

Pascal v Port Auth. of N.Y. and N.J.

2019 NY Slip Op 31877(U)

May 7, 2019

Supreme Court, Bronx County

Docket Number: 306558/2010

Judge: Laura G. Douglas

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
PART 11

SANDRA PASCAL, X

Plaintiff,

-against-

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY
and DELTA AIR LINES, INC.,

Defendants.

DELTA AIR LINES, INC., X

Third-Party Plaintiff,

-against-

TRIANGLE SERVICES, INC. d/b/a MAINTECH,
MAINTECH, INC., MAINTECH ACQUISITION, LLC,
and TRIANGLE AVIATION SERVICES, INC.,

Third-Party Defendants.

_____ X

Recitation, as required by Rule 2219(a) of the C.P.L.R., of the papers considered in the review of this motion to compel production of additional witness for deposition and related relief:

| <u>Papers</u> | <u>Numbered</u> |
|--|-----------------|
| Plaintiffs' Notice of Motion, Good Faith Affirmation of Elizabeth M. Unterman, Esq. dated August 15, 2018, Affirmation of Arthur M. Unterman, Esq. dated August 15, 2018 in Support of Motion, and Exhibits ("A" through "H")..... | 1 |
| Affirmation of Mark G. Vaughan, Esq. dated October 15, 2018 in Opposition to Motion, Affidavit of Kevin J. Lynch dated October 15, 2018 and attachment in Opposition to Motion..... | 2 |
| Reply Affirmation of Arthur M. Unterman, Esq. dated October 19, 2018..... | 3 |

Index No. 306558/2010

DECISION/ORDER

Present:

**Hon. Laura G. Douglas
J.S.C.**

**Supplemental Affirmation of Mark G. Vaughan, Esq. dated November 9,
2018 in Opposition to Motion and Affidavit of Virginia Elliott dated
November 8, 2018 in Opposition to Motion.....**

4

Upon the foregoing papers and after due deliberation, the Decision/Order on this motion is as follows:

The plaintiff seeks an order compelling defendant Delta Air Lines, Inc. (“Delta”) to produce Virginia “Ginny” Elliot (“Elliot”) for a deposition and to furnish certain electronic maintenance records or, alternatively, striking Delta’s answer or precluding Delta from testifying at trial as a penalty for Delta’s purported failure to produce a knowledgeable witness for deposition and provide relevant discovery. The motion is granted solely as ordered below and is otherwise denied.

The plaintiff seeks monetary damages from the defendants for personal injuries allegedly sustained on August 9, 2009 when she was caused to trip and fall while departing an airplane “due to the Jetway/Walkway, which connected the plane to the terminal building, being approximately six inches lower than the plane door threshold” (Plaintiff’s Verified Complaint, paragraph “10”). It appears that the third-party defendant(s) had service/maintenance contract(s) with Delta related to the location and/or mechanism of the plaintiff’s accident.

Delta produced Teisha Borgia (“Borgia”) for a deposition. She is employed as a safety specialist by Delta and is responsible for the safety of Terminals A, C, and D, which include the marine terminal. At the time of the accident, Borgia was employed as a trainer for other Delta employees. Borgia had no knowledge of the occurrence, of records kept by either Delta or Maintech, or of the respective responsibilities of Delta or Maintech with respect to maintenance. She identified a “Ginny Elliot” as Delta’s “station manager” at the time of the accident.

Delta does not challenge the plaintiff’s reading of the contract between Delta and Maintech in effect at the time of the accident to require that Maintech “follow reasonable instructions from Delta’s Station Manager or [her] designee”, that the Station Manager “shall be authorized to request services that are within the scope of work on behalf of Delta”, and that Maintech agreed to “keep Delta’s Station Manager . . . continuously advised of . . . emergencies, worker absences, accidents involving workers, or substandard performance of Work”. In addition, the plaintiff notes that the contract states “Delta will administer the performance of [Maintech], which may include equipment inspections on a monthly basis, through an on-site Delta representative who will be either the Delta Station Manager or the Station Manager’s designee, and who shall direct the maintenance and

operation of the Facility through [Maintech's] on-site manager . . . [Maintech] shall report to the Delta Station Manager who will be on duty Monday through Friday from 8 a.m. to 5 p.m., and is available on-call as needed. The Station Manager will approve all non-scheduled maintenance expenditures, including regular and overtime labor, prior to [Maintech] beginning work." Finally, the plaintiff cites the deposition testimony of Maintech's witness that maintenance records were kept on Delta's electronic system.

Delta contends that it does not have any responsive documents, which it claims would be in the possession of the third-party defendant(s). However, Delta has attached certain records to its opposition papers and claims that it has no other relevant documents. The records consist of an "overview of all work orders entered by Maintech between February 15, 2009 and December 15, 2009" and "print-outs of each of the referenced work orders, which were opened and completed by Maintech and have not been changed by Delta". They were pulled from Delta's electronic system and are verified by Kevin J. Lynch ("Lynch"), Delta's General Manager of Corporate Real Estate. Lynch submits an affidavit averring that while he was responsible for overseeing the contract with Maintech, Delta did not have any employee responsible for on-site, direct, day-to-day management of this contract. Lynch states that he has no independent knowledge of the accident, any issues or complaints with the subject jet bridge, or any repairs or maintenance regarding the jet bridge at or about the time of the plaintiff's alleged accident. Elliott submits an affidavit conceding that she was the "station manager", but stating that she only oversaw the "financial portion" of the Maintech contract. She contends that Delta did not have any employee responsible for on-site, direct, day-to-day management of the Maintech contract, that Maintech had the authority under the contract to perform all necessary maintenance and repairs, and that Maintech was not required to seek prior approval for same. Like Lynch, Elliott states that she has no independent knowledge of the accident, any issues or complaints with the subject jet bridge, or any repairs or maintenance regarding the jet bridge at or about the time of the plaintiff's alleged accident.

As a corporate party, Delta had the right to produce a representative of its choosing to testify at its initial deposition (*see Nunez v. Chase Manhattan Bank*, 71 A.D.3d 967 [2nd Dept. 2010]) The plaintiff must make a detailed showing of the need to take the additional deposition of Elliott by demonstrating that Borgia had insufficient information regarding relevant issues and that there is a substantial likelihood that Elliott has information material and necessary to prosecute the claims in

this case (*see Best Payphones, Inc. v. Guzov Ofsink, LLC*, 135 AD3d 585 [1st Dept 2016]). The burden of proof borne by the plaintiff warrants inquiry into the defendants' respective responsibilities for the subject location. Borgia had no knowledge whatsoever regarding the terms or performance of the contract. The undisputed terms of the defendants' contract appear to be inconsistent with the sworn testimony of Lynch and Elliott. Elliott has clearly been identified as the Delta "point person" contemplated by the contract with respect to its performance. Under these circumstances, Elliott should submit to a deposition.

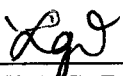
It appears that Delta has turned over the records in its possession. The plaintiff may serve a new discovery notice regarding any additional records revealed during the course of Elliott's deposition and she may be required to return for a further deposition should any such additional records be found to be material and necessary to prosecute the claims in this action.

Accordingly, it is hereby

ORDERED that Delta shall produce Virginia "Ginny" Elliott for a deposition no later than 45 days following service of a copy of this Order with notice of entry.

This constitutes the Decision and Order of this Court.

Bronx, New York
May 1, 2019



HON. LAURA G. DOUGLAS
J.S.C.