

Guzzardi v Lake Ave. Owners, Inc.
2018 NY Slip Op 33814(U)
January 22, 2018
Supreme Court, Westchester County
Docket Number: 51828/2017
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
STEPHEN GUZZARDI,

Plaintiff,

-against-

LAKE AVENUE OWNERS, INC., J. L. WHITE
MANAGEMENT, INC. a/k/a WHITE MANAGEMENT,
VINCENT BIANCO LANDSCAPING, VINCENT BIANCO
and JOHN DOE NO. 1 through JOHN DOE NO. 10,
representing additional potentially liable persons and/or
entities,

Defendants.

-----X
LEFKOWITZ, J.

DECISION & ORDER

Index No. 51828/2017

Motion Date: Jan. 22, 2018

Seq. No. 4

The following papers were read on the motion by defendants Vincent Bianco and Vincent Bianco Landscaping (the “Bianco defendants”) for an order compelling co-defendants Lake Avenue Owners, Inc. (“Lake Avenue”) and J. L. White Management, Inc. a/k/a White Management (“White Management”) (collectively the “Lake Avenue defendants”) to fully answer and respond to demands 1, 2, 5, 6, 8, 9, 10, 11, and 13 of the Bianco defendants’ notice of discovery and inspection dated October 18, 2017 (the “discovery demands”). The Lake Avenue defendants oppose the motion.

Order to Show Cause, Affirmation in Support with Exhibits A-K
Affirmation in Opposition with Exhibits A-D
NYSCEF Docs. # 65, 66

Upon the foregoing papers and the proceedings held on January 22, 2018, this motion is determined as follows:

This action was commenced by plaintiff on February 7, 2017 by the filing of a summons and verified complaint seeking damages for personal injuries allegedly sustained on February 18, 2014 when plaintiff slipped and fell on/at the Alger Court complex, located in Bronxville, New York (the “premises”) (Bianco defendants, Exhibit B). Specifically, plaintiff alleged that he fell “in front of parking garage number 8 behind Lake Avenue” (the “accident site”) as a result of defendants’ negligence with respect to snow/ice removal. Issue was joined by the service of verified answers with cross claims by the Lake Avenue defendants and the Bianco defendants

dated February 22, 2017 and August 17, 2017, respectively (NYSCEF Docs. 65, 66). The Bianco defendants served their discovery demands on or about October 18, 2017 (Exhibit E). The Lake Avenue defendants served a response to those discovery demands on or about October 26, 2017 (Exhibit F). By letter emailed and faxed on November 8, 2017, the Bianco defendants alleged certain deficiencies in the Lake Avenue defendants' response with respect to demands 2, 3, 5, 6, 8, 9, 10, 11 and 13 (the "deficiency letter") (Exhibit G). On or about December 5, 2017 the Lake Avenue defendants served a supplemental response to the discovery demands (Exhibit J). The Bianco defendants contend that to date, the Lake Avenue defendants have failed to cure the deficiencies in their discovery responses. Subsequent to the filing of this motion, the Lake Avenue defendants served second and third supplemental responses dated December 21, 2017 and January 2, 2018, respectively.

The Parties' Contentions:

The parties note the following contentions with respect to the Bianco defendants' discovery demands:

Discovery Demand No. 1¹

Copies of all contracts, and drafts of contracts between Vincent Bianco Landscaping or Vincent Bianco and co-defendants Lake Avenue Owners, Inc. and J. L. Management, Inc. from January 2014 to the present concerning or relating to the services of snow removal.

The Bianco defendants state that although they provided snow removal services to the premises pursuant to a contract there were specific areas that were excluded from the scope of their services. In his affidavit submitted in support of the motion defendant Vincent Bianco ("Mr. Bianco") asserts that as per the contract which was in effect at the time of the accident the area in front of the garage doors was excluded from the scope of the Bianco defendants' snow removal services (Bianco defendants, Exhibit A). The Bianco defendants contend that following the subject accident, the Lake Avenue defendants increased the scope of the snow removal services provided by the Bianco defendants to include the areas in proximity to the parking garages, including the accident site. The Bianco defendants assert that contracts subsequent to the one in effect at the time of the accident reflect additional compensation for the increased scope of work. The Bianco defendants state that the Lake Avenue defendants have failed to produce any contracts for the year 2014-2015, which the Bianco defendants argue are relevant as such documents would demonstrate the contrast in the scope of the Bianco defendants' snow removal responsibilities at the time of the accident and after the accident.

The Lake Avenue defendants argue that they have provided the contract that was in effect from December 1, 2013 through April 30, 2014 which was the contract between the parties at the

¹ The response to this demand is not noted in the deficiency letter.

time of the accident. The Lake Avenue defendants state that contracts which were in effect after the accident are irrelevant.

Discovery Demand No. 2

All contracts and drafts of contracts between co-defendant Lake Avenue Owners, Inc. and J. L. White Management, Inc. and non parties from January 2016 [sic] to the present concerning or relating to the services of snow removal.

The Lake Avenue defendants while objecting to this request, have responded that they are not in possession, custody or control of any such documents in effect on the date of the accident.

Discovery Demand No. 3

Copies of all videos within Lake Avenue Owners, Inc. and J. L. Management, Inc.'s possession, custody or control pertaining to the subject area identified by plaintiff in the complaint and pertaining to the Alger Court complex behind Lake Avenue Garages in Bronxville, New York from February 1 to February 28, 2014.

The Bianco defendants contend that these videos are material and relevant as to their affirmative defenses as the videos will demonstrate the exact location of the accident.

The Lake Avenue defendants argue that the Bianco defendants' arguments on this demand should not be considered on the grounds that this demand was not provided for in the briefing schedule for the motion, but assert that they do not have such videos in their possession, custody or control.

Discovery Demand No. 5

Names and addresses of all employees of co-defendants Lake Avenue Owners, Inc. and J. L. Management, Inc. from January 2014 to January 2015, who worked directly or indirectly at the Alger Court complex behind the Lake Avenue Garages in Bronxville, New York concerning, without limitation, ice and snow removal.

The Bianco defendants contend that this information bears directly on the issue of the parties' respective scope of duties and on the issue of contributory negligence if a party other than the Bianco defendants removed the snow or ice at the accident site.

The Lake Avenue defendants while objecting to this demand state that no Lake Avenue employees performed ice and snow removal at the accident site in February 2014. They contend that the Bianco defendants are not entitled to the names of employees who performed duties other than snow and ice removal at the accident location, or the names of the employees who worked at the accident location after the date of the accident.

Discovery Demands Nos. 6 and 8

6. All invoices paid by co-defendants Lake Avenue Owners, Inc. and J. L. Management, Inc. from January 2014 to January 2015, for services rendered at the Alger Court complex behind the Lake Avenue Garages in Bronxville, New York concerning, without limitation, ice and snow removal.

8. All invoices paid to Vincent Bianco Landscaping from January 2014 to January 2015.

The Bianco defendants state that the Lake Avenue defendants have not produced any paid invoices submitted by the Bianco defendants for snow removal services provided from January 2014 through January 2015. The Bianco defendants argue these documents are relevant since they will reflect that the Bianco defendants did not provide services to the accident site.

The Lake Avenue defendants assert that they have produced responses to this demand in their second and third supplemental responses and further object to this demand as irrelevant, unduly burdensome and overbroad since it requests post-accident documents.

Discovery Demands Nos. 9, 10, and 11

9. Any statement signed or unsigned, or any recorded statements made by or taken by co-defendant and his, her or its agents, servants or employees now in your possession, custody or control of any party you represent in this action, if such statement in any manner bears on the issues in this action.

10. Any written reports concerning the incident which is the subject matter of this lawsuit prepared in the regular course of business operations or practices of any person, firm, corporation, association, or other public or private entity.

11. Any correspondence concerning the incident which is the subject matter of this lawsuit prepared in the regular course of business operations or practices of any person, firm, corporation, association or other public or private entity.

The Bianco defendants state that the Lake Avenue defendants have not produced any documents responsive to these demands nor have they provided a privilege log as requested by the Bianco defendants in the discovery demands.

The Lake Avenue defendants have responded that they are not in possession, custody or control of any statements or incident reports. They object to demand 11 as overbroad, unduly burdensome and seeking materials prepared in anticipation of litigation, but have provided certain correspondence in their third supplemental response. The Lake Avenue defendants argue

that the Bianco defendants are not entitled to investigation reports prepared by the insurance carrier as these constitute materials prepared for litigation and are exempt from disclosure. They argue that these are distinguishable from reports "made in the regular internal operations."

Discovery Demand No. 13

All documents or any correspondence exchanged between co-defendants and plaintiff or their respective current and/or former attorneys including without limitation all letters, notices or emails exchanged prior to the institution of this action.

The Bianco defendants state that the Lake Avenue defendants have refused to provide any notices or correspondence exchanged between them and plaintiff. The Bianco defendants contend that these notes are critically important to their defenses, including spoliation of evidence and laches.

The Lake Avenue defendants assert that they have provided correspondence and documents responsive to this demand in the third supplemental response.

Verification

The Bianco defendants contend that the Lake Avenue defendants failed to provide verification of their responses as directed by the court at the pre-motion conference and in accordance with CPLR 3133(b). The Lake Avenue defendants argue that they were not directed to provide verification of their discovery responses and a search affidavit but state that same will be provided if the court so directs.

Analysis

CPLR 3101(a)(1) provides that there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action. The term material and necessary in the statute must 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 (*Matter of Kapon*, 23 NY3d 32, 38 [2014] quoting *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). CPLR 3126 provides that if any party "willfully fails to disclose information which the court finds ought to have been disclosed," the court may issue an order striking the pleadings, dismissing the action, or rendering judgment by default against the disobedient party. "The nature and degree of the penalty to be imposed on a motion pursuant to CPLR 3126 is a matter generally left to the discretion of the Supreme Court" (*Carbajal v Bobo Robo*, 38 AD3d 820 [2d Dept 2007]).

With respect to demands 1 and 2, the court finds that contracts for 2014 and for years subsequent to 2014 are relevant as they might help establish the scope of the Bianco defendants' snow removal responsibilities. Although the Lake Avenue defendants have stated they do not possess documents responsive to demand 2 that were in effect at the time of the accident, they do not mention whether they possess documents responsive to that demand for the period of 2014-2015. To the extent that the Lake Avenue defendants do possess documents responsive to that demand for the period of 2014-2015, the Bianco defendants are entitled to those documents. With respect to demand 3 the Lake Avenue defendants have stated that they are not in possession of videotapes responsive to this demand. While a party cannot be compelled to produce what it does not have, to the extent that the Lake Avenue defendants may have at one time been in possession of videotapes responsive to demand 3, they shall provide an affidavit as set forth below. With respect to demand 5, the court agrees that the Bianco defendants would only be entitled to discovery of the names, if any, of the employees of the Lake Avenue defendants who were involved with snow and ice removal. To the extent that the Lake Avenue defendants have asserted that none of their employees were involved in snow and ice removal during February 2014, the Bianco defendants are not entitled to any further discovery concerning this demand.

Concerning demands 6 and 8, the court finds the invoices, limited to snow and ice removal only, for the time period of January 2014 to January 2015 are relevant to the issue of the scope of the work performed by the Bianco defendants. Although the Lake Avenue defendants have provided some invoices, the invoices submitted are illegible. Therefore, the Lake Avenue defendants shall respond, and/or supplement their responses to these demands as set forth below.

Concerning demands 9, 10, and 11, to the extent that the Lake Avenue defendants assert that they are not in possession of responsive documents, no further inquiry is appropriate. However, to the extent that they assert that they are in possession of responsive documents which they contend are protected by privilege, they shall provide such documents to the court for in camera review as detailed below. Lastly, with respect to demand 13, to the extent that the Lake Avenue defendants are in possession of any additional responses to this demand they shall supplement their responses. To the extent that the Lake Avenue defendants contend that documents responsive to this demand are privileged such documents shall be provided to the court for in camera review as set forth below.

All other arguments raised and evidence submitted by the parties have been considered by this court notwithstanding the specific absence of reference thereto.

In light of the foregoing it is:

ORDERED that the motion by the Bianco defendants is granted to the following extent: that the Lake Avenue defendants are directed to produce, so as to be received in hand by February 9, 2018, to the Bianco defendants supplemental responses to demands 1, 2, 6, 8, 9, 10, 11 and 13, including providing legible copies of the documents previously provided in response

to demands 6 and 8. To the extent that the Lake Avenue defendants contend that any of these supplemental responses are privileged, they shall submit a privilege log, pursuant to CPLR 3122 (2)(b) and the documents which they seek to withhold on that basis, including the nature of the privilege asserted, the corresponding demand to which the document is responsive, and the author of the document, so as to be received in hand by February 9, 2018, to the Compliance Part Clerk, 8th floor, of this courthouse for in camera review. The Lake Avenue defendants shall provide the court with two sets of Bates stamped documents for in camera review, one set redacting any material which they contend should be withheld pursuant to the claimed privilege, and the other set unredacted. With respect to demand 3, to the extent that the Lake Avenue defendants were ever previously in possession of videotapes responsive to this demand, they shall provide a notarized affidavit from a person with knowledge that the Lake Avenue defendants are not in possession of the videotapes, describing in sufficient detail the search conducted for the videotapes, including providing the particular area(s) searched, how much time was spent searching for the subject videotapes, whether the videotapes were destroyed and if so, by whom, when and for what purpose, and identifying any third parties who may be in possession of such videotapes; and it is further

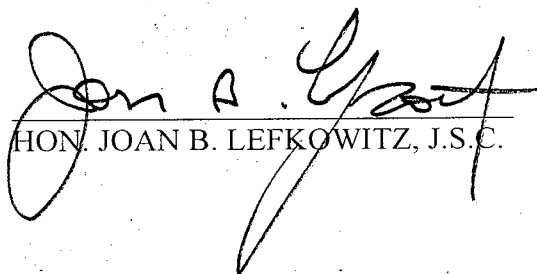
ORDERED that all other requests for relief are denied; and it is further

ORDERED that all parties shall appear for a conference in the Compliance Part, Courtroom 800, on February 21, 2018, at 9:30 A.M.; and it is further,

ORDERED that the Bianco defendants shall serve a copy of this decision and order, with notice of entry, upon all other parties within three days of entry.

The foregoing constitutes the decision and order of this court.

Dated: White Plains, New York
January 22, 2018



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

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