

Diaz v City of New York
2019 NY Slip Op 33650(U)
December 16, 2019
Supreme Court, New York County
Docket Number: 150521/2019
Judge: W. Franc Perry
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY****PRESENT: HON. W. FRANC PERRY****PART****IAS MOTION 23EFM***Justice*-----X
NICOLE DIAZ, B P,

Plaintiff,

- v -

THE CITY OF NEW YORK, NEW YORK CITY TRANSIT
AUTHORITY, G & L REALTY GROUP LLCDefendant.
-----X

INDEX NO.) 150521/2019

MOTION DATE 08/28/2019

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16

were read on this motion to/for

PRECLUDE

This personal injury action arises out of a claim made by plaintiff Nicole Diaz, as parent and natural guardian of B.P., an infant, that infant B.P. sustained injuries when she was exiting a bus and was caused to fall due to a defective condition on the sidewalk. Defendant G & L Realty Group, LLC (G & L Realty)¹ now moves, pursuant to CPLR 3042 (c), precluding plaintiff from offering any evidence at trial concerning the claims made against G & L Realty. In the alternative, G & L Realty moves for an order, pursuant to CPLR 3124, compelling disclosure of items demanded, pursuant to CPLR 3101 and 3102.²

¹ G & L Realty provides this correction in the motion papers: "Defendant G & L Realty Delaware LLC, incorrectly s/h/a G & L Realty Group, LLC."

² The notice of motion seeks to compel disclosure of items demanded under CPLR 3101 and 3102. However, in the affirmation submitted in support of the motion, counsel seeks to compel disclosure of items demanded under CPLR 3101 and 3120. Although counsel does not address any of the discovery statutes or case law in support of the motion, in light of the discovery requests, the court refers to CPLR 3120 in its decision.

BACKGROUND AND FACTUAL ALLEGATIONS

Plaintiff commenced this action by filing a summons and complaint on January 18, 2019.

See NYSCEF Doc. No. 1. The complaint states that, “[o]n or about May 10, 2017, infant B.P., was lawfully alighting [sic] a bus owned and operated by the New York City Transit Authority (NYCTA) at or near 265 Amsterdam Avenue when she was caused to fall due to a defective condition on the sidewalk/curb thereat.” *Id.*, ¶ 40. Defendant NYCTA is also alleged to have “wrongfully discharged the infant-claimant into a broken, missing, cracked, unlevelled, defective area of the sidewalk/curb, causing the infant-claimant to trip and fall and become injured.” *Id.*, ¶ 46. Plaintiff alleged that both defendant City of New York and G & L Realty owned and were responsible for maintaining the subject sidewalk. The complaint indicates that, on August 8, 2017, plaintiff served both City of New York and the NYCTA with a notice of claim. An examination before trial pursuant to General Municipal Law (GML) § 50-h was held on March 19, 2018.

G & L Realty answered the complaint on April 12, 2019 and also served plaintiff with its discovery demands on that date. Included in the demands were a demand for verified bill of particulars, demand for notice of claim and municipal hearing information, notice of discovery and inspection of collateral sources, and notice to produce a written accident report, among other demands.³

³ The other demands include a notice for discovery of statement of party, notice to take deposition upon oral examination, notice for discovery and inspection of loss of income data, notice for discovery and inspection of expert witness information, defendant’s demand for ad damnum information, demand for copies of plaintiff’s medical reports and authorizations, demand for witness disclosure, demand for insurance information, demand pursuant to section 111 of the Medicaid, Medicare and SCHIP extension act 2007, consent to release, demand for social networking information, demand for ambulance call report, demand for litigation funding information, demand for proof of special damages and notice for preservation of electronically stored evidence.

Pursuant to a letter sent to plaintiff's counsel dated April 29, 2019, G & L Realty requested copies of the notice of claim, the transcript from the GML § 50-h hearing and the accompanying exhibits. After not receiving any response, on June 11, 2019, G & L Realty sent another letter to plaintiff's counsel. In the letter, G & L Realty requested that plaintiff's counsel provide copies of the notice of claim, the transcript from the GML § 50-h hearing and the accompanying exhibits. G & L Realty further noted that it "previously served an answer which contained a demand for a bill of particulars, as well as combined discovery demands." NYSCEF Doc. No. 15. G & L Realty indicated that it had not received these responses and requested that it be provided with the outstanding discovery within 30 days.

G & L Realty moved for the instant relief on July 19, 2019, and requests an order, pursuant to CPLR 3042 (c), precluding plaintiff from offering any evidence at trial concerning claims made against G & L Realty. Alternatively, G & L Realty seeks an order, pursuant to CPLR 3124, compelling disclosure and responses to its notice and demand. In support of its request, G & L Realty provides an affirmation of good faith from Robert L. Emmons (Emmons). Emmons states that plaintiff's counsel has neither responded to any of the discovery demands nor returned Emmons's phone call. G & L Realty states that, "[u]nless plaintiff is compelled to produce a response to these demands for bill of particulars and response to our discovery demands and demand for medical records and authorization, [G & L Realty] will be unable to properly prepare a defense in this action." Emmons affirmation, ¶ 10. Plaintiff has not opposed this motion.

STANDARD OF REVIEW/ANALYSIS

G & L Realty served a demand for a verified bill of particulars on April 12, 2019. To this date, plaintiff has not served a bill of particulars nor objected to any of the items in the demand.

“A bill of particulars . . . is a more limited [discovery] device, designed simply to amplify or supplement the pleading.” *Northway Eng’g, v Felix Indus.*, 77 NY2d 332, 335 (1991); *see also Toth v Bloshinsky*, 39 AD3d 848, 849 (2d Dept 2007) (“The purpose of a bill of particulars is to amplify pleadings, limit proof, and prevent surprise at trial, not to provide evidentiary material”).

Pursuant to CPLR 3042 (c), if “a party fails to respond to a demand [for a bill of particulars] in a timely fashion or fails to comply fully with a demand, the party seeking the bill of particulars may move to compel compliance, or, if such failure is willful, for the imposition of penalties pursuant to subdivision (d) of this rule.”⁴ The court may issue a preclusion order as a penalty for willfully failing to respond to a demand for a bill of particulars. *See also Northway Eng’g, v Felix Indus.* 77 NY2d at 336 (citation omitted) (“If a party neglects to or refuses to respond to a demand for a bill of particulars, the court may enter a preclusion order”).

The complaint alleged that G & L Realty failed to maintain the sidewalk and that, as a result, plaintiff sustained injuries. Among other things, the bill of particulars is requesting that plaintiff set forth the statutes alleged to have been violated by G & L Realty and that plaintiff state what medical treatments plaintiff has undergone as a result of G & L Realty’s alleged negligence. Accordingly, “the specific material requested by the defendant is discoverable and the proper subject of a bill of particulars . . . [and] the defendant was within its rights to seek this

⁴ *See also* CLPR 3042 (d): “If a party served with a demand for a bill of particulars willfully fails to provide particulars which the court finds ought to have been provided pursuant to this rule, the court may make such final or conditional order with regard to the failure or refusal as is just, including such relief as is set forth in section thirty-one hundred twenty-six of this chapter.”

information through a bill of particulars.” *Brannigan v City of New York*, 224 AD2d 340, 341 (1st Dept 1996). Nevertheless, it is well settled that “[a]n action should be determined on the merits whenever possible.” *Stinton v Robin’s Wood, Inc.*, 45 AD3d 203, 206 (2d Dept 2007). Thus, at this time, the court declines to impose the penalty of a preclusion order for plaintiff’s failure to respond to the demand for a verified bill of particulars. However, pursuant to CPLR 3042 (c) plaintiff is directed to file a bill of particulars in response to G & L Realty’s demand within 20 days of the date of this decision and order.

“Disclosure in civil actions is generally governed by CPLR 3101 (a), which directs: [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. . . . The test is one of usefulness and reason.” *Forman v Henkin*, 30 NY3d 656, 661 (2018) (internal quotation marks and citations omitted). “The supervision of disclosure and the setting of reasonable terms and conditions therefor rests within the sound discretion of the trial court” *Montalvo v CVS Pharm, Inc.*, 102 AD3d 842, 843 (2d Dept 2013) (internal quotation marks and citations omitted).

Pursuant to CPLR 3120, “Discovery and production of documents and things for inspection, testing, copying or photographing,” a party may serve a notice on another party “to produce and permit the party seeking discovery. . . to inspect, copy, test or photograph any designated documents” CPLR 3120 (1) (i). Pursuant to CPLR 3122 (a), in relevant part, objections to discovery demands shall be made “[w]ithin twenty days of service of a notice . . . under rule 3120.”

Pursuant to CPLR 3124, “[i]f a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article . . . the party seeking disclosure may move to compel compliance or a response.” On a motion brought pursuant to

CPLR 3124, the burden is on the party seeking the disclosure to establish a basis for the production sought. *Rodriguez v Goodman, M.D.*, 2015 NY Slip Op 31412(U), *5 (Sup Ct, NY County 2015). “[T]he request need only be appropriately tailored and reasonably calculated to yield relevant information. . . . [T]he purpose of discovery is to determine if material relevant to a claim or defense exists.” *Forman v Henkin*, 30 NY3d at 664. Plaintiff, as the opposing party, has the burden of establishing that the “disclosure sought is improper.” *Roman Catholic Church of Good Shepherd v Tempco Sys.*, 202 AD2d 257, 258 (1st Dept 1994). However, even if an opposing party does not timely object, under certain circumstances, courts may limit or strike discovery demands as “palpably improper, because they are either overly broad, unduly burdensome, irrelevant or vague.” *McMahon v Cobblestone Lofts Condominium*, 134 AD3d 646, 646 (1st Dept 2015) (internal quotation marks and citation omitted).

Included in the demands for further discovery and inspection is a demand for plaintiff to supply G & L Realty “copies of all Notices of Claim filed with the City of New York . . . [a] copy of the transcript of any and all statutory hearings pursuant to GML § 50-h . . . copies of any and all exhibits . . . utilized during the statutory hearing held . . .” NYSCEF Doc. No. 8 at 14. After plaintiff failed to object to the demands within 20 days, G & L Realty wrote two letters to plaintiff’s counsel, asking to be provided with this information. In support of the instant motion, pursuant to 22 NYCRR 202.7 (a), counsel submitted the affirmation of good faith required in motions related to discovery disclosure. *See* 22 NYCRR 202.7 (a).⁵

⁵ 22 NYCRR 202.7 (a) states the following:

“There shall be compliance with the procedures prescribed in the CPLR for the bringing of motions. In addition, except as provided in subdivision (d) of this section, no motion shall be filed with the court unless there have been served and filed with the motion papers (1) a notice of motion, and (2) with respect to a motion relating to disclosure or to

"CPLR 3120 authorizes the service of a notice to produce and permit discovery of specifically designated documents * * * specified with reasonable particularity in the notice." *City of New York v Friedberg & Assoc.*, 62 AD2d 407, 409 (1st Dept 1978) (internal quotation marks omitted). Courts have found that using terms such as "'All', 'All other' or 'Any and all', renders a request or notice for production under CPLR 3120 'palpably improper'" *Id.* at 410.

While the instant demand contained the request for "[t]rue and accurate copies of all Notices of Claim . . .", the complaint itself provided the relevant information for the specific two notices of claim and when a deposition was taken. *See e.g. Zurich Ins. Co. v State Farm Mut. Auto. Ins. Co.*, 137 AD2d 401, 402 (1st Dept 1988) ("Although appellant's discovery requests are framed in the broadest of terms, the documents sought relate to a specific subject matter and are therefore sufficiently identifiable to satisfy the requirements of CPLR 3120 (a)"). In addition, the requested discovery is material and necessary as it directly relates to the accident which occurred on a sidewalk allegedly owned and maintained by G & L Realty. Accordingly, plaintiff is compelled produce the notices of claim and testimony related to the GML § 50-h hearing and is also compelled to produce any potential exhibits or photographs related to the hearing that "are in the possession, custody or control of the party or person served." CPLR 3120 (1) (i).

G & L Realty is seeking an order compelling disclosure of items demanded and has attached all demands it sent to plaintiff upon answering the complaint. However, most of the discovery demands are generic, and include, among others, a demand of social networking

a bill of particulars, an affirmation that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion."

information, and, although the injured party is an infant, a demand for income tax and employment records. G & L Realty did not explain how the remainder of the discovery requests, most of which are generic, would contain relevant information. In seeking to compel responses, G & L Realty should have numbered each demand, identified which demand must be produced and stated why it is relevant. Moreover, “disclosure of tax returns is disfavored. The party seeking disclosure must make a strong showing of necessity and demonstrate that the information contained in the returns is unavailable from other sources.” *Williams v New York City Hous. Auth.*, 22 AD3d 315, 316 (1st Dept 2005) (internal quotation marks and citation omitted).

Except for the items delineated in the letters to plaintiff’s counsel, which include the bill of particulars, notices of claim and items related to the GML § 50-h hearing, G & L Realty has not demonstrated how the litany of other discovery requests are “material and necessary to the defense of this action.” *Chervin v Macura*, 28 AD3d 600, 601 (2d Dept 2006). Accordingly, at this time, G & L Realty’s motion to compel is granted only to the extent of compelling the production of discovery related to the notices of claim and the GML §50-h hearing. Accordingly, it is

ORDERED that G & L Realty’s motion, pursuant to CPR 3042 (c), seeking to preclude plaintiff from offering evidence at trial concerning claims made against G & L Realty, is denied; and it is further

ORDERED plaintiff is directed to file a bill of particulars in response to G & L Realty’s demand within 20 days of the date of this decision and order; and it is further

ORDERED that G & L Realty’s motion to compel is granted, to the extent that plaintiff is directed to produce the information and documents requested in the demand for notice of claim

and municipal hearing information, and the motion to compel is otherwise denied; and it is further

ORDERED that plaintiff shall produce the discovery demands to G & L Realty within 20 days of the date of this decision and order; and it is further

ORDERED that failure to comply with this order may result in the issuance of discovery sanctions against plaintiff pursuant to CPLR 3126, including but not limited to, the issuance of an order precluding plaintiff from introducing evidence with rest to the items demanded.

12/16/2019
DATE

CHECK ONE:

☐

CASE DISPOSED

☐

GRANTED

☒

DENIED

APPLICATION:

☐

SETTLE ORDER

CHECK IF APPROPRIATE:

☐

INCLUDES TRANSFER/REASSIGN

☒

NON-FINAL DISPOSITION

☐

GRANTED IN PART

☐

SUBMIT ORDER

☐

FIDUCIARY APPOINTMENT

☐

OTHER

☐

REFERENCE

W. FRANC PERRY, J.S.C.

**HON. W. FRANC PERRY, III
J.S.C.**