

<b>Nyambuu v Whole Foods Mkt. Group, Inc.</b>
2020 NY Slip Op 31053(U)
April 27, 2020
Supreme Court, New York County
Docket Number: 150197/2015
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

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INDEX NO. 150197/2015

ZOLJARGAL NYAMBUU,

Plaintiff,

MOTION SEQ. NO. 004

- v -

WHOLE FOODS MARKET GROUP, INC., COLITE INTERNATIONAL, LTD., NORTH SHORE NEON SIGN CO., INC.

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200

were read on this motion to/for QUASH SUBPOENA, FIX CONDITIONS

In this personal injury action commenced by plaintiff Zoljargal Nyambuu, plaintiff moves, in effect, pursuant to CPLR 2304, to quash deposition notices and subpoenas served on two nonparty witnesses by by defendant Whole Foods Market Group, Inc. Defendant opposes the motion. After a review of the motion papers, as well as the relevant statutes and case law, the motion is decided as follows.

The facts of this case are set forth in detail in the order of this Court entered September 12, 2019, which decided the summary judgment motions filed in motion sequence numbers 001, 002, and 003. Docs. 160-162. Specifically, this Court dismissed all claims against defendants Colite International, Ltd. and North Shore Neon Sign Co., Inc. Any additional relevant facts are set forth below. In brief, plaintiff was allegedly injured on February 13, 2014 when, while standing in front of defendant's Whole Foods store, she was struck by a piece of the stores' sign.

On or about November 1, 2016, plaintiff's counsel provided a response to defendants' combined discovery demands. Doc. 33. The response included an authorization for the release to defendant's prior attorneys of plaintiff's "lost wage and attendance record for 2 years prior to the accident to the present date to the plaintiff's employer, Tibet House . . ." Doc. 33. After numerous discovery conferences were conducted, plaintiff filed a note of issue and certificate of readiness on July 9, 2018. Doc. 52. At no time did defendant move to vacate the note of issue or certificate of readiness

Defendants thereafter filed motions for summary judgment which, as noted above, were decided by order entered September 12, 2019.

On or about September 18, 2019, after the note of issue was filed, defendant's attorney wrote to plaintiff's attorney to request, inter alia, an authorization for plaintiff's employment records. Doc. 197. Plaintiff thereafter provided defendant's attorney with an authorization for the release of records relating to plaintiff's employment at Tibet House. Doc. 198. Defendant's attorney represents that the employment records he received from Tibet House in October 2019 revealed the names of plaintiff's supervisor, Ganden Thurman, as well as of his co-worker, Beata Tikos. Doc. 195.

In November 2019, defendant's counsel served notices and subpoenas for the depositions of Thurman and Tikos. Docs. 170-173. Neither of these individuals had been previously named by plaintiff as a witness.

Plaintiff now moves, in effect, pursuant to CPLR 2304, to quash the subpoenas and to vacate the deposition notices served by defendant. Docs. 168-169. In support of the motion, plaintiff's counsel argues that defendant is not entitled to further discovery since the note of issue and certificate of readiness have been filed and defendant failed to move to strike the same.

Plaintiff's counsel further argues that, neither Thurman nor Tikos was named as a witness before the subpoenas and deposition notices were served on them. Additionally, counsel asserts, without any substantiation, that defendant knew that Thurman was plaintiff's supervisor long before the note of issue was filed.

In opposition to the motion, defendant's attorney argues that defendant should be entitled to conduct the depositions of Thurman and Tikos since defendant did not learn of their identities until after the filing of the note of issue, and that defendant obtained the employment records containing their names as the result of an authorization voluntarily provided by plaintiff's counsel after the filing of the note of issue. Thus, claims counsel, learning the names of these witnesses at this time was unusual and unanticipated. Additionally, claims counsel, since Thurman and Tikos work with plaintiff, they can testify regarding her ability to perform her job duties.

In reply, plaintiff argues that defendant's counsel failed to demonstrate unusual or unanticipated circumstances warranting post-note of issue discovery. Doc. 200.

It is well-settled that a party seeking to obtain post-note of issue discovery must demonstrate "unusual or unanticipated circumstances" and "substantial prejudice." 22 NYCRR 202.21(d). Although defendant's attorney did not move to vacate the note of issue, he urges that unanticipated circumstances exist herein since the employment records alerted him to the identities of Thurman and Tikos only after the note of issue was filed. Counsel further asserts that defendant will be prejudiced if it cannot depose these individuals since they will be able to testify regarding plaintiff's ability to perform her job, as well as her "interpersonal and occupational functioning", which, she claims, was impaired by the accident. Doc. 195.

This Court has “discretionary power to direct discovery post-note of issue, absent prejudice to either party.” *Vazquez v 3M Co.*, 177 AD3d 428, 429 (1<sup>st</sup> Dept 2017) (citation omitted). This Court finds that Thurman and Tikos are reasonably calculated to possess information regarding plaintiff’s ability to perform her job, and thus plaintiff’s motion to quash the subpoenas and deposition notices is denied. In holding that defendant is entitled to conduct these depositions, this Court emphasizes that, since defendant only discovered the identities of Thurman and Tikos as a result of an authorization provided by plaintiff’s counsel after the filing of the note of issue, it follows that defendant should be able to explore any knowledge these individuals have regarding plaintiff’s ability to do her job. *See Massa v Lower Manhattan Dev. Corp.*, 142 AD3d 927 (1<sup>st</sup> Dept 2016) (motion to quash plaintiff’s nonparty, post-note of issue subpoena denied where counsel represented that he did not know importance of the nonparty’s testimony until after the filing of the note of issue). Further, plaintiff fails to explain how it would be prejudiced, if at all, were defendant to conduct the depositions. To minimize any inconvenience to Tibet House, this Court directs that the depositions of Thurman and Tikos be conducted on the same day and that each deposition is to last no longer than four hours.

Therefore, in light of the foregoing, it is hereby:

ORDERED that plaintiff’s motion is denied in its entirety; and it is further

ORDERED that defendant is to conduct the depositions of Ganden Thurman and Beata Tikos at the offices of its attorney within 60 days after the entry of this order; and it is further


ORDERED that the depositions of said individuals are to proceed on the same day and are to last no more than 4 hours each; and it is further

ORDERED that the parties are directed to participate in a telephone conference with the court on July 1, 2020 at 4:30 p.m. to discuss any further discovery issues, and if such conference is not necessary, are to notify the court of such fact in advance; and it is further

ORDERED that this constitutes the decision and order of the court.

4/27/2020

DATE



KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: