

Casiano v Start Elevator, Inc.
2013 NY Slip Op 33782(U)
July 22, 2013
Supreme Court, Bronx County
Docket Number: 300973/09
Judge: Laura G. Douglas
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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WILTON CASIANO,

DECISION AND ORDER

Index No: 300973/09

Plaintiff(s),

- against -

START ELEVATOR, INC. AND TUCK-IT-AWAY, INC.,

Defendant(s).

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START ELEVATOR, INC.,

Third-Party Plaintiff(s),

- against -

TUCK-IT-AWAY, INC.,

Third-Party

Defendant(s).

-----x

Plaintiff moves seeking an order striking defendant/third-party plaintiff's (Start Elevator) answer pursuant to CPLR § 3126 or alternatively for an order pursuant to CPLR § 3124 compelling plaintiff to provide the discovery requested in plaintiff's Notice of Discovery and Inspection dated July 18, 2012. Plaintiff avers that it requested records that are material and necessary from Start Inc. and that in a belated response, served

five months later, Start Elevator merely provide legally insufficient objections. Thus, plaintiff avers that in failing to provide the requested discovery, plaintiff acted willfully and contumaciously. Start Elevator opposes plaintiff's motion asserting that insofar as plaintiff seeks disclosure of post-accident repair and maintenance records, its objections were legally sufficient and plaintiff's motion should be denied.

For the reasons that follow hereinafter, plaintiff's motion is hereby denied.

The instant action is for alleged personal injuries. According to plaintiff's Complaint and Bill of Particulars on July 19, 2006 plaintiff injured his left wrist and several fingers when the freight elevator doors within premises located at 3240 Bronx Boulevard, Bronx, NY closed upon and crushed his left hand. Plaintiff alleges that the premises were owned by defendant Tuck-IT-AWAY, INC. (Tuck-it-Away), and that the elevator was maintained by Start Elevator. He further alleges that the elevator was defective and that defendants were negligent in its maintenance because they they, *inter alia*, failed to repair a door strap. Plaintiff's deposition testimony evinces that he was employed as the operator of the instant elevator by Tuck-it-Away. On the date of his accident, plaintiff was attempting to close the elevator doors, which opened and

closed vertically and had to be manually operated. With his right hand, plaintiff grabbed a two-inch screw (presumably used as a handle) on the top door and grabbed the bottom door with his left hand. As he was bringing the doors together, his left hand became wedged in between the doors and he was allegedly injured as a result. Plaintiff testified that the doors on the elevator should have been equipped with straps to facilitate their operation. Prior to his accident, he had complained to employees of Start Elevator, the company charged with general maintenance of the elevator, about the need for and the absence of straps.

On November 8, plaintiff deposed Kevin Shea (Shea), an employee with Start Elevator, who testified that he inspected the elevator prior to entering into a maintenance contract with Tuck-it-Away. Had he found any major defects with the elevator he would have conveyed the same to Tuck-it-Away. Shea couldn't recall if he recommended the installation of straps on this elevator and further stated that the absence of straps would not have been noticed by him.

A review of plaintiff's motion papers evinces that pursuant to a "Lubrication Agreement" between Start Elevator and Tuck-it-Away, Start elevator was responsible for the maintenance of the elevator Pursuant to the agreement, which was in effect from May 1, 2004 to April 30, 2005, besides lubricating the elevator

parts, Start Elevator was also required to "[m]ake adjustments when necessary to motor and controller parts . . . [i]nspect main machine for proper operation . . . [and] [i]nspect, clean and lubricate door operator parts to function properly."

On July 18, 2012, plaintiff served a Notice for Discovery and Inspection upon Start Elevator seeking post-accident repair and maintenance records for the Elevator. On December 14, 2012, five months later, Start elevator provided a response to plaintiff's demand objecting to disclosing the requested records because they were, *inter alia*, irrelevant and inadmissible.

Motion to Strike Start Elevator's Answer

It is well settled that "[t]he nature and degree of a penalty to be imposed under CPLR 3126 for discovery violations is addressed to the court's discretion" (*Zakhidov v Boulevard Tenants Corp.*, 96 AD3d 737, 738 [2d Dept 2012]). However, since striking a party's pleading for failure to provide discovery is an extreme sanction it is only warranted when the failure to disclose is willful and contumacious (*Bako v V.T. Trucking Co.*, 143 AD2d 561, 561 1st Dept 1999]). Similarly, since the discovery sanction imposed must be commensurate with the disobedience it is designed to punish, the sanction of preclusion is also only appropriate when there is a clear showing that a party has willfully and contumaciously failed to comply with

court-ordered discovery (*Zakhido* at 739; *Assael v Metropolitan Transit Authority*, 4 AD3d 443, 444 [2d Dept 2004]; *Pryzant v City of New York*, 300 AD2d 383, 383 [2d Dept 2002])). Accordingly, where the failure to disclose is neither willful nor contumacious, and instead constitutes a single instance of non-compliance for which a reasonable excuse is proffered, the extreme sanction of striking of a party's pleading is unwarranted (*Palmenta v. Columbia University*, 266 AD2d 90, 91 [1st Dept 1999])). Nor is the striking of a party's pleadings warranted merely by virtue of "imperfect compliance with discovery demands" (*Commerce & Industry Insurance Company v Lib-Com, Ltd*, 266 AD2d 142, 144 [1st Dept 1999])). Because willful and contumacious behavior can be readily inferred upon a party's repeated non-compliance with court orders mandating discovery (*Pryzant v City of New York*, 300 AD2d 383, 883 [2d Dept 202])), only when a party adopts a pattern of willful non-compliance with discovery demands (*Gutierrez v Bernard*, 267 AD2d 65, 66 [1st Dept 1999]) and repeatedly violates discovery orders, thereby delaying the discovery process, is the striking of pleadings warranted (*Moog v City of New York*, 30 AD3d 490, 491 [2d Dept 2006]; *Helms v Gangemi*, 265 AD2d 203, 204 [1st Dept 1999])).

Here, a review of the papers submitted in support and in opposition to plaintiff's motion evinces that while Start

Elevator has not provided the information requested in plaintiff's discovery demand dated July 18, 2012, it did interpose objections to the items listed within the demand. Since, as will be discussed below, plaintiff has not demonstrated entitlement to the discovery sought, and did in fact provide Start Elevator with a response objecting to the same, it cannot be said that Start Elevator has willfully or contumaciously refused to provide the discovery requested. Moreover, the discovery sought has never been court-ordered and thus, Start Elevator is not in violation of any court order mandating the disclosure sought. Accordingly, plaintiff's motion pursuant to CPLR § 3126 is hereby denied.

Plaintiff's Motion to Compel Discovery

"The purpose of disclosure procedures is to advance the function of a trial, to ascertain truth and to accelerate the disposition of suits" (*Rios v Donovan*, 21 AD 2d 409, 411 [1st Dept. 1964]). Accordingly, our courts possess wide discretion to decide whether information sought is "material and necessary" to the prosecution or defense of an action (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). The terms

material and necessary, are, in our view, 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. CPLR 3101 (subd. [a]) should be construed, as the leading text on practice puts it, to permit discovery of testimony which is sufficiently related to the issues in litigation to make the effort to obtain it in preparation for trial reasonable

(*id.* at 406 [internal quotation marks omitted]). Accordingly, whether information is discoverable does not hinge on whether the information sought is admissible and information is therefore discoverable if it "may lead to the disclosure of admissible proof" (*Twenty Four Hour Fuel Oil Corp. v Hunter Ambulance*, 226 AD2d 175, 175 [1st Dept 1996]).

Generally, when a party fails

to challenge the propriety of a notice for discovery and inspection pursuant to CPLR 3120 within the time prescribed by CPLR 3122 [such failure] forecloses inquiry into the propriety of the information sought, except as to material which is privileged under CPLR 3101 or as to requests which are palpably improper

(*Muller v Sorensen*, 138 AD2d 683, 684 [2d Dept 1988]). A review of the case law, however, evinces that in order to avoid a waiver of the right to challenge requested discovery, a party must not merely object, but must also timely move for a protective order pursuant to CPLR 3103 (*Roman Catholic Church of Good Shepherd v*

Tempco Sys., 202 AD2d 257, 258 [1st Dept 1994]; *Zurich Ins. Co. V State Farm Mut. Auto. Ins. Co.*, 137 AD2d 401, 401 [1st Dept 1988]; *Wood v Sardi's Rest. Corp.*, 47 AD2d 870, 871[1 st Dept 1975]).

Pursuant to CPLR §3103, a court, by issuing a protective order, can limit or preclude disclosure. CPLR §3103 reads, in pertinent part,

[t]he court may at anytime on its own initiative, or on motion of any party or any person from whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure devise. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the court.

Thus, by issuing a protective order, a court can circumscribe the otherwise, liberal scope of discovery, and in the exercise of its discretion, regulate the discovery process (*Church & Dwight Co., Inc., v UDDO & Associates, Inc.*, 159 AD2d 275, 276 [1st Dept 1990]).

While CPLR § 3103 states that a motion for a protective order can be made at any time, a review of the case law indicates that with respect to discovery demands made pursuant to CPLR § 3120 or CPLR § 3121, such motion must be made within the 20 days

prescribed by CPLR § 3122, namely the time within which to assert any objections to duly served discovery demands (*Roman Catholic Church of Good Shepherd* at 258 [citing CPLR § 3122 as prescribing the time period within which to make a timely motion for a protective order]; *Haller v North Riverdale Partners*, 189 AD2d 615, 616 [1st Dept 1993] [same]). As noted above, the failure to timely move for a protective order within the 20 days prescribed by CPLR § 3122 constitutes a waiver and generally bars a party from obtaining a protective order (*Coffey v Orbachs, Inc.*, 22 AD2d 317, 319-320 [1st Dept 1964]. The exception to this general rule only arises when a discovery demand is palpably improper (*Haller* at 616; *2 Park Avenue Associates v Cross & Brown Company*, 60 AD2d 566, 566-567 [1st Dept 1977]; *Wood* at 870; *Zambelis v Nicholas*, 92 AD2d 936, 936-937 [2d Dept 1983]). When the discovery for which a protective order is sought is palpably improper, failure to timely move for a protective order will not constitute a waiver (*id.*).

In support of his motion, plaintiff argues that not only are the records requested on July 18, 2012 material and necessary such that Start Elevator should be ordered to disclose them, but that insofar as Start Elevator failed to object to the disclosure sought within 20 days of receiving plaintiff's discovery demand, Start Elevator has waived its right to object to the demands. This Court disagrees.

As discussed above, a party who fails to timely object and move for a protective order with respect to discovery demands served upon him is generally barred from objecting to those demands or belatedly moving for a protective order to preclude discovery of the information sought. However, it is beyond cavil that the failure to timely object to discovery demands does not preclude a belated motion for a protective order on grounds that the discovery sought is palpably improper. Moreover, CPLR § 3103 empowers a court to issue a protective order on its own initiative and presumably much like a belated motion for a protective order shall be granted if the discovery sought is palpably improper a court can *sua sponte* issue a protective order even if there was no timely objection to discovery demands on the very same ground.

Here, while Start Elevator undisputably failed to timely object to plaintiff's discovery demand and has made no application for a protective order the discovery sought will have to be provided unless this court determines that the discovery sought is palpably improper and *sua sponte* issues a protective order. For the reasons that follow hereinafter, this Court holds that the discovery sought is palpably improper such that this Court must issue a protective order.

While it is certainly true that a party is generally

entitled to discover all items material and necessary to the prosecution or defense of an action, even if the same is not ultimately admissible, it is well settled that, generally, evidence of post-accident repairs, and or modifications to an accident-causing instrumentality is inadmissible as proof of negligence (*Corcoran v Village of Peekskill*, 108 NY 151, 154-155 [1888]; *Fernandez v Higdon El. Co.*, 220 AD2d 293, 293 [1st Dept 1995]; *Kaplan v Einy*, 209 AD2d 248, 252 [1st Dept 1994]). In fact, such evidence is generally not even discoverable (*Klatz v Armor El. Co.*, 93 AD2d 633, 637 [2d Dept 1983]. Such evidence is, however, discoverable and admissible if it bears on the issue of maintenance or control of the accident-causing instrumentality (*Steinel v 131/93 Owners Corp.*, 240 AD2d 301, 302 [1st Dept 1997]; *Fernandez* at 293; *Klatz* at 637), it bears on the existence of a dangerous condition on the date of an accident (*Mercado v St. Andrews Housing Development Fund Company, Inc.*, 289 AD2d 148, 148 [1st Dept 2001]; *Steinel* at 302; *Kaplan* at 252), or when it is claimed that the accident causing instrumentality was defectively manufactured (*Steinel* at 302; *Fernandez* at 293).

Contrary to plaintiff's assertion, here, nothing warrants the disclosure of post-accident maintenance and repair records insofar as there is no dispute that Start Elevator was charged with the maintenance of the freight elevator which purportedly

injured him. Specifically, when Shea was deposed, nothing in his testimony disputed the fact that Start elevator was responsible to maintain the elevator on the date of plaintiff's accident. Moreover, given Shea's testimony it is evident that despite the effective dates listed in the "Lubrication Agreement," the same or an agreement of some sort binds Start Elevator, charging it with the duty to maintain the elevator within Tuck-it-Away's premises. Additionally, the alleged defect here, the absence of straps, is not only in dispute but is not the kind of transitory defect whose existence is provable by post accident records. In *Kaplan*, for example, plaintiff was injured when he walked through an elevator door expecting to board an elevator only to discover that the elevator was not there (*Kaplan* at 249). Plaintiff thus fell down the elevator shaft sustaining injury (*id.*). During the course of discovery, plaintiff sought and obtained post-accident records because as the court noted "such evidence is admissible herein to ascertain the condition of the elevator prior to the admitted modifications, this being especially necessary in light of the fact that defendants refuse to state that their own photographs represent the condition of the elevator doors at the time of the incident" (*id.* at 252). Similarly, in *Mercado*, the court ordered disclosure of post accident repairs because "the alleged defective condition of the sidewalk on the date of the alleged accident, as well as defendant's notice of the same,

cannot otherwise be proven" (*Mercado* at 148).

Plaintiff's reliance on *Franklin v New York el. Co., Inc.* (38 AD3d 329 [1st Dept 2007]) for the proposition that the First Department allows the unfettered discovery of post-accident repair records is grossly misplaced. While it is true that on its face, the decision seems to express just such a holding it is equally true that many of the First Department's decisions are confined to that appeal's particular set of facts. A review of plaintiff's brief submitted on appeal in *Franklin* bears this out. According to plaintiff's brief on appeal, in *Franklin* plaintiff sustained injury as a result of a mis-leveling condition in an elevator within a premises. The trial court ordered the disclosure of post-accident repair records and the defendant in that case appealed. With regard to these records, plaintiff argued that the same were discoverable insofar as they were necessary to ascertain the condition of the elevator (whether it was mis-leveling) on the date of plaintiff's accident. Thus, while not stated in the court's opinion, post-accident repair records were ordered disclosed because they came within an exception to the general rule, and not as argued by plaintiff because they are always discoverable and admissible as a matter of course.

Based on the foregoing, it is clear that the post-accident

records sought by plaintiff are palpably irrelevant and therefore a protective order is warranted. Accordingly, plaintiff's motion to compel compliance with his discovery demand dated July 18, 2012 is hereby denied.

It is hereby

ORDERED that Start Elevator is granted a protective order with respect to all the post-accident documentation requested in plaintiff's Notice for Discovery and Inspection dated July 18, 2012. It is further

ORDERED that Start Elevator serve a copy of this Decision and Order with Notice of Entry upon plaintiff within thirty (30) days hereof.

This constitutes this Court's decision and Order.

Dated : 7-22, 2013
Bronx, New York



Laura G. Douglas, J.S.C.