

Romero v City of New York

2017 NY Slip Op 32860(U)

November 1, 2017

Supreme Court, Queens County

Docket Number: 1738/16

Judge: Howard G. Lane

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE
Justice

IAS PART 6

JUAN CARLOS ROMERO,

Plaintiff,

-against-

THE CITY OF NEW YORK, et al.,

Defendants.

Index No. 1738/16

Motion
Date August 22, 2017

Motion
Cal. No. 154

Motion
Seq. No. 1

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Upon the foregoing papers it is ordered that this motion by plaintiff for an order compelling defendants to appear for depositions on a date certain and enlarging the date upon which the Note of Issue must be filed; and defendants' motion for an order pursuant to CPLR 3115, 3124 and 3126 compelling the plaintiff to comply with the Court's Orders by a date certain as to written discovery and appear for a further unobstructed deposition on a date thereafter at penalty of sanctions; enlarging the date upon which the Note of Issue must be filed to allow for disclosure of the outstanding discovery; and denying plaintiff's application to compel defendants' deposition dated May 30, 2017 as premature, are hereby decided as follows:

The underlying action is one brought by plaintiff Juan Carlos Romero for personal injuries he allegedly sustained on May 11, 2015 as a result of falling from a sidewalk bridge while working at a construction project located in Corona, New York.

The branches of the motions to enlarge the time to file the Note of Issue are granted. Pursuant to the Compliance Conference Order, the Note of Issue was to be filed August 4, 2017. As it is undisputed that significant discovery remains outstanding, good cause has been shown for an enlargement of time to file the

Note of Issue and the new Note of Issue due date shall be Friday, January 26, 2018.

That branch of plaintiff's motion seeking to compel defendants' depositions is hereby granted solely to the following extent:

Pursuant to the Compliance Conference Order, defendants' depositions were to be completed by March 22, 2017. Defendants did not comply with this Court Order, claiming that discovery cannot proceed as plaintiff has not fully complied with his discovery obligations and such compliance is a condition precedent. The Court finds that such is not a reasonable excuse for non-compliance with the Court Order in the instant matter and accordingly, the Court finds that defendants are compelled to appear for outstanding EBT's on a date, time, and place mutually agreed upon by the parties, but no later than sixty (60) days from the date of service of a copy of this order with notice of entry. Should defendants fail to comply with this Order, defendants shall be precluded from offering any evidence at trial that would have been elicited at an EBT that had not been previously provided to plaintiff by defendants by another disclosure device.

That branch of defendants' motions seeking to compel plaintiff to appear for a further unobstructed deposition is hereby granted solely to the following extent:

The record reflects that plaintiff refused to answer the following questions at his deposition:

- (1) Q. Were you using a scaffold on the date of the accident? and
- (2) Q. What's the difference in your mind between a bridge and a scaffold?

Under CPLR 3101 there shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action. The purpose of disclosure proceedings is to advance the function of trial, to ascertain truth and to accelerate disposition of suits. The CPLR further provides that disclosure should be construed broadly to effectuate this purpose (CPLR 3101[a][1][2]; *Allen v. Crowell-Collier Publishing Co.*, 21 NY2d 403 [1968]). "Evidence" is defined to mean not the equivalent to that evidence which might be admissible on trial of the action, but means evidence required in preparation for trial. The information sought need not qualify as evidence admissible at the trial of an action, but only lead to such evidence. Disclosure is required as to all relevant information calculated to lead to relevant evidence (Siegel, NY Prac § 344, at 550 [4th ed 2005]). It is well-established law that under CPLR 3101(a), the parties

may engage in liberal discovery of evidence that is "material and necessary" for the preparation of trial (see, *Allen v. Crowell-Collier Publ. Co.*, 21 NY2d 403 [1968]). "The words 'material and necessary' as used in the statute are to be interpreted liberally, to require disclosure, upon request, of any facts bearing on the controversy which will assist in the preparation for trial" (*Anonymous v. High School for Environmental Studies et. al.*, 820 NYS2d 573, 578 [1st Dept 2006] [citations omitted]). The Court is given broad discretion to supervise discovery (*Lewis v. Jones, et. al.*, 182 AD2d 904 [3d Dept 1992]). "The test is one of usefulness and reason. CPLR 3101(subd[a]) should be construed . . .to permit discovery of testimony 'which is sufficiently related to the issues in litigation to make the effort to obtain it in preparation for trial reasonable' (Weinstein-Korn-Miller, NY Civ Prac, par. 3101.07, p. 31-13)" (*Allen, supra*). It is immaterial that the material sought may not be admissible at trial as "pretrial discovery extends not only to proof that is admissible but also to matters that may lead to disclosure of admissible proof" (*Twenty Four Hour Fuel Oil Corp v. Hunter Ambulance, Inc.*, 226 AD2d 175 [1st Dept 1996]; *Polygram Holding, Inc. v. Cafaro*, 42 AD3d 339 [1st Dept 2007] ["disclosure extends not only to admissible proof but also to testimony or documents which may lead to the disclosure of admissible proof, including materials which may be used in cross-examination"]). Moreover the adequacy and circumstances and reasons for the disclosure will ultimately be determined by the trial court, and the "determination of whether a particular discovery demand is appropriate, are all matters within the sound discretion of the trial court, which must balance competing interests" (*Id.; Santariga v. McCann*, 161 AD2d 320 [1st Dept 1990] [the scope and supervision of disclosure is a matter within the sound discretion of the court in which the action is pending]).

As the Court stated in *Staten Island University Hospital v. Comprehensive Habilitation Services Inc.*, 2007 NY Misc Lexis 1248 [Sup Ct, Richmond County, 2007]):

Section 3101(a) embodies the policy determination that liberal discovery encourages fair and effective resolution of disputes on the merits, minimizing the possibility for ambush and unfair surprise (see, *Delta Financial Corp. v. Morrison*, ___ Misc3d ___, 829 NYS2d 877, 2007 WL 283039 [Sup Ct, Nassau County, Jan. 26, 2007]). Parties are entitled to ask broad questions at depositions in an effort to ascertain the truth and to flush out the relevant issues

that may assist them in the prosecution or defense of their action (see, *Seaman v. Wyckoff Heights Medical Center, Inc.*, 8 Misc3d 628, 632, 798 NYS2d 866 [Sup Ct, Nassau County, 2005]). The structure of CPLR Article 31 "envisages a maximum disclosure of Facts with a minimum of supervision" ([*5] *Wiseman v. American Motors Sales Corp.*, 103 AD2d 230, 232, 479 NYS2d 528 [2d Dept 1984]), to "create an environment conducive to open, expansive disclosure during the taking of the deposition" (*Mora v. St. Vincent's Catholic Med. Ctr.*, 8 Misc3d 868, 800 NYS2d 298 [Sup Ct, NY County, 2005]).

On October 1, 2006 a new Part 221, entitled "Uniform Rules for the Conduct of Depositions" became effective. Section 1 of the Rule provides that every objection raised during an deposition shall be stated succinctly. Section 2 provides that the proper procedure for a deposition is to permit the witness to answer all questions subject to objections pursuant to CPLR 3115 (b), (c) and (d), except (i) to preserve a privilege or right of confidentiality, (ii) to enforce a limitation set forth in an order of a court, or (iii) if the question is plainly improper and would, if answered, cause significant prejudice to any person, and "[a]n attorney shall not direct a deponent not to answer except as provided in CPLR 3115 or this subdivision".

* * *

"[T]he scope of questioning and testimony which may be elicited at a deposition may be more extensive than that which may be admissible at trial" (New Rules on Conducting Depositions, Robert S. Kelner and Gail S. Kelner, NYLJ, Sept. 19, 2006). While the answer to these questions may prove to be [*7] irrelevant to this litigation, such a determination cannot be made until the questions are posed and answered (see, *Lipp v. Zigman*, 14 Misc. 3d 1217(A) [Sup Ct, Nassau County, 2007]). All issues regarding admissibility in evidence of questions asked and answered at a deposition, except those relating to form, are reserved for the trial

court (see, *Shapiro v. Levine*, 104 AD2d 800, 479 NYS2d 1006 [2d Dept 1984]).

As the Court finds that the subject questions do not fall in in any of the exceptions enumerated in Part 221 of the "Uniform Rules for the Conduct of Depositions," It is ordered that plaintiff is to appear to complete his examination before trial on a date, time, and place mutually agreed upon by the parties, but no later than sixty (60) days from the date of service of a copy of this order with notice of entry.

Should plaintiff fail to comply with this order, plaintiff shall be precluded from offering any evidence at trial.

Regarding defendants requests for outstanding discovery from plaintiff, the Court finds as follows:

On August 17, 2016, a Preliminary Conference Order was entered into between the parties, whereby the plaintiff was to provide discovery, including unrestricted authorizations for treating providers. Plaintiff failed to comply with the terms of this Order. Thereafter, on August 4, 2017, a Compliance Conference Order was entered into between the parties, whereby the plaintiff was to again provide said outstanding discovery. As plaintiff has failed to comply with two Court Orders, plaintiff's Complaint shall be stricken without further order of the Court unless plaintiff provides all outstanding discovery, including unrestricted authorizations within sixty (60) days after service of a copy of this order with notice of entry.

Regarding defendants' post-deposition demand for authorizations dated June 9, 2017, plaintiff's time to respond had not yet expired as of the making of the motion, and as such, said request is moot.

This constitutes the decision and order of the Court.

Dated: November 1, 2017

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Howard G. Lane, J.S.C.