Hutchinson v Holland 3204 LLC
2016 NY Slip Op 31995(U)
September 9, 2016
Supreme Court, Bronx County
Docket Number: 304977/2012
Judge: Laura G. Douglas
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 11

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NICKOLE HUTCHINSON,

Plaintiff,

-against-

HOLLAND 3204 LLC,
CHESTNUT HOLDINGS OF NEW YORK, INC., and
ELTECH INDUSTRIES, INC.,

Defendants.

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Index No. 304977/2012

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 to compel a further deposition, to impose sanctions pursuant to CPLR 3126, including striking defendants' answer and precluding certain evidence, to declare that plaintiff has made out a *prima facie* case, to impose sanctions upon defendants' attorney, and to award costs and fees for the instant motion:

Papers	**Numbered**
Plaintiff's Notice of Motion, Good Faith Affirmation of Bryan J. Hutchinson, Esq. dated May 17, 2016, Plaintiff's Affidavit dated May 17, 2016 in Support of Motion, Affirmation of Bryan J. Hutchinson, Esq. dated May 10, 2016 in Support of Motion, and Exhibits ("A" through "U")...	**1**
Affirmation of Kevin F. Mahon, Esq. dated June 27, 2016 in Opposition to Motion and Exhibits ("A" and "B").....	**2**
Affirmation of Amy L. Mandel, Esq. dated May 18, 2016 in Partial Opposition to Motion.....	**3**
Reply Affirmation of Bryan J. Hutchinson, Esq. dated July 15, 2016 and Exhibits ("A" and "B").....	**4**
Notice of Cross-Motion by Defendants Holland 3204 LLC and Chestnut Holdings of New York, Inc., Affirmation of Kevin F. Mahon, Esq. dated June 28, 2016 in Support of Cross-Motion, and Exhibits ("A" through "E").....	**5**
Affirmation of Bryan J. Hutchinson, Esq. dated July 27, 2016 in Opposition to Cross-Motion and Exhibit ("A").....	**6**

Reply Affirmation of Kevin F. Mahon, Esq. dated August 18, 2016..... 7

This motion and cross-motion are consolidated for purposes of Decision/Order and upon the foregoing papers and after due deliberation, the Decision/Order on this motion and cross-motion is as follows:

The plaintiff seeks an order compelling defendants Holland 3204 LLC and Chestnut Holdings of New York, Inc. (collectively, "Holland") to produce a witness for a continued deposition, penalizing Holland for refusing to answer certain questions at deposition, including striking Holland's answer and/or precluding them from offering certain evidence, and awarding costs and sanctions. The motion is granted solely as ordered below, and is denied in all other respects. Holland cross-moves for an order awarding costs and sanctions against the plaintiff as a penalty for her purportedly frivolous motion. The cross-motion is denied in its entirety.

The plaintiff seeks monetary damages for injuries allegedly sustained in an accident on a certain elevator located on premises owned, operated, and or serviced by the defendants. Holland produced its Field Manager, Cesar Morales, for deposition. The deposition became contentious over the multiple interjections by Holland's attorney regarding certain of the plaintiff's attorney's questions and directions to Mr. Morales not to answer certain questions. After some back-and-forth, plaintiff's attorney ceased questioning Mr. Morales.

In pertinent part, 22 NYCRR §221.2 allows a deponent to refuse to answer a question when the question is plainly improper and would, if answered, cause significant prejudice to any person. The rule also provides that an attorney shall not direct a deponent not to answer except as provided by CPLR Rule 3115 or 22 NYCRR §221.2. Finally, the deponent and/or attorney shall give a clear and succinct statement of the basis for refusing to answer the question.

The duty of a deponent to answer all questions does not extend to questions requiring the witness to provide a legal conclusion, a factual conclusion, or to draw an inference from the facts (*see Lobdell v. South Buffalo Railway Co.*, 159 AD2d 958 [4th Dept 1990] and *White v. White*, 42 Misc3d 260 [Sup Ct Monroe Cty 2013]). In *Mayer v. Hoang*, 83 AD3d 1516 [4th Dept 2011], the plaintiff properly refused to answer questions concerning whether defendant supplied "any defective, unsafe or improper devices or materials which caused [plaintiff's] fall" or whether the work area

appeared to be "unreasonably dangerous." In *Lakeville Merrick Corp. v. Town Board of Islip*, 23 AD2d 584 [2nd Dept 1965], the deponent was not required to state whether a certain property was suitable for industrial purposes, since the question demands a conclusion of law or fact.

Many of the questions at issue here fall into this category, including,

1. "Would you agree that the braking, the leveling, the stopping and the control mechanism of the elevator are all under the exclusive control of the owner and the property manager of this property?"; and
2. "Would you agree that the failure of the elevator to brake properly does not necessarily occur in the absence of some need to maintain or repair the elevator?" (and related questions concerning the failure of the elevator to stop and level properly); and
3. "Had you received those letters on or about the time they were sent to your office, which is around January 11, 2012 and March 20, 2012, what would you have done in the ordinary course of business upon receiving those letters?"; and
4. "Under this contract, Eltech Industries has a contractual obligation to repair the elevator and make sure it is in a reasonable safe condition, right?"; and
5. "Did the elevator malfunction on January 4, 2012?".

Such questions require Mr. Morales to state whether the plaintiff has established a claim as a matter of law. For example, "exclusive control" is an element of the plaintiff's theory of *res ipsa loquitur*. While the plaintiff may seek to ascertain facts regarding who controlled the subject elevator, the determination of whether such facts are legally sufficient to establish "exclusive control" is for the court and/or jury to decide. Similarly, whether the elevator "malfunctioned" on the accident date asks Mr. Morales to reach a factual conclusion or draw an inference from certain facts. Finally, questions asking to interpret the obligations under a party's contract demand conclusions of law and fact (*see Gassman v. Rothlein*, 275 AD2d 731 [2nd Dept 2000] ("It is well established that the interpretation of a contract is a matter of law for the court.")). Mr. Morales and Holland would be clearly prejudiced were Mr. Morales obligated to agree with the ultimate factual and legal contentions made by the plaintiff, rather than providing the facts that may support such allegations.

It appears that the interjections by Holland's counsel were related to his instructions to the witness not to answer these disputable questions. Therefore, the application for sanctions against Holland or its attorney, including striking its answer, precluding certain evidence at trial, declaring that the plaintiff has made out a *prima facie* case under the doctrine of *res ipsa loquitur*, and awarding attorney's fees and costs, is denied.

The Court will direct Cesar Morales to appear for a further deposition by the plaintiff. The stalemate between the attorneys prevented the completion of an agreed upon deposition. The Court strongly suggests that plaintiff's counsel refrain from asking questions that require the witness to draw legal and/or factual inferences and that Holland's counsel refrain from stating anything other than a succinct "objection" without any additional statement unless requested by the examining party. There should be no need for a referee to monitor the deposition if counsel follow these rules.

The cross-motion is denied. The contentions made by the plaintiff in her instant motion did have some arguable basis in law. The deposition questions in dispute were not egregiously improper. Holland has not demonstrated that any of the positions taken by the plaintiff rise to the level of frivolous conduct required to sustain an award of costs under Part 130 of the Rule of the Chief Administrator.

Accordingly, it is hereby

ORDERED, that defendants Holland 3204 LLC and Chestnut Holdings of New York, Inc. shall produce Cesar Morales for a continued deposition by the plaintiff on or before October 31, 2016.

This constitutes the Decision and Order of this Court.

Bronx, New York
September 9, 2016

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