

Butler v City of New York
2014 NY Slip Op 31476(U)
June 3, 2014
Sup Ct, New York County
Docket Number: 110450/11
Judge: Kathryn E. Freed
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN FREED
JUSTICE OF SUPREME COURT
Justice

PART 5

Index Number : 110450/2011
BUTLER, CAROLE
vs
CITY OF NEW YORK
Sequence Number : 001
COMPEL

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

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED

JUN 10 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6-3-14
JUN 03 2014



_____, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

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

- 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: IAS PART 5

-----X
CAROLE BUTLER ,

Plaintiff,

- against -

DECISION/ORDER
Index No. 110450/11
Seq. No. 001

THE CITY OF NEW YORK, CATHOLIC HEALTH
CARE SYSTEM AND THE MARY MANNING
WALSH NURSING HOME COMPANY, INC.

FILED

JUN 10 2014

Defendants.

-----X
HON. KATHRYN E. FREED:

COUNTY CLERK'S OFFICE
NEW YORK

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF
THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	1,2(Exs. A-B)...
AFFIRMATIONS IN OPPOSITION.....	...3(Exs. A-B)...
REPLY AFFIRMATION.....4.....
OTHER.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

In this personal injury action arising from a trip and fall on February 8, 2011, defendants Catholic Health Care System and the Mary Manning Walsh Nursing Home Company, Inc. move, pursuant to CPLR 3108, for an open commission to conduct the deposition of nonparty witness Nicholas Braithwaite. Plaintiff Carole Butler opposes the motion. After oral argument and consideration of the parties' papers and the applicable statutes and case law, the motion is **denied**.

Factual And Procedural Background:

Plaintiff Carol Butler was allegedly injured on February 8, 2011 when she tripped and fell on a defective sidewalk in front of a nursing home owned and operated by the movants. At her deposition, plaintiff testified that, following the incident, she asked her handyman/housekeeper, Nicholas Braithwaite, to photograph the allegedly defective sidewalk. The photographs taken by Braithwaite were exchanged with movants' attorney, who had the opportunity to question plaintiff about them at her deposition. Plaintiff testified at her deposition that the photographs taken by Braithwaite fairly and accurately depicted the defective sidewalk as it appeared on the date of the alleged incident.

Following plaintiff's deposition, the movants asked plaintiff's counsel to produce Braithwaite for a deposition. According to movants' attorney, plaintiff's counsel "refused indicating that [Braithwaite was] a nonparty and [that he thus had] no control over [him]." Plaintiff's counsel provided movants' attorney with Braithwaite's last known address, which was in New Jersey.

Movants' counsel now seeks an order granting an open commission allowing him to conduct the deposition of Braithwaite.

Contentions of the Parties:

Movants argue that this court should grant their motion for an open commission since Braithwaite's testimony is "material and necessary to the defense of this action because he is the individual who allegedly took the photographs plaintiff is using to document the condition she claims caused her to trip and fall." Movants' Aff. In Support, at par. 2. Counsel urges that Braithwaite's testimony is crucial to the movants' defense because movants "must utilize

Braithwaite's testimony at trial to introduce the photographs she claims depict the condition that caused her to fall" since only his testimony can establish that "the photographs he took were true and accurate depictions of the condition that caused [the incident]." *Id.*, at pars. 6-7.

In opposition to the motion, plaintiff asserts that movants have failed to establish that Braithwaite's testimony is necessary to admit the photographs he took of the accident scene. Plaintiff maintains that, since she testified at her deposition that the photographs taken by Braithwaite fairly and accurately represented the condition of the sidewalk as it existed on the day of the incident, there is no need to question Braithwaite regarding their authenticity.

In their reply affirmation in further support of the motion, movants assert that, since it is "likely plaintiff will call Mr. Braithwaite as a witness at trial", they should be entitled to conduct his deposition to avoid "trial by ambush". Movants' Reply Aff., at pars. 4, 9. Movants maintain that, since plaintiff did not accompany Braithwaite to the accident scene when he took the photographs, they should be entitled to question him about where plaintiff told him to take the photographs and how she described to him the condition that caused her alleged fall. In the alternative, movants request that, should this Court deny their request for an open commission, then it should preclude Braithwaite from testifying at trial.

Conclusions of Law:

CPLR 3108 provides as follows:

Written questions; when permitted

A deposition may be taken on written questions when the examining party and the deponent so stipulate or when the testimony is to be taken without the state. A commission or letters rogatory may be issued where necessary or convenient for the taking of a deposition outside of the state.

It is well settled that:

Pursuant to CPLR 3108, a party may take an oral deposition outside the state under an open commission where it is demonstrated to be necessary or convenient. The reason for this procedural device is that service of a subpoena outside of New York State is ineffective to compel a non-party witness to appear at a deposition or produce documents. In order to justify the issuance of a commission to take the deposition of an out-of-state non-party witness, the party seeking the commission must demonstrate the information sought is material and necessary to the prosecution or defense of the claims. The moving party must establish that the witness possesses relevant evidence, or that an examination of the witness would be reasonably calculated to lead to the discovery of information bearing on the claims or defense at issue.

Generally, however, the party seeking an open commission must demonstrate not only that the information sought is necessary to the investigation of the claim but also that a voluntary appearance or compliance by the witness is unlikely or that discovery cannot be obtained by stipulation or the cooperation of the witness either in New York or the other state. Absent any showing that the “proposed out-of-state deponent would not cooperate with a notice of deposition or would not voluntarily come within this State or that the judicial imprimatur accompanying a commission will be necessary or helpful when the [designee] seeks the assistance of the foreign court in compelling the witness to attend the examination, the moving party fails to demonstrate that a commission is necessary or convenient” (2000 *Arthur Ave. Corp. v Hardy*, NYLJ, Sept. 17, 2009, at 28, col 3 [Sup Ct Westchester County]) (*internal citations and quotation marks omitted*).” *Matter of Peltz*, 39 Misc3d 1225(A) (Sup Ct Nassau County 2013).

Here, movants have failed to demonstrate that this Court should issue an open commission for Braithwaite’s deposition. In his affirmation in support of the instant application, movants’ counsel advances, as the sole reason why Braithwaite’s testimony is crucial to the movants’ defense, that, without Braithwaite’s deposition, movants will not be able to move into evidence at trial the

photographs Braithwaite took of the allegedly defective sidewalk. However, as plaintiff's counsel asserts, plaintiff has already authenticated the photographs by testifying at her deposition that they represented the accident site and the allegedly defective condition of the sidewalk. Although plaintiff was not present when Braithwaite took the photographs, "[i]t is settled law that photographs may be authenticated by any witness shown to be familiar with the subject portrayed (*Alberti v New York, Lake Erie & Western R.R. Co.*, 118 NY 77; Richardson, Evidence [Prince 10 ed], § 137)." *Kowalski v Loblaws, Inc.*, 61 AD2d 340, 344 (4th Dept 1978). Thus, plaintiff's deposition testimony clearly authenticated the photographs.

Since plaintiff testified at her deposition that the photographs taken by Braithwaite fairly and accurately depicted the condition which caused her to fall, it would be superfluous for this Court to issue a commission solely for the purpose of allowing Braithwaite to authenticate the photographs. Thus, movants have failed to establish that "the judicial imprimatur accompanying a commission [for Braithwaite's deposition] will be necessary or helpful" to their defense of the action. *MBIA Ins. Corp. v Credit Suisse Securities (USA) LLC*, 103 AD3d 486, 488 (1st Dept 2013). Movants' assertion that plaintiff, at her deposition, did not point to the specific defect which caused her fall is belied by plaintiff's testimony identifying the defect in one of the photographs taken by Braithwaite. *See* Ex. A to Movants' Motion, at 56-57.

"Denial is proper for the additional reason that plaintiff has failed to demonstrate that a commission is 'necessary or convenient' (CPLR 3108), by neglecting to include 'allegations that the proposed out-of-State deponent would not cooperate with a notice of deposition or would not voluntarily come within this State...' (*Reyes v Riverside Park Community [Stage I], Inc.*, 59 AD3d

219 [1st Dept 2009][*internal quotation marks omitted*].” *MBIA Ins. Corp. v Credit Suisse Securities (USA) LLC*, 103 AD3d *supra* at 488.. Indeed, the “present application is devoid of any information concerning efforts by [movants’] counsel to obtain the voluntary cooperation of [Braithwaite].” *Matter of Mittler*, 15 Misc3d 1142(A) (Sur Ct Nassau County 2007); *see also Cioffi v S.M. Food, Inc.*, 2012 N.Y. Misc LEXIS 6200 (Westchester County 2012).

Finally, this Court cannot consider movants’ argument regarding preclusion of Braithwaite’s testimony at trial, since it was not raised in the notice of motion (*see* CPLR 2214) and was raised for the first time in movants’ reply affirmation. *See Goldstone v Gracie Terr. Apt. Corp.*, 110 AD3d 101 (1st Dept 2013).

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the motion by defendants Catholic Health Care System and The Mary Manning Walsh Nursing Home Company, Inc. is denied; and it is further,

ORDERED that this constitutes the decision and order of the Court.

DATED: June 3, 2014

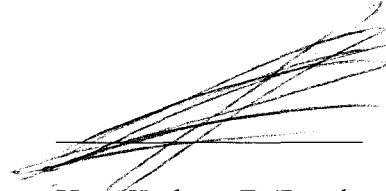
JUN 03 2014

FILED

JUN 10 2014

COUNTY CLERK'S OFFICE
NEW YORK

ENTER:



Hon. Kathryn E. Freed,
J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT