

Blackstock v AVR Crossroads, LLC
2019 NY Slip Op 32203(U)
July 26, 2019
Supreme Court, New York County
Docket Number: 155167/2012
Judge: Barbara Jaffe
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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. BARBARA JAFFE PART IAS MOTION 12EFM

Justice

-----X

INDEX NO. 155167/2012

ALBERT BLACKSTOCK, DEZETA BLACKSTOCK,
and EDNA BLACKSTOCK,

MOTION DATE

Plaintiffs,

MOTION SEQ. NO. 006

- v -

AVR CROSSROADS, LLC, BOSTON PROPERTIES
LIMITED PARTNERSHIP, SCHINDLER
ELEVATOR CORPORATION, NEW YORK CITY
TRANSIT AUTHORITY, and THE CITY OF NEW
YORK,

DECISION + ORDER ON
MOTION

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 006) 142-194
were read on this motion to compel

Defendant Schindler Elevator Corporation moves for an order compelling discovery
responses from plaintiffs, and in the event of their failure to comply, precluding them from
offering certain evidence at trial. Plaintiffs oppose and cross-move for an order compelling
Schindler to produce an employee for an examination before trial, and compelling defendant
Boston Properties Limited Partnership to respond to certain discovery demands. Schindler
opposes. By so-ordered stipulation dated May 22, 2019, all but plaintiffs' cross-motion to
compel the deposition were resolved. (NYSCEF 194). Accordingly, only that motion is
addressed.

I. RELEVANT BACKGROUND

By summons and complaint dated August 3, 2012, plaintiffs initiated this action alleging
that on May 19, 2011, father and daughter, plaintiffs Albert and Dezeta, were injured when an

escalator they were riding malfunctioned. (NYSCEF 146).

On July 3, 2013, plaintiffs served a notice for discovery and inspection, demanding that Schindler produce all “inspection and/or repair records pertaining to any work, labor and/or services” performed in relation to their accident. (NYSCEF 160). On February 26, 2014, Schindler objected to the demand and stated that it had no notice of plaintiffs’ accident. (NYSCEF 161). On March 27, 2014, Schindler served a supplemental response objecting to plaintiffs’ demand for post-accident records and stating that “Schindler had received no notice of the subject incident which resulted in any inspection and/or repair records related to the alleged accident.” (NYSCEF 189).

A Boston Properties security log reflects that on the date of the accident, a Schindler mechanic had reported that someone had fallen on the escalator, and that he took the escalator out of service. (NYSCEF 164). A security log dated the day after the accident, reflects that a Schindler escalator crew was onsite to “check” the escalator. (NYSCEF 165).

In light of the contradiction arising from the security logs and Schindler’s representation that it lacked notice, at a compliance conference held on October 23, 2014, plaintiffs sought to compel Schindler to produce an affidavit relating to a search of post-accident reports which was granted the following day with an order that Schindler provide an affidavit detailing the means and methods by which the search of “post-accident reports” was conducted. (NYSCEF 166).

By affidavit dated November 3, 2014, the employee responsible for “researching Schindler’s contracts in New York City and securing records of maintenance, repair and testing of escalators at those contact locations,” detailed her records search and stated that she “did not locate any records that reflected any post-accident reports or claims regarding the claimed accident of May 19, 2011,” and that to her knowledge “no other records exist with regard to the

subject escalator and any reference to the subject claimed incident.” She states that her search entailed a review of Schindler’s hard copy and computer files. (NYSCEF 167).

Schindler’s foreman testified at a deposition on September 7, 2018 and October 16, 2018 that he did not know whether Schindler had been notified of plaintiffs’ accident. According to him, Schindler employees who provided work, labor, and services on the escalator were required to complete time tickets and turn them in each week, that the tickets would reflect the work completed, and that a review of the tickets would show any alleged problem with the escalator. The foreman also stated that if a log had been kept in the motor room of the escalator, it would show what work had been done. He claimed to have seen, at some unspecified time, one such log but did not know the log’s location. (NYSCEF 185, 186).

II. CONTENTIONS

Plaintiffs contend that the affidavit of the employee responsible for the search is insufficient, as a search for “reports or claims” does not satisfy their demand for post-accident “records.” They rely on the compliance conference order that Schindler search for post-accident reports, which characterization did not allow Schindler to ignore their demands. Plaintiffs argue that they are entitled to records of post-accident repairs to show the condition of the escalator at the time of plaintiffs’ accident, and moreover, to depose the employee as to the search she conducted for post-accident records. Plaintiffs claim that such deposition testimony would establish whether Schindler spoliated evidence. (NYSCEF 158).

In opposition, Schindler contends that it complied with the court’s order by providing its employee’s affidavit and asserts that there is no evidence demonstrating that Schindler provided false information or obstructed discovery. In addition, Schindler notes that plaintiffs have waited years before raising an issue about the affidavit. Thus, there is no basis to compel an examination

before trial. (NYSCEF 178).

In reply, plaintiffs reference the Boston Properties security logs as evidence that Schindler had notice of the incident and conducted post-accident repairs, and the affidavit of Schindler's foreman who denied that any tickets or the log related to the accident had been produced. Given the evidence that such records exist or had existed, plaintiffs contend that they are entitled to depose Schindler's employee as to the location of such records and whether they were spoliated. (NYSCEF 193).

III. ANALYSIS

To compel the deposition of another Schindler employee, plaintiffs must demonstrate that the employee possesses "material and necessary" information. (*Hayden v City of New York*, 26 AD3d 262 [1st Dept 2006]). While plaintiffs may have initially sought more than reports, and the security logs and foreman's testimony reveal that Schindler conducted post-accident work on the escalator and generated time tickets allegedly detailing such work, the court's directive implicitly denied plaintiffs' request to the extent it sought items other than "reports." The employee's affidavit complies with the court's directive, as the employee detailed the manner in which she conducted her search and stated that her efforts reveal no post-accident reports. Moreover, her denial of the existence of reports is not contradicted by the foreman who testified that time tickets and a log were prepared in 2011, absent any reason to believe that the time tickets and log are equivalent to post-accident reports. Plaintiffs thus fail to establish that they are entitled to depose the Schindler employee responsible for the search.

IV. CONCLUSION

Accordingly, plaintiffs' cross motion to compel is denied.

20190726113310BJAFFE1A0E3AF309D241648AC167C8E1B5B7C6



BARBARA JAFFE, J.S.C.

7/26/2019

DATE

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