Pina v Ice Hutch, Inc.
2019 NY Slip Op 34088(U)
May 20, 2019
Supreme Court, Westchester County
Docket Number: 53990/18
Judge: Joan B. Lefkowitz
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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

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IVELISE PINA,

Plaintiff,

-against-

ICE HUTCH, INC., SPORTS UNDERDOME, INC. and THE CITY OF MOUNT VERNON,

Defendants.

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DECISION & ORDER

Index No. 53990/18
Motion Date: May 20, 2019
Seq. #1

LEFKOWITZ, J.

The following papers were read on this motion by plaintiff for an order pursuant to CPLR §3126[1] striking the defendant City of Mount Vernon's Answer for its willful and contumacious failure to provide necessary discovery, or in the alternative, pursuant to CPLR §3124, compelling defendant City of Mount Vernon to immediately produce any relevant documents and witnesses with actual knowledge of ownership, maintenance, and control over the subject premises as well as any/all complaint and maintenance records (including snow removal information, paving information) maintained by all relevant departments for the subject premises, and for such other and further relief that this court may deem just and proper:

Order to Show Cause - Affirmation in Support - Exhibits
Affirmation in Partial Support - Exhibits
Affirmation in Opposition - Exhibits
Affidavit of Service
NYSCEF file

Upon the foregoing papers and proceedings held on May 20, 2019, this motion is determined as follows:

This is an action for money damages for personal injuries allegedly suffered by plaintiff on January 28, 2017 while walking in the parking lot adjacent to the premises leased by defendants Ice Hutch, Inc. (hereinafter "Ice Hutch") and Sports Underdome, Inc. (hereinafter "Underdome") located on Garden Street in Mount Vernon, New York.

[1] Relief pursuant to CPLR §3126 was neither requested nor approved at the pre motion conference before the Court Attorney Referee in this matter. As such, the relief is denied without prejudice as violative of the DCM Protocol, Rule II(C).

Plaintiff served a Notice of Claim regarding the accident with defendant City of Mount Vernon (hereinafter "Mount Vernon") on February 22, 2017. This action was commenced by the filing of a Summons and Verified Complaint on October 4, 2017. Issue was joined by the service of Verified Answers by the defendants Underdome, Mount Vernon and Ice Hutch on October 27, 2017, November 15, 2017 and December 5, 2017 respectively.

All defendants, including Mount Vernon, deny ownership, management, maintenance and control of the subject parking lot. Lease agreements were produced by the defendants with property adjacent to the subject parking lot, all of which indicate that Mount Vernon is the owner of the leased property. The leases further include language indicating that Mount Vernon has final approval of all repairs and alterations of the leased property and has full right to re-enter the leased property. Exhibits A and B, indicating the leased area and originally attached to the lease agreements, were not able to be located by defendants despite a request for production thereof.

All parties have been deposed. The representative and owner of Ice Hutch testified that he leases the premises from Mount Vernon, but does not know who is responsible for the subject parking lot. He testified that if issues arise with respect to the parking lot, he would have to inform Mount Vernon by email or telephone. He testified that snow removal and maintenance is performed by Mount Vernon.

The representative and owner of Underdome testified that she leases the premises from Mount Vernon, but does not know who is responsible for the subject parking lot. She testified that if issues arise with respect to the parking lot, she would inform Mount Vernon by telephone. She testified that snow removal and maintenance is performed by Mount Vernon.

Mount Vernon produced two witnesses. The first witness, Louis Migliore (hereinafter "Migliore"), testified that he is employed as the assistant to the mayor of Mount Vernon and works with the Department of Public Works. Although he was produced to testify about the results of a records search for complaints regarding the subject area, Migliore testified he did not perform the search himself and could not testify about the specific findings of the search or the parameters of the search. He stated that another employee, Peter Cornacchio (hereinafter "Cornacchio") performed the search under his direction. Notably, Migliore testified he does not know who owns or maintains the parking lot, or who would be responsible for snow removal or re-paving of the lot. He testified he has no knowledge of the leases between Mount Vernon and defendants Ice Hutch and Underdome. He did not know who or what department would maintain such leases.

Cornacchio was next produced by Mount Vernon. Cornacchio is a laborer for the Department of Public Works. Contradicting the testimony of Migliore, Cornacchio stated he did not perform the records search for complaints, but merely performed the search at Migliore's direction. He could not testify about the search or its results. Cornacchio does not know who owns, controls or maintains the subject parking lot and has never seen or been asked to look for leases related to the area. Cornacchio does not know what department within the City of Mount Vernon would maintain records related to the ownership or maintenance of the subject parking lot.

Upon the instant motion, plaintiff moves for an order pursuant to CPLR §3124, compelling

Mount Vernon to produce any relevant documents and witnesses with actual knowledge of the ownership, maintenance and control of the subject premises, as well and any and all complaint and maintenance records maintained by the City of Mount Vernon.

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action." The phrase "material and necessary" is "to 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. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403 [1968]; *see Matter of Kapon*, 23 NY3d 32 [2014], *Foster v. Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). "It is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims" (*Foster v Herbert Slepoy Corp.*, 74 AD3d at 1139). The trial court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*see Auerbach v Klein*, 30 AD3d 451 [2d Dept 2006]; *Feeley v Midas Properties, Inc.*, 168 AD2d 416 [2d Dept 1990]). If the information sought is sufficiently related to the issues in litigation so as to make the effort to obtain it in preparation for trial reasonable, then discovery should be permitted (*see Allen v Crowell-Collier Publishing Co.*, 21 NY2d at 406-407; *In re Beryl*, 118 AD2d 705 [2d Dept 1986]).

CPLR §3124 states that "[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."

Here, all defendants, including Mount Vernon, have denied ownership, management, maintenance and control of the subject parking lot. Lease agreements produced by defendants Ice Hutch and Underdome indicate that Mount Vernon is the owner of the leased premises adjacent to the subject parking lot. Mount Vernon has produced two witnesses, each of whom testified that they have no knowledge of the ownership or maintenance of the subject property, despite the lease agreements. Each witness testified that the other performed a search for complaints regarding the subject area and neither was able to provide specifics about the search.

In light of the foregoing, the motion is granted. Plaintiff has demonstrated that the testimony of a representative of the defendant Mount Vernon with actual knowledge of the ownership, maintenance and control of the subject premises, as well and any and all complaint and maintenance records maintained by the City of Mount Vernon, is material and necessary to the prosecution of this action and must be produced.

All other arguments raised on this motion and evidence submitted by the parties in connection thereto, have been considered by this Court, notwithstanding the specific absence of reference thereto.

Accordingly, it is

ORDERED that the plaintiff's motion to compel is granted as hereinafter set forth; and it is

further

ORDERED that defendant Mount Vernon is directed to produce documents and a deposition witness with actual knowledge of the ownership, maintenance and control of the subject premises, as well and any and all complaint and maintenance records maintained by the City of Mount Vernon, as directed by the Court Attorney Referee; and it is further

ORDERED that the branch of the motion pursuant to CPLR §3126 is denied without prejudice; and it is further

ORDERED that counsel are directed to appear for a further conference in the Compliance Part, Room 800, on May 22, 2019 at 9:30 A.M.; and it is further

ORDERED that plaintiff shall serve a copy of this decision and order upon defendants with notice of entry within 10 days of entry.

Dated: White Plains, New York
May 20, 2019

HON. JOAN B. LEFKOWITZ, J.S.C.

TO:

All Counsel by NYSCEF

cc: Compliance Part