

Eastland v HWP Dev. LLC
2015 NY Slip Op 31968(U)
October 22, 2015
Supreme Court, New York County
Docket Number: 160257/2013
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

ELIZABETH EASTLAND,
Plaintiff,
-against-

INDEX NO. 160257/2013
MOTION DATE 10-07-2015
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

HWP DEVELOPMENT LLC, SIX FLAGS ENTERTAINMENT CORP. and SIX FLAGS OPERATIONS, INC.
Defendants.

The following papers, numbered 1 to 7 were read on this motion to strike the complaint and compel discovery, cross-motion to strike the Answer and compel discovery.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 3,</u>
Answering Affidavits — Exhibits _____	<u>4 - 5</u>
Replying Affidavits _____	<u>6 - 7</u>
Cross-Motion: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	

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

Upon a reading of the foregoing cited papers, it is Ordered that Defendants' motion to strike the Complaint is denied, the portion of the motion to compel discovery is granted, Plaintiffs' cross-motion to strike the Answer and compel discovery is denied.

Plaintiff commenced this action by Summons and Complaint dated November 5, 2013 to recover monetary damages for injuries she sustained when she allegedly slipped and fell at an in-door water park. Defendants served an Answer dated December 11, 2013. After joinder of issue, the parties proceeded with discovery.

There have been five discovery conferences held ordering the parties to conduct depositions (see NYSCEF No. 11-15). Plaintiff has refused to appear for her deposition claiming that the defendants owe plaintiff outstanding discovery. Specifically, plaintiff's March 3, 2014 Combined Demands and March 4, 2015 Demand for Discovery and Inspection seek, in part, documents and records relating to the area where plaintiff slipped detailing the name of the party that constructed the walkway, the material used, and what maintenance was done on the walkway.

In various conference Orders, this Court ordered defendants to provide the sought after discovery responses. In a letter date May 22, 2015, defendants responded to the remaining discovery demands. The letter states, in relevant part, that:

"In response to your demand, we contacted the contractor who performed the initial construction work with respect to the walkways at the indoor water park. The contractor advised that the company maintained no documentation concerning the original construction work. They were able to locate two invoices for product that was purchased by

the indoor water park in 2008. Copies of those invoices are provided herewith. I also enclose copies of records from defendant HWP Development, LLC for the purchase of rollers that may have been used to apply the product. Answering defendants have no further documents.” (See Moving Papers, Exhibit L).

In a letter dated June 26, 2015, defendants again responded to plaintiff’s demands and advised plaintiff that:

“Defendant HWP has conducted extensive searches of paper and computer files maintained by it in the regular course of business for documents responsive to plaintiff’s demands and have produced all such documents that have been located. See Affidavit of Loressa Schulze, Safety Manager, enclosed herewith. I also refer you to the Statement in Reply to Request for Admission duly sworn by Eric Gilbert, in which he averred that HWP Development, LLC contracted with various legal entities for the construction of the indoor water park and denied that Six Flags Entertainment Corp. and/or Six Flags Operations, Inc. were responsible for the construction of the indoor water park.

Further, defendants have gone above and beyond their obligation to produce documents by providing plaintiff with copies of records obtained from the outside contractor who performed the initial construction work of the indoor water park’s walkway.” (See Moving Papers, Exhibit N).

Loressa K. Schulze is the Safety Manager for the Great Escape Lodge and Indoor Water Park (see Moving Papers, Exhibit O). Schulze states that she was provided the extensive discovery demands by defense counsel and that she subsequently conducted an extensive search for the records demanded by plaintiff (Id.). The search included maintenance documents, human resource documents, and various computer files. (Id.). After various discovery-related letters between counsels for plaintiff and defendant, Schulze conducted a further search for relevant records (Id.).

Schulze’s various searches resulted in the finding of the:

“First Aide Report of the accident; Safety Department Investigation of the accident; 7/6/09 letter from plaintiff to the lodge regarding the accident; various blueprints and drawings reflecting the walkway within the park; Safety Plan in effect on the date of plaintiff’s accident; Pressure Washer Daily Inspection Record for the period of 6/1/09 - 6/28/09; Pre-Opening Checklist for the water park for the period of 6/14/09 - 6/28/09; [and] invoices for materials/supplies possibly related to work performed on the walkway prior to plaintiff’s accident. To the best of my knowledge, these documents represent all available documents maintained in the regular course of business of HWP Development LLP that could be located responsive to the plaintiff’s demands.” (see Id., PP 7-8).

Plaintiff rejected these responses and refused to appear for her court-ordered deposition.

Defendants now move for an Order striking the Complaint, precluding plaintiff, or compelling plaintiff to appear for her deposition. Plaintiff cross-moves for an Order striking defendants' Answer, and compelling defendants to produce outstanding discovery.

CPLR § 3101(a) allows for the "full disclosure of all evidence material and necessary in the prosecution or defense of an action regardless of the burden of proof." CPLR § 3124 grants the court the power to compel a party to provide discovery demanded. CPLR § 3126 grants the court the power to sanction a party that fails to comply with a court's discovery order.

The nature and degree of the penalty to be imposed for a party's failure to comply with an order is a matter within the sound discretion of the court (see CPLR § 3126; *Silberstein v. Maimonides Medical Center*, 109 A.D.3d 812, 971 N.Y.S.2d 167 [2nd Dept., 2013]). The striking of a pleading is a drastic remedy and is only warranted where a clear showing has been made that the noncompliance with an order was willful, contumacious or due to bad faith (*Mateo v. City of New York*, 274 A.D. 2d 337, 711 N.Y.S. 2d 396 [1st. Dept. 2000]).

When certain discovery is unavailable, the party ordered to produce the discovery may submit "[a]n affidavit regarding the unavailability of documents that are the subject of a discovery order," and that affidavit "must document a thorough search conducted in good faith." (*Henderson-Jones v. City of New York*, 87 A.D.3d 498, 505, 928 N.Y.S.2d 536, 542[1st Dept. 2011]).

The various letters sent by the defendants to plaintiff in response to her specific discovery demands, along with the Schulze affidavit, sufficiently explain the unavailability of the requested documents and the various searches conducted by the defendants. The defendants have established that no other records besides the records stated in the letters and Schulze's affidavit exist. Defendants complied with this Court's various Discovery Orders and with plaintiff's discovery demands. Despite having received these documents and affidavits plaintiff still refuses to appear for deposition.

Accordingly, it is ORDERED that defendants' motion to strike the Complaint is denied, the portion of motion to compel plaintiff's deposition is granted, and it is further,

ORDERED, that plaintiff's cross-motion to compel discovery or strike the Answer is denied, and it is further,


ORDERED, that plaintiff is to appear for her deposition on or before December 31, 2015. Failure of plaintiff to timely appear for her deposition may result in the striking of her Complaint for her failure to comply with numerous Court Conference Orders, and it is further,

ORDERED, that the defendants appear for their depositions on or before January 15, 2016, and it is further,

ORDERED, that the filing of the Note of Issue is extended to January 29, 2016, and it is further,

ORDERED, that the parties appear for a Status Conference in IAS Part 13 located at 71 Thomas St., Room 210, N.Y., N.Y. on January 20, 2016 at 9:30AM.

ENTER: **MANUEL J. MENDEZ**
J.S.C.



MANUEL J. MENDEZ
J.S.C.

Dated: October 22, 2015

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE