

Flynn v Turner Constr. Co.

2015 NY Slip Op 32093(U)

April 29, 2015

Supreme Court, New York County

Docket Number: 113859/11

Judge: Joan A. Madden

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This opinion is uncorrected and not selected for official publication.

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: How Joan A. Madden
Justice

PART 11

Index Number : 113859/2011
FLYNN, MARTIN
vs
TURNER CONSTRUCTION
Sequence Number : 001
COMPEL DISCLOSURE

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 the
attached Memorandum Decision and Order

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

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Dated: April 29, 2015

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- 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
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11**

-----X
MARTIN FLYNN,

Index No.:113859/11

Plaintiffs,

-against-

TURNER CONSTRUCTION COMPANY,
MSG HOLDINGS, L.P, and LVI SERVICES, INC.,

Defendants.

FILED

MAY 06 2015

COUNTY CLERK'S OFFICE
NEW YORK

-----X
TURNER CONSTRUCTION COMPANY,
MSG HOLDINGS, L.P.,

Third-Party Index No.: 590270/13

Third-Party Plaintiffs

-against-

FIVE STAR ELECTRIC CORP. and
LVI SERVICES, INC.,

Third-Party Defendants

FILED

MAY 05 2015

COUNTY CLERK'S OFFICE
NEW YORK

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Joan A. Madden, J.:

In this action arising out of an injuries sustained at a construction site, plaintiff moves to compel the deposition of William Callahan (“Callahan”), the shop steward employed by third party defendant Five Star Electric Corp. (“Five Star”)(motion seq. no. 001). Defendants/third-party plaintiffs Turner Construction Company (“Turner”) and MSG Holdings, L.P. (“MSG”) (together “the Turner defendants”) separately move to compel Callahan’s deposition, as well as the deposition of Five Star’s Safety Director, Alan Mason (“Mason”)(motion seq. no. 002).¹ Five Star opposes both motions.

Background

Plaintiff alleges that he was exposed to toxic air in the spring of 2011, while working as a

¹Motion seq. nos. 001 and 002 are consolidated for disposition.

union electrician employed by Five Star, on a project involving the full renovation of Madison Square Garden (“the Project”), which is owned by MSG. Turner was the general contractor on the Project. Plaintiff has asserted claims for violations of Labor Law §§ 241(6) and 200 and for common law negligence. In his interrogatories plaintiff alleges, *inter alia*, that he was exposed to “diesel fumes, chlorine gas, acetylene torches burning lead pipe, concrete dust, asbestos, and other toxic dust” (Plaintiff’s Answer Interrogatories, ¶ 10). He further alleges that his exposure to “toxic air existed during his entire time at [the Project] from approximately April 13, 2011 through May 27, 2011” (Id, ¶ 9(d)).

During discovery, Five Star produced two witnesses, Paul Mosely, who was its general foreman and Robert Mosely, who directly supervised plaintiff. Plaintiff and the Turner defendants argue that Five Star should be compelled to also produce Callahan for deposition based on his first hand knowledge of the issues related to air quality and measures taken to remedy the condition, noting that Paul Mosely testified that he “would bring complaints about air quality to Callahan’s attention” (P. Mosely Dep., at 231). In addition, Robert Mosely testified that Callahan spoke to Turner about air quality issues and that Callahan said it was “taken care of” but that he did not know what Callahan meant by “taken care of” (Mosely Dep, at 177). The Turner defendants also point to evidence that Callahan attended meetings with Turner to discuss air quality, and note that plaintiff identified Callahan as a fact witness to “the occurrence referred to in the complaint and/or the condition that precipitated the occurrence” (Plaintiff’s response to Five Star’s combined demands). Plaintiff further notes that Paul Mosely testified that he was present at a meeting when Callahan complained to an employee of Turner about the air and that when Turner’s employee told Callahan that the air was fine, the two got

into a “heated argument” about the issue. (Paul Mosely Dep., at 180-181).

As for Mason, the Turner defendants argue that he should be deposed as he was the safety director at Five Star and, in this position, prepared the Five Star Health and Safety Plan, which did not include respirators, and that Mason would be able to testify as to why they were not included.

Five Star opposes the motions, arguing that they produced Paul Mosely and Robert Mosely for deposition and both of these witnesses were at the worksite on a daily basis throughout the time that Five Star performed work, and that they each had first hand knowledge of the air quality conditions at the worksite and testified regarding such conditions. Five Star further argues that the information obtained at the depositions of Callahan and Mason would be duplicative of that obtained at the depositions of Paul Mosely and Robert Mosely. As to the Health and Safety Plan, Five Star speaks for itself.

In reply, the Turner defendants argue that while Paul Mosely and Robert Mosely possessed relevant knowledge, Callahan and Mason have knowledge regarding additional matters.

Discussion

CPLR 3101(a) provides that “[t]here shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action.” The words “material and necessary” are “liberally interpreted to require disclosure, upon request, of any facts bearing on a controversy which will assist in sharpening the issue at trial.” Roman Catholic Church of Good Shepherd v. Tempco Systems, 202 AD2d 257, 258 (1st Dept 1994). Disclosure is thus not limited to “evidence directly related to the issues in the pleadings.” Allen v. Crowell-Collier Publishing

Co., 21 NY2d 403, 408 (1968).

“In order to show that additional depositions are necessary, the moving party must demonstrate that (1) the representative already deposed had insufficient knowledge or otherwise provided inadequate information, and (2) there is a substantial likelihood that the person or persons sought for depositions can supply information that is material and necessary to the prosecution (or defense) of the case.” Filpo v. Linemaster Switch Corp., 244 AD2d 454, 454 (2d Dept 1997); See also, Hayden v. City of New York, 26 AD3d 262 (1st Dept 2006). Moreover, the party seeking the additional deposition must make a “detailed showing” as to the necessity of taking additional depositions. Alexopoulos v. Metropolitan Transportation Authority, 37 AD3d 232, 233 (1st Dept 2007).

Here, notwithstanding that the two witnesses already produced by Five Star provided relevant information, the moving parties are entitled to the additional depositions of Callahan and Mason, based on a showing that these witnesses have knowledge of additional facts that are relevant to the central issues in this action, including the allegedly poor condition of the air at the worksite, and the measures taken to protect plaintiff and other workers from such condition. With respect to Callahan, the record shows that he interfaced between Turner and those complaining about air quality at the worksite and was identified by plaintiff as a witness to conditions underlying the claims. As for Mason, as the author of Five Star’s Health and Safety Plan, he would have first hand knowledge as to the hazards that Five Star anticipated that its employees would need protection from at the worksite, and as to why respirators were not included in the plan. Accordingly, the motions for the additional depositions of Callahan and Mason should be granted. See Alexopoulos v. Metropolitan Transportation Authority, 37 AD3d

at 232-233 (reversing trial court's denial of motion to compel deposition of two additional employees of defendants who authored and approved a memoranda relating to safety guidelines for use in construction project on subway where "defendants' liability [was] premised, inter alia, on allegations that they knew of overcrowded conditions on the subway platform and made those conditions worse by starting a construction project, thereby causing decedent's fall to his death"); Saiia v. The City of New York, 3 AD3d 397 (1st Dept 2004)(holding that in a personal injury case arising from a fall on ice in a playground, the trial court erred in denying plaintiff's motion to compel the City of New York to produce a further witness where original witness did not know certain facts, including the condition of the relevant path when the City's employees began snow removal); compare Those Certain Underwriters at Lloyds, London v. Occidental Gems, Inc., 41 AD3d 362, 364 (1st Dept 2007)(trial court properly rejected recommendation of the Special Referee that additional deposition be conducted where witness "did not possess non-duplicative 'material and necessary' information pertinent to the disputed issues").

In view of the above, it is

ORDERED that the motions to compel are granted; and it is further

ORDERED that the dates for the additional depositions shall be scheduled at the status conference to be held on April 30, 2015, at 9:30 am in Part 11, room 351, 60 Centre Street, New York, NY.

DATED: April 29, 2015

 **FILED**
J.S.C. MAY 06 2015

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