

Pushae v Presbyterian Hosp. in the City of N.Y.

2016 NY Slip Op 31022(U)

March 29, 2016

Supreme Court, New York County

Docket Number: 153595/14

Judge: Donna M. Mills

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 58

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JAMES PUSHAE,

Plaintiff,

- against -

Index No. 153595/14
DECISION & ORDER
(Motion Seq. 001)

THE PRESBYTERIAN HOSPITAL IN THE CITY
OF NEW YORK,

Defendant.

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DONNA MILLS, J.:

Plaintiff moves, pursuant to CPLR 3124 and 3126, to compel defendant to produce certain documents and a witness for an examination before trial or, in the alternative, for an order precluding defendant from offering any testimony at trial concerning liability or damages.

Plaintiff also requests an extension of time to file his note of issue.

This lawsuit arises from an alleged slip and fall by the plaintiff on February 6, 2014 in the first floor lobby or vestibule of defendant’s hospital facility located at 622 West 168th Street, New York, New York. Plaintiff allegedly slipped and fell on accumulated water, fracturing his patella, requiring surgery. According to a Security Department report that was produced, the weather that day was snowy and the floor condition was “wet,” although rugs were allegedly on the floor (*see* Sells affirmation, Ex. 6).

Plaintiff alleges that, despite numerous demands and four court orders, defendant has refused to disclose the following:

- (a) cleaning/maintenance, repair and inspection records for the lobby area in question for one year prior to and including the date of the accident;
- (b) a legible copy of the Security Department report referred to above, identifying the author of the report;

- (c) the name and last known address of the maintenance employee assigned to the area in question on February 6, 2014;
- (d) relevant video footage from security cameras for the lobby on February 6, 2014; and
- (e) the identity of the security guard who helped the plaintiff, and, if no longer employed, his last known address.

In opposition to the motion, defendant submits an affirmation from its counsel, who insists that defendant has complied with all of the plaintiff's document demands and that it is plaintiff who refuses to go ahead with the defendant's deposition. However, defense counsel objects to the burden of having to produce a year's worth of "maintenance and repair" records since this accident allegedly involved a slip and fall on melted snow, contending that the request is "palpably improper."

By letter dated March 6, 2015, defense counsel identified, by name, the security officer who responded to the incident and prepared the incident report, a copy of which was then being produced; advised that there was no video footage capturing the area in question at the time of the incident; and advised that the maintenance employee assigned to the area in question was no longer employed by the hospital. On July 29, 2015, defendant disclosed the name and last known address of its former maintenance worker and another copy of the incident report. Accordingly, there is no question that defendant has supplied all of the information requested in demands (b) through (e), except for cleaning, maintenance, repair and inspection records.

On March 5, 2015, defense counsel advised: "We are working with NYPH to confirm whether or not maintenance/repair/inspection records exist with regard to the floor in the subject vestibule for the time period of one year prior to the incident, and will provide these to the extent that they exist" (Rita affirmation, Ex. A). On April 17, 2015, defendant signed a second court-

ordered stipulation agreeing to produce these records within 30 days.¹ On July 29, 2015, defendant now objected that the demand was overbroad, citing *Roof v Port Auth. of N.Y. & N.J.* (67 AD2d 849 [1st Dept 1979]) and *Epstein v Lewis Bus. Forms* (45 AD2d 705 [1st Dept 1974]). Without waiving that objection, defense counsel advised that no “cleaning records” are maintained (Rita affirmation, Ex. B).

The case law upon which defendant relies involved “blunderbuss” document demands, which is clearly not the case here, and a disclosure request is palpably improper only “if it seeks information of a confidential and private nature that does not appear to be relevant to the issues in the case” (*Saratoga Harness Racing v Roemer*, 274 AD2d 887, 889 [3d Dept 2000], quoting *Titleserv, Inc. v Zenobio*, 210 AD2d 314, 315-316 [2d Dept 1994]). That cleaning, maintenance, repair and inspection records are highly relevant to establishing, in a slip and fall case, the requisite actual or constructive notice cannot be seriously questioned (*see e.g. Dorsa v National Amusements*, 6 AD3d 652 [2d Dept 2004]; *Hardy v Tops Mkts.*, 231 AD2d 879 [4th Dept 1996]).

Plaintiff is not required to accept an unsworn statement from defense counsel that no cleaning records exist.

“An affidavit regarding the unavailability of documents that are the subject of a discovery order must document a thorough search conducted in good faith. It should include details such as ‘where the subject records were likely to be kept, what efforts, if any, were made to preserve them, whether such records were routinely destroyed, [and] whether a search [was] conducted in every location where the records were likely to be found’”

(*Henderson-Jones v City of New York*, 87 AD3d 498, 505 [1st Dept 2011], quoting *Jackson v City of New York*, 185 AD2d 768, 770 [1st Dept 1992]).

Accordingly, the motion is granted to the extent that defendant shall be precluded from offering any evidence at trial as to liability unless, within 30 days of service of a copy of this

¹ Defendant had previously agreed to produce these records within 30 days by court-ordered stipulation dated January 17, 2015.

order with notice of entry, defendant provides plaintiff with an affidavit by someone possessing personal knowledge of the cleaning and maintenance practices for the hospital's floors, whether it be an employee or third-party contractor, attesting to what records or other documents should or may exist regarding the cleaning, maintenance, repair and/or inspection of the lobby area in question between February 5, 2013 and February 6, 2014 and the search effort made to locate such records. Any and all documents identified shall also be produced. Defendant shall appear for an examination before trial on or before April 30, 2016. If the parties agree to a date for the deposition beyond this date, it must be set forth in a stipulation and submitted to the court to be so-ordered. Finally, plaintiff's time to file a note of issue is extended until May 31, 2016.

The foregoing constitutes the decision and order of this court.

Dated: March 29, 2016

ENTER:



J.S.C.

DONNA M. MILLS