

Hysmith v City of Mount Vernon
2018 NY Slip Op 34287(U)
June 4, 2018
Supreme Court, Westchester County
Docket Number: Index No. 57280/2016
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

FELICIA HYSMITH,

Plaintiff,

-against-

THE CITY OF MOUNT VERNON, ABC APPLIANCES,
145 APPLIANCES CORP., and DONAVAN WHYTE,
individually,

Defendants.

-----X

LEFKOWITZ, J.

DECISION & ORDER

Index No. 57280/2016
Motion Date: June 4, 2018
Motion Sequence No. 2

The following papers were read on plaintiff’s motion for an order compelling defendant the City of Mount Vernon (hereinafter “the City”) to produce three additional witnesses for a deposition.

- Order to Show Cause – Affirmation in Support – Exhibits 1-11
- Affirmation in Opposition – Exhibits A-1
- NYSCEF File

Upon the foregoing papers and proceedings held on June 4, 2018, this motion is determined as follows:

In this personal injury action, plaintiff seeks to recover damages for injuries she allegedly sustained on May 19, 2015, when she tripped in a sidewalk hole located in front of 145 South 4th Avenue, in Mount Vernon, New York (Plaintiff’s Exhibit 1). Plaintiff commenced the instant action by filing of a summons and complaint on May 23, 2016 (NYSCEF Doc. #1). In the original complaint, plaintiff named the City, ABC Appliances (hereinafter “ABC”), Dominic Yanni, individually, and Donavan Whyte (hereinafter “Whyte”), individually, as defendants (NYSCEF Doc. #1). On June 14, 2016, plaintiff filed an amended summons and an amended verified complaint naming the City, ABC Appliances, 145 Appliances Corp. (hereinafter “145”), and Whyte as defendants (Plaintiff’s Exhibit 1). Dominic Yanni was removed as a defendant in this action in the amended complaint (Plaintiff’s Exhibit 1). In her amended complaint, plaintiff alleges that defendant City removed a parking meter located in front of the property, leaving a hole approximately 1 ½ feet wide and 5 inches deep, causing a defect in the sidewalk and causing her injury (Plaintiff’s Exhibit 1).

Issue was joined by service of the City's answer with affirmative defenses and a cross claim against ABC, 145 and Whyte, on or about June 27, 2016 (City's Exhibit B), and by service of Whyte's answer with affirmative defenses and a cross claim against the City, ABC and 145, on or about December 13, 2016 (NYSCEF Doc. #9). Plaintiff thereafter moved for a default judgment as against 145 and ABC based on their respective failures to answer, move or otherwise appear in the action (NYSCEF Docs. #10-15). By Decision and Order dated June 16, 2017, plaintiff's motion for a default judgment was granted as against defendants, ABC and 145 (NYSCEF Doc. #16).

Plaintiff was deposed on November 29, 2017, and she testified that immediately prior to her accident, she was leaving her house at 129 South 4th Avenue and walking down the block from 129 to 145 East 4th Avenue (Plaintiff's Exhibit 2, Tr. at page 24). Her daughter's cousin was walking behind her and to her left (Plaintiff's Exhibit 2, Tr. at pages 25-27, 47-48, 51). When plaintiff stopped and turned to speak to her daughter's cousin, plaintiff fell into a hole in the sidewalk (Plaintiff's Exhibit 2, Tr. at pages 25-27, 47-48, 51). Plaintiff testified that she had observed the hole for approximately three months prior to her fall, that a parking meter had been in the location of the hole, that she had observed the parking meter laying on the ground and that the parking meter had been removed from the location by the City (Plaintiff's Exhibit 2, Tr. at pages 28, 55-59).

Two City witnesses were deposed, Anthony Amiano, the Deputy Commissioner of the City Department of Public Works (hereinafter "DPW") and Omar Jimenez, a City parking enforcement officer (City's Exhibits C and D). Mr. Amiano testified that based on the notice of claim, it was his understanding that the parking meter had been knocked down, causing a hole in the sidewalk, and that, upon inspection, he verified that there was indeed a hole in the sidewalk (City's Exhibit C, Tr. at page 14, 16). He further testified that DPW filled the hole with concrete and that the Parking Bureau placed a parking meter in the hole (City's Exhibit C, Tr. at pages 14-17, 26-27, 33-34).

The City's second witness, Mr. Jimenez, testified that parking meter workers, who worked for the Parking Bureau of the City Police Department, were responsible for overseeing the maintenance of the City's parking meters and would be responsible for installing or removing parking meters (City's Exhibit D, Tr. at pages 8, 11-12). However, Mr. Jimenez testified that parking meters were very rarely removed but were often knocked down by cars or trucks (City's Exhibit D, Tr. at page 12). Mr. Jimenez also testified as to the standard procedure for the removal of a parking meter (City's Exhibit D, Tr. at pages 13-15). When questioned regarding this removal procedure, Mr. Jimenez testified that the parking meter workers did not remove the subject parking meter but rather the meter was likely hit (City's Exhibit D, Tr. at pages 15 and 18).

On or about January 16, 2018, plaintiff served post-deposition demands, seeking: (1) the production of any and all records in the possession of the City Parking Bureau and its parking meter workers, concerning or relating to the removal of a parking meter or other structure on South 4th Avenue, in the vicinity of 145 South 4th Avenue, within the five years prior to the accident complained of herein; and (2) the identity of all individuals, including but not limited to any City parking meter workers, who performed any removal of a parking meter or other structure on South 4th Avenue in the vicinity of 145 South 4th Avenue, within the five years prior to the accident complained of herein (Plaintiff's Exhibit 7; City's Exhibit E). The City served its response, on or about February 5, 2018, indicating that it was not in possession of any records relating to the removal of a parking meter or other structure in the vicinity of 145 South 4th Avenue and was not

aware of any individuals, who performed removal of such parking meter or other structure, except those that may appear in public documents (Plaintiff's Exhibit 8; City's Exhibit F).

On February 8, 2018, plaintiff served a demand for an additional deposition of a parking meter worker, who was knowledgeable regarding the removal or installation of the parking meter located on 145 South 4th Avenue, and sought business records regarding the maintenance, removal, and repair of the City's parking meters (Plaintiff's Exhibit 9).

On February 21, 2018, plaintiff served a supplemental post-deposition demand seeking: (1) the production of any all records in the possession of the City Parking Bureau and its parking meter workers, concerning or relating to the location of a parking meter or other structure on South 4th Avenue, in the vicinity of 145 South 4th Avenue, within the five years prior to the accident complained of herein; and (2) the identity of all individuals, including but not limited to any City parking meter workers, who performed any maintenance or repair of a parking meter or other structure on South 4th Avenue in the vicinity of 145 South 4th Avenue, within the five years prior to the accident complained of herein (Plaintiff's Exhibit 11; City's Exhibit H). The City served its response, on or about April 3, 2018, indicating that it was not in possession of any records relating to the location of a parking meter or other structure in the vicinity of 145 South 4th Avenue and identifying three individuals who performed maintenance or repair of the parking meter or other structure on South 4th Avenue, Charles Ferreira, Bissondial Hardyal and Kenneth Totino, of the Department of Public Safety, Parking Bureau (City's Exhibit I).

The City objected to producing an additional witness for a deposition and on April 9, 2018, this Court issued a briefing schedule for the instant motion.

By this motion, plaintiff seeks an order compelling the City to produce additional witnesses for a deposition, who possess relevant knowledge as to the previously-removed parking meter or the creation of the sidewalk hole. Plaintiff contends that Mr. Amiano possessed no relevant knowledge as to the previous parking meter or the sidewalk hole and that Mr. Jimenez also failed to provide relevant, non-speculative information because he did not maintain the City's parking meters. Plaintiff argues that based on these depositions, she could only gather that the parking meter was "probably" knocked down, probably taken away by the Parking Bureau, as well as probably newly installed. Plaintiff argues that she is prejudiced in that the City failed to produce any witnesses with adequate, non-speculative knowledge as to the parking meter and the sidewalk hole at that location.

In opposition to the motion, the City contends that plaintiff has failed to make a detailed showing in her moving papers for the necessity of the requested depositions. The City notes that Mr. Amiano testified that he determined that there was a hole in the sidewalk and concluded that a parking meter was knocked down, leaving the hole in the sidewalk. Additionally, Mr. Jimenez testified that the parking meter workers did not remove the subject parking meter. The City contends that plaintiff's application should be denied in its entirety as plaintiff has not demonstrated that the deposition of additional witnesses would result in the disclosure of relevant evidence, or would lead to discovery of information bearing on her claims.

Analysis

To show that additional depositions are necessary, the moving party that is seeking additional depositions has the burden of demonstrating “(1) that the representatives already deposed had insufficient knowledge, or were otherwise inadequate, and (2) there is a substantial likelihood that the persons sought for depositions possess information which is material and necessary to the prosecution of the case” (*Zollner v City of New York*, 204 AD2d 626, 627 [2d Dept. 1994]; see *Thristino v County of Suffolk*, 78 AD3d 927 [2d Dept 2010]; *Nazario v City of New York*, 27 AD3d 439 [2d Dept 2006]; *Barone v Great Atl. & Pac. Tea Co.*, 260 AD2d 417, 417-418 [2d Dept 1999]).

At bar, there is no showing that the witnesses produced have insufficient knowledge or that their testimony was otherwise inadequate. Additionally, the record demonstrates that the depositions of three witnesses sought would be duplicative (see *Those Certain Underwriters at Lloyds, London v Occidental Gems, Inc.*, 41 AD3d 362, 364 [1st Dept 2007] [trial court properly denied motion seeking to compel the defendant to produce an additional witness for a deposition when it was established that the witness sought would merely provide testimony duplicative to that about which the first witness testified]). Notably, the City produced two witnesses, Mr. Anthony Amiano, the DPW Deputy Commissioner, and Mr. Omar Jimenez, a City parking enforcement officer. Mr. Amiano testified that he had inspected the sidewalk upon learning of the notice of claim and that upon inspection had verified that there was a hole in the sidewalk. He further testified that it was his understanding that the parking meter had been knocked down, causing a hole in the sidewalk. Mr. Amiano also testified that DPW filled the hole with concrete and that the Parking Bureau placed a parking meter in the hole. The City’s second witness, Mr. Jimenez, testified that parking meter workers, who were responsible for overseeing the maintenance of the City’s parking meters, including the installation and removal of the parking meters, did not remove the subject parking meter. Plaintiff herself testified that a parking meter had been in the location of the hole and that she had observed the parking meter laying on the ground. Plaintiff now seeks three additional witnesses to testify regarding the removed parking meter, along with the subsequent creation of the hole, which testimony would be duplicative. Accordingly, plaintiff’s motion to compel the additional depositions is denied.

In view of the foregoing, it is

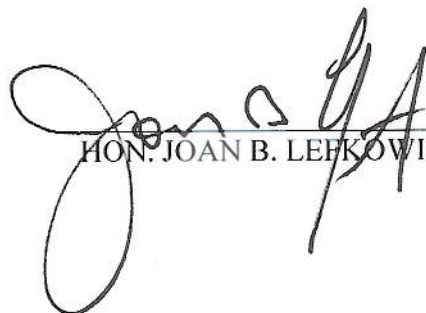
ORDERED that plaintiff’s motion is denied in its entirety; and it is further

ORDERED that all parties shall appear for a conference in the Compliance Part, Courtroom 800, on June 15, 2018, at 9:30 A.M., at which time it is contemplated that a trial readiness order will issue; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon defendant within ten (10) days of entry.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
June 4, 2018



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

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