

**Massey v Sterling Mets, L.P.**

2009 NY Slip Op 31267(U)

June 9, 2009

Supreme Court, New York County

Docket Number: 105992/07

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE, J.S.C.

PART 10

*Justice*

Index Number : 105992/2007

MASSEY, ELLEN

vs

STERLING METS LP

Sequence Number : 003

COMPEL

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

is motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**motion (s) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of even date.**

**FILED**  
JUN 12 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 6/9/09

JUDITH J. GISCHE, J.S.C. *JJG*

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10

-----X  
ELLEN MASSEY,

Plaintiff,

-against-

STERLING METS, L.P.; ARAMARK SPORTS  
and ENTERTAINMENT GROUP, INC. d/b/a  
ARAMARK @ SHEA STADIUM; SERVICE  
EMPLOYEES INTERNATIONAL UNION  
(SEIU) LOCAL 177; "JOHN DOE" and THE  
CITY OF NEW YORK,

Defendants.  
-----X

DECISION/ORDER

Index No.: 105992/07

Seq. No.: 003

Present:

Hon. Judith J. Gische

J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of  
this/these motion(s):

**Papers**

Pltff n/m (compel), w/MA affirm, exhs .....

Def x-mot w/ CV affirm, exhs .....

KMD affirm in opp, exhs .....

MA affirm in opp to x-mot .....

MA reply affirm .....

**FILED**  
Numbered  
JUN 12 2009  
2  
COUNTY CLERK'S OFFICE  
NEW YORK

*Upon the foregoing papers the court's decision is as follows:*

Plaintiff moves for an order compelling defendants Sterling Mets, L.P. ("Sterling")  
and Harry M. Stevens, LLC ("Stevens"), sued herein incorrectly as Aramark Sports and  
Entertainment Group, Inc. d/b/a Aramark @ Shea Stadium, to respond to plaintiff's  
discovery demands. CPLR § 3124. Since this motion was brought, Stevens has  
provided sufficient discovery responses and plaintiff is willing to withdraw that branch of  
the motion concerning Stevens. Sterling opposes the motion and cross-moves for an

order denying plaintiff's motion to compel.

This is a personal injury action. Plaintiff alleges that on April 9, 2007, she sustained injuries at Shea Stadium in Queens, New York, when an intoxicated person fell on her. Plaintiff does not know the identity of the alleged intoxicated person, and has sued that person in this action as "John Doe."

Sterling is the operator and tenant in possession of Shea Stadium. The principal dispute between plaintiff and Sterling within the context of this motion is plaintiff's request for the name and address of John Doe. This demand is numbered Item 6 in plaintiff's Third Notice for Discovery & Inspection dated July 25, 2008, which requests "[t]he name and address of the Individual who fell upon plaintiff on April 9, 2007 at Shea Stadium as alleged in the complaint." In its response, Sterling "objects to this demand as palpably improper and as seeking information protected by privilege, including the attorney work product doctrine. Sterling also objects to the characterization of the incident set forth in this demand."

CPLR § 3101 (a) broadly defines the scope of disclosure as "all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof . . ." Allen v. Crowell-Collier Pub. Co., 21 NY2d 403 (1968). The words, "material and necessary," are interpreted liberally so as to require disclosure of "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. . ." Allen v. Crowell-Collier Pub. Co., supra at 407. The test is one of "usefulness and reason." Id. The burden of showing that the disclosure sought is improper is upon the party seeking the protective order. Roman Catholic

Church of the Good Shepherd v. Tempco Systems, 202 A.D.2d 257, 258 (1st Dept 1994).

Plaintiff argues that Sterling should be required to divulge John Doe's identity and address because "a party may reasonably be required to disclose the name and address of a witness whose identity it has learned in investigating the case, but of whom the opposing party is ignorant." Sterling asserts in a blunderbuss fashion that "plaintiff's demand for this information would be subject to work product inasmuch as Sterling ascertained the identity through its own investigation, it would fall within the attorney work-product protection."

The attorney work product privilege is narrowly construed as materials prepared by an attorney, acting as an attorney, which contain his or her analysis and trial strategy. "The discovery of witnesses, even though the result of the attorney's zeal and investigative efforts, does not qualify as an attorney's work product under subdivision (c). Not every manifestation of a lawyer's labors enjoys the absolute immunity of work product" (Hoffman v. Ro-San Manor, 73 AD2d 207, 211 [1st Dept 1980]). Here, Sterling has merely stated that an attorney work product privilege exists to its investigation, if such investigation was in fact conducted, without even identifying what documents to which the privilege applies. They do not affirmatively state by someone with personal knowledge that an actual investigation was conducted. This is not a sufficient showing to sustain an attorney work product privilege (see i.e. Netherby Ltd. v. G.V. Trademark Investments, Ltd., 261 AD2d 161 [1st Dept 1999]; Eisic Trading Corp. v. Somerset Marine, Inc., 212 AD2d 451 [1st Dept 1995]; see generally Spectrum

Systems Intern. Corp. v. Chemical Bank, 78 NY2d 371 [1991]). Therefore, Sterling's response to Item 6 is insufficient.

Several other discovery demands remain outstanding. In Item 7, Plaintiff requests "the written rules, regulations and policies concerning the training of managers, vendors and alcohol compliance officers for identifying intoxicated patrons, which was in effect on April 9, 2007." Sterling "objects to this demand as palpably improper and unduly broad and burdensome", and maintains that defendant Stevens has already provided this information. In the court's view, Sterling's written policies regarding alcohol use at Shea Stadium is relevant and material to plaintiff's claims, and Sterling has not established that plaintiff has already been provided a sufficient response to the extent that such documents exists. Sterling also argues that it "has provided this information, subject to the parties' Confidentiality Agreement." No confidentiality agreement has been provided to the court, and as Sterling has not adequately responded to Item 7, the court hereby orders Sterling to properly respond to this item. Based upon the same reasoning, Sterling is also directed to provide a further response to Item 12, which requests the "[w]ritten rules, regulations and policies of Sterling Mets as to the sale and consumption of alcoholic beverages at Shea Stadium which were in effect on April 9, 2007."

In Item 9, plaintiff seeks the "[f]ull name and status of employment of the individual assigned to review photographs, video photography and surveillance of section 43 of Shea Stadium relating to the April 9, 2007 baseball game." Sterling maintains that the deposition testimony of its witness, Bruce Smith, makes its

boilerplate objection/response sufficiently responsive. Sterling produced for deposition a witness, Bruce Smith, who testified as follows:

Q. Do you know whether or not that incident involving Ellen Massey was photographed by surveillance cameras at Section 43.

A. I don't, I don't know.

Q. Are there surveillance cameras at Section 43?

...

A. I don't know.

Since Mr. Smith did not testify, one way or the other, whether surveillance videos of the relevant section of Shea Stadium exist from April 9, 2007, the court hereby orders Sterling to provide a sufficient response to Item 9.

Sterling objects to plaintiff's Item 13 request for "[f]ull names of the security personnel/employees who escorted and/or assisted and/or accompanied 'John Doe' out of Section 43 on April 9, 2007 after the subject occurrence. If no longer employed, please provide their last known addresses." The basis for the objection is that this request should be made in the form of an interrogatory and not a discovery demand. This distinction is of no moment and certainly is not a basis for Sterling's failure to respond. Sterling also maintains that it has responded sufficiently by providing "its security roll call for the date of the alleged accident." The security roll call has not been provided to the court, and to the extent that such a document most likely does not identify those individuals responsible for Section 43 of Shea Stadium, Sterling should itself clearly identify the security personnel/employees who escorted, assisted and/or

accompanied John Doe immediately after plaintiff's accident.

Sterling objects to plaintiff's request for all documentation regarding the ejection of fans and patrons from Shea Stadium on April 9, 2007 (Item 15) on grounds that this demand is overbroad, prejudicial, is not reasonably tailored in time or location, and amounts to a fishing expedition. The court outright rejects this argument. The mere fact that Shea Stadium sat approximately 55,000 persons does not make the demand burdensome because it is most likely that far less than that amount were actually ejected from the stadium on that date. Plaintiff claims that this information is probative and likely lead to information material and relevant to her case because plaintiff claims that Sterling is "derelict in ejecting obstreperous fans, such as 'John Doe' from [Shea Stadium]." In the court's view, the information requested is likely relevant to plaintiff's claims. Accordingly, the court finds Item 15 to be a reasonably tailored discovery request and directs Sterling to respond thereto.

Item 17 also remains outstanding, wherein plaintiff requests "[p]rior similar incident reports involving intoxicated patrons/fans falling on other patrons/fans at Shea Stadium for two years prior to the subject occurrence." Based upon the same reasoning as in Item 15, the court rejects Sterling's argument that this demand is overbroad and unduly burdensome. Accordingly, Sterling is directed to fully respond to Item 17 as well.

Accordingly, Sterling is directed to fully respond to Items 6, 7, 9, 12, 15 and 17 as set forth in plaintiff's Third Notice for Discovery & Inspection dated July 17, 2008 on or before June 26, 2009. Sterling's cross-motion for an order denying plaintiff's motion


to compel is denied in its entirety.

The compliance conference previously scheduled by the court for June 18, 2009, is hereby rescheduled to July 9, 2009. All parties are directed to appear at that time.

Any requested relief not expressly addressed has nonetheless been considered and is hereby denied and this shall constitute the decision and order of the Court.

Dated: New York, New York  
June 9, 2009

So Ordered:

  
\_\_\_\_\_  
Hon. Judith J. Gische, J.S.C.

**FILED**  
JUN 12 2009  
COUNTY CLERK'S OFFICE  
NEW YORK