Morgan v 400-408 Hous. Dev. Fund Co., Inc.
2019 NY Slip Op 31439(U)
May 22, 2019
Supreme Court, New York County
Docket Number: 151837/2017
Judge: William Franc Perry

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. W. FRANC PERRY** **PART** **IAS MOTION 23EFM**

Justice

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SHARON MORGAN,

Plaintiff,

- v -

400-408 HOUSING DEVELOPMENT FUND COMPANY, INC. AND, URBAN HOME OWNERSHIP CORPORATION, APEX BUILDING COMPANY INC., APEX BUILDING GROUP, INC.

Defendants.

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INDEX NO. 151837/2017

MOTION DATE 03/29/2019

MOTION SEQ. NO. 004

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 004) 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94

were read on this motion to/for AMEND CAPTION/PLEADINGS

In this personal injury action, defendant, Apex Building Company Inc., moves pursuant to CPLR 3123(b), for leave to withdraw or amend its response to plaintiff's Notice to Admit. Plaintiff opposes the motion.

Plaintiff alleges that she was injured in her apartment due to the negligence of the defendants, in permitting the floor and bedroom door saddle to become and remain uneven, broken and defective.[1] (NYSCEF Doc. Nos. 89 and 93). Plaintiff served a Notice to Admit on defendant, Apex Building Company Inc., seeking an admission or denial of the following: "That at some point prior to January 19, 2017, the defendant Apex Building Company Inc. installed a door saddle for the bedroom door(s) located at 400 Manhattan Ave. Apt 70, New York, NY." (NYSCEF Doc. No. 77). On July 26, 2018, defendant served its response admitting the allegation set forth in the notice. (NYSCEF Doc. No. 78).

[1] On October 19, 2018, this Court granted defendant Apex Building Group, Inc.'s motion to dismiss. (NYSCEF Doc. No. 65)

In plaintiff's verified bill of particulars, she alleges that the door saddle in her apartment caused the injuries for which she is seeking to recover damages. (NYSCEF Doc. No. 93). Thereafter, on August 28, 2018, defendant 400-408 Housing Development Fund Company served responses to plaintiff's discovery demands, indicating that in July 2013, it had installed a door sweep in plaintiff's apartment. (NYSCEF Doc. No. 79).

In support of its motion to withdraw or amend its response to plaintiff's Notice to Admit, defendant Apex Building Company Inc., submits the affidavit of its President and CEO, Mr. Robert Horsford, indicating that upon reviewing the records submitted by defendant 400-408 Housing Development Fund Company, he went back to review his records and realized that he had mistakenly and inadvertently admitted to a fact that was incorrect. Specifically, Mr. Horsford states that "I cannot say with certainty whether APEX performed work on the door saddle for the bedroom located at 400 Manhattan Ave., Apt 7G, New York, NY prior to January 19, 2017." (NYSCEF Doc. No. 80, ¶6).

In further support of its motion, defendant Apex Building Company Inc., contends that withdrawal of its admission is appropriate, as the notice was improper as it sought admission of matters central to the issues in this action. In addition, defendant notes that it has not yet produced a witness to testify and discovery is ongoing, thus, withdrawal of its admission will not result in surprise or prejudice.

"A notice to admit is designed to elicit admissions on matters which the requesting party reasonably believes there can be no substantial dispute' (CPLR 3123[a])" (*National Union Fire Ins. Co. of Pittsburgh, Pa. v Allen,* 232 AD2d 80, 85, 662 N.Y.S.2d 8 [1st Dept 1997]). "[A] notice to admit may not be utilized to request admission of material issues or ultimate or conclusory facts," or "facts within the unique knowledge of other parties" (*Taylor v Blair,* 116

AD2d 204, 206, 500 N.Y.S.2d 133 [1st Dept 1986]). Rather, it is "only properly used to eliminate from trial matters which are easily provable and about which there can be no controversy" (*Samsung Am. v Yugoslav-Korean Consulting & Trading Co.,* 199 AD2d 48, 49, 604 N.Y.S.2d 112 [1st Dept 1993]). Further, because a notice to admit "is not intended as simply another means for achieving discovery," it may not be used to obtain information in lieu of other disclosure devices (see *Hodes v City of New York*, 165 AD2d 168, 170, 566 N.Y.S.2d 611 [1st Dept 1991]).

CPLR 3123(b) provides, in part, that "Any admission made, or deemed to be made, by a party … is for the purpose of the pending action only … and the court, at any time, may allow a party to amend or withdraw any admission on such terms as may be just." The movant must establish that the notice or answers were improper or that the admission was inadvertent and contrary to the party's pleadings (*Webb v Tire and Brake Distributor, Inc.*, 13 AD3d 835, 786 NYS2d 636 [3rd Dept 2004]; *Riner v Texaco, Inc.*, 222 AD2d 571, 635 N.Y.S.2d 658 [2nd Dept 1995]; *Langdon v WEN Management Company,* 147 AD2d 450, 537 NYS2d 603 [2nd Dept 1989]). Courts have exercised discretion permitting the withdrawal of an admission in the interest of justice, when there is an inadvertent error and the admission is at the heart of the controversy and contrary to a party's pleadings, (see, *Riner v Texaco, Inc.*, supra; *Cazenovia Coll. v Patterson*, 45 AD2d 501, 360 NYS2d 84 [3rd Dept 1974]).

Here, defendant Apex Building Company Inc. has established through the affidavit of its President and CEO that its admission to plaintiff's notice was both inadvertent error and is fundamental to the issues in this matter. Asking the defendant to admit that it "installed a door saddle for the bedroom door" where it is alleged plaintiff sustained her injuries, is akin to asking the defendant to admit to the very facts which plaintiff alleges in her complaint constitute the

negligence of the defendant. In addition, the question included in the notice should be established through other disclosure devices such as depositions and demands for documents (see *Berg v Flower Fifth Ave. Hosp.*, 102 AD2d 760, 476 N.Y.S.2d 895, [1st Dept 1984] ["To allow the notice to admit to become perverted into a further form of deposition in the nature of written interrogatories would defeat and detract from its intended purpose"]).

A Notice to Admit may not be used as a substitute for other disclosure devices, such as examinations before trial, depositions upon written questions or interrogatories. *Taylor v Blair,* 116 AD2d at 206. Here, the notice seeks information that bears on the central issue of this personal injury action, specifically, whether the maintenance and installation of the door saddle by the defendants was negligent. As these are material issues or ultimate facts, which can only be resolved after a full trial, a notice to admit is not a proper disclosure device for such inquiries. As the notice was improper in the first instance, defendant Apex Building Company Inc.'s motion seeking to withdraw its admission, is granted. Accordingly, it is hereby,

ORDERED that defendant Apex Building Company Inc.'s motion to withdraw its Response to Plaintiff's Notice to Admit is granted and the response is withdrawn.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

5/22/2019
DATE

W. FRANC PERRY, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE