

Higuita v KPV Realty, LLC

2015 NY Slip Op 32141(U)

October 23, 2015

Supreme Court, Bronx County

Docket Number: 301373/13

Judge: Laura G. Douglas

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
PART 11

Index No. 301373/13
Motion Calendar No.
Motion Date:

DAMIAN HIGUITA,

Plaintiff,

-against-

KPV REALTY, LLC, ERICK DILLON, and
ADRIANO HENRIQUEZ,

Defendants.

DECISION/ORDER

Present:
Hon. Laura G. Douglas
J.S.C.

Recitation, as required by Rule 2219(a) of the C.P.L.R., of the papers considered in the review of this motion for leave to withdraw note of issue and related relief:

<u>Papers</u>	<u>Numbered</u>
Plaintiff's Notice of Motion, Affirmation of Bill Greenberg, Esq. dated February 10, 2015 in Support of Motion, and Exhibits ("A" through "C").....	1
Plaintiff's Notice of Motion, Affirmation of Rebecca Greenberg, Esq. dated March 20, 2015 in Support of Motion, and Exhibits ("A" through "E").....	2
Affirmation of Alfredo J. Alvarado, Esq. dated April 30, 2015 in Opposition to Motion.....	3
Reply Affirmation of Bill Greenberg dated May 4, 2015.....	4
Defendants' Notice of Cross-Motion, Affirmation of Alfredo J. Alvarado, Esq. dated March 11, 2015 in Support of Cross-Motion, and Exhibits ("A" through "K").....	5
Affirmation of Bill Greenberg, Esq. dated March 22, 2015 in Opposition to Cross-Motion and Exhibits ("A" through "F").....	6
Reply Affirmation of Alfredo J. Alvarado, Esq. dated May 4, 2015 and Exhibit ("A").....	7

The foregoing motions and cross-motion are consolidated for purposes of Decision/Order and after due deliberation and upon the foregoing papers, the Decision/Order on these motions and cross-motion

is as follows:

The plaintiff seeks an order striking the answer of defendant Adriano Henriquez (“Henriquez”) for his failure to appear for a court-ordered deposition and compelling the defendants to fully respond to his Notice for Discovery & Inspection dated October 10, 2014. The defendants seek an order granting leave to file and serve an amended answer, precluding the plaintiff from introducing certain photographs into evidence at trial, and relieving defense counsel as attorney for Henriquez. The motions and cross-motion are granted solely to the extent ordered below, and are otherwise denied.

The plaintiff seeks monetary damages for injuries allegedly sustained when he tripped and fell on certain stairs located within a building owned, managed, and/or operated by the defendants. Many of the issues raised by these applications were resolved by the parties’ stipulation dated May 5, 2015. The branch of defendants’ motion seeking to be relieved as counsel is denied, since the motion was not served upon Henriquez. Defendants’ attorney separately moved to withdraw as counsel for Henriquez, but this motion was permitted to be withdrawn by Order of Hon. Betty Owen Stinson, J.S.C. dated June 29, 2015.

The defendants seek leave to amended their answer to admit that Edward Pena (“Pena”) was the superintendent of the subject building at the time of the plaintiff’s accident, rather than Henriquez as they originally admitted. Defendants’ counsel avers that it mistakenly answered for Henriquez, in the belief that he was the superintendent of the subject building. It is now believed that Pena was the superintendent on the date of the plaintiff’s accident, while Henriquez worked in some capacity at other properties owned/managed by the defendants. The plaintiff is certainly free to present whatever conflicting admissible evidence he may have to the trier of fact. Pena has appeared for a deposition.

C.P.L.R. Rule 3025(b) only requires that the proposed amendment not be palpably insufficient or patently devoid of merit (*see Castor Petroleum, Ltd. v. Petroterminal de Panama, S.A.*, 90 A.D.3d 424 [1st Dept. 2011] and *MBIA Insurance Corporation v. Greystone & Co., Inc.*, 74 A.D.3d 499 [1st Dept. 2010]). Here, the proposed amendment is not entirely without merit or surprising, given the supporting deposition testimony of the various witnesses deposed on behalf of the defendants. No prejudice would inure to the plaintiff as a result of this amendment, since the defenses will not change and both Pena and Henriquez have been deposed or are subject to deposition. In addition, this action is still in the discovery stage, and the plaintiff can therefore adequately prepare for trial under these new circumstances (*see Sahdala v. New York City Health & Hospital Corporation*, 251 A.D.2d 70 [1st Dept. 1998] and *O’Neill v. Schlessinger*, 86

A.D.2d 842 [1st Dept. 1982]). Accordingly, the plaintiff has not demonstrated that this case presents an exception to the rule that leave to amend shall be freely given (*see Dittmar Explosives, Inc. v. A.E. Ottaviano, Inc.*, 20 N.Y.2d 498 [NY 1967]). However, since the issue of the correct superintendent had not been settled prior to Pena's deposition, the plaintiff may seek to depose him again.

With respect to the branch of the plaintiff's motion seeking to strike Henriquez's answer, it is undisputed that Henriquez has not appeared for a court-ordered deposition. While the defendants aver that Henriquez was not the correct superintendent and is not their employee, he remains a party to this action and is still represented by defendants' counsel. As such, he is subject to deposition. Since Henriquez remains a party to this action and is represented by defense counsel, the plaintiff is not free to contact him directly despite his lack of affiliation to the defendants. Therefore, it would be manifestly unfair to the plaintiff to simply preclude Henriquez from testifying at trial should he fail to appear for a deposition, since that would shut off an appropriate avenue of investigation for the plaintiff at little loss, if any, to the defendants. Under these circumstances, it is more appropriate that Henriquez's answer be stricken unless he appears for a deposition as ordered below.

By letter dated October 21, 2014, the plaintiff provided the defendants with certain photographs purportedly depicting the subject stairs and injuries sustained. By then, the plaintiff had been deposed (on April 29, 2014), as had four defendant witnesses (on October 1, 2014). The plaintiff argues that there was no willful failure to timely disclose these photographs, just that they were discovered only after the depositions had taken place. Other photographs were introduced at those depositions, but the defendants' witnesses testified that the accident happened at a location different than that depicted on those photographs. It was only then that plaintiff's counsel discovered that the photographs at issue had been inadvertently omitted from the plaintiff's discovery responses. The defendants contend that these photographs must be precluded from use at trial, since their witness's testimony is tainted by not having these particular photographs available to them prior to testifying at deposition. The plaintiff submits that the photographs were not willfully withheld, and offers to be deposed again regarding these photographs.

Precluding evidence that has been belatedly exchanged is appropriate where the offending party's violation was willful, deliberate, and contumacious, a finding that can be based upon the party's repeated failure to comply with discovery without a reasonable excuse (*see Arpino v. F. J. F. & Sons Electric Co., Inc.*, 102 AD3d 201 [2nd Dept 2012]). In *Arpino*, the Court considered the following factors in deciding

to preclude the use of certain photographs at trial that had been untimely exchanged: 1) that the photographs were exchanged after the note of issue had been filed, 2) that the offending party had affirmatively misrepresented that it did not possess any photographs, and 3) that the offending party's failure to timely exchange discovery "seriously impaired" its adversary's ability to fully conduct depositions and prepare for trial. Here, the action is still in the discovery stage (no note of issue has been filed), the plaintiff has offered to be deposed again, and there has been no showing of an ongoing pattern of willful and contumacious conduct designed to thwart timely disclosure. The defendants can adequately account for the use of these photographs through further discovery proceedings.

Therefore, the subject photographs will not be precluded from use at trial as a penalty for being untimely exchanged. However, the plaintiff is precluded from using the deposition testimony of the defendants' witnesses taken on October 1, 2014 to impeach the defendant(s) regarding matters as depicted in these photographs. This penalty preserves the value of the photographs at trial, while alleviating the defendants' concern that the credibility of their witnesses was tarnished by having to testify without the benefit of these photographs and/or by testifying under the impressions of inaccurate photographs submitted by the plaintiff.

Accordingly, it is hereby

ORDERED, that defendant Adriano Henriquez's Answer is stricken unless he appears for a deposition no later than 60 days following service of a copy of this Order with notice of entry; and it is further

ORDERED, that the defendants may serve an amended answer within 20 days following service of a copy of this Order with notice of entry only to the extent of substituting "Edward Pena" for "Adriano Henriquez" as the superintendent for the premises known as 663 Crescent Avenue, Bronx, New York on May 10, 2012; and it is further

ORDERED, that the plaintiff may conduct a further deposition of Edward Pena upon written notice to defendants' counsel no later than 20 days following service of a copy of this Order with notice of entry, and any such deposition shall be held no later than 45 days following such written notice; and it is further

ORDERED, that the photographs exchanged by the plaintiff on October 21, 2014 are deemed to have been timely exchanged; and it is further

ORDERED, that the plaintiff is precluded from using the deposition testimony of the defendants'

witnesses taken on October 1, 2014 to impeach the defendant(s) regarding matters as depicted in the photographs exchanged by the plaintiff on October 21, 2014.

The foregoing constitutes the Decision and Order of this Court.

DATED: 10-23-15
Bronx, New York

LGD
HON. LAURA G. DOUGLAS
J.S.C.