

Alaverdi v Bui

2019 NY Slip Op 33260(U)

November 1, 2019

Supreme Court, New York County

Docket Number: 159549/2017

Judge: Adam Silvera

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This opinion is uncorrected and not selected for official publication.

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

PRESENT:	<u>HON. ADAM SILVERA</u>	PART	IAS MOTION 22
	<i>Justice</i>		
	-----X	INDEX NO.	<u>159549/2017</u>
	LOURA ALAVERDI, AN INCAPACITATED PERSON, BY HER TEMPORARY GUARDIAN, RUDYARD WHYTE, ESQ,	MOTION DATE	<u>N/A</u>
	Plaintiff,	MOTION SEQ. NO.	<u>013</u>

- v -

HUEY BUI, JENNY YMOUI CHEV, ROSEANN
BIRRITELLA, RALPH LAUREN CORPORATION,

Defendant.

**DECISION + ORDER ON
MOTION**

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 013) 308, 309, 310, 311, 312, 313, 314, 317, 318, 319, 320, 321, 322, 323, 324

were read on this motion to/for DISCOVERY.

Upon the foregoing documents, and after oral arguments, it is ordered that defendant Ralph Lauren Corporation's order to show cause for a protective order is denied, and defendant Roseann Birrittella's oral application for a deposition of Ralph Lauren is granted for the reasons set forth below.

At the outset, the Court notes that this action arose from a motor vehicle accident on July 20, 2017 in which plaintiff, a pedestrian, was struck by a vehicle operated by defendant Huey Bui and owned by defendant Jenny Chev. At the time of the accident, defendant Bui was employed as the driver for defendant Birrittella who was a passenger in the vehicle when the accident occurred. Defendant Birrittella was employed by defendant Ralph Lauren Corporation at the time of the accident. As a result of the accident, plaintiff was devastatingly injured and has been in a persistent vegetative state ever since.

Due to the contentious nature of the case, thirteen motions have been filed in a span of two (2) years, and numerous conferences have been held. At one such conference on September

27, 2019, counsel for defendant Roseann Birrittella requested the deposition of Mr. Ralph Lauren. After strenuous objections from defendant Ralph Lauren Corporation's various counsel, all counsel were given an opportunity to brief the issue, and oral arguments were scheduled for October 29, 2019 at 2:15pm. In lieu of the brief, defendant Ralph Lauren Corporation filed the instant order to show cause seeking a protective order precluding the deposition of Mr. Lauren. Defendant Birrittella submitted opposition. On October 29, 2019, all parties appeared for the previously scheduled oral arguments. Defendant Ralph Lauren Corporation's instant order to show cause was signed at such conference with the return date scheduled for the same day. As all parties received a copy of the instant order to show cause, and defendant Birrittella had the opportunity to, and did, submit opposition papers, defendant Ralph Lauren Corporation waived a reply such that oral arguments could proceed as originally scheduled. At oral arguments, plaintiff stated on the record that it takes no position on the instant order to show cause.

Here, defendant Ralph Lauren Corporation argues that an order should be entered quashing the notice to take the deposition of Mr. Lauren as defendant Birrittella failed to make the appropriate motion to compel the deposition, but rather, made an oral application to the Court during a conference. Defendant Ralph Lauren Corporation further argues that Mr. Lauren possesses no knowledge or information relevant to this litigation, that his deposition is precluded pursuant to the Apex Rule, and that defendant Birrittella has failed to demonstrate that the representatives already deposed had insufficient knowledge.

Preliminarily, the Court notes that plaintiff was previously ordered to file the note of issue, and in fact timely filed such note of issue on July 18, 2019. Where additional discovery is needed following the filing of the note of issue, the Court, in its discretion, may grant discovery. 22 NYCRR §202.21(d) states that "[w]here unusual or unanticipated circumstances develop

subsequent to the filing of a note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice, the court, upon motion supported by affidavit, may grant permission to conduct such necessary proceedings.”

Here, this Court’s Part Rules specifically states that “[t]he Court invests significant resources into the DCM system in order to efficiently and fairly resolve discovery disputes. . . . Counsel attending the conference are expected to be familiar with the case and have the authority to discuss and stipulate to resolve all discovery issues.” Part 22, Part Rules, IV.B(1). Thus, defendant Birrittella was merely following this Court’s Part Rules, and the custom and practice of the Motor Vehicle Part, by raising all outstanding discovery issues at a conference to be discussed and resolved if possible. In fact, the Part Rules further states that “[f]ailure to address all outstanding discovery existing at the time of the compliance conference may be deemed a waiver of the right to obtain said discovery.” *Id.* at IV.B(2). Additionally, the Part Rules explicitly state that “[i]f the dispute cannot be resolved at the conference, then the issue(s) will be narrowed and the DCM Order will specifically allow a motion to be brought”. *Id.* at II.I(4). Defendant Birrittella raised the issue of a deposition of Mr. Lauren at a conference in accordance with the Part Rules. When the issue could not be immediately resolved at such conference, the Court, rather than order a motion to be filed, gave all counsel an opportunity to brief the issue for oral argument. As such, defendant Ralph Lauren Corporation’s argument that defendant Birrittella’s oral application for a deposition was procedurally improper fails.

As to defendant Ralph Lauren Corporation’s argument that Mr. Ralph Lauren has no relevant information, the Court finds that defendant Birrittella has met her burden in establishing that a deposition of Mr. Lauren is relevant to the instant action. “It is . . . well settled that a motion to quash a subpoena duces tecum should be granted only where the materials sought are utterly

irrelevant to any proper inquiry”. *Velez v Hunts Point Multi-Serv. Ctr., Inc.*, 29 AD3d 103, 112 (1st Dep’t 2006). CPLR §3101(a)(4) states that “[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by: (4) any other person, upon notice stating the circumstances or reasons such disclosure is sought or required.” The Court of Appeals has held that:

“[t]he words ‘material and necessary’ as used in section 3103 must be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. Section CPLR 3101(a)(4) imposes no requirement that the subpoenaing party demonstrate that it cannot obtain the requested disclosure from any other source. Thus, so long as the disclosure sought is relevant to the prosecution or defense of an action, it must be provided by the nonparty.” *Matter of Kapon v Koch*, 23 NY3d 32, 38 (2014)(internal citations and quotations omitted).

Here, defendant Birrittella served a notice to take Mr. Lauren’s deposition on September 23, 2019, four (4) days prior to a conference with the Court. At such conference on September 27, 2019, defendant Birrittella requested the deposition of Mr. Lauren in accordance with the Part Rules. Thereafter, on October 7, 2019, defendant Ralph Lauren Corporation timely rejected defendant Birrittella’s notice for the deposition. Defendant Birrittella’s opposition papers sufficiently established the reason for the deposition, and that such deposition is likely to lead to relevant information that is material and necessary to defendant Birrittella’s defense. Specifically, defendant Birrittella argues, *inter alia*, that she was in the scope of her employment at the time of the allegations in the complaint. She further argues that the witnesses previously proffered by defendant Ralph Lauren Corporation for deposition had no knowledge of whether defendant Birrittella was in the scope of the employment at the time of the allegations claimed by plaintiff. Defendant Birrittella convincingly argues that she has been an employee of defendant Ralph Lauren Corporation for over 48 years, that she started the company with Mr. Lauren, helped to build the brand, and has worked side by side with Mr. Lauren for nearly half a century.

Moreover, a review of defendant Birrittella's deposition transcript reveals that she testified that she reported only to Mr. Lauren. In fact, defendant Birrittella explicitly testified that at the time of the accident, her position at defendant Ralph Lauren Corporation was Executive Vice President and Senior Creative Director for Ralph Lauren womenswear, Special Advisor to the Executive Chairman. It is undisputed that the executive chairman is Mr. Lauren. Furthermore, Mr. Lauren concedes that he has "worked closely with Defendant...Birrittella for approximately fifty years and have shared a close working relationship with her." Order to Show Cause, Exh. C, Ralph Lauren Aff., ¶2. Although Mr. Lauren's affidavit states that he was not a passenger in the vehicle at the time of the accident, such fact does not preclude his deposition. The complaint alleges numerous causes of action which include negligent hiring and retention in the months prior to the accident. Defendant Birrittella alleges that, due to her unique relationship with Mr. Lauren, as she reported solely to him, and acted as Special Advisor to him, he ratified all her decisions including the decision to retain defendant Huey Bui, the driver of the vehicle involved in the instant motor vehicle accident. Thus, having met her burden, the burden shifts to defendant Ralph Lauren Corporation to establish that a deposition of Mr. Lauren is "utterly irrelevant to any proper inquiry". *Velez v Hunts Point Multi-Serv. Ctr., Inc.*, 29 AD3d at 112. While Mr. Lauren states in his affidavit that he does not have any material and necessary information, nor any unique knowledge, such conclusory statements fail to meet the burden.

Lastly, with regards to the apex witness rule, the Court notes that such doctrine is recognized in Federal Courts in New York, which State Courts have not codified. In fact, no binding authority has been cited by defendant Ralph Lauren Corporation in arguing that the apex witness rule applies. Rather, other state court decisions have been cited. The one Appellate Division case cited by defendant Ralph Lauren Corporation is clearly distinguishable. In

Colicchio v New York, cited by defendant Ralph Lauren Corporation, the Appellate Division, held that the deposition of the Commissioner of the New York City Department of Transportation was precluded on the basis that “plaintiffs therefore have failed to establish that the individuals already deposed possess insufficient knowledge or that the testimony was otherwise inadequate.” *Colicchio v New York*, 581 NYS2d 36, 37 (1st Dep’t 1992). As stated above, here, defendant Birrittella has established that the individuals previously produced for deposition did not have knowledge of the scope of her employment. The apex witness rule does not exempt an individual from a deposition based solely on their title or position in a company or organization. In fact, the Federal Court has specifically held that “senior executives are not exempt from deposition, and, because principles relating to apex witness are in tension with the broad availability of discovery, it is important to excuse a witness from giving testimony only in compelling circumstances.” *Chevron Corp. v Donziger*, 11 Civ.0691, 2013 WL 1896932 (SDNY 2013)(internal citations omitted). The Courts in the Southern District of New York have also explicitly held that it does not “matter that the proposed witness is a busy person or professes lack of knowledge of the matters at issue, as the party seeking the discovery is entitled to test the asserted lack of knowledge.” *Naftchi v New York Univ. Med. Ctr.*, 172 FRD 130, 132 (SDNY 1997). As such, the apex witness rule does not shield Mr. Lauren from a deposition. Thus, defendant Ralph Lauren Corporation’s order to show cause for a protective order is denied, and defendant Birrittella’s oral application for the deposition of Mr. Lauren is granted. Discovery is ordered below.

Accordingly, it is

ORDERED that defendant Ralph Lauren Corporation’s order to show cause seeking to quash the notice to take the deposition of Ralph Lauren, and for a protective order, is denied in

its entirety; and it is further

ORDERED that defendant Roseann Birrittella's oral application for the deposition of Ralph Lauren is granted; it is further

ORDERED that the deposition of Ralph Lauren shall be completed within 21 days. Failure to complete such deposition shall result in the preclusion of defendant Ralph Lauren Corporation from testifying at trial and from offering an affidavit in substantive motion practice and/or striking of their answer. Should any affidavit be submitted prior to the deadline for the deposition, and should defendant Ralph Lauren Corporation fail to comply with the discovery ordered herein, such affidavit shall be stricken and not considered; and it is further

ORDERED that all parties shall appear for a previously scheduled conference on November 26, 2019 at 11:00am in room 136 of 80 Centre Street, New York, NY 10013; and it is further

ORDERED that, within 14 days of entry of this decision/order, defendant Birrittella shall serve a copy upon all parties with notice of entry.

This constitutes the decision and order of this Court.

11/1/19
DATE


ADAM SILVERA, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE