

Benedict v Kemeys Cove Condominiums

2013 NY Slip Op 32835(U)

June 10, 2013

Supreme Court, Westchester County

Docket Number: 50148/12

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

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
LORI BENEDICT,

Plaintiff,

-against-

KEMEYS COVE CONDOMINIUMS and STILLMAN
MANAGEMENT, INC.,

Defendants.
-----X

DECISION & ORDER

Index No. 50148/12
Motion Date: June 10, 2013

Seq. No. 2

LEFKOWITZ, J.

The following papers¹ were read on this motion by plaintiff for an order pursuant to CPLR 3126 compelling defendants to comply with plaintiff's Notice to Produce dated January 22, 2013.

- Order to Show Cause - Affirmation in Support - Exhibits A-F
- Affirmation in Opposition - Exhibit A-E

Upon the foregoing papers and the proceedings held on June 10, 2013, this motion is determined as follows:

Plaintiff commenced this action to recover damages for, inter alia, personal injuries which she allegedly sustained when she slipped and fell on a private roadway owned by defendant Kemeys Cove Condominiums (hereinafter "defendant condominium) as the result of an accumulation of ice and snow. Plaintiff alleges, inter alia, that she was injured due to defendants' negligence in the maintenance and control of the premises, allowing ice and snow to accumulate, failing to properly remove the ice, negligently removing the ice, failing to properly apply salt or other de-icing agents, and permitting the hazardous condition to remain for a long and/or unreasonable time.

On January 22, 2013, Andrea Ostrowe, a member of defendant condominium's Board at the time of plaintiff's accident, testified at a deposition, in relevant part, as follows: The day of

¹ The court has not considered the Affirmation in Reply submitted by plaintiff insofar as the Order to Show Cause directed that no reply papers shall be accepted. Plaintiff, however, was given the opportunity at oral argument to reply to the opposition.

plaintiff's accident there was a "substantial" snow storm. Defendant condominium owns a pickup truck with a snowplow and salter, which Bruce Benedict, the condominium's full time superintendent and plaintiff's husband, used for snow removal. Defendant condominium had a contingency plan to call the landscaper, Total Turf, to help remove snow if the snow is over a certain amount. The pending snowstorm was discussed in advance by either email or by telephone and the landscaper was notified a day or two in advance to help with the snow removal. The morning of plaintiff's accident and before the accident, Ms. Ostrowe took a photograph of plaintiff in the parking lot of the condominium, the snow had already been plowed at that time and there was some compacted snow on the asphalt. She gave the photograph to "the insurance person." Ms. Ostrowe was walking with plaintiff, who was walking her dog, when plaintiff slipped and fell. Plaintiff's accident occurred in a roadway which led to the condominium's dog walk and tennis courts. The roadway where plaintiff fell had just been plowed prior to the accident. Plaintiff slipped and fell near the curb of the roadway when plaintiff's dog "pulled into the grassy area" and the dog's leash came out of plaintiff's hand. There was compacted snow on the roadway where plaintiff fell.

By Notice to Produce dated January 22, 2013, plaintiff demanded defendants to produce certain discovery, including (1) photograph Andrea Ostrowe testified that she took of plaintiff at defendant condominium just before the accident, (2) all memos, emails and other writings, documents or correspondence regarding snow removal that was utilized as protocol or procedure on the date of the accident; and (3) any emails made between Board members of defendant condominium regarding plaintiff's accident.

By Response to Notice for Discovery and Inspection dated March 21, 2013, defendants objected to the demand for the production of the photograph of plaintiff taken by Ms. Ostrowe on the date of the accident on the grounds that the photograph was not taken at or near the location of the accident and was taken hours prior to the accident. Defendants asserted that the photograph would not be probative of the conditions or the location of the accident at or near the time of the accident or the condition of the plaintiff at or near the time of the accident. As to the demand for memos, emails or other writings regarding snow removal utilized as protocol or procedure, defendants responded that there were no memos, emails or other writings that were used as protocol or procedure for snow removal on the date of the accident. Finally, as to the demand for any emails made between or among members of defendant condominium's Board, defendants objected to the demand on the grounds that it was vague, overbroad, unduly burdensome, invasive and violative of the privacy rights of individuals, may contain privileged matter or matter developed in anticipation of litigation, and improper since the individual board members were not named as defendants and did not individually have the power to act upon any matter regarding the operation of defendant condominium.

Plaintiff now seeks an order compelling defendants to comply with plaintiff's Notice to Produce. Plaintiff specifically seeks an order compelling defendants to produce the following: (1) the photograph taken of plaintiff by Andrea Ostrowe prior to the accident; (2) all memos, emails, writings, documents or correspondence regarding snow removal that was utilized as

protocol or procedure on the date of the accident; and (3) emails between members of defendant condominium's Board regarding plaintiff's accident about which Andrea Ostrowe testified at her deposition. Plaintiff contends that the photograph of plaintiff outside on the day of the accident, but before the accident, is discoverable insofar as it depicts the extent of the snow at the time just before the accident, as well as plaintiff's clothing and the conditions at the time of the accident. Plaintiff asserts that although the question of whether the photograph will be admissible at trial is arguable, it should be produced as part of discovery. Plaintiff also contends that the demanded documents regarding snow removal that were utilized as protocol or procedure on the date of the accident and any and all emails between or among the board members of defendant condominium about which Andrea Ostrowe testified are necessary for the preparation of plaintiff's case and discoverable.

Defendants oppose the motion. Defendants assert that the photograph has no probative value since: it does not show the area where plaintiff slipped and fell; was taken the morning of the accident, which occurred in the afternoon; and Bruce Benedict testified at his deposition that he did not come to plow the roadway where plaintiff fell until approximately 15 minutes prior to the accident. Accordingly, defendants contend that the photograph of a different location taken hours before the accident can have no probative value and could be misleading and prejudicial insofar as it could lead a person to infer that the extent of snow removal on the main road might be indicative of the extent of snow removal on the access road where plaintiff fell. Defendants also assert that the photograph cannot lead to discovery about snow removal since Bruce Benedict, plaintiff and Andrea Ostrowe have all been deposed about the snow removal.

With respect to the demand for emails, memos and correspondence regarding snow removal that were utilized as protocol or procedure for snow removal, defendants assert that they have already responded that no such documents were used as protocol or procedure for snow removal. Defendants note that Bruce Benedict testified at his deposition that there was no procedure book regarding snow removal.

As to the emails between and among members of defendant condominium's Board regarding plaintiff's accident, defendants contend that they are not discoverable because the individual board members are not defendants, only the Board at its meetings had the power or authority to act on behalf of defendant condominium, demanding individuals who are not litigants to search for emails discussing plaintiff's accident is unwarranted, overbroad, unduly burdensome, intrusive and a fishing expedition. Additionally, defendants contend that plaintiff has not provided a factual predicate to establish that the emails between Board members are material and necessary to the preparation of plaintiff's case. Finally, defendants contend that to the extent emails mention contact with counsel or the insurance representative, such material would be privileged as attorney-client communication and/or material prepared in anticipation of litigation.

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." 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, 406 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). Although the discovery provisions of the CPLR are to be liberally construed, “a party does not have the right to uncontrolled and unfettered disclosure” (*Foster*, 74 AD3d at 1140; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531 [2d Dept 2007]). The party seeking disclosure has the burden to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims (*Foster*, 74 AD3d at 1140). The court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*Mironer v City of New York*, 79 AD3d 1106, 1108 [2d Dept 2010]; *Auerbach v Klein*, 30 AD3d 451, 452 [2d Dept 2006]).

Initially, the court notes that with respect to the demand for documents used as protocol or procedure as to snow removal, defendants responded that no such documents existed. Accordingly, the court cannot compel defendants to produce that which does not exist. That branch of the motion, therefore, is denied.

As to the photograph of plaintiff taken by Andrea Ostrowe, plaintiff has failed to demonstrate that the demanded discovery is material or relevant to the issues in the action, or will lead to information bearing on plaintiff’s claim. As contended by defendants, the photograph of plaintiff at a different location than where plaintiff’s accident occurred and hours before her accident is not probative as to any of the issues in this action. The condition of the plowed parking lot where the photograph was taken in the morning is irrelevant to the condition of the roadway where plaintiff fell that afternoon. Moreover, plaintiff has failed to establish how the discovery of the photograph will lead to relevant evidence.

Similarly, plaintiff has failed to establish that emails between the individual members of defendant condominium Board in the possession of the members are discoverable. Notably, plaintiff failed to name the individual Board members as defendants. Moreover, plaintiff has failed to set forth a factual predicate for the discovery. Although Andrea Ostrowe, a former board member and nonparty, testified at her deposition that through conversations she learned that, before the snowstorm, either an email or telephone call was made to notify the landscaping company they would need to help with snow removal, she did not testify about emails between Board members regarding plaintiff’s accident. Additionally, the court agrees with defendants that the demand for the personal emails of the individual members of the Board is overly burdensome and an invasion of the individual board members’ privacy. Moreover, it is unclear if the members of the Board at the time of the accident are still members of the Board and within defendant condominium’s control. The motion, therefore, is denied to the extent that it seeks to compel defendants to produce the personal emails of individual members of the Board. The motion, however, is granted to the extent that the Board of defendant condominium shall produce any emails in the records maintained by the Board regarding plaintiff’s accident to the court for an in camera review to determine if the emails are discoverable or subject to a privilege, such as the attorney-client privilege.

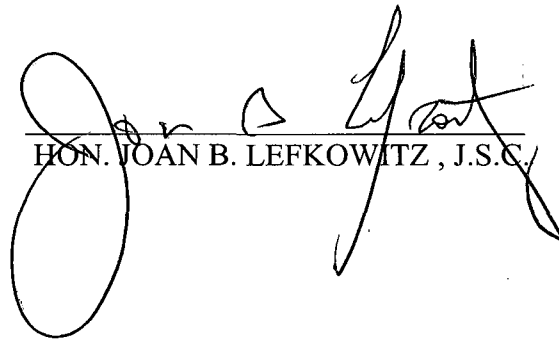
In view of the foregoing, it is

ORDERED that plaintiff's motion seeking an order compelling defendants to produce certain demanded discovery is denied except to the extent that defendants shall produce to the court for in camera review, on or before June 24, 2013, any emails between Board members regarding plaintiff's accident which are contained in the Board's records, or an affidavit to the effect that a search of the records has been made and no such emails are in the possession of the Board; and it is further

ORDERED that all parties are directed to appear for a conference in the Compliance Part, Courtroom 800, on June 27, 2013 at 9:30 a.m.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
June 10, 2013



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

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