

<b>Baker v Plaza Residence, LP</b>
2015 NY Slip Op 32530(U)
February 11, 2015
Supreme Court, Kings County
Docket Number: 3916/11
Judge: Lawrence S. Knipel
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51687-GH

At an IAS Term, Part CCP of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 11<sup>th</sup> day of February, 2015

P R E S E N T:

HON. LAWRENCE KNIPEL,  
Justice.  
-----X

KEIARTRA BAKER, INDIVIDUALLY AND AS  
NATURAL MOTHER AND LEGAL GUARDIAN  
OF DONAI WOODBINE,

Plaintiff,

- against -

Index No. 3916/11

PLAZA RESIDENCE, LP,

Defendant.  
-----X

The following papers numbered 1 to 5 read on this motion:

Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	_____
Opposing Affidavits (Affirmations) _____	_____
Reply Affidavits (Affirmations) _____	_____
_____ Affidavit (Affirmation) _____	_____
Other Papers _____	_____

By short form order dated March 31, 2014, plaintiff's motion to strike defendant's answer was granted to the extent that defendant was directed to produce one Ron Everett for a deposition,

or be precluded from contesting notice of hazard. Defendant moved for "reconsideration and modification" of the March 31, 2014 order by deleting therefrom the directive to produce the above-named former employee and to delete any reference to preclusion. By short form order dated July 7, 2014, defendant's motion was "granted to the extent that the previous order is adhered to in view of fact no papers submitted in opposition to previous order of March 31, 2014."

In this motion defendant, in effect, moves to appeal the July 7, 2014 order. Defendant argues that subsequent to the March 31, 2014 order, it became aware that Ron Everett, a building porter, was no longer employed by defendant and no longer under its control. Everett's status as a former employee was asserted in a Reply Affirmation in support of defendant's motion for reconsideration and modification. That affirmation stated that Everett was no longer employed as of December 2013, that the attorney appearing in court on March 31, 2014 was unaware of that status, and that plaintiff was provided with Everett's last known address. Defendant contends it cannot be compelled to produce a former employee over which it has no control. Moreover, it is argued, the court was advised in unspecified "prior papers" that even when he was employed he "hid behind union rules" and was not cooperative.

In opposition, plaintiff notes that the deposition of plaintiff was conducted March 26, 2013; the deposition of Ron Everett was noticed June 24, 2013; Everett did not appear; by order dated August 15, 2013, defendant was directed to produce Everett on or before September 19, 2013; on

September 19, 2013 Everett failed to appear; on November, 2013, plaintiff moved to strike the answer for failing to produce Everett, resulting in the March 31, 2014 order directing defendant to produce Everett by April 30 or be precluded from denying notice; defendant moves to reargue and modify, resulting in order dated July 7, 2014 adhering to the prior order. Plaintiff acknowledges that defendant supplied three videotapes from the date of the accident, but notes they were produced two and one-half years after directed to do so and one year after plaintiff's deposition. Thus, plaintiff argues, defendants "have repeatedly and wilfully thwarted discovery and attempted to prejudice plaintiff by not producing witnesses or videotapes." This motion, plaintiff asserts, is a further attempt to prejudice plaintiff that should not be tolerated.

Characterizing this motion as one for reargument, plaintiff argues that the defendant could have appealed the prior motion which denied its motion for reargument, and should not give plaintiff "carte blanche to repeatedly make the same motion." This is "nothing more than a misguided attempt to seek sympathy from the Court for its own ineptitude." Defendant, it is urged, has failed to demonstrate what the Court overlooked or misapprehended, or to submit any evidence supporting their claim. Nor can this be deemed a motion to renew since there is no justification for failing to present any allegedly new facts in opposition to plaintiff's original motion.

Annexed as an exhibit to plaintiff's opposition is an affirmation in opposition to defendant's motion to reconsider and modify, in which it is stated that on March 26, 2013, defendant produced

the current superintendent, but he testified he was not employed at the time of the accident, and that Everett was responsible for garbage removal at the time of the incident.

The thrust of defendant's motion is that Everett is no longer employed and defendant cannot be compelled to produce a witness over which it has no control. Defendant conveniently ignores its repeated failure to produce Everett while he was still in defendant's employment. Had defendant complied with the August 15, 2013 order of JHO Schneier, Everett would have been deposed of on or before September 19, 2013, more than three months prior to his termination of employment. By the time the March 31, 2014 order was made, Everett was no longer an employee.

Accordingly, the orders dated March 31, 2014 and July 7, 2014 are modified to the extent of vacating the directives to produce Everett for deposition. However, defendant remains precluded from contesting "Notice of Hazard" for ignoring the order of the JHO dated August 15, 2013, which had it been complied with would have resulted in the timely deposition of Everett.

The foregoing constitutes the decision and order of this court.

ENTER,



J. S. C.

HON. LAWRENCE KNIPEL

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CLERK  
