

De La Cruz v New York Palace Hotel
2012 NY Slip Op 32325(U)
September 4, 2012
Supreme Court, New York County
Docket Number: 103034/2010
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER
Justice

PART 15

Index Number : 103034/2010
DELACRUZ, FATIMA
vs.
N.Y. PALACE HOTEL
SEQUENCE NUMBER : 008
ORDER OF PROTECTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, It is ordered that this motion is

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

~~DECIDED~~ ~~ACCOMPANIED~~ ~~WITH~~ ~~ORDER~~

HON. EILEEN A. RAKOWER

FILED

SEP 10 2012

COUNTY CLERK'S OFFICE
NEW YORK

~~DECIDED~~ ~~ACCOMPANIED~~

Dated: 9/4/12



HON. EILEEN A. RAKOWER

J.S.C.

1. CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X

FATIMA DE LA CRUZ,

Plaintiff,

Index No.103034/10

- against -

Decision and Order

Mot. Seq. 08

NEW YORK PALACE HOTEL, DORCHESTER
SERVICES, INC., ALLSTATE OVERHEAD
GARAGE DOORS, INC., ACME ROLLING STEEL
DOOR, CORP. ARCHDIOCESE OF NEW YORK,
Defendants.

-----X

AMEDEO HOTELS, LTD d/b/a NEW YORK
PALACE HOTEL,

Third-Party Index No.:
590674/10

Third-Party Plaintiff,

-against-

MICHAEL SKURNIK WINES, INC.

Third-Party Defendant.

-----X

ACME ROLLING STEEL DOOR CORP.,

Second Third-Party

Second Third-Party Plaintiff, Index No.: 590835/10

-against-

MICHAEL SKURNIK WINES, INC.

Second Third-Party Defendant.

-----X

AMEDEO HOTELS, LTD., d/b/a NEW YORK PALACE
HOTEL,

Third Third-Party
Index No.:

Third Third-Party Plaintiff,

-against-

FOND DU LAC COLD STORAGE, LLC,

Third Third-Party Defendant.

-----X

AMEDEO HOTELS, LTD., d/b/a NEW YORK PALACE
HOTEL,

Fourth Third-Party
Index No. 590202/12

Fourth Third-Party Plaintiff,

-against-

OTIS ELEVATOR COMPANY,

Fourth Third-Party Defendant

-----X

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff Fatima De La Cruz brings this action to recover money damages for personal injuries allegedly incurred in a freight elevator accident at the New York

[*3]
Palace Hotel, located at 455 Madison Avenue in the County and State of New York, on November 6, 2007. Plaintiff claims that while in the course of her employment, she was making a delivery at the New York Palace Hotel, and that she sustained personal injuries when she was struck by a closing screen/gate as she entered the hotel's freight elevator.

Fourth third-party defendant Otis Elevator ("Otis") presently moves for a protective order pursuant to CPLR §3103 to vacate or modify plaintiff's notice for discovery and inspection, dated May 10, 2012, and for a confidentiality order with regard to any trade secret materials that are to be disclosed. Plaintiff cross moves pursuant to CPLR §§3124 and 3126 compelling Otis to respond to its notice.

CPLR §3103(a) provides that "the court may... on motion of any party... make a protective order denying, limiting, conditioning or regulating the use of any disclosure device" in order to "prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice . . .".

CPLR §3101(a) generally provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." The Court of Appeals has held that the term "material and necessary" is to be given a liberal interpretation in favor of the disclosure of "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity," and that "[t]he test is one of usefulness and reason" (*Allen v. Cromwell-Collier Publishing Co.*, 21 N.Y.2d 403, 406 [1968]).

During the pendency of this motion, counsel for Otis and plaintiff entered into a stipulation and order of confidentiality. In his reply affirmation, Otis' counsel John A. McCarthy states that this does not resolve the confidentiality issues because counsel for all of the parties have not executed the stipulation. In addition, after Otis filed its motion, plaintiff's counsel, by letter dated June 19, 2012, also agreed to narrow plaintiff's demands to the following requests:

1. Any and all records demonstrating the inspection, repair, testing or installation of the Slimscreen light curtain and the elevator cab gate (and its controller) for the period of two years prior and one year after the incident);
2. A listing of all components comprising the elevator at issue, including the slimscreen and cab gate, at the time Otis entered into the maintenance contract

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for this elevator;

3. The production of Jimmy Bennett for an EBT and all documents used or referred to by Jimmy Bennett in connection with his May 13, 2007 inspection of the elevator; and

4. All documents used in the drafting of the On-Line History Report involving the May 13, 2007 inspection of the elevator.

Mr. McCarthy states that the letter was presented to him by plaintiff's counsel at court at the June 19, 2012 compliance conference and objects to these demands as overly broad and improper.

As to plaintiff's demand for records "demonstrating the inspection, repair, testing or installation of the Slimscreen light curtain and the elevator cab gate (and its controller) for the period of two years prior and one year after the incident," Otis states it has already provided service records for the nine months prior to the alleged incident. Otis objects to records for a time period greater than nine months prior, and also as to any post-accident. "It is well settled that evidence concerning post-accident repairs is generally inadmissible absent certain exceptions and is never admissible as proof of admission of negligence." (*Fernandez v. Higdon Elevator Co.*, 220 A.D. 2d 293 [1st Dept 1995] (citation omitted)).

As to plaintiff's demand for "[a] listing of all components comprising the elevator at issue, including the slimscreen and cab gate, at the time Otis entered into the maintenance contract for this elevator," Otis objects on the basis that this is an improper request and subjective. Otis states that plaintiff's counsel and expert have previously inspected the elevator and can make his or her own list of components.

As to plaintiff's demand for "[t]he production of Jimmy Bennett for an EBT and all documents used or referred to by Jimmy Bennett in connection with his May 13, 2007 inspection of the elevator," Otis states that it has already agreed to produce Mr. Bennett for deposition. As for the request for documents, Otis' counsel states that he has advised plaintiff's counsel that "the chances are remote that Mr. Bennett utilized any documents at all, or even referenced any [documents] and that Mr. Bennett can address any documents he may have used at his deposition." As to plaintiff's demand for "[a]ll documents used in the drafting of the On-Line History Report involving the May 13, 2007 inspection of the elevator," Otis' counsel states

[*5]
that it advised plaintiff's counsel that "that there should be no documents used in the drafting of the report." Plaintiff is entitled to these documents requested in these two demands to the extent that they exist prior to Mr. Bennett's deposition, and Otis is obligated to produce them or to state with certainty if there are none.

Accordingly, while Otis has demonstrated a basis to limit and modify certain of plaintiff's demands, it is directed to comply with other demands.

Wherefore it is hereby,

ORDERED that fourth third-party defendant Otis Elevator Company's motion for a protective order and plaintiff Fatima De La Cruz's cross motion to compel is granted that Otis is directed to provide "[a]ny and all records demonstrating the inspection, repair, testing or installation of the Slimscreen light curtain and the elevator cab gate (and its controller) for the period" of two years prior to the alleged accident" to the extent not previously produced; and it is further

ORDERED that plaintiff Fatima De La Cruz's demand for "[a] listing of all components comprising the elevator at issue, including the slimscreen and cab gate, at the time Otis entered into the maintenance contract for this elevator" is stricken as an improper disclosure request; and it is further

ORDERED that fourth third-party defendant Otis Elevator Company shall produce "all documents used or referred to by Jimmy Bennett in connection with his May 13, 2007 inspection of the elevator" and "all documents used in the drafting of the On-Line History Report involving the May 13, 2007 inspection of the elevator" ten days prior to the Jimmy Bennett's deposition to the extent that they exist; and it is further

ORDERED that to the extent that any party alleges that requested discovery contains confidential or proprietary information and seeks a protective order, the moving party is directed to submit the requested discovery, along with a privilege log, to the Court for *in camera* review, with the motion for a protective order.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: 9/4/12



EILEEN A. RAKOWER, J.S.C.