

Cioffi v S.M. Foods Inc.
2013 NY Slip Op 32585(U)
February 11, 2013
Sup Ct, Westchester County
Docket Number: 55391/2011
Judge: Joan B. Lefkowitz
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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

-----X
FREDERICK M. CIOFFI and ELISABETTA CIOFFI,

Plaintiffs,

-against-

DECISION & ORDER

Index No.:55391/2011
Motion Date: Jan. 7, 2013
Seq No. 11

S.M. FOODS, INC., GFI BOSTON, LLC, ATLANTA FOODS INTERNATIONAL, RUSSELL McCALL'S INC., RUSSELL McCALL'S INC. d/b/a SHEILA MARIE FOODS, SHEILA MARIE IMPORTS, DOUG JAY, RYDER TRUCK RENTAL, INC., PLM TRAILER LEASING and DANIEL E. BURKE,

Defendants.

-----X
S.M. FOODS, INC., GFI BOSTON, LLC, PLM TRAILER LEASING and DANIEL BURKE,

Third-Party Plaintiffs,

-against-

VILLAGE OF TUCKAHOE and VINCENT PINTO,

Third-Party Defendants.

-----X
LEFKOWITZ, J.

The following papers were read on this motion by plaintiffs for an order (1) striking defendants' answers for their failure to respond to various demands contained in plaintiffs' April 30, 2012 Notice to Produce, other discovery demands and Interrogatories and failure to comply with the directives contained in this court's September 27, 2012 decision and order; (2) precluding defendants from offering evidence at trial or from rebutting the testimony of plaintiffs on various issues due to defendants' failure to comply with this court's September 27, 2012 decision and order; (3) directing further disclosure by defendants; and (4) for costs, sanctions and attorneys fees for their frivolous conduct in refusing in good faith to make disclosure.

Order to Show Cause-Affirmation/Affidavit in Support- Memorandum of Law - Exhibits
Affirmations in Opposition - Exhibits

Upon the foregoing papers and the proceedings held on January 7, 2013, this motion is decided as follows:

In this personal injury action, plaintiffs allege that on or about May 22, 2009, plaintiff Frederick Cioffi, a police officer for the Village of Tuckahoe, sustained serious personal injuries when he was struck by a tractor trailer while performing a routine vehicle stop. Plaintiffs allege that Mr. Cioffi was injured due to the negligence of defendants in the ownership, leasing, operation, control, management, maintenance and repair of the tractor trailer involved in the accident.¹

This action involves complex matters related to the ownership of the tractor trailer that struck the injured plaintiff, Mr. Cioffi. Plaintiffs allege that at the time of the accident, defendant Daniel E. Burke (“Burke”), who was the driver of the tractor trailer, was on the payroll of GFI Boston LLC (“GFI Boston”), but believed his employer was “Sheila Marie.”² Furthermore, plaintiffs allege that defendant SM Foods leased the trailer, and that defendant GFI Boston rented the tractor portion of the tractor trailer from defendant Ryder Truck Rental, Inc. (“Ryder”).

Ryder had moved for summary judgment on the basis that it was immune from liability pursuant to the Graves Amendment.³ On or about August 13, 2012, the court (Smith, J.) granted Ryder’s motion and dismissed plaintiffs’ claims against Ryder. Plaintiffs moved to renew and reargue the August 13, 2012 decision and order. On or about November 20, 2012, the court (Smith, J.) granted plaintiffs’ motion to renew and reargue and reinstated plaintiffs’ complaint as against Ryder.

On or about September 27, 2012, this court directed defendants to respond to certain discovery demands served by plaintiffs on or before October 17, 2012. Pursuant to that same order, this court also directed defendants to respond to certain interrogatories contained within plaintiffs’ first set of interrogatories on or before October 17, 2012.

¹On or about August 7, 2009, plaintiffs filed the initial complaint in this action under a different index number. According to plaintiffs, during the course of discovery, they became aware of additional parties that should be named as defendants. Thus, on or about September 13, 2011, plaintiffs filed a new summons and complaint, bearing the current operative index number.

² In addition, plaintiffs assert that Sheila Marie is a trade name and key identifier for the business of defendant SM Foods, Inc., and that at the time of the accident, defendant Russell McCall’s Inc. had infused that company with capital and was paying all its bills.

³ The Graves Amendment, 49 USC § 30106, potentially provides vehicle renters and lessors with a statutory basis for dismissing vicarious liability claims in motor vehicle accident lawsuits.

On or about October 17, 2012, defendants Atlanta Foods International, Russell McCall's Inc., and Doug Jay (the "Atlanta Defendants") responded to plaintiffs' discovery demands and plaintiffs' first set of interrogatories.

On or about October 17, 2012, defendants SM Foods, Inc., GFI Boston LLC, PLM Trailer Leasing and Daniel Burke (the "GFI Defendants") responded to plaintiffs' discovery demands and plaintiffs' first set of interrogatories.

On or about November 23, 2012, plaintiffs served a third notice to produce on defendants.

On this motion, plaintiffs argue that defendants did not sufficiently respond to plaintiffs' discovery demands and interrogatories. With respect to the Atlanta Defendants' responses, plaintiffs aver that these defendants offered vague, conclusory responses that the discovery should be obtained from some other party since counsel for the Atlanta Defendants does not represent the parties from whom the discovery is being sought. Furthermore, plaintiffs argue that defendants did not establish that the documents being sought do not exist. Similarly, plaintiffs aver that the Atlanta Defendants' responses to plaintiffs' first set of interrogatories is incomplete and does not provide sufficient information.

With respect to the discovery and interrogatory responses of the GFI Defendants, plaintiffs also aver that the responses are vague, conclusory and deficient. With respect to the discovery demand which requested defendant Ryder's rules and regulations, plaintiffs' argue that the GFI Defendants' response that "Ryder is no longer a party to this action" is insufficient since the claims against defendant Ryder have now been reinstated. In addition, plaintiffs aver that the GFI Defendants claim in a conclusory fashion that they are not in possession of many of the documents requested. With respect to the GFI Defendants' interrogatory responses, plaintiffs claim that the responses are unsworn and unresponsive. The GFI Defendants served a subsequent verified interrogatory response, however, plaintiffs argue that the response is still not sufficient as no additional information was added. Plaintiffs also submit the affidavit of Thomas G. Fiorenza, CPA, in support of the instant motion. Mr. Fiorenza asserts that the documents produced by defendants are incomplete.

In opposition to this motion, defendants assert that they have complied with this court's September 27, 2012 decision and order, and therefore plaintiffs' motion should be denied. The Atlanta Defendants assert that defendants' responses to plaintiffs' third notice to produce on November 23, 2012 are not a proper subject on this motion as it was served after the September 27, 2012 decision and order. All defendants argue that their discovery demands and interrogatory responses are complete. With respect to the GFI Defendants' interrogatory responses, these defendants also aver that the responses provided were properly verified by John Greeley.

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action." The phrase "material and necessary" is "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will

assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason” (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 288 NYS2d 449 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139, 902 NYS2d 426 [2d Dept 2010]). However, “a party does not have the right to uncontrolled and unfettered disclosure.” (*Merkos L'Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 408, 873 NYS2d 145 [2d Dept 2009]; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531, 845 NYS2d 124 [2d Dept 2007]). CPLR 3103(a) provides the Court may issue a protective order “denying, limiting, conditioning or regulating the use of any disclosure device” to “prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.”

Here, in response to this court’s September 27, 2012 decision and order, defendants served responses to plaintiffs’ discovery demands and first set of interrogatories on or about October 17, 2012. Therefore, this court will not strike defendants’ answers or preclude defendants from testifying at trial. However, certain defendants objected to some discovery demands and interrogatories on the basis that defendant Ryder was no longer a party in the action, and claims against Ryder have now been reinstated. Thus, plaintiffs are entitled to supplemental responses from those defendants concerning defendant Ryder. In addition, to the extent defendants objected to the discovery demands on the basis that they do not have possession, custody or control over certain documents, defendants shall provide an affidavit from a person with knowledge detailing the search conducted for the documents, and identifying any third parties who may be in possession of such documents.

In view of the foregoing, it is


ORDERED that the branch of plaintiffs’ motion directing further disclosure by defendants is granted to the following extent: for each document request that defendants claim to not have possession, custody or control, defendants shall provide, on or before February 25, 2013, an affidavit from a person with knowledge detailing the search conducted for documents responsive to the particular discovery demand, the results of that search, and identifying any third parties who may be in possession of the documents; and it is further

ORDERED that on or before February 25, 2013, defendants shall serve supplemental responses to plaintiffs’ discovery demands or interrogatories only to the extent they objected to a demand or interrogatory on the basis that defendant Ryder was not a party to the action; and it is further

ORDERED that the remaining branches of plaintiffs’ motion are denied; and it is further

ORDERED that the parties shall appear for a Compliance Conference in Courtroom 800 at 9:30 a.m. on March 20, 2013.

Dated: White Plains, New York
February 11, 2013


HON. JOAN B. LEFKOWITZ, J.S.C.

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cc: Compliance Part Clerk