

Connor v Spa Castle Premier 57, Inc.

2019 NY Slip Op 31575(U)

June 3, 2019

Supreme Court, New York County

Docket Number: 155780/2016

Judge: Arlene P. Bluth

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 32

Justice

-----X

INDEX NO. 155780/2016

KATHLEEN CONNOR,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 003

- v -

SPA CASTLE PREMIER 57,INC., CASTLE GROUP CORP.,

DECISION AND ORDER

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86

were read on this motion to/for DISCOVERY

Plaintiff's motion to compel defendants to produce an additional witness for a deposition is granted.

Background

Defendant corporations own and operate Spa Castle, a day-spa and lounge. On April 8, 2016, plaintiff tripped and fell while at Spa Castle, sustaining injuries to her leg and hip. Plaintiff alleges that defendants were negligent in maintaining the premises, thereby causing plaintiff injuries. In response, defendants claim that plaintiff's own negligence resulted in her injury because she did not watch her step. According to Spa Castle's Incident Report, plaintiff and her sister were disputing who would pay for their spa services and her sister stepped in front of her to pay, which caused plaintiff to take a step back. Because plaintiff supposedly was not watching where she stepped, she did not see a ledge and fell (NYSCEF Doc. No. 79).

At issue in this motion is a surveillance video of the accident which defendants claim is no longer available. Plaintiff states that this video is important because it will help to resolve certain

factual disputes in the case. Those disputes include the appearance of the raised platform where plaintiff fell, the lighting and setup of the foot massage area where the accident occurred, and whether Spa Castle had warning signs telling customers to watch their step.

A month after the accident, plaintiff sent defendants a letter demanding that the video be preserved (NYSCEF Doc. No. 80). Two more letters were sent to defendants demanding preservation of the video (NYSCEF Doc. No. 81, 82).

Depositions commenced in this suit. A Spa Castle employee named Jimmy Tong was deposed. However, he had no knowledge of the video or its non-retention. But Mr. Tong named two witnesses who he believed might have such knowledge: Joshua Lee and Steven Chon. This Court ordered that Mr. Lee be deposed and stated that if Mr. Lee did not have proper knowledge as to the non-retention of the video, then plaintiff could bring another motion for the deposition of a further witness. Mr. Lee was deposed and did not have knowledge of the non-retention of the video.

Plaintiff now brings this motion to compel defendants to depose Steven Chon, the owner of Spa Castle. Alternatively, plaintiff seeks an order prohibiting defendants from offering any evidence on the issue of liability, or alternatively, for an order granting plaintiff an adverse inference charge with respect to the non-retention of the video.

Defendants oppose the motion, stating that they have already provided two witnesses for a deposition and that Mr. Chon has no knowledge of the plaintiff's accident or the video. They further argue that because they provided an accident report and the name and address of the person who created the report, defendants should not be subject to any further depositions, preclusive action, or an adverse inference.

Discussion

Pursuant to CPLR 3124, “[i]f a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article . . . the party seeking disclosure may move to compel compliance or a response” (CPLR § 3124). Further, “discovery determinations rest within the sound discretion of the trial court” (*Andon ex rel. Andon v 302-304 Mott St. Assocs.*, 94 NY2d 740, 745, 731 NE2d 589 [2000] [citations omitted]).

CPLR 3101 provides that: “There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof” (CPLR § 3101 [a]). “The words material and necessary, are . . . to 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” (*Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 406, 288 NYS2d 449 [1968] [internal quotations omitted]). “Discovery demands are improper if they are based upon hypothetical speculations calculated to justify a fishing expedition” (*Forman v Henkin*, 134 AD3d 529, 530, 22 NYS3d 178 [1st Dept 2015] [internal quotations and citation omitted]).

Plaintiff’s motion to compel the deposition of Steven Chon is granted. Based on the deposition testimony of prior witnesses, Mr. Chon may have knowledge of the video or at least defendants’ policy on surveillance video retention. Mr. Tong previously testified that Mr. Chon interacts with Spa Castle employees, visits the property, and helps in the operation of the business (NYSCEF Doc. No. 83 at pg.25). He also testified that he believes surveillance videos are saved for ninety days and that Steven Chon has a policy in which IT would transfer surveillance footage to a flash drive (*id.* at pg.39-41). Thus, Mr. Chon’s deposition may result in helpful information regarding the non-retention of the video or Spa Castle’s general policies regarding surveillance

videos. The issue of the video is an important one. Apparently the subject accident was entirely caught on camera, but that video has now disappeared despite plaintiff's three letters demanding that the video be preserved. At the very least, plaintiff is entitled to gather information as to the video preservation policies and why defendants failed to preserve the video of this accident.

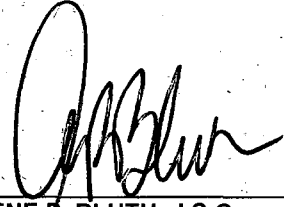
Accordingly, it is hereby

ORDERED that plaintiff's motion to compel the deposition of Steven Chon is granted.

Next Conference: 9/10/19 @ 2:15 P.M.

6/3/19

DATE



ARLENE P. BLUTH, J.S.C.

HON. ARLENE P. BLUTH

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE