

Holosko v Fairway Supermarket

2014 NY Slip Op 31247(U)

May 12, 2014

Sup Ct, New York County

Docket Number: 158694/2013

Judge: Eileen A. Rakower

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: Hon. EILEEN A. RAKOWER
Justice

PART 15

KARINA HOLOSKO,

Petitioner,

INDEX NO. 158694/2013

- v -

MOTION DATE _____

MOTION SEQ. NO. 2

FAIRWAY SUPERMARKET and
FAIRWAY OPERATING CORPORATION,

Respondents.

MOTION CAL. NO. _____

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

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

PAPERS NUMBERED

1, 2, 3, 4, 5

Answer — Affidavits — Exhibits _____

6-8

Replying Affidavits _____

Cross-Motion: Yes No

This action arises out of an alleged slip and fall accident that occurred on January 3, 2013, at Fairway Market, located at 240 East 86th Street, New York, New York 10028.

Karina Holosko (“Petitioner”) previously moved by way of Order to Show Cause pursuant to CPLR §3102(c) seeking an order (a) directing respondents Fairway Supermarket and Fairway Operating Corporation to provide pre-action discovery of certain videotape, digital or photographic evidence for purposes of inspection and (b) a temporary restraining order prohibiting Respondents from destroying or altering the subject items sought prior to completion of inspection thereof by Petitioner.

Specifically, Petitioner sought a copy of Surveillance Video(s) and Accident Report(s) that allegedly depict Petitioner’s accident of January 3, 2013 at Fairway Supermarket at 240 E. 86th St., New York, New York, 10028.

By Order dated November 25, 2013, the Court granted Petitioner’s motion without opposition, directing Respondents to allow Petitioner to examine and obtain a copy of surveillance video(s) and accident report(s) depicting Petitioner’s accident and the videotape of the location for one hour prior to the accident of

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE DATED:

January 3, 2013 at Fairway Supermarket at 240 E. 86th Street, New York, New York 10028 and prohibiting Respondents from destroying or altering the subject videotape(s) and accident report(s) relating to Petitioner's accident, and are directed to preserve said evidence.

The Court Order stated, "Petitioner has made the requisite showing to warrant pre-action discovery and for an Order prohibiting Respondents from destroying or altering the subject items sought prior to completion of inspection thereof by Petitioner."

Respondent Fairway East 86th Street LLC, incorrectly sued as Fairway Supermarket and Fairway Operating Corporation, now moves for an Order (i) pursuant to CPLR §5015(a), vacating this Court's November 25, 2013 Order, on the ground that Respondent has a reasonable excuse for the default as it was not served with Plaintiff's petition, or in the alternative; (ii) pursuant to CPLR §3103(a), denying Petitioner access to any video surveillance footage of the alleged accident and accident location until after her examination before trial on the grounds that such pre-action disclosure is not appropriate under CPLR §3102(c) and would cause disadvantage and prejudice to Petitioner.

Respondent submits the affirmation of Aigul E. Sarvarova, Esq., and affidavit of Katherine Martin. Martin, who is employed by Fairway Market as Administrative Services & Risk Management Specialist since 2008, avers that she is responsible for general liability and claims handling. Martin avers that Respondent was not served with Plaintiff's Petition or any other documents in this case, except the Notice of Entry, dated December 5, 2013, with the November 25, 2013 Order.

Respondent argues that Petitioner can identify the defendant as well as the time and place of her accident, and only seeks the discovery to determine whether acts support alternate theories of liability and tailor her complaint and testimony to what is depicted in the video surveillance, which Respondent contends it is not an appropriate use under CPLR §3102(c). Respondent further states that to the extent that Petitioner is seeking the video footage of the accident location for one hour prior to the accident, no such video footage exists. Respondent submits the affidavit of Glen Anderson, a previous security guard and current security manager of Fairway Market. Anderson avers that the maximum retention on their video machines is 200 days, and that while they have retrieved and preserved the actual footage of the accident in preparation for potential litigation, any additional footage from the date of the accident was overwritten and became unretrievable, on or about July 22, 2013. Anderson states that Fairway is therefore unable to produce copy of the footage of one hour prior to the alleged accident.

Petitioner cross moves, pursuant to CPLR §3124, compelling Respondents to comply with the prior Court Order and for sanctions. Petitioner submits the affirmation of Eliot S. Bickoff. Bickoff states that Petitioner's Order to Show Cause was properly served on Respondents, and that Petitioner had submitted sufficient proof of service. Annexed to Bickoff's affidavit are affidavits attesting to personal service of the Order to Show Cause on respondent Fairway Supermarket on October 7, 2013 and on respondent Fairway Operating Corporation on October 7, 2013.

In reply, Respondent submits the affirmation of Margaret Merrill, who serves as in-house counsel for Fairway Group Holdings Corp., and the affidavit of Eric Katz, which challenges the Affidavits of Service submitted by Petitioner. However, new matters raised for the first time in a reply affidavit are not properly considered.

CPLR §3102(c) states:

Before action commenced. Before an action is commenced, disclosure to aid in bringing an action, to preserve information or to aid in arbitration, may be obtained, but only by court order . . .

Under CPLR §3102(c), pre-action discovery may be appropriate to preserve evidence or to identify potential defendants. (see *Holzman v. Manhattan and Bronx Surface Transit Operating Auth.*, 271 AD2d 346[1st Dept. 2000]). The First Department has noted that "while pre-action disclosure may be appropriate to preserve evidence or to identify potential defendants, it may not be used to ascertain whether a prospective plaintiff has a cause of action worth pursuing." (*Uddin v. New York City Tr. Auth.*, 27 A.D.3d 265, 266 [1st Dept. 2006]). "A petition for pre-action discovery should only be granted when the petitioner demonstrates that he has a meritorious cause of action and that the information sought is material and necessary to the actionable wrong." (*Id.*).

CPLR §5015(a)(1) states in pertinent part,

The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of:

1. excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry

It is well settled that a court may, in its discretion, vacate a default if the party seeking to vacate can show a reasonable excuse for the delay and a meritorious defense. (*Mutual Marine Office, Inc. v. Joy Const.*, 39 A.D.3d 417 [1st Dept. 2007]).

Inasmuch as the Order to Show Cause was purportedly served on October 7, 2013, in excess of 200 days after the accident, the issue of preserving and producing the video which has now been rewritten is moot. However, Respondent is directed to comply with the Court Order of November 25, 2013 and allow Petitioner to examine and obtain a copy of the surveillance video depicting Petitioner's accident.

Wherefore, it is hereby

ORDERED that Respondent Fairway East 86th Street LLC's, incorrectly sued as Fairway Supermarket and Fairway Operating Corporation, motion is denied in its entirety; and it is further

ORDERED that Petitioner's cross motion is granted to the extent that Respondents are directed to comply with the Court Order of November 25, 2013 and allow Petitioner to examine and obtain a copy of surveillance video depicting Petitioner's accident.

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

Dated: MAY 12, 2014



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

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE