

Darbeau v 136 W. 3rd St., LLC

2019 NY Slip Op 35095(U)

January 31, 2019

Supreme Court, Bronx County

Docket Number: Index No. 22428/2012

Judge: Laura G. Douglas

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
PART 11

Index No. 22428/2012

MYIKA DARBEAU,

Plaintiff,

DECISION/ORDER

-against-

Present:

136 WEST 3rd STREET, LLC and RAYON McINTOSH,

Hon. Laura G. Douglas

J.S.C.

Defendant.

Recitation, as required by Rule 2219(a) of the C.P.L.R., of the papers considered in the review of this motion for a protective order and cross-motion to preclude and related relief:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion by Defendant 136 West 3rd Street, LLC, Affirmation of Kevin A. Hickman, Esq. dated December 11, 2018 in Support of Motion, and Exhibits (“A” through “D”).....	1
Plaintiff’s Notice of Cross-Motion, Good Faith Affirmation of Alan Greenberg, Esq. dated December 28, 2018, Affirmation of Alan Greenberg, Esq. dated December 28, 2018 in Support of Cross-Motion and in Opposition to Motion and Exhibits (“A” through “L”).....	2
Affirmation of Kevin A. Hickman, Esq. dated January 3, 2019 in Opposition to Cross-Motion.....	3
Reply Affirmation of Alan Greenberg, Esq. dated January 7, 2019.....	4

This motion and cross-motion are consolidated for purposes of Decision/Order and, upon the foregoing papers and after due deliberation, the Decision/Order on this motion and cross-motion is as follows:

Defendant 136 West 3rd Street, LLC (“136 West 3rd”) seeks a protective order essentially striking the plaintiff’s Second Notice for Discovery and Inspection dated November 15, 2018 and Third Notice for Discovery and Inspection also dated November 15, 2018. The plaintiff cross-moves

for an order precluding 136 West 3rd from offering any evidence at trial, striking its answer, and directing it to furnish certain discovery. The motion is granted solely as ordered below and is otherwise denied at this time. The cross-motion is denied in its entirety at this time.

The plaintiff seeks monetary damages for personal injuries allegedly sustained in a franchised McDonald's restaurant owned and operated by 136 West 3rd as a result of an altercation with defendant Rayon McIntosh, an employee of 136 West 3rd. Among other claims, the plaintiff alleges that 136 West 3rd hired and retained McIntosh despite knowing of his "vicious" propensities and failed to provide adequate security and proper training. Various discovery notices, motions, and orders have sought production from 136 West 3rd of the practices, policies, procedures, rules, and manuals related to the screening, vetting, hiring, training, supervision, and expected conduct of employees in place at the relevant times. Given the nature of a franchised business, many, if not all, of this material would have been created by the franchisor, McDonald's, and imposed upon and/or adopted by the franchisee, 136 West 3rd. Therefore, 136 West 3rd's contention that it has been unfairly required to produce items not in its possession, but obtained from its franchisor, is unavailing. The burden upon 136 West 3rd is not only to disclose those items in its possession, but also those responsive items which it has the authority or ability to secure, even from a non-party (*see Commonwealth of the Northern Mariana Islands v. Canadian Imperial Bank of Commerce*, 21 NY3d 55 [Ct App 2013]).

In response to this Court's Decision/Order dated September 28, 2018, 136 West 3rd provided the plaintiff with a disc apparently containing over 1,000 pages of "manuals and training materials from non-party McDonald's Corporation" (see Hickman Affirmation in Support, paragraph "5"). The plaintiff's subsequent discovery notices seek specific manuals, modules, and chapters allegedly omitted from the discovery responses to date. Given the need to sort the voluminous discovery produced to date and potentially to come, the Court will grant the motion only to the extent of striking the plaintiff's Second Notice for Discovery and Inspection dated November 15, 2018 and Third Notice for Discovery and Inspection dated November 15, 2018 at this time, denying the cross-motion at this time, and directing that 136 West 3rd produce a witness for deposition with knowledge of its practices, policies, procedures, rules, and manuals related to the screening, vetting, hiring, training, supervision, and expected conduct of employees in place at the relevant times, whether

conceived by the franchisee or franchisor. Following this deposition, the plaintiff may re-serve an appropriate discovery notice using the information revealed by the deponent and seek additional deposition(s) of 136 West 3rd or non-parties as necessary, including a further deposition of the same witness once any previously undisclosed material has been provided.

Accordingly, it is hereby

ORDERED that the plaintiff's notices for discovery and inspection dated November 15, 2018 are stricken in their entirety at this time; and it is further


ORDERED that 136 West 3rd shall produce a witness with pertinent knowledge, including its practices, policies, procedures, rules, and manuals related to the screening, vetting, hiring, training, supervision, and expected conduct of employees in place at the relevant times, whether conceived by the franchisee or franchisor hiring, no later than 30 days following service of a copy of this Order with notice of entry; and it is further

ORDERED that the plaintiff may thereafter serve an appropriate document disclosure notice; and it is further

ORDERED that the plaintiff may thereafter seek additional deposition(s) of 136 West 3rd and/or non-parties, including a further deposition of the same witness with respect to previously undisclosed material.

This constitutes the Decision and Order of this Court.

DATED: 1-31-19
Bronx, New York



HON. LAURA G. DOUGLAS
J.S.C.