

Valdez v KPV Realty, LLC

2014 NY Slip Op 33205(U)

January 14, 2014

Sup Ct, Bronx County

Docket Number: 307114-2011

Judge: Laura G. Douglas

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: CIVIL TERM: IA PART - 11

YSABEL VALDEZ,

Plaintiff,

Index No. 307114-2011

- against -

DECISION AND ORDER

KPV REALTY, LLC,

Defendant..

HON. LAURA G. DOUGLAS:

Plaintiff has moved have moved for an order 1)striking defendant's answer based upon its purported failure to provide discovery and to produce a witness with knowledge for an examination before trial ("EBT") or, in the alternative, compelling defendant to produce Konstantino Vorillas for an EBT on a date certain and, if said deposition is not conducted within 30 days of the date of any order issued herein, striking defendant's answer without further hearing, and 2) extending the deadline to file a note of issue, and 3) requiring defendant to reimburse plaintiff for the cost of making this motion. The motion is granted solely as ordered below, and is otherwise denied.

Plaintiff alleges that on December 28, 2010 she slipped and fell on accumulated ice and snow on the front steps of the premises located at 2357 Crotona Avenue in Bronx County. Defendant was the owner of the premises at the time of the accident.

On May 22, 2013, defendant produced Athena Pappas for an EBT (plaintiff's Exhibit D). Ms Pappas was a manager for Vorillas Inc. ("Vorillas"), the managing agent for the subject premises at the time of the accident. She testified that Vorillas was responsible for cleaning and snow removal at the subject premises, but she did not know who was

responsible for snow removal and kept no records pertaining to snow removal. She believed that a couple who lived at the building, "Jeannette and Marcelino", took care of the property, but she did not know whether they were employees. She further testified that Konstantino Vorillas was the President of both defendant and Vorillas at the time of the accident, and that Mr. Vorillas was the only person who regularly visited the properties owned by defendant.

Plaintiff asserts that Ms. Pappas possessed insufficient knowledge with respect to the issue of snow removal at the subject premises at the time of the accident and that defendant should be required to produce Mr. Vorillas.

In response, defendant has provided an affidavit from Mr. Vorillas dated October 4, 2013 (defendant's Exhibit C) in which he states that in December 2010 he was President of both defendant and Vorillas and would visit the buildings owned by defendant as part of his duties. He further states that defendant kept paperwork for individual tenants and the building, but when the building was sold, all paperwork was turned over to the new owner, Fortress Corona. Mr. Vorillas states that he is not familiar with plaintiff, did not receive any incident reports for accidents occurring at the subject premises, and was not aware of any complaints regarding snow removal at the subject premises.

Defendants submit that the affidavit of Mr. Vorillas establishes that he has no relevant testimony to give, and, therefore, defendant should not be compelled to produce him for an EBT. In addition, defendant asserts that plaintiff's motion is procedurally defective, since it does not contain an affirmation of good faith as is required under 22 NYCRR 202.7 [c].

In her affirmation in support of the instant motion, counsel for plaintiff states that at

the conclusion of Ms. Pappas's EBT, she requested that defendant produce Mr. Vorillas, but defendant's counsel stated that he would not produce Mr. Vorillas and that plaintiff should make an application to the Court.

A court may excuse a party's failure to include an affirmation of good faith where any effort to resolve the dispute without court intervention would have been futile (see *Scaba v. Scaba*, 99 AD3d 610 [1st Dept 2012] and *Baulieu v. Ardsley Assoc., L.P.*, 84 AD3d 666 [1st Dept. 2011]). Such appears to be the case here.


"A corporate entity has the right to designate, in the first instance, the employee who shall be examined" (see *Conte v. County of Nassau*, 87 AD3d 559, 560 [2nd Dept 2011]). In order to compel a corporate defendant to produce an additional witness, a plaintiff is required to demonstrate that the witness already deposed "had insufficient knowledge or was otherwise inadequate, and that there was a substantial likelihood that the person sought by plaintiffs for an additional deposition possessed information which was material and necessary to the production of the action" (see *Bentze v. Union Free School District*, 92 AD3d 709 [2nd Dept 2012]; see also *Hayden v. City of New York*, 26 AD3d 262 (1st Dept 2006)).

In this case, Ms. Pappas clearly did not possess sufficient knowledge regarding snow removal at the subject premises at the time of the accident. Although Mr. Vorillas states in his affidavit that he no longer possesses any records regarding the subject premises, he did in fact visit the premises on a regular basis and is the only person who may possess knowledge regarding the maintenance personnel and/or snow removal procedures at the subject premise at the time of the accident.

Accordingly, defendant is directed to produce Mr. Vorillas for an EBT within 45 days of service of this Order with notice of entry. Therefore, the deadline to file a note of issue is extended until May 30, 2014.

This constitutes the decision and order of the Court.

Dated: January 14, 2014



LAURA G. DOUGLAS
J.S.C.