilities at the site. Plaintiff maintains that defendant's counsel repeatedly offered answers to the witness and thwarted the deposition by preventing any line of questions regarding procedures in effect at the job site for safety and the issuance of safety equipment at the site. Plaintiff also argues that

defendant's counsel improperly failed to allow the witness to answer any questions with respect to the witness' opinion. Plaintiff asserts that defendant's counsel's objections violated the Uniform Rules for the Conduct of Depositions, and therefore a further deposition is warranted; this court agrees.

"It is beyond cavil that 'New York has long favored open and far-reaching pretrial discovery'." *Anonymous v. High School for Envtl. Studies*, 32 AD3d 353, 358 (1st Dept 2006) (citations and internal quotation marks omitted). Moreover, the interpretation of the words "material and necessary" in CPLR 3101(a), which addresses the scope of disclosure, while not authorizing a "fishing expedition," is, traditionally, quite liberal, and encompasses any good faith request for information that will assist in the preparation for trial. *Allen v. Crowell-Collier Publ. Co.*, 21 NY2d 403, 406-407 (1968); *Anonymous*, 32 AD3d at 358; *Twenty Four Hour Fuel Oil Corp. v Hunter Ambulance Inc.*, 226 AD2d 175 (1st Dept 1996); *Roman Catholic Church of The Good Shepherd v. Tempco Sys.*, 202 AD2d 257, 258 (1st Dept 1994); *Johnson v National R.R. Passenger Corp.*, 83 AD2d 916 (1st Dept 1981).

With respect to depositions, the Uniform Rules for the Conduct of Depositions (Part 221 of the Uniform Rules for the New York State Trial Courts) ("Rules") require that deponents :

"answer all questions at a deposition, except (i) to preserve a privilege or right of confidentiality, (ii) to enforce a limitation set forth in an order or (iii) when the question is plainly improper and would, if answered, cause significant prejudice to any person. An attorney shall not direct a deponent not to answer except as provided in CPLR Rule 3115 or this subdivision. Any refusal to answer or direction not to answer shall be accompanied by a succinct and clear statement of the basis therefor. If the deponent does not answer a question, the examining party shall have the right to complete the remainder of the deposition."

22 NYCRR 221.2. (emphasis supplied). Moreover, 22 NYCRR 221.1, titled "objections and depositions" specifically provides that: "[n]o objections shall be made at a deposition except those which pursuant to subdivision (b), (c) or (d) of Rule 3115 of the [CPLR], would be waived if not interposed..." (emphasis supplied). Such section further provides that, once a proper objection is made, it should be noted in the record, *"and the answer shall be given and the*

deposition shall proceed subject to the objections and to the right of a person to apply for appropriate relief pursuant to Article 31 of the CPLR.” 22 NYCRR 221.1(a).

Here, defendant’s counsel’s conduct during the course of the deposition of defendant’s witness, was not in compliance with the Rules, and therefore a further deposition of Mr. Munich is warranted. *See Parker v. Ollivierre*, ___ AD3d ___, 2009 WL 884623 (2nd Dept 2009). There were numerous improper objections, and once the improper objection was noted, defendant’s counsel did not advise the witness to answer the question as required. Further, at various times defendant’s counsel asserted in essence that a particular question was “plainly improper”¹ and therefore should not be answered; however, in conjunction with such objection defendant’s counsel failed to assert that if such question was answered, it would “cause significant prejudice”, as required, thus making such objections improper. *See* 22 NYCRR 221.2.

Further, the objections made by defendant’s counsel with respect to questions posed as to Mr. Munich’s opinion and/or hypothetical questions based upon his 22 years of experience as a construction manager, as to the safety standards, practices and procedures of defendant, were also not in accordance with the rules; the witness should have been instructed to answer such questions. *See Zambini v. Otis Elevator et al.*, 242 AD2d 453 (1st Dept 1997)(defendant’s employee with extensive experience with elevator repair and maintenance was to answer questions as to his opinion). It is noted that Mr. Munich, an employee of defendant, was produced for deposition pursuant to CPLR 3101(a), which requires “full disclosure of all matter material and necessary in the prosecution or defense of an action.” Clearly, defendant’s employee’s opinion based upon his experience is material and necessary in this case, for discovery purposes. *See Glaburgh v. Port Authority of New York and New Jersey*, 213 AD2d 196 (1st Dept 1995)(pursuant to CPLR 3101(a) an employee of defendant is “subject to deposition...without restriction as to opinion testimony).

¹ While defendant’s counsel’s actual objection was that the questions asking for the witness’ opinion were “palpably improper”, the Rules do not provide for such an objection.

While plaintiff seeks that the further deposition of defendant's witness be supervised by the court or that a special referee be assigned, since this deposition is the only remaining portion of discovery which needs to be completed, such a referral would cause significant delay and may not be necessary or fruitful. The continued deposition can be completed promptly and without incident, provided that the parties comply with the Rules. Thus, it is

ORDERED that *prior to the continued deposition of Mr. Munich*, defendant's counsel shall review the Uniform Rules for the Conduct of Depositions in detail, such that the continued deposition will proceed without delay, and in accordance with such Rules.

Should, however, a referee become necessary, plaintiff may seek such referral, within 5 business days of the parties' attempt at continuing the deposition, by letter to the court, detailing the circumstances, which defendant shall respond to within two (2) business days. The parties are, however, warned that the costs associated with any supervised discovery, shall be imposed upon the disobedient party, and the court will consider sanctions, if made by motion with a copy of the transcript, including striking of the answer.

The court will grant the within motion by plaintiff for costs to the extent that plaintiff is awarded \$100.00, as the costs associated with the making of the within motion, which shall be paid by defendant's counsel, to plaintiff's counsel, within 14 days of service of a copy of this order with notice of entry. CPLR 8202. Should plaintiff seek additional attorney's fees and other costs associated with the making of the within motion exceeding \$100.00, plaintiff's counsel shall serve and submit to the court a *detailed* affirmation indicating the time expended on the within motion, the hourly rate, and reasonableness of the fee, on or before April 30, 2009, or it is waived [See *Nager v. Teacher's Retirement System of City of New York*, 57 A.D.3d 389 (1 Dept 2008)] ; defendant may contest any additional claim for costs by responsive affirmation by May 15, 2009 (such submissions shall be in an envelope accompanied by a copy of this order on top).

Thus, it is

ORDERED that plaintiff's motion to compel is granted; it is further
ORDERED that within 30 days of service of a copy of this order with notice of entry,
defendant shall produce Chris Munich for a continued deposition²; such deposition shall be
conducted in accordance with the Uniform Rules for the Conduct of Depositions which
defendant's counsel shall read prior to the deposition; and it is further

ORDERED that the failure to comply with this order may result in the imposition of
sanctions, including the striking of pleadings, as a note of issue has already been filed and this
case has already been placed on the trial calendar; thus, this remaining discovery must be
completely expeditiously; it is further


ORDERED that within 14 days of service of a copy of this order with notice of entry,
defendant's counsel shall pay to plaintiff's counsel \$100.00, as costs associated with the making
of this motion, as detailed above.

It is further

ORDERED that within 10 days of entry of this decision/order, plaintiff shall serve a copy
upon defendant, with notice of entry.

This constitutes the decision/order of the Court.

Dated: 4/18/09


Doris Ling-Cohan, JSC

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Check if Appropriate: DO NOT POST

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² Such EBT shall be held on Friday, May 8, 2009, unless counsel agree otherwise.