

Ulin v 550 Madison Fifth, LLC
2017 NY Slip Op 32149(U)
October 10, 2017
Supreme Court, New York County
Docket Number: 158826/2014
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 59

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SUSAN ULIN and RICHARD ULIN,

Plaintiffs,

-against-

158826/2014

Index No.:

550 MADISON FIFTH, LLC, SONY CORPORATION
OF AMERICA, 550 MADISON AVENUE TRUST LTD.,
and ABM JANITORIAL SERVICES, INC.,

Defendants.

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DEBRA A. JAMES, J.:

In this slip and fall personal injury action, defendant ABM Janitorial Services, Inc. (ABM) moves to vacate the note of issue (NOI) and certificate of readiness filed by plaintiffs in this slip-and-fall case.

In a post-deposition demand, served on July 11, 2016, ABM demanded certain security camera footage from defendant SONY Corporation of America (SONY), 550 Madison Fifth, LLC and 550 Madison Avenue Trust Ltd. Such demand was triggered by the testimony of SONY's security director given on June 8, 2016, that SONY had such footage for the time period when plaintiff alleges she fell, on April 4, 2014, but that it does not reveal any recorded incident.¹ Such witness also testified that SONY had the footage archived by a vendor, which provided a copy to SONY.

¹ Whether the camera was focused on the place where plaintiff Susan Ulin fell is not determined here. In addition, the medical authorization, which was provided by plaintiff to ABM, renders such discovery issue moot.

A discovery order in this case, dated July 26, 2016, required plaintiff, ABM and defendant 550 Madison Fifth, LLC to respond to post-deposition demands within 30 days, but does not address SONY. Plaintiff served the NOI on August 18, 2016, before that time frame ran.

In a good faith affirmation, ABM's counsel states that it sent good faith letters to plaintiff and Sony on September 9, 2016, but did not receive the outstanding discovery prior to the deadline to file this motion. He then made this motion on September 13, 2016. On September 28, 2016, SONY's response to ABM's demand for the security camera footage was that:

"other than the security camera footage obtained from numerous cameras and vantage points and including view of the area of plaintiff's alleged incident, taken on the date of incident, [SONY] possess[es] no additional security camera footage on the date of the incident".

ABM seeks the SONY footage, discovery essential to its defense.

22 NYCRR 202.21 (e) provides:

"Vacating note of issue. Within 20 days after service of a note of issue and certificate of readiness, any party to the action or special proceeding may move to vacate the note of issue, upon affidavit showing in what respects the case is not ready for trial, and the court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some material respect."

Where a party timely moves to vacate a note of issue, it need show only that 'a material fact in the certificate of readiness

is incorrect, or that the certificate of readiness fails to comply with the requirements of . . . section [202.21] in some material respect" (Vargas v Villa Josefa Realty Corp., 28 AD3d 389, 390 [1st Dept 2006] [citation omitted]; see also Ortiz v Arias, 285 AD2d 390, 390 [1st Dept 2001] [a note of issue should be vacated where it is based upon erroneous facts]). A motion to vacate a note of issue that is made more than 20 days after the note of issue had been served is untimely, necessitating the movant's showing of special circumstances (Arnold v New York City Hous. Auth., 282 AD2d 378, 378 [1st Dept 2001]).

Plaintiffs argue that they complied with the discovery demands served upon them, and that defendant's remedy is to move to strike codefendant's answer or for summary judgment on the cross claims. Plaintiffs make conclusory assertions about dilatory tactics by defendants, but provide no details.

Plaintiffs filed the NOI until over 30 days after ABM's demand was served, and, as stated above, the last discovery order in this case did not directly address SONY. As the NOI has been filed for almost a year, and Susan Ulin, now approximately 80 years old, has a trial preference, vacating the NOI would be prejudicial to plaintiffs (see Walker v Saftler, Saftler & Kirschner, 236 AD2d 224, 225 [1st Dept 1997] [NOI not vacated]). In addition, this motion was not made within 20 days after the filing of the NOI. Therefore, the NOI will not be vacated.

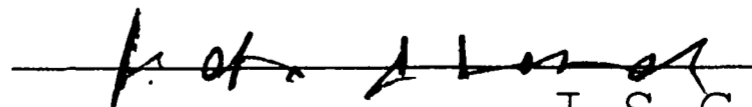
However, there is a single item remaining to be exchanged, a copy of the video recording, which is very material to this lawsuit, and was demanded. SONY responded to a follow-up letter demand for the camera footage after the NOI was filed and this motion made, and, under the circumstances in this record, and in the interests of justice and judicial economy, the exchange should be effected. Therefore, to that extent this court treats ABM's motion as one to compel, and orders SONY to provide a copy of any security camera footage of the area in which plaintiff alleges she fell, covering the date of the alleged incident, within 20 days of the date of this order. To prevent any possible prejudice to SONY, it may move for a protective order within 20 days of the date of this order, if it has a legally cognizable objection to exchanging this evidence.

In light of the foregoing, it is

ORDERED that the motion ABM Janitorial Services, Inc.'s motion is granted to the extent that, within 20 days of the date of this order, SONY must provide a copy of any camera footage of the incident site, as indicated in the opinion above, or, alternatively, to move for a protective order, and the motion is otherwise denied.

Dated: October 10, 2017

ENTER:


DEBRA A. JAMES J.S.C.