

Velez v Bear Stearns & Co., Inc.

2010 NY Slip Op 33745(U)

February 8, 2010

Supreme Court, New York County

Docket Number: 601075/2003

Judge: Saliann Scarpulla

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

PRESENT: Saliann Scarpulla

PART 19

Index Number : 601075/2003
VELEZ, ROBERT
vs.
BEAR STEARNS
SEQUENCE NUMBER : 019
REARGUMENT/RECONSIDERATION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

n this motion to/for _____

PAPERS NUMBERED

1

2

3

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 is determined in accordance with the accompanying decision and order.

FILED
FEB 16 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/10/10

Saliann Scarpulla
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

-----X
ROBERT VELEZ,

Plaintiff,

- against-

BEAR STEARNS & CO., INC., HARVARD
MAINTENANCE, INC., HARVARD BUILDING
SERVICES INC., OTIS ELEVATOR COMPANY,
383 MADISON VENTURE, GREGORY/MADISON
LLC AND HINES PROPERTY MANAGEMENT,

Defendants.

-----X
For Plaintiff: Bamundo, Zwal & Schermerhorn, L.L.P.
111 John Street
New York, NY 10038
For Defendants: Geringer & Dolan LLP
5 Hanover Square, 3rd Floor
New York, NY 10004

Index No.: 601075/03

Submission Date: 1/12/2010

DECISION AND ORDER

Papers considered in review of this motion to reargue and resettle:

- Notice of Motion 1
- Aff in Opp 2
- Reply 3

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for personal injuries, defendants Bear Stearns & Co., Inc., Otis Elevator Company, 383 Madison Venture, Gregory/Madison LLC and Hines Property Management (“defendants”)¹ move for leave to reargue and to resettle Justice Edward H. Lehner’s November 2, 2009 order.

¹ The claims asserted against Harvard Maintenance, Inc. and Harvard Building Services Inc. have been discontinued.

Plaintiff Robert Velez ("Velez") commenced this action in or about April 2003 seeking to recover damages for injuries he sustained on April 22, 2002 when he allegedly tripped and fell on a misaligned landing while exiting an elevator at 383 Madison Avenue. Velez served and filed a note of issue dated September 5, 2006.

In a so-ordered stipulation dated October 19, 2007, the parties agreed to permit Velez to amend his bill of particulars to include a left shoulder injury and additional lost wages claims, to mark the case off the trial calendar pending completion of discovery, to allow Velez to provide certain outstanding discovery, and to have Velez appear for a deposition to supply testimony regarding his left shoulder injury claim, his right knee injury claim, his claims of lost wages, damages, physical disability, and inability to work and obtain employment, and the circumstances surrounding the claimed injuries/conditions.

Velez appeared for a deposition on May 1, 2008 at which time his counsel objected to certain questions posed by defendants' counsel and directed Velez not to answer those questions. Defendants then moved, *inter alia*, for an order directing Velez to appear for a deposition and to answer the questions which his counsel had directed him not to answer. In an order dated November 3, 2008, Judge Edward H. Lehner directed Velez to appear for another deposition. Velez appeared for a deposition on February 10, 2009. At that time, he was again directed by counsel to not answer those same questions.

On or about February 17, 2009, Velez served a second note of issue. In a letter dated February 23, 2009, defendants asked Velez to withdraw the note of issue and to provide certain outstanding authorizations. Defendants then moved, *inter alia*, to vacate the note of issue, to compel the production of outstanding discovery, to stay all trial proceedings for sixty days to permit the completion of discovery, and to compel Velez to appear for further deposition with the direction that Velez respond to the questions to which improper objections were taken at the prior depositions. At oral argument on June 19, 2009, Velez produced the outstanding discovery and the remaining parts of the motion were submitted for decision by Judge Lehner.

In an order dated November 2, 2009, Judge Lehner held that defendants' motion was "granted to the extent of precluding plaintiff from offering proof, testimony and evidence upon the trial of the action regarding his physical and medical condition unless the plaintiff fully complies and provides the matter sought in the movants' letter of counsel of February 23, 2009 as annexed to the moving papers within thirty days after service of a copy of this order with notice of entry."

Defendants now move to reargue and resettle Judge Lehner's November 2, 2009 order, arguing that Judge Lehner failed to address the issue of the deposition rulings and the request for a stay of all trial proceedings for sixty days.

Velez opposes the motion, arguing that the objections made at the May 1, 2008 and February 10, 2009 depositions were valid in that they were made to prevent Velez

from answering questions that were beyond the scope of the depositions or seeking irrelevant, prejudicial, or privileged information.

Discussion

Pursuant to CPLR §2221, a motion for reargument is addressed to the sound discretion of the Court, and may be granted upon a showing that the Court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law or for some reason mistakenly arrived at its earlier decision. *William P. Pahl Equip. Corp. v. Kassis*, 182 A.D.2d 22 (1st Dept. 1992).

Here, Judge Lehner's November 2, 2009 order did not address the portion of defendants' motion seeking to compel Velez to appear for a further deposition with rulings on the questions objected to by Velez's counsel at the May 1, 2008 and February 10, 2009 depositions and a stay of all trial proceedings for sixty days. Therefore, this court grants reargument.

Upon reargument, the court directs Velez to appear for a further deposition. The questions objected to by Velez's counsel at the May 1, 2008 deposition and again at the February 10, 2009 deposition are listed in the Pauline A. Mason affirmation submitted in support of defendants' motion to reargue at pages 11-13. Velez's counsel argues that he directed Velez not to respond to those questions because they were beyond the scope of the depositions or seeking irrelevant, prejudicial, or privileged information. However, pursuant to 22 NYCRR §221.2, "a deponent shall 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 of a court, or (iii) when the question is plainly improper and would, if answered, cause significant prejudice to any person.”

While Velez now argues that certain of those questions were objected to on the basis of attorney client privilege and Fifth Amendment privilege, it does not appear that those privileges were specifically asserted at the deposition. Only excerpts from both depositions were submitted, and within those excerpts, counsel seems to have merely objected to the questions and marked them for a ruling without asserting any privilege at that time.

If, at the next deposition, Velez’s counsel still believes that certain questions would violate Velez’s Fifth Amendment rights or violate the attorney client privilege, Velez’s counsel may direct Velez to not answer those questions, but must specifically assert the privilege. *See Lipp v. Zigman*, 14 Misc. 3d 1217A (Sup. Ct. Nassau Co. 2007). Also, Velez is directed to respond to the remaining questions listed in the Pauline A. Mason affirmation submitted in support of defendants’ motion to reargue at pages 11-13 at the next deposition and Velez’s counsel may preserve his objections to those questions for trial by objecting to the question while permitting Velez to answer.

In accordance with foregoing, it is

ORDERED that defendants Bear Stearns & Co., Inc., Otis Elevator Company, 383 Madison Venture, Gregory/Madison LLC and Hines Property Management’s motion for

leave to reargue and to resettle Judge Edward H. Lehner's November 2, 2009 order is granted and upon reargument, plaintiff Robert Velez is directed to appear for a deposition on or before March 9, 2010 at 9:30 a.m. or at another time and place agreed to by the parties, and Velez is to respond to the questions asked as directed above; and it is further

ORDERED that any and all trial proceedings are stayed until sixty days following the completion of Robert Velez's deposition.

This constitutes the decision and order of the court.

Dated: New York, New York
February 8, 2010

ENTER:

William J. Caspulle
J.S.C.

FILED
FEB 16 2010
NEW YORK
COUNTY CLERKS OFFICE