

Luna v Brodcom W. Dev. Co., LLC
2019 NY Slip Op 32376(U)
August 6, 2019
Supreme Court, New York County
Docket Number: 101340/2015
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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CARMEN LEZCANO LUNA as Administratrix of
the Estate of JOHNNY LUNA, Deceased, and
CARMEN LEZCANO LUNA Individually,

Index No. 101340/2015

Plaintiff

- against -

BRODCOM WEST DEVELOPMENT COMPANY, LLC,
and BRODSKY ORGANIZATION, LLC,

Defendants

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BRODCOM WEST DEVELOPMENT COMPANY, LLC,
and BRODSKY ORGANIZATION, LLC,

Third Party Plaintiffs

- against -

P.S. MARCATO ELEVATOR CO., INC.,

Third Party Defendant

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DECISION AND ORDER

LUCY BILLINGS, J.S.C.:

Plaintiff sues for her husband Johnny Luna's personal injury and death January 9, 2015, when he was working as an elevator mechanic in a passenger elevator shaftway and a descending elevator struck and killed him in defendants' building at 75 West End Avenue, New York County. The building's elevators were undergoing modernization carried out by third party defendant P.S. Marcato Elevator Co., Inc., Luna's employer. Plaintiff moves to compel defendants to produce the superintendent at 75

West End Avenue, Andrew Moroch, who was at the building January 9, 2015, when Luna was working in the elevator shaftway and the elevator descended upon him. C.P.L.R. § 3124.

I. TESTIMONY FROM PREVIOUS WITNESSES AND POTENTIAL TESTIMONY FROM MOROCH

Plaintiff seeks this deposition because the two defendants have produced only one witness, the property manager Ralph Cruz, for a deposition and, without the benefit of Luna's testimony, plaintiff needs other witnesses with further personal knowledge regarding the circumstances of his injury and death. While Cruz was not totally unknowledgeable about relevant issues, his knowledge did not extend to all relevant issues, and he identified Moroch as the person most likely to possess additional relevant knowledge. Moroch was principally responsible for the safety of building occupants. Among the building employees, he was in most frequent contact with the elevator workers who came to the building because he was responsible for providing them access to their work areas and otherwise facilitating their work. Regarding contact with the elevator mechanic Luna specifically, Cruz estimated that his and Moroch's interaction with Luna was equal. If the elevators workers needed information about the building, they asked Cruz or Moroch.

Moroch was familiar with the elevator modernization because he escorted an elevator modernization consultant when the consultant visited the building and he attended meetings along with Cruz about the modernization. Moroch also attended meetings about elevator maintenance with P.S Marcato Elevator Co.

Although P.S. Marcato Elevator Co.'s witness, Paul Kahl, testified at his deposition that Luna was working on the modernization, no party attributes Luna's injury and death to the modernization work versus a condition needing maintenance or repair. The contract between defendants and P.S. Marcato Elevator Co. required it to keep a daily elevator maintenance logbook at the building, recording "any symptoms, inspections, call back reports, repairs, replacements, or maintenance performed." Aff. Of Michael J. Asta Ex. F, at 52. The logbook thus may have recorded relevant information regarding work on or operation of the elevator that killed Luna January 9, 2015. Cruz was unfamiliar with the logbook. Moroch, given his responsibilities, is likely to be familiar with it.

Perhaps most importantly, Moroch and not Cruz possessed a key to the elevators' motor room, which may have been accessed to start the elevator that descended upon Luna and perhaps ought to have been accessed to stop its descent. Cruz was unfamiliar with any work on or operation of the equipment in the motor room and believed that Moroch might be more knowledgeable about those potentially relevant issues. Both Cruz and Kahl, the modernization foreman, testified that the building employees did not decide to start up or shut down an elevator's power when P.S. Marcato Elevator Co. was working at the building, but Moroch may have given P.S. Marcato Elevator Co. workers access to the motor room for such a purpose or at least know what they did in the motor room January 9, 2015.

Although defendants may not rely on Kahl to satisfy each defendant's obligation to produce a witness, Kahl, in any event, was at the building only once per week and only for purposes of checking the progress of the modernization, whether materials and equipment that had been ordered were delivered, and whether further materials or equipment was needed. Kahl did reveal, however, that switches within a locked panel in the elevator cab, as well as the systems in the motor room, controlled the elevator that killed Luna. Moroch, the building porters whom he supervised, and the building's concierge desk possessed keys to the panel door. Thus Moroch may know whether one of these keys was used to start the elevator that descended upon Luna or to attempt to stop its descent. Finally, even if Moroch lacks personal knowledge of any of the relevant facts delineated above, he well may know of other building employees whom he supervised or other P.S. Marcato Elevator Co. employees who may be familiar with the circumstances leading to Luna's injury and death.

II. CONCLUSIONS

Plaintiff thus has met her burden to show the inadequacies in defendants' previous witness' knowledge about relevant issues and to require the two defendants to produce their second witness who is most likely to know more about the relevant issues about which the previous witness testified and most likely to know about the relevant issues about which the previous witness knew little. 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); Gomez v. State of New York, 106 A.D.3d 870, 872-73 (2d Dep't 2013); Trueforge Global Mach. Group v. Viraj Group, 84 A.D.3d 938, 939-40 (2d Dep't 2011). At minimum, the second witness may know other witnesses who may possess relevant knowledge or other information that may lead to evidence material or necessary to the prosecution of plaintiff's action.

Consequently, the court grants plaintiff's motion to compel defendants to produce Andrew Moroch for a deposition. C.P.L.R. §§ 3107, 3124. To avoid duplication of Ralph Cruz's testimony, the inquiry by plaintiff shall be limited to three hours, including answers, but excluding colloquy. See Hutton v. Aesthetic Surgery, P.C., 161 A.D.3d 595, 596 (1st Dep't 2018); Nathel v. Nathel, 55 A.D.3d 434, 434 (1st Dep't 2008); Matter of Dier, 13 A.D.3d 150, 151 (1st Dep't 2004); Bielat v. Montrose, 249 A.D.2d 103, 103 (1st Dep't 1998). Even though Moroch's testimony may lead to other building employees who may possess relevant knowledge, defendants shall not be required to produce any further witness for a deposition.

Plaintiff shall complete Moroch's deposition by September 19, 2019. Although on August 1, 2019, defendants declined to specify when Moroch would be available for his deposition, the court allows them until August 23, 2019, to provide to plaintiff a mutually acceptable date for his deposition. If they fail to do so, plaintiff may re-serve a notice of Moroch's deposition consistent with C.P.L.R. § 3107 so as to complete his deposition

by September 19, 2019. If plaintiff fails to conduct Moroch's deposition by September 19, 2019, she shall have waived his deposition. Plaintiff shall serve and file a note of issue by October 10, 2019.

DATED: August 6, 2019



LUCY BILLINGS, J.S.C.

LUCY BILLINGS
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