

Gilbert v City of Rye
2015 NY Slip Op 32920(U)
November 2, 2015
Supreme Court, Westchester County
Docket Number: 68391/2013
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
KATHERINE GILBERT and
MITCHELL A. GILBERT,

Plaintiffs,

-against-

THE CITY OF RYE, THE PRESBYTERIAN
CHURCH OF THE TOWN OF RYE,
ALFREDO LANDSCAPING, INC. and
JOHN DOES #1 through #50,

Defendants.
-----X

LEFKOWITZ, J.

DECISION & ORDER

Index No. 68391/2013
Motion Date: Nov. 2, 2015
Seq. No. 1

The following papers were read on this motion by plaintiffs pursuant to CPLR 3124 for an order compelling defendant The City of Rye ("Rye") to produce all non-privileged documents in its possession, custody or control responsive to Plaintiffs' Post-Deposition Demands for Production of Documents (the "Post-Deposition Demands") dated August 11, 2015. Defendants oppose the motion.

- Order to Show Cause - Affirmation in Support - Exhibits 1-7
- Memorandum of Law in Support
- Affirmation in Opposition - Exhibits A-D

Upon the foregoing papers and the proceedings held on November 2, 2015 this motion is determined as follows:

This action was commenced on or about November 1, 2013, seeking damages for, among other things, injuries allegedly sustained by plaintiff Katherine Gilbert ("Mrs. Gilbert") on February 14, 2013 when she slipped and fell on a patch of black ice on the sidewalk along Boston Post Road in Rye, New York, which abuts the property of the Presbyterian Church of the Town of Rye (the "Presbyterian Church"). Plaintiffs contend that Mrs. Gilbert's accident occurred as a result of defendants' negligence in plowing and/or piling snow near and on the sidewalk in such a manner as to cause the snow to melt and then pool and re-freeze as black ice.

On July 17, 2015, plaintiffs took the deposition of Scott Fontecchio ("Mr. Fontecchio"), the general foreman for Rye. On August 6, 2015, plaintiffs took the deposition of Jim Alfredo, co-owner of defendant Alfredo Landscaping, Inc. ("Alfredo"), the entity hired by the Presbyterian Church to provide snow maintenance for its premises.

Plaintiffs served their Post-Deposition Demands on August 11, 2015. On or about September 2, 2015, Rye served its Response to Plaintiffs' Post-Deposition Demands (the "Response"), wherein Rye objected to all of the demands.

Counsel for the parties appeared at a Compliance Conference on September 9, 2015 at which time Rye's failure to provide documents in response to the Post-Deposition Demands was discussed and plaintiffs were provided a briefing schedule for the present motion.

On September 17, 2015, plaintiffs' counsel states that its office contacted Rye's counsel's office in an unsuccessful attempt to resolve the discovery dispute without motion practice.

Plaintiffs bring the instant motion seeking to compel Rye to respond to Plaintiffs' Post-Deposition Demands. Plaintiffs contend that to date, Rye has not responded to those demands. Plaintiffs state that they served those demands in accordance with the July 24, 2015 Compliance Conference Referee Report & Order.

The Post-Deposition Demands consisted of, in pertinent part, the following eight demands:

1. Documents containing instructions for the plowing/ removal of snow or elimination of ice from Boston Post Road and/or the sidewalk abutting the Presbyterian Church from the time period of February 14, 2011 to the present.
2. Rye's document management or retention policy, in effect on February 14, 2013 or subsequent thereto, applicable to (a) Rye's salting and/or plowing records, inclusive of Boston Post Road and/or the sidewalk abutting the Presbyterian Church; (b) complaints about plowing /removal of snow or elimination of ice from Boston Post Road and/or the sidewalk abutting the Presbyterian Church; (c) the condition of sidewalks in Rye; and/or (d) communication with property owners in Rye about its maintenance of sidewalks and/or the state of repair of the sidewalks it maintains, including alleged Code violations.
3. Documents discussing any need for replacement or repair of the relevant sidewalk, from February 14, 2011 to present.
4. Documents discussing the scope of any replacement or repair of the

relevant sidewalk, from February 14, 2011 to present.

5. Documents reflecting the budget and/or costs of any replacement or repair of the relevant sidewalk, from February 14, 2011 to present.

6. Documents reflecting any formal or informal disputes arising out of any replacement or repair of the relevant sidewalk, from February 14, 2011 to present.

7. Pleadings from another litigation thought by Mr. Fontecchio to involve a slip-and-fall on Boston Post Road.

8. Documents regarding the property line between the Presbyterian Church and its neighbor Resurrection Church.

Boston Post Road Plow/Salting Instructions (Demand 1)

Plaintiffs state they are entitled to documents concerning plowing/salting instructions for Boston Post Road because such instructions could bear on the extent to which Rye may have negligently contributed to the creation of the black ice. Rye argues that the snow plowing documents have no relevance to plaintiffs' claims because plowing of snow or causing snow to be piled up on a sidewalk is not evidence of negligent snow removal. Additionally, Rye contends that it has a legal and statutory defense to plaintiffs' claims. Rye argues that pursuant to City Code section 167-47 Rye does not have a duty to remove the snow and ice from its sidewalks but rather the duty to remove snow and ice from sidewalks rests with the owner of the land adjacent to the subject sidewalk, in this case the Presbyterian Church. Moreover, Rye argues that even if it did have a duty with respect to clearing the sidewalks of snow and ice, plaintiffs failed to provide the requisite prior written notice of a purported defect as required by City Charter section 23-1. Additionally, Rye argues that the Presbyterian Church had hired Alfredo to handle the snow and ice removal from the subject sidewalk.

Rye further argues that plaintiffs' demands violate the June 29, 2015, Compliance Conference Referee Report & Order which limited a prior request relating to plowing and snow removal documents demanded in plaintiffs' Supplemental Discovery Demand dated March 6, 2015 to documents "related to the plowing of the relevant street within the two-week period leading up to the plaintiff's accident." Plaintiffs argue that the two week restriction in the June 29, 2015 Order applies only to the demands served by plaintiffs on April 9, 2014 and March 6, 2015, and does not apply to Plaintiffs' Post-Deposition Demands.

Rye contends that notwithstanding the above, no such documents exist and submits the affidavit of Ryan Coyne, City Engineer, PE for Rye, wherein he states that, among other things, by statute Rye does not provide snow or ice abatement to the subject premises and as such is not

in possession of documents relative to snow or ice abatement concerning those premises.

Rye's Document Management/ Retention Policies (Demand 2)

Plaintiffs cite Rye's lack of forthcoming responses to its Post-Deposition Demands and plaintiffs' earlier discovery demands as sufficient grounds for the production of Rye's document management and retention policies. Rye states its lack of responsibility for clearing ice and snow from the subject sidewalk is precisely why there are no documents relating to that responsibility.

Sidewalk Replacement/ Repair Documents (Demands 3, 4, 5)

Plaintiffs argue they are entitled to documents concerning any replacement or repairs of the subject sidewalk because of deposition testimony that there had been a construction job which had changed or replaced the sidewalk but that the work was not performed by the Presbyterian Church. Additionally, plaintiffs state that the Presbyterian Church is attempting to build a record that the black ice was the result of water run off from a nearby driveway belonging to the neighboring Resurrection Church and that the issue of the sidewalk grading has become significant.

Rye argues that since plaintiffs have not asserted claims concerning the grading or that the condition of the sidewalk caused Mrs. Gilbert's injuries in the complaint or bill of particulars, these documents are irrelevant. Additionally, Rye contends that notwithstanding its objections, although Rye replaced certain sidewalks at 900 Boston Post Road in 2012, the subject sidewalk at 882 Boston Post Road was not replaced, remediated, or altered by Rye in any manner either before or after the accident.

Prior Litigation Documents (Demand 7)

Plaintiffs are seeking documents concerning the possible existence of another lawsuit involving a slip and fall on Boston Post Road as testified to by Mr. Fontecchio during his deposition. Mr. Fontecchio testified that some of the documents produced to plaintiffs were searched for and collected in connection with a case involving a slip and fall on Boston Post Road, near Rectory Street, however he was unable to recall the name of the plaintiff of that case. Plaintiffs contend these documents are relevant in that pleadings from a case with the same type of claims sustained at or very near the subject premises may lead to admissible evidence. Rye objects to the production of these documents arguing that documents concerning an incident involving a slip and fall which occurred at a different location than the subject accident on Boston Post Road are irrelevant to the current litigation. Additionally, Rye argues that since Mr. Fontecchio is unable to recall the name of the plaintiff involved in the prior incident, it is impossible for Rye to produce the documents in the other unrelated lawsuit.

Property Line Documents (Demand 8)

Plaintiffs state that documents reflecting or regarding the property line dividing the properties of the Presbyterian Church and Resurrection Church are relevant to Rye's determination of delegation of snow and ice removal responsibilities under the City Code. Rye argues that it has already responded to this request by responding that surveys and deeds of the respective properties are a matter of public record. Additionally, Rye states that plaintiffs are seeking to conduct their own survey of the subject area to determine the property lines between the various entities.

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action." The phrase "material and necessary" is "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). Although the discovery provisions of the CPLR are to be liberally construed, "a party does not have the right to uncontrolled and unfettered disclosure" (*Merkos L'Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 408 [2d Dept 2009]; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531 [2d Dept 2007]). "It is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims" (*Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). The trial court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*Auerbach v Klein*, 30 AD3d 451 [2d Dept 2006]; *Feeley v Midas Properties, Inc.*, 168 AD2d 416 [2d Dept 1990]).

With respect to demand number 1, the court finds that documents concerning Rye's snow and/or ice removal instructions limited to the two week period prior to the date of the subject accident are relevant to whether or not Rye contributed to the conditions which created the black ice. However, insofar as Rye has proffered the sworn affidavit of its city engineer that Rye does not possess documents responsive, no further response to this demand is warranted.

Additionally, plaintiffs have demonstrated that they are entitled to documents responsive to demand number 7 concerning the other slip and fall litigation referred to during Mr. Fontecchio's deposition. The court takes judicial notice of the proximity of Rectory Street to the subject premises and finds those documents, if any, would be relevant to the instant litigation.

Lastly, plaintiffs are entitled to any documents in Rye's possession concerning the property line dividing the properties of the Presbyterian Church and Resurrection Church. These documents are relevant to the issue of which entity was responsible for snow and ice removal from the subject sidewalk.

Plaintiffs have failed to demonstrate the relevance of the documents sought in demands 2,

3, 4, 5, and 6. Plaintiffs have alleged that Mrs. Gilbert's injuries were caused by a fall on black ice, but have made no allegations concerning the condition or state of repair of the sidewalk. Additionally, plaintiffs have failed to demonstrate the basis for their entitlement to Rye's retention policies, if any, concerning ice and snow removal.

In view of the foregoing, it is

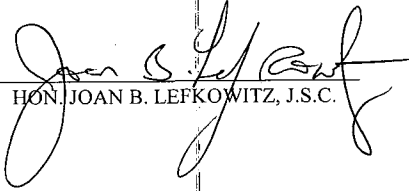
ORDERED that plaintiffs' motion seeking to compel substantive responses to its Post-Deposition Demands is granted to the extent that defendant The City of Rye is directed to provide responses to demands 7 and 8 of Plaintiffs' Post-Deposition Demands on or before December 1, 2015. In the event that no responsive documents to a demand are found, The City of Rye is directed to provide an affidavit detailing the nature of the search undertaken for those documents, including the date/s, location/s and the name/s of the person/s conducting the search; and it is further

ORDERED that the motion is denied in all other respects; and it is further

ORDERED that all parties are directed to appear for a conference in the Compliance Part, Courtroom 800, on December 2, 2015 at 9:30 a.m.; and it is further

ORDERED that movants shall serve a copy of this order with notice of entry upon defendants within ten (10) days of entry.

Dated: White Plains, New York
November 2, 2015


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

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