

Gelardo v City of Mount Vernon
2015 NY Slip Op 32890(U)
June 1, 2015
Supreme Court, Westchester County
Docket Number: 62940/13
Judge: Joan B. Lefkowitz
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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

-----X

LINDA GELARDO,

Plaintiff,

DECISION & ORDER

-against-

Index No. 62940/13
Motion Date: June 1, 2015

THE CITY OF MOUNT VERNON and ASMA
REALTY CORP.,

Seq. No. 2

Defendants.

-----X

LEFKOWITZ, J.

The following papers were read on this motion by plaintiff for an order compelling defendant City of Mount Vernon to produce (1) a witness from the Mount Vernon Parking Bureau for a deposition, and (2) records, including complaints, work orders, repair records, and/or inspection records for the subject parking garage for the two years prior to and including the date of the subject accident received or made by the Mount Vernon Parking Bureau.

Order to Show Cause-Affirmation of Good Faith-Affirmation in Support
-Exhibits A-F
Affirmation in Opposition

Upon the foregoing papers and the proceedings held on June 1, 2015, the motion is determined as follows:

In this action, plaintiff seeks to recover damages for personal injuries, including fractures of her left foot, which she allegedly sustained on August 25, 2012, when she tripped and fell over a broken metal post in a parking lot owned, operated, maintained and/or supervised by defendants. Plaintiff served defendant City of Mount Vernon (hereinafter "defendant City") with a Notice of Claim. Defendant City appeared in this action and served an answer.¹ On or

¹ Defendant ASMA Realty Corp. failed to serve an answer or appear. By order dated November 19, 2014, the court (Adler, J.) granted plaintiff a default judgment against ASMA Realty Corp., severed the claims against it, and stayed an inquest on damages pending the resolution of the claims against defendant City.

about March 27, 2015, defendant City produced for a deposition Curtis J. Woods, Commissioner of the Department of Public Works for the City of Mount Vernon.

Plaintiff now seeks, inter alia, an order compelling defendant City to produce a witness from the Mount Vernon Parking Bureau for a deposition. Plaintiff contends that Commissioner Woods, who was produced by defendant City, had insufficient knowledge and an additional deposition is necessary. Plaintiff specifically notes that at his deposition, Commissioner Woods testified as follows: (1) the subject parking garage is run by the Mount Vernon Parking Bureau, which is separate and apart from the Department of Public Works; (2) the Commissioner of the Parking Bureau is Gaylord Worrell; (3) he did not know how many employees of the Parking Bureau were assigned to the subject parking garage in August, 2012, or their identities; (4) it is the duty of the Department of Public Works to perform structural repairs on the subject parking garage; (5) while the Department of Public Works would keep a record regarding a civilian complaint made to it concerning the parking garage, it would not keep records if the complaint came from another governmental agency, such as the Parking Bureau; and (6) he did not know if the Parking Bureau had a process to register complaints or incidents within a parking garage.

Plaintiff contends that since Commissioner Woods testified that his department does not keep written records of complaints made by non-civilians regarding the parking garage, despite defendant City's prior written notice statute, which requires written notice to the Commissioner for Public Works, a deposition of a witness from the Parking Bureau is necessary. Plaintiff further contends that defendant City's refusal to produce a witness from the Parking Bureau furthers defendant City's inequitable system which permits it to avoid liability for accidents involving dangerous conditions within parking garages which are not reported to it by civilians. Additionally, plaintiff asserts that the Department of Public Works has shifted the burden of record keeping for complaints regarding dangerous conditions and other notice records to the Parking Bureau since Commissioner Woods testified that the Department of Public Works would not keep written records of a complaint forwarded to it from someone at the Parking Bureau. Accordingly, plaintiff contends that a witness from the Parking Bureau needs to be deposed regarding, inter alia, whether any complaints about the subject defect were received by the Parking Bureau or made by the Parking Bureau to the Department of Public Works. Plaintiff further contends that Commissioner Woods does not have knowledge regarding these issues.

Plaintiff also seeks to compel the Parking Bureau to search for and produce records regarding any complaints, work orders, repair records, and/or inspection records for the subject parking garage for a period of two years prior to and including the date of the subject accident.²

Defendant City opposes the motion on the ground that plaintiff seeks to conduct a fishing

² At oral argument, plaintiff's counsel raised for the first time the argument that such records are necessary to determine if the Parking Bureau created the defective condition. Plaintiff failed to include this argument in the affirmation in support of the motion, and the relief was not included in the Briefing Schedule issued for the present motion.

expedition. Defendant City relies upon § 256 of the City Charter of the City of Mount Vernon Municipal Code, which establishes that as a condition precedent to a personal injury action against the City, plaintiff must plead and prove that prior written notice of the defective condition was given to the Commissioner of Public Works. In view of the foregoing section, defendant City contends that Commissioner Woods was the best witness with knowledge regarding whether he received prior written notice of the subject defect. Defendant City notes that Commissioner Woods testified that the Department of Public Works' records were searched and there was nothing. Defendant City asserts that plaintiff is trying to circumvent the prior written notice law and conduct a fishing expedition by arguing that someone other than the Commissioner of Public Works may have received written notice of the subject defect. Accordingly, defendant City contends that plaintiff's motion should be denied as there is no offer of proof that anyone else had received written notice.

A municipal party has the right to designate which of its officers or employees with knowledge of the facts shall be examined (*Brevetti v City of New York*, 79 AD3d 958 [2d Dept 2010]; *Filoramo v City of New York*, 61 AD3d 715 [2d Dept 2009]). A party seeking an additional deposition of a municipal party must establish that (1) the officers or employees already deposed had insufficient knowledge, or was otherwise inadequate, and (2) there is a substantial likelihood that the person or persons sought to be deposed possess information which is material and necessary to the prosecution or defense of the case (*Brevetti*, 79 AD3d at 958-959; *Filoramo*, 61 AD3d at 715).

Plaintiff correctly contends that the deposition testimony of Commissioner Woods demonstrates that he did not have knowledge regarding whether the Parking Bureau received complaints about the subject defect and forwarded the complaints to the Department of Public Works. Notably, Commissioner Woods specifically testified that the Department of Public Works would not keep records of any complaints it received from another governmental agency, such as the Parking Bureau. Whether the Department of Public Works received a complaint about the subject defect from the Parking Bureau, which would constitute prior written notice of the subject defect under § 256 of the City Charter, is relevant to the issue of prior written notice in this action. Accordingly, since Commissioner Woods had no knowledge regarding whether such notice was received from the Parking Bureau and conceded that no records of such notice would be kept by the Department of Public Works, plaintiff is entitled to a deposition of a witness from the Parking Bureau limited to the issue of notice to the Department of Public Works regarding the subject defect. In view of the foregoing, plaintiff is also entitled to the production of any records in the possession of the Parking Bureau regarding any notice or complaints it received regarding the subject defect and any written notice or complaints it forwarded or made to the Department of Public Works regarding the subject defect during the period of two years prior to and including the date of the subject accident.

Accordingly, it is

ORDERED that the branch of plaintiff's motion seeking to compel defendant City to produce records is granted to the extent that, on or before June 19, 2015, defendant City shall

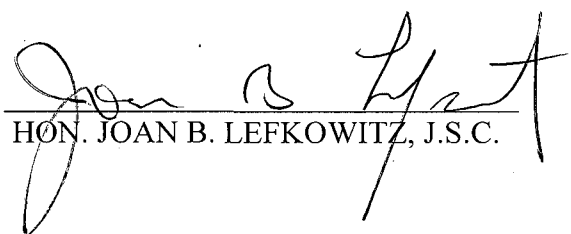
produce records in the possession of the Parking Bureau of any notice or complaints regarding the subject defect made to it and any written notice or complaints made by it to the Department of Public Works during the two year period prior to and including the date of the subject accident; or if no such records of such complaints are located by the Parking Bureau, defendant City shall serve an affidavit of an employee of the Parking Bureau with personal knowledge of the search undertaken for the records which shall set forth that no such records were located and the details of the search undertaken for the records; and it is further

ORDERED that the branch of plaintiff's motion seeking to compel defendant City to produce a witness from the Parking Bureau for a deposition is granted to the extent that, on or before June 26, 2015, defendant City shall produced a witness from the City of Mount Vernon Parking Bureau with knowledge of any notice or complaints made to it and any written notice or complaints made by it to the Department of Public Works regarding the subject defect for a deposition limited to such notice or complaints and/or the search undertaken to locate records of such complaints; and it is further

ORDERED that plaintiff is directed to serve a copy of this order with notice of entry upon all parties within 10 days of entry; and it is further

ORDERED that counsel are directed to appear in the Compliance Part, Courtroom 800, for a conference on July 13, 2015 at 9:30 A.M.

Dated: White Plains, New York
June 1, 2015


HON. JOAN B. LEFKOWITZ, J.S.C.

TO:

Louis Grandelli, P.C.
By John J. Rapawy, Esq.
Attorneys for Plaintiff
90 Broad St., 15th Floor
New York, NY 10004
BY NYSCEF

Office of Corporation Counsel for
the City of Mount Vernon
By Brian G. Johnson, Esq.
Attorneys for Defendant
City of Mount Vernon
1 Roosevelt Square East
Mount Vernon, NY 10550
BY NYSCEF

cc: Compliance Part Clerk