

**Sadowsky v Consolidated Edison Co. of N.Y., Inc.**

2019 NY Slip Op 32608(U)

September 3, 2019

Supreme Court, New York County

Docket Number: 161209/2015

Judge: Frank P. Nervo

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This opinion is uncorrected and not selected for official publication.

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

-----X  
ROGER SADOWSKY and ROBIN PHILLIPS,

Plaintiffs,

-against-

CONSOLIDATED EDISON COMPANY OF  
NEW YORK, INC., TIME WARNER CABLE INC.,  
and TIME WARNER CABLE NEW YORK LLC,

Defendants.  
-----X

TIME WARNER CABLE NEW YORK LLC,  
i/s/h/a TIME WARNER CABLE INC.,

Third-Party Plaintiffs

-against-

HYLAN DATACOM & ELECTRICAL INC.,

Third-Party Defendant.  
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FRANK P. NERVO, J.S.C.

DECISION AND ORDER

Index Number

161209/2015

Third Party Index Number

595623/2016

Plaintiffs seek an order pursuant to CPLR §§ 3124 and 3126 striking defendant Time Warner Cable’s (hereinafter “Time Warner”) pleadings. Plaintiffs further seek an order resolving the issues of negligence, notice, and the existence of a defective condition(s) against Time Warner for its alleged failure to provide meaningful responses to plaintiff’s demands. Plaintiffs also seek sanctions against Time Warner. Alternatively, plaintiffs seek an order compelling Time Warner to provide alleged missing discovery or a *Jackson* affidavit for material it cannot locate and a further deposition of a Time Warner employee within its “Northern Construction” department. Finally, plaintiffs seek to extend the time to file and serve a note of issue.

The instant personal injury action arises from an alleged fall by Roger Sadowsky into a sidewalk utility box or vault precipitated by the metal cover giving way when Sadowsky’s weight was placed upon it while walking his dog.

CPLR § 3124 provides that a party seeking disclosure may move to compel compliance or a response if the responding party fails to respond or comply with a request, notice, interrogatory demand or question pursuant to Article 31 of the CPLR. CPLR § 3101(a) directs that there “shall be full disclosure of all matter material and necessary to the prosecution or defense of an action, regardless of the burden of proof” (*Forman v. Henkin*, 30 NY3d 656, 661 [2018]). The test utilized is “one of usefulness and reason” (*id.*). Under CPLR § 3126, a party’s nondisclosure, including persons controlled by a party, is sanctionable. Subsection three provides that the Court may strike a pleading, stay proceedings, dismiss an action, or enter a default judgment when it finds, inter alia, that a party has refused to obey an order for disclosure or willfully fails to disclose information that ought to have been disclosed (*id.*). These remedies are drastic and should only be imposed when the movant has “clearly shown that its opponent’s nondisclosure was willful, contumacious or due to bad faith” (*Commerce & Indus. Ins. Co. v. Lib-Com Ltd.*, 266 AD2d 142 [1st Dept 1999]; *see also Siegman v. Rosen*, 270 AD2d 14 [1st Dept 2000]).

Here, plaintiffs are dissatisfied with the deposition of the employee designated by Time Warner and the materials produced in response to their discovery demands. Plaintiffs contend, in essence, that at the deposition Time Warner’s employee stated he believed a reason existed for Time Warner to inspect the subject vault/box one week before the alleged accident, and plaintiffs believe Time Warner is willfully failing to produce records of the event occasioning the inspection. Plaintiffs further contend Time Warner is willfully withholding materials and records requested in their post-EBT demand of December 19, 2018.

Time Warner contends that it designated a construction manager employee with substantive knowledge, not a mere record keeper, to appear at the deposition and the employee’s inability to answer certain questions fails to amount to inadequate or insufficient knowledge of the material facts warranting an additional deposition. Time Warner further contends that it responded to plaintiffs’ demands and provided all requested material in its possession.

Additional depositions are necessary where the already deposed representative had insufficient knowledge or information, which is material to the prosecution of the case, and a substantial likelihood exists that the person sought for further deposition possess such knowledge or information (*Hayden v. City of New York*, 26 AD3d 262 [1st Dept 2006]; *Saxe v. City of New York*, 250 AD2d 751 [2d Dept 1998]). Here, defendants' representative was knowledgeable about Time Warner's construction projects, but did not have first-hand knowledge related to the construction, inspection, and repair of the box/vault cover, as a different department within Time Warner, Northern Construction, performed those tasks. However, the representative performed a comprehensive record search for information and records related to the box/vault inspections and maintenance protocols, and was unable to locate the same. The representative further testified that the box/vault had been installed years prior by a different cable provider, and Time Warner was not in possession of the prior company's records related to the box/vault. Plaintiffs contention that a Time Warner employee within its Northern Construction department would have such documents is mere speculation and does not rise to the level of substantial likelihood necessary to order an additional deposition.

To the extent that plaintiffs argue Time Warner has a heightened responsibility as a "quasi exclusive franchise to deliver services to New York City residents ... justifying an award of punitive damages" on this motion, that argument is rejected and warrants no further discussion (Plaintiffs' notice of motion at 4). Likewise inappropriate is plaintiffs' request to place "for-profit ... quasi-monopiles ... on notice that proper care of the sidewalks is NOT to be regarded with indifference" by awarding plaintiff punitive damages (Plaintiffs' affirmation at 11, emphasis in original).

Finally, to the extent that plaintiffs seek to resolve various liability and notice issues in their favor, their request is without merit. Although Time Warner did not provide all material requested in plaintiffs' post-EBT demand, it did provide a response to the demand. The Court finds the response and failure to provide certain material does not rise to the level of willful bad faith nondisclosure necessary to trigger the drastic remedies of CPLR § 3126.

Accordingly, it is

ORDERED that plaintiffs' motion to compel, pursuant to CPLR § 3124, is granted solely to the extent of requiring defendant Time Warner to produce to plaintiffs the documents and materials requested in plaintiffs' discovery demand of December 19, 2018 under numbered paragraphs 1, 2, 4, 5, 6, 7, and 8, to the extent such material is not privileged, within 20 days of entry and service of this Decision and Order and it is further

ORDERED that defendant Time Warner shall provide an affidavit for the above material which cannot be located within 20 days of entry and service of this Decision and Order; and it is further

ORDERED that the deadline to serve and file a note of issue is extended to November 1, 2019; and it is further

ORDERED that plaintiffs' motion is otherwise denied; and it is further

ORDERED that the parties are reminded they are directed to appear for a status conference on October 25, 2019 at 10:00am in Part 4 at 80 Centre Street.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated

*Sept. 3, 2019*

ENTER:



J.S.C.

HON. FRANK P. NERVO