

Sarris v Fairway Group Plainview, LLC

2014 NY Slip Op 34008(U)

October 16, 2014

Supreme Court, Nassau County

Docket Number: 11166-13

Judge: Steven M. Jaeger

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This opinion is uncorrected and not selected for official publication.

FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEVEN M. JAEGER,
Acting Supreme Court Justice

EILEEN SARRIS,

Plaintiff,

-against-

FAIRWAY GROUP PLAINVIEW, LLC, KIMCO
REALTY and MANETTO HILLS ASSOCIATES,
INC.,

Defendants.

KIMCO REALTY CORPORATION and MANETTO
HILLS ASSOCIATES, INC.

Third-Party Plaintiffs,

-against-

TEAM 6 ENTERPRISES,

Third-Party Defendant.

The following papers read on this motion:

Notice of Motion, Affirmation, and Exhibits	X
Notice of Cross-Motion and Affirmation	X
Affirmation in Opposition and Exhibit	X
Affirmation in Reply and in Opposition to Cross-Motion and Exhibit	X
Affirmation in Reply	X

TRIAL/IAS, PART 39
NASSAU COUNTY
INDEX NO.: 11166-13

MOTION SUBMISSION
DATE: 9-8-14

MOTION SEQUENCE
NOS. 001 and 002

The Court has not considered Plaintiff's second Reply dated September 7, 2014.

[* 2]

Plaintiff moves for an Order pursuant to CPLR §3124 and 3101 to compel Defendant, Fairway Group Plainview, LLC ("Fairway") to respond to Plaintiff's demand for photographs and/or video. Fairway cross-moves for an Order pursuant to CPLR §3103 denying Plaintiff access to any video until after Plaintiff testifies at an examination before trial, or limiting the time-frame of the video to be provided.

This is an action for alleged personal injuries sustained by Plaintiff when she allegedly tripped/slipped and fell on ice on December 24, 2012 at approximately 7:45 a.m. outside Fairway, a supermarket. Fairway maintains video that depicts the area where the accident occurred. Plaintiff has thus demanded the video for a twenty-four (24) hour period prior and up to the time of the accident. Fairway seeks to delay exchange of the video until after Plaintiff testifies at an examination before due to the concern that Plaintiff may tailor her testimony after reviewing the video. Fairway also seeks to limit the time-frame of the video to six (6) hours prior to the accident.

CPLR §3101 requires "full disclosure of all evidence material and necessary in the prosecution or defense of an action". The words "material and necessary" are interpreted liberally to allow for broad disclosure. *Congel v. Malfitano*, 84 AD3d 1145 (2nd Dept. 2011), citing *Allen v. Cromwell-Collier Publ. Co.*, 21 NY2d 403, 407 (1968). This includes evidence required for trial preparation, as well as that which may lead to the disclosure of admissible evidence. *Montalvo v. CVS Pharmacy, Inc.*, 81 AD3d 611 (2nd

Dept. 2011); see also, *Keenan v. Harbor View Health & Beauty Spa*, 205 AD2d 589 (2nd Dept. 1994).

CPLR §3124 gives the court discretion to compel discovery or to strike a pleading for failure to abide with discovery and disclosure orders. At the discretion of the court, a party's failure to comply with such requests may result in sanctions pursuant to CPLR §3126.

It is undisputed that the video maintained by Fairway is material and necessary to Plaintiff's prosecution of the action. Further, CPLR §3101(i) requires full disclosure of video tapes that depict a "party, or the officer, director, member, agent or employee of a party". CPLR §3101(a)(1). Plaintiff is therefore entitled to the portion of the video that depicts the happening of the accident, as well as portions that may depict actions of employees of Fairway related to the accident.

The Court concurs with Fairway that there is no need at this time for Plaintiff to have access to video for a twenty-four (24) hour period, but it is appropriate for Defendant to provide of the video from the closing of Fairway the night before the incident through the time of the happening of the incident. As such, Plaintiff is entitled to the video from 10:00 p.m. on December 23, 2012 through the time of the accident. However, Fairway is to preserve the video for the full twenty-four (24) hour period should the approximate ten (10) hour period reveal any evidence that would lead to a need for the rest of the video.

[* 4]

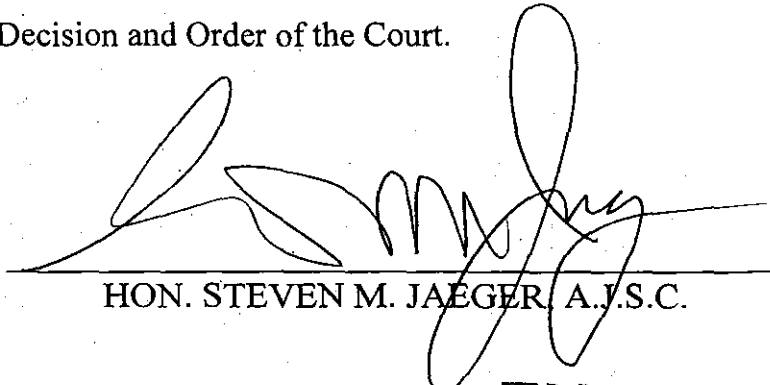
As to the timing of disclosure, the Court finds Fairway's argument to be unavailing. In *Tai Tran v. New Rochelle Hosp. Med. Ctr.*, 99 NY2d 383 (2003), the Court of Appeals held that CPLR §3101(i) requires full disclosure of video with no limitation to timing even though there may be a danger of tailored testimony. Fairway attempts to distinguish *Tai Tran* from the instant matter as *Tai Tran* involved surveillance tape of a Plaintiff prepared in anticipation of litigation. However, CPLR §3101(i) does not limit disclosure to surveillance tape, and requires "full disclosure of any films, photographs video tapes or audio tapes".

Accordingly, Fairway's cross-motion is DENIED, and Plaintiff's motion is GRANTED to the extent that Fairway is to exchange video from 10:00 p.m. on December 23, 2012 through the time of the happening of the accident within thirty (30) days of the date of this Order. Fairway shall also preserve the video for the twenty-four (24) hour period prior to the accident.

The parties are directed to appear for the compliance conference scheduled for **December 11, 2014 at 9:30 a.m.**

This constitutes the Decision and Order of the Court.

Dated: October 16, 2014


HON. STEVEN M. JAEGER, A.J.S.C.

ENTERED

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COUNTY CLERK'S OFFICE