

Boss v 83-85 Baxter St., LLC
2019 NY Slip Op 31576(U)
May 31, 2019
Supreme Court, New York County
Docket Number: 156974/2016
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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MARIE BOSS,

Index No. 156974/2016

Plaintiff

- against -

DECISION AND ORDER

83-85 BAXTER STREET, LLC, MAROLDA
PROPERTIES, INC., M&C FOOD BEVERAGE, LLC,
and BREAK ROOM RESTAURANT,

Defendants

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LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff sues for personal injuries she sustained when she fell down a staircase behind a gate on premises owned by defendant 83-85 Baxter Street, LLC, and managed by defendant Marolda Properties, Inc., at 83-85 Baxter Street in New York County. She claims that the cracked pavement surrounding the gate, the disrepair of the gate and staircase as well as the pavement, and the absence of a handrail on the staircase all contributed to her fall. She moves to compel 83-85 Baxter Street and Marolda Properties to produce documents responsive to her requests dated December 21, 2018, and for penalties due to these defendants' past failure even to search for those documents. C.P.L.R. §§ 3124, 3126. She also seeks a deposition witness with personal knowledge about those documents, particularly insofar as they pertain to inspection, maintenance, and repair of premises where plaintiff fell. C.P.L.R. § 3124. Plaintiff believes that

witness is Marolda Properties' owner or officer William Marolda or its former employee Audrey Johnson. Plaintiff seeks this deposition because neither the witness Marolda Properties previously produced, Jose Perez, nor the witness 83-85 Baxter Street produced, Vinny Singh, for a deposition was knowledgeable about Marolda Properties' or 83-85 Baxter Street's relevant documents.

While Perez was knowledgeable about inspection of the premises, oversight of handymen and contractors who performed work on the premises, and maintenance and repair of the premises where plaintiff fell during the period leading up to her fall, he admitted that he personally kept no records of his inspections or the repair work that he oversaw and never searched for any such documents. Singh, who owns 83-85 Baxter Street, LLC, and owned it when Marolda Properties managed 83-85 Baxter Street, testified that after plaintiff's fall, when Casa Property Management LLC took over management of the premises from Marolda Properties, it delivered to him one or more boxes of documents related to the building, but he was unfamiliar with them. He also admitted that he was unknowledgeable about the condition, maintenance, or repair of the premises where plaintiff fell and about the daily operations of 83-85 Baxter Street and testified that the persons most knowledgeable about those operations during the period leading up to her fall were William Marolda and Audrey Johnson, a former property manager for the premises.

II. ENFORCEMENT OF THE ORDER DATED APRIL 25, 2019

A stipulated Status Conference Order dated April 25, 2019, required 83-85 Baxter Street and Marolda Properties, by May 10, 2019, to respond further to plaintiff's December 2018 document requests. Although these defendants did respond further, they produced no responsive documents and admit that they have not searched for responsive documents, even in Marolda Properties' boxes of documents pertaining to the 83-85 Baxter Street building. The order also required 83-85 Baxter Street to produce Singh for his deposition May 14, 2019. He did testify on that date, but left the deposition after two and a half hours, before plaintiff had concluded her questioning and before co-defendants had begun their questioning. After the deposition, plaintiff served further requests for production of documents on 83-85 Baxter Street and Marolda Properties.

Consequently, the court grants plaintiff's motion to compel disclosure as follows. C.P.L.R. § 3124. 83-85 Baxter Street shall produce Singh for his continued deposition before the current deadline for filing the note of issue, June 13, 2019. 83-85 Baxter Street and Marolda Properties shall search the boxes of Marolda Properties' documents pertaining to 83-85 Baxter Street delivered to Singh and any other places in the possession or control of each defendant and its owners, officers, or former owners or officers where documents responsive to plaintiff's December 2018 and May 2019 document requests may be kept. At least five days before Singh's continued deposition, these

defendants shall produce any responsive documents found, or, if none is found, the persons who searched shall serve and file affidavits specifying where such documents were likely to be kept, the efforts to preserve such documents, the circumstances surrounding the documents' loss, and the thoroughness of the search. Vazquez v. Lambert Houses Redevelopment Co., 110 A.D.3d 450, 451-52 (1st Dep't 2013); Henderson-Jones v. City of New York, 87 A.D.3d 498, 505 (1st Dep't 2011). Particularly given Perez's testimony that repairs to the area where plaintiff fell were performed and that the building or its management hired contractors to perform repairs, it defies belief that neither the building nor its management ever possessed any documents regarding the payment for, scope of, or conditions needing repairs.

III. THE REMAINDER OF PLAINTIFF'S MOTION

Based on the testimony of Perez and Singh, plaintiff has met her burden to show the inadequacies in both previous witnesses' knowledge regarding relevant documentary evidence and in Singh's knowledge on behalf of 83-85 Baxter Street regarding the daily operations of its premises during the period leading up to plaintiff's fall. She also shows a likelihood that Marolda and Johnson possess this knowledge. Best Payphones, Inc. v. Guzov Ofsink, LLC, 135 A.D.3d 585, 585 (1st Dep't 2016); Alexopoulos v. Metropolitan Transp. Auth., 37 A.D.3d 232, 233 (1st Dep't 2007); Trueforge Global Mach. Group v. Viraj Group, 84 A.D.3d 938, 939-40 (2d Dep't 2011); Aronson v. Im, 81 A.D.3d 577, 577-78 (2d

Dep't 2011). While Marolda Properties may not retain control over a former employee such as Johnson, the corporation's owners and officers are the corporation. The corporation may not insist that it retains no control over persons who remained owners or officers up until it ceased conducting business simply on the basis that it no longer is conducting business. They controlled the corporation, not the reverse, and remain responsible for evidence regarding any liability incurred when it admittedly was conducting business. The only such owner or officer of Marolda Properties whom the parties currently have identified is William Marolda.


Consequently, the court also grants plaintiff's motion to compel Marolda Properties to produce another witness for a deposition to the following extent. C.P.L.R. § 3124. By June 7, 2019, Marolda Properties shall provide to plaintiff an address within the state where plaintiff may serve a subpoena for a deposition on William Marolda consistent with C.P.L.R. § 308. Upon receipt of that address, plaintiff shall serve a subpoena for his deposition consistent with C.P.L.R. § 3107, to be conducted by July 3, 2019, or plaintiff shall have waived further depositions. If Marolda Properties does not provide such an address, by June 27, 2019, Marolda Properties shall produce William Marolda or another current or former owner, officer, or employee most knowledgeable about the relevant documentary evidence specified above and the daily operations of 83-85 Baxter Street during the period leading up to plaintiff's fall. The

court extends the deadline for filing the note of issue to July 7, 2019, to allow for the above disclosure.

IV. FURTHER REMEDIES

If 83-85 Baxter Street and Marolda Properties, which are represented jointly, fail comply with any a part of this order, the issues of whether they received notice of the cracked pavement surrounding the gate, the disrepair of the gate and staircase as well as the pavement, and the absence of a handrail on the staircase in time to repair those conditions before plaintiff's fall, but failed to do so, shall be determined in her favor. C.P.L.R. § 3126(1); Crooke v. Bonofacio, 147 A.D.3d 510, 510-11 (1st Dep't 2017); Baldwin v. Gerard Ave., LLC, 58 A.D.3d 484, 484-85 (1st Dep't 2009); Horizon Inc. v. Wolkowicki, 55 A.D.3d 337, 338 1st Dep't 2008); Longo v. Armor El. Co, 307 A.D.2d 848, 849 (1st Dep't 2003). See Weissman v. 20 E. 9th St. Corp., 48 A.D.3d 242, 243 (1st Dep't 2008); Schilling v. Quiros, 23 A.D.3d 243, 244 (1st Dep't 2005). The court denies plaintiff's motion insofar as it seeks any further penalty. C.P.L.R. § 3126(3). If Marolda Properties produces a witness who is unknowledgeable about the relevant documentary evidence specified above and the daily operations of 83-85 Baxter Street during the period leading up to plaintiff's fall, plaintiff may move to compel the deposition of Audrey Johnson or another knowledgeable witness identified in any future documents produced or by Singh, Marolda, or another witness produced.

DATED: May 31, 2019



LUCY BILLINGS, J.S.C.