

Gunzburg v The Related Cos., Inc.

2012 NY Slip Op 30026(U)

January 6, 2012

Sup Ct, NY County

Docket Number: 115910/09

Judge: Louis B. York

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

PRESENT: LOUIS B. YORK
Jus. C.

PART 2

Gangberg

INDEX NO.

115910/09

MOTION DATE

MOTION SEQ. NO.

001

MOTION CAL. NO.

Related

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

is decided in accordance with the accompanying decision

FILED

JAN 10 2012

NEW YORK COUNTY CLERK'S OFFICE

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

Dated: 1/6/12

Ley
LOUIS B. YORK
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

-----X
ARLEEN GUNZBURG,

Plaintiff,

Index No. 115910/09

-against-

DECISION/ORDER

**THE RELATED COMPANIES, INC. and
QUALITY BUILDING SERVICES CORP.,**

FILED

JAN 10 2012

Defendants.

-----X
LOUIS B. YORK, J.S.C.:

NEW YORK
COUNTY CLERK'S OFFICE

Co-defendant Quality Building Services has withdrawn its motion for summary judgment. The Related Companies cross-move for summary judgment. This motion is still before the Court.

According to her complaint, on September 27, 2008 plaintiff Arleen Gunzburg fell on the premises of the Time Warner Center, located at 10 Columbus Circle, New York, New York. She alleges that as she walked toward the down escalator on the third floor, she slipped on wet marble purportedly caused by rainwater that patrons had tracked into the building. She sustained injuries to her left shoulder, which according to plaintiff required surgery and continue to present ongoing problems.

Subsequently, on November 9, 2009, plaintiff sued The Related Companies, Inc. ("Related"), which she believed owned the Time Warner Center. Plaintiff also sued Quality Building Services Corporation ("QBS"), the company contracted to perform cleaning and other janitorial services at the Time Warner Center. In its verified answer,

Related denied that it owned the area of the Time Warner Center described in plaintiff's complaint. It also denied that it had entered into a maintenance contract with Quality.

Related did not move to dismiss.

On April 14, 2010, the court held a preliminary conference. The order stated that the end date for all disclosure would be October 15, 2010 and that the parties needed to file the note of issue by October 22, 2010. Subsequently, plaintiff served discovery demands on defendants, which were dated July 1, 2010. In a compliance conference held on September 8, 2010, plaintiff contended that Related had not provided all discovery. Counsel for Related replied that he had provided some discovery earlier, but could not find the rest.

QBS subsequently moved for summary judgment. The motion stated that QBS did not have actual or constructive notice of the hazardous condition. Moreover, it contended that plaintiff based her allegations that QBS did have notice on pure speculation. Plaintiff's cross-motion against Related and QBS requests that the court (1) compel both defendants to comply with previous discovery demands, including an additional demand dated February 7, 2011, and produce key witnesses, and (2) permit her to amend her complaint to add additional defendants who may own or manage the Time Warner Center.

Related opposes the portion of the cross-motion that seeks discovery from it on the ground that it neither owns nor manages the Time Warner Center. Plaintiff's counsel knows this because Related informed plaintiff's counsel of this fact numerous times and even served a copy of the contract between QBS and the true owner of the Time Warner Center, A/R Retail. Related states that although it does not own the Time

Warner Center, it agreed to accept service on behalf of the true owner A/R Retail and respond to plaintiff's discovery demands "in the interests of judicial economy and moving this matter towards disposition." (Aff. in Opposition of Related ¶ 2). Related contends that in exchange for these actions it only asked the plaintiff to discontinue the proceedings against it. It sent a stipulation delineating this agreement to co-defendant, QBS, and plaintiff. QBS signed the stipulation, while plaintiff did not.

By this time, QBS had withdrawn its motion for summary judgment. Moreover, QBS subsequently provided its outstanding discovery to plaintiff. In response, plaintiff withdrew the section of her cross motion that applied to QBS. Therefore, only the portion of plaintiff's cross-motion remains before the court.

The court first considers Related's request to be dismissed from the action. This request is defective pursuant to CPLR § 2215, which requires a party to serve a notice of cross-motion upon the moving party. The notice of cross-motion alerts both the other party and the court of the affirmative relief sought. New York State Div. of Human Rights v. Oceanside Cove II Apartment Corp., 39 A.D.3d 608, 835 N.Y.S.2d 246 (2nd Dept. 2007). Therefore, where a party "merely requests" relief in its opposition the request should be denied. See Id. Here, where rather than comply with the mandates of CPLR § 2215, Related requested affirmative relief in its affirmation in opposition, Related undermined the underlying purpose of the notice of motion requirement. Therefore, the court denies Related's request to be dismissed from the action.

The court now considers the portion of plaintiff's cross-motion which seeks to compel discovery from Related. First, the court holds that plaintiff has satisfied NYCRR § 202.7(a) which requires who makes a discovery motion to submit an affirmation in

good faith. Plaintiff's affirmation outlines its attempts to secure discovery, including at numerous Court conferences.

Moreover, Related's opposition does not justify its failure to provide discovery. While Related contends that it does not have control over the requested documents, it has not submitted an affidavit supporting this statement. The contentions in Related's affirmation in opposition are set forth by its counsel rather than by Related itself. The party having knowledge of the facts must submit the affidavit, as the hearsay statements of the attorneys have no probative effect. See Taub v. Art Students League of New York, 63 A.D.3d 630, 882 N.Y.S.2d 94 (1st Dept. 2009).

Finally, plaintiff's demands meet the requisite discovery requirements. A court typically will grant a motion to compel discovery provided that the demands are not "overbroad, duplicative, or irrelevant." Stever v. Stever, 10 A.3d 358, 359, 780 N.Y.S.2d 382, 384 (2nd Dept. 2004). In this case, plaintiff served letter demands upon Related on July 1, 2010 and February 7, 2010. The demands included a copy of the contract between Related and QBS, incident reports of prior slip and falls before the date of the accident, and videotapes pertaining to the accident. Defendant does not dispute plaintiff's contention that information is relevant and reasonable. It simply states that it does not have the information. Accordingly, the court grants plaintiff's motion to compel discovery against Related. If Related does not have the compelled documents, it must submit a detailed affidavit stating so. The detail must, inter alia, include the dates when and the places where the search was conducted.

Finally, plaintiff requests leave to amend the complaint to name Related Urban Management Company, L.L.C., Related Urban Development, L.P., Quality Protection

Services, Inc., and A/R Retail, L.L.C., as additional defendants. The fundamental consideration in deciding a motion to amend is whether amending the complaint would prejudice the other party. See Banfi Products Corp. v. Gentile, 236 A.D.2d 348, 348, 653 N.Y.S.2d 647, 647 (2nd Dept. 1997). If there is no prejudice to the adverse party, "leave should be freely given." CPLR 3025(b). In this case, no parties would experience prejudice as a result of the proposed amendment. Plaintiff states that additional names of parties who might own the Time Warner Center surfaced during depositions. These parties are connected with Related, and reasonably could have inferred that they would be brought into the lawsuit. Furthermore, Related produced a witness affiliated with A/R Retail and provided documents of A/R as well. Plaintiff states that during the course of defendants' depositions it became evident that these parties are proper to the case. Finally, neither Related nor QBS opposes this portion of plaintiff's cross-motion or asserts any prejudice. Therefore, the court grants plaintiff leave to amend the complaint. Moreover, as (1) only a limited amount of discovery is sought in the current motion, and (2) based on the papers submitted here it appears that Related provided the relevant and available discovery which plaintiff required from the proposed additional parties, plaintiff has 15 days from receipt of the new defendants' answers to file the note of issue – or, 65 days from the entry of this order, based on the schedule set forth below.

Based on the above, it is

ORDERED that Quality's motion for summary judgment is withdrawn; and it is further

ORDERED that Related's request to be dismissed from the action is denied; and it is further

ORDERED that plaintiff's motion to compel discovery is granted, and within 30 days of service of a copy of this order with notice of entry, Related shall provides the outstanding discovery; and it is further

ORDERED plaintiff's cross-motion for leave to amend its complaint to add Related Urban Management Company, L.L.C., Related Urban Development L.P., Quality Protection Services, Inc. and A/R Retails, L.L.C. as additional defendants is granted; and it is further

ORDERED that plaintiff has 30 days from the entry of this order to serve an amended complaint and defendants have 20 days from such service to answer or make a pre-answer motion; and it is further

ORDERED that plaintiff has 65 days from entry of this order to file the note of issue.

ENTER:

FILED

JAN 10 2012

NEW YORK
COUNTY CLERK'S OFFICE

Louis B. York, J.S.C

LOUIS B. YORK
J.S.C.

Dated: 1/6/12