

Slavin v Village of Sleepy Hollow

2014 NY Slip Op 32821(U)

June 17, 2014

Supreme Court, Westchester County

Docket Number: 64731/12

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

MARGARET SLAVIN,

Plaintiff,

-against-

THE VILLAGE OF SLEEPY HOLLOW, A & L
PROPERTIES, INC., and ANTONIO CABINETRY
CORP.,

Defendants.

LEFKOWITZ, J.

DECISION & ORDER

Index No. 64731/12
Motion Date: June 16, 2014

Seq. No. 1

The following papers were read on this motion by plaintiff for an order compelling defendant Village of Sleepy Hollow (hereinafter "the Village") to produce Anthony Giaccio, Village Administrator, for a deposition, or, in the alternative, produce Richard Gross for a further deposition.

Order to Show Cause-Affirmation-Exhibits A-I
Affirmation in Opposition

Upon the foregoing papers and the proceedings held on June 16, 2014, the motion is determined as follows:

In this action, plaintiff seeks to recover damages for personal injuries she allegedly sustained when she tripped and fell over an eight inch high asphalt "curb" which abutted the sidewalk located at the rear of the building located at 334 North Broadway, Sleepy Hollow, New York. Plaintiff claims that the "raised asphalt condition" is located approximately 11 feet from a dumpster located at the rear of 334 North Broadway on the sidewalk. Plaintiff further claims that while walking on the sidewalk at night, her path was blocked by the dumpster and she had to walk onto the asphalt and toward the asphalt "curb." Accordingly, plaintiff contends that the dumpster directed her path of travel towards the defective asphalt curb over which she tripped and fell.

Plaintiff now seeks an order compelling the Village to produce Anthony Giaccio, Village Administrator, for a deposition, or, in the alternative, produce Richard Gross for a further deposition. Plaintiff contends that the deposition of Mr. Giaccio is necessary since the witnesses

produced by the Village had insufficient knowledge of the Village Ordinance and the two witnesses produced by the Village gave conflicting testimony as to the Village's practices regarding the placement and pick-up of dumpsters. In support of the motion, plaintiff submitted the deposition transcripts of the two witnesses produced by the Village, namely Richard Gross, the General Foreman of the Village Highway Department, Sanitation Department, Water Department, Recreation Department and Central Garage, and Sean McCarthy, the Village Building Inspector in charge of the Building Department. The deposition transcript of Mr. McCarthy is unsigned. Plaintiff's counsel contends that he was required to file the unsigned transcript, which was received from the court reporter on April 15, 2014, in view of the court's desire to certify the case as trial ready and the Village's refusal to produce another witness. Plaintiff also submitted the deposition testimony of Antonio Rodriguez, the owner of defendant Antonio Cabinetry, a business located at 334 North Broadway, as well as the owner of defendant A & L Properties, which owns the building at 334 North Broadway.

Plaintiff relies upon the following deposition testimony of Mr. Rodriguez: A dumpster has been located on the sidewalk behind the building on his property since he purchased the building in 2011. Initially a smaller dumpster was located at the same spot, but the Village replaced it with a bigger dumpster.

Mr. Gross, on behalf of the Village, testified, he was the General Foreman in charge of the Highway Department, Sanitation Department, Water Department, Recreation Department and Central Garage. He testified, in relevant part, as follows: He did not make any decisions about the location of the dumpster and such decisions are made by the Planning Board and the Building Department, which is supervised by Sean McCarthy. The Planning Board determined the placement of dumpsters by site plan for apartment complexes and other commercial buildings. Dumpsters for commercial buildings, other than apartment complexes, are placed "at the sidewalk." However, Mr. Gross also testified that the Village does not direct where to place dumpsters on the sidewalk and they could be placed anywhere the garbage trucks could get to them. He did not know of any Village directive as to where to place dumpsters on a sidewalk and did not know of any policy that dumpsters should not impede pedestrian traffic. With respect to 334 North Broadway, Mr. Gross testified that there is a partial public sidewalk at the rear of the building leading up to the rear garage doors, but the Village does not own any of the sidewalk and the sidewalk is owned and maintained by the property owner.

After Mr. Gross testified, plaintiff deposed Sean McCarthy on behalf of the Village. Although the transcript submitted by plaintiff is unsigned, the Village did not challenge the accuracy of the transcript in its opposition to the motion. Therein, Mr. McCarthy testified during his deposition that he is the Village Building Inspector in charge of the Village Building Department and coordinates the activities of the Planning and Zoning Boards. Mr. McCarthy also testified that he is in charge of enforcement of the ordinances of Sleepy Hollow and New York State, as well as the review and issuance of building permits and the inspection of those projects. He testified, however, that he does not enforce the Village Code with respect to dumpsters, and that Mr. Gross, as the Superintendent of Highways, would enforce it. He further

testified that the Building Department does not make decisions about the placement of dumpsters. He did not know if the Village owned any dumpsters, but testified that Mr. Gross would know. Mr. McCarthy also testified that the use of dumpsters was subject to the Village Code and the Village had an ordinance about the type of dumpster required. Upon being shown, Chapter 347 of the Village Code for Solid Waste, Mr. McCarthy testified that it contains the rules and regulations regarding the collection and disposal of solid waste, and the Village requires the use of dumpsters of a certain type and size. Finally, Mr. McCarthy testified that the Superintendent of Highways would make decisions with respect to the placement of dumpsters.

Plaintiff also relies upon Village Code, Chapter 347, entitled "Solid Waste." Section 347-9 of the ordinance states that the removal and disposal of garbage, trash and recycling is under the jurisdiction of the Department of Public Works, and the General Foreman of Public Works is empowered to make and publish regulations concerning, inter alia, the location of the containers. Section 347-14 (B)(2) provides that businesses and stores disposing of garbage in excess of eight waste containers/garbage cans per pickup shall provide one or more mechanically emptied containers compatible with the Village collection trucks. Section 347 defines a "mechanically emptied container," which the ordinance states are also known as a "dumpster", as a one-and-one-half-cubic-yard container, the make and model compatible with Village collection trucks, such as the J&T Metal Products Co., Inc. Model RL 1 ½ or equivalent, and equipped with lift bars which measure 77 ½ inches from end to end. Section 347-14 (C) requires each owner and/or tenant of a business to provide himself with the approved waste containers and mechanically emptied containers. Section 347-21 of the ordinance provides that the Superintendent of Public Works or his designee may issue a summons for a violation of the ordinance. Plaintiff further relies upon Village Code, Chapter 175, which requires permits for dumpsters used or operated on Village streets.

Plaintiff contends that since neither Mr. Gross or Mr. McCarthy had sufficient knowledge of the Village ordinances set forth in the Village Code, this court should direct a deposition of the Village Administrator since both Mr. Gross and Mr. McCarthy report to the Village Administrator or a further deposition of Mr. Gross. Plaintiff contends that the Village Administrator should be able to identify the Village employee responsible for dumpsters and the enforcement of the Village ordinances relating to dumpsters. Plaintiff asserts that pursuant to the Village Ordinance, Mr. Gross, as General Foreman, was in charge of all regulations concerning the location of the dumpsters, and he must approve the location of the containers which are to be mechanically emptied into a Village truck. However, Mr. Gross testified that he had no responsibility for the placement of the dumpsters and testified that Mr. McCarthy and the Planning Board decided where dumpsters were to be placed for commercial buildings. Plaintiff contends that, as a result of this testimony, they deposed Mr. McCarthy, who denied being responsible for solid waste disposal or code enforcement with respect to dumpsters and testified that it was Mr. Gross's jurisdiction. In view of the foregoing, plaintiff contends that it is entitled to depose a witness with knowledge of the content and enforcement of the Village Code, Chapter 347 (Solid Waste) and Chapter 175 (Dumpsters). Moreover, plaintiff asserts that Mr. Gross's testimony that the Planning Board decided where dumpsters were placed on commercial property misdirected plaintiff's efforts away from Mr. Gross's duties at the deposition.

The Village opposes the motion on the ground that the witnesses it produced had sufficient knowledge. The Village notes that Mr. Gross testified at his deposition about work performed in the area and that the Village does not direct where on the sidewalk dumpsters should be placed and that they only had to be where the trucks could get to them. The Village further notes that Mr. Gross testified that there was no policy that the dumpster should not impede pedestrian traffic and no provision as to where a dumpster should be placed on the sidewalk with respect to pedestrian traffic. The Village contends that his testimony that placement of dumpsters was not under his purview does not require a further deposition and his mistake can be explored at trial during cross examination. Accordingly, the Village asserts that plaintiff has failed to satisfy the requirements for the production of an additional witness, namely that the witnesses produced had insufficient knowledge and there is a substantial likelihood that another witness possesses material and necessary information.

The Village correctly contends that a municipal party has the right to designate which of its officers or employees with knowledge of the facts shall be examined (*Brevetti v City of New York*, 79 AD3d 958 [2d Dept 2010]; *Filoramo v City of New York*, 61 AD3d 715 [2d Dept 2009]). Moreover, the Village also correctly contends that a party seeking an additional deposition of a municipal party must establish that (1) the officers or employees already deposed had insufficient knowledge, or was otherwise inadequate, and (2) there is a substantial likelihood that the person or persons sought to be deposed possess information which is material and necessary to the prosecution or defense of the case (*Brevetti*, 79 AD3d at 958-959; *Filoramo*, 61 AD3d at 715).

Initially, the court determines that there is nothing in the record to indicate that there is a substantial likelihood that Anthony Giaccio, the Village Administrator, possesses information which is material and necessary to the issues in this action. Moreover, contrary to plaintiff's contention, Mr. McCarthy was able to answer questions regarding the applicable Village ordinances regarding dumpsters and the requirements therein, including the type of dumpster required at commercial buildings. However, to the extent that plaintiff's inquiry of Mr. Gross as to the placement of dumpsters essentially ended after he testified that he did not make the decisions as to where dumpsters are placed, plaintiff is entitled to a further limited deposition of Mr. Gross or another Village employee with knowledge regarding the placement of dumpsters at commercial buildings, other than apartment complexes, and the enforcement of the Village Ordinance as it pertains to dumpsters. Notably, after Mr. Gross testified, Mr. McCarthy testified that Mr. Gross was responsible for enforcing ordinances regarding dumpsters and the placement of the dumpsters, and Mr. McCarthy's testimony was supported by Chapter 347 of the Village Code. The further deposition, however, shall be limited to the placement of dumpsters at commercial buildings, other than apartment complexes, and the enforcement of the Village ordinances with respect to dumpsters.

In view of the foregoing, it is

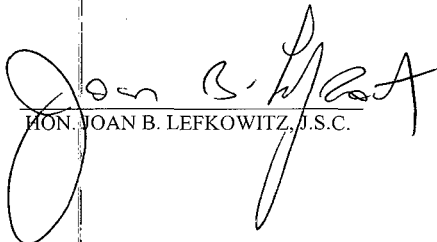
ORDERED that the branch of plaintiff's motion seeking to compel the Village to produce Anthony Giaccio, the Village Administrator, for a deposition is denied; and it is further

ORDERED that the branch of plaintiff's motion seeking to compel a further deposition of Richard Gross on behalf of the Village is granted to the extent that the Village shall, on or before July 16, 2014, produce for a further deposition either Richard Gross or another employee with knowledge of the placement of dumpsters at commercial buildings in the Village, other than apartment complexes, and with respect to the enforcement of Village ordinances relating to dumpsters. The further deposition shall be limited to the issues of the placement of dumpsters at commercial buildings, other than apartment complexes, and the enforcement of Village ordinances relating to dumpsters; and it is further

ORDERED that plaintiff is directed to serve a copy of this order with notice of entry upon all parties within 10 days of entry; and it is further

ORDERED that counsel are directed to appear in the Compliance Part, Courtroom 800, for a conference on July 18, 2014 at 9:30 A.M.

Dated: White Plains, New York
July 16, 2014



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

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