

<b>Williams v Incorporated Vil. of Freeport</b>
2020 NY Slip Op 31132(U)
March 3, 2020
Supreme Court, Nassau County
Docket Number: 605720/16
Judge: Denise L. Sher
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.



**SHORT FORM ORDER**

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER  
Acting Supreme Court Justice

<hr/> <p>HEATHER LEVY WILLIAMS,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- against -</p>	<p>TRIAL/IAS PART 33 NASSAU COUNTY</p> <p>Index No.: 605720/16 Motion Seq. No.: 04 Motion Date: 10/23/19</p>
--	--

THE INCORPORATED VILLAGE OF FREEPORT,  
THE TOWN OF HEMPSTEAD and THE COUNTY OF  
NASSAU,

Defendants.

**The following papers have been read on this motion:**

	Papers Numbered
Order to Show Cause, Affirmation and Exhibits	1
Affirmation in Opposition and Exhibits	2
Affirmation in Reply	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Plaintiff moves, pursuant to CPLR § 3124, for an order compelling defendant The County of Nassau (“Nassau”) to produce further discovery in response to plaintiff’s Post-EBT Demands, dated July 17, 2018, regarding the sidewalk slab containing a sewer and manhole cover, and the surrounding area; and moves for an order staying the trial of this matter until defendant Nassau fully responds to plaintiff’s July 17, 2018 discovery demand; or, in the alternative, moves, pursuant to 22 NYCRR 202.21(e), for an order vacating the Note of Issue. Defendant Nassau opposes the motion.

In support of the motion, counsel for plaintiff asserts, in pertinent part, that, “[t]his is a case where, as set forth in more detail below, Plaintiff was grossly misled by Defendant, COUNTY OF NASSAU (hereafter, ‘County’ or ‘Defendant’) (until just before the Court ordered the Note of Issue to be filed), about the entity responsible for maintaining the accident site, to wit, a public sidewalk slab situated at the northeast corner of West Seaman Avenue and Pennsylvania Avenue, in the ... Village of Freeport, and in the County. Having previously been misled by the County that the Village of Freeport had such maintenance responsibility, but belatedly discovering, at a second EBT of the County (held shortly before Your Honor directed plaintiff to file her note of issue even though it was brought to the Court’s attention that no developments in the case had occurred necessitating further discovery), that the County is the sole entity responsible for maintaining the accident site. Plaintiff has and still wishes to obtain critical discovery from this Defendant, which is her right to do under the liberal disclosure rules of the CPLR. Initially, the County’s ‘Claims Management Bureau’ (‘CMB’) sent Plaintiff’s counsel a letter dated April 25, 2016 ..., whereby the County erroneously, incorrectly, and/or falsely advised Plaintiff that ‘the accident location is under the jurisdiction of the Incorporated Village of Freeport.’ Exactly two (2) years later (give or take a day), the County produced a witness for deposition in this case, one Anthony Esposito (‘Esposito’), who concurred with said letter.... When asked if the County controls, in any way, the sidewalk at the accident site, Esposito answered no, based on the Nassau Administrative Code, and further posited that the Village of Freeport exercised such control.... When shown the aforementioned CMB denial letter ..., Esposito agreed with it.... Esposito also based his conclusion about (*sic*) Village of Freeport’s jurisdiction on a purported computer map, which map shows lines that delineate the boundaries of the Village and, according to Esposito, the accident location was within those boundary lines.... Subsequent to this EBT, however, there was motion practice involving the Village of

Freeport's attempts to extricate itself from this matter. During those attempts, evidence surfaced that, indeed, it appeared, contrary to the County's false/erroneous/incorrect assertions, that the County was, in fact, responsible for the sidewalk slab at issue. Thus, Esposito was recalled for an EBT whereupon he testified diametrically opposite to his previous testimony.... At his second deposition, Esposito testified as follows. He unequivocally admitted that West Seaman Road is a roadway maintained by the County.... The County is responsible for both the roadway and the storm drains along the roadway.... The catch basin at issue is maintained by the County.... There is a box beneath the manhole cover and, if the box is made of poured concrete, the County is responsible for pouring the concrete comprising this box.... The rectangle which contains the manhole cover is a separate construct, that is, it comprises the top deck for the catch basin.... This top deck is the County's responsibility.... Plaintiff respectfully submits the foregoing unequivocally means the County is directly, solely, and exclusively responsible for the height of the sidewalk slab relevant to the adjacent slabs - both at the time of installation and thereafter." *See Plaintiff's Affirmation in Support Exhibits E-G.*

Counsel for plaintiff further submits, in pertinent part, that, "[f]ollowing the wholly turned about revelations and admissions at the second Esposito EBT, plaintiff served her 'Post-EBT Discovery Demands', dated July 17, 2018 ..., upon the County.... The County responded with 'Nassau County's Post-EBT Productions' dated August 18, 2018, ... Said responses were woefully insufficient.. Accordingly, Plaintiff sent a letter to the County's attorney dated September 18, 2018 ..., which letter details the wholesale insufficiency of the aforesaid response, to wit, that the County only served 'plans' for the installation of the drainage sewage system drawn in 1945. Obviously, the seventy year old illustrations the County served did not even come close to full disclosure as contemplated by Article 31 of the CPLR. On July 29, 2019, our office called the Court to request permission to make the within motion. The Court

conferenced Deputy County Attorney Ralph Reissman, in on the call at which time a discussion was held about the outstanding discovery demand and Mr. Reissman indicated that a further search would be conducted and a supplemental response to Plaintiff's Post EBT demands would be forthcoming. To date, the County has not responded to Plaintiff's outstanding Post EBT demand, the good faith letter from Plaintiff's counsel with regard to it, or the directive issued by the Court on the July 29, 2019 conference call." *See* Plaintiff's Affirmation in Support Exhibits H-J.

In opposition to the motion, counsel for defendant Nassau submits, in pertinent part, that, "I submit this Affirmation in opposition to the motion of plaintiff Heather Levy Williams ('plaintiff') to compel further discovery pursuant to CPLR 3124, on the ground that the County has in fact served a Supplemental Post-EBT response on November 1, 2019 upon plaintiff's counsel, and that plaintiff's motion is therefore moot. In the alternative, as plaintiff has moved for an order vacating her Note of Issue, the County does not oppose this branch of the motion.... On August 28, 2018 the County served upon plaintiff's attorney Nassau County's Post-EBT Production.... The production consisted of the Plan and Profile of the catch basin installed by the County in January 1945 at West Seaman Avenue, at or about the northeast corner of West Seaman Avenue and Pennsylvania Avenue, in the Village of Freeport. Plaintiff's counsel asserts in the instant motion that this production was insufficient. In response to the instant motion, on November 1, 2019 the County served a Supplemental Post-EBT Production, ..., stating, 'Defendant County has previously, on August 18, 2018 provided all documents and things in the County's possession relating to the catch basin located on West Seaman Avenue, at or about the northeast corner of West Seaman Avenue and Pennsylvania Avenue, in the Village of Freeport. The document produced at that time, the Plan and Profile dated January 1945, is the only record of the installation of the catch basin. Defendant County is not in any possession of any reports, plans, papers, records, drawings, estimates, checks, sketches, photographs, invoices, billing statements, contracts, material orders and request for proposal related to the catch basin, other

than that which has been previously produced. There exist no other records in defendant County's possession, custody or control relating to this catch basin, of the installation, maintenance or repair of the catch basin since January 1945.' Since the County has provided to plaintiff's counsel all the documents in its possession regarding the catch basin, and has served the annexed Supplemental Post-EBT Production on November 1, 2019 stating that there are no further documents to provide, plaintiff's motion to compel further production is moot. To the extent that plaintiff seeks records of installation, maintenance and repair to the sidewalk adjacent to the catch basin, since the Village of Freeport is responsible for the sidewalks, the County is not in possession, custody or control of any documents in connection with the installation, maintenance and repair to the sidewalk adjacent to the catch basin. Therefore, to the extent that plaintiff seeks to reopen discovery to serve nonparty subpoenas upon the Village of Freeport on the subject of sidewalks, since Freeport has been dismissed from this action, the County has no objection. To the extent that plaintiff seeks to reopen discovery from the County, as stated above, there is nothing further to produce on the part of the County." See Defendant Nassau's Affirmation in Opposition Exhibits A-C.

New York has long favored "open and far-reaching pretrial discovery." *Kavanaugh v. Ogden Allied Maintenance Corp.*, 92 N.Y.2d 952, 683 N.Y.S.2d 156 (1998) quoting *DiMichel v. South Buffalo Ry. Co.*, 80 N.Y.2d 184, 590 N.Y.S.2d 1(1992) cert. den. sub. nom. *Poole v. Consolidated Rail Corp.*, 510 U.S. 816 (1993). CPLR § 3101(1) provides for "full disclosure of all matters material and necessary in the prosecution or defense of an action..." This provision has been liberally construed to require disclosure of any information or material reasonably related to the issues "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 Pub. Co.*, 21 N.Y.2d 403, 288 N.Y.S.2d 449 (1968). See also *Titleserv, Inc. v. Zenobio*, 210 A.D.2d 314, 619 N.Y.S.2d 769 (2d Dept. 1994). "The trial court is afforded broad discretion in supervising disclosure." *Those Certain Underwriters at Lloyds, London v. Occidental Gems, Inc.*, 11 N.Y.3d

843, 873 N.Y.S.2d 239 (2008). “If there is any possibility that the information is sought in good faith for possible use as evidence-in-chief or in rebuttal or for cross-examination, it should be considered evidence material . . . in the prosecution or defense.” *Allen v. Crowell-Collier Pub. Co., supra*.

Indeed, “the scope of permissible discovery is not entirely unlimited and the trial court is invested with broad discretion to supervise discovery and to determine what is ‘material and necessary’ as that phrase is used in CPLR 3101(a).” *Auerbach v. Klein*, 30 A.D.3d 451, 816 N.Y.S.2d 376 (2d Dept. 2006). *See also Ural v. Encompass Ins. Co. of Am.*, 97 A.D.3d 562, 948 N.Y.S.2d 621 (2d Dept. 2012). Ultimately, “[i]t 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.” *Gomez v. State of New York*, 106 A.D.3d 870, 965 N.Y.S.2d 542 (2d Dept. 2013) *quoting Vyas v. Campbell*, 4 A.D.3d 417, 775 N.Y.S.2d 375 (2d Dept. 2004).

However, the full disclosure authorized by CPLR § 3101(a) does not mean uncontrolled and unfettered disclosure. *See Farrell v. E.W. Howell Co., LLC*, 103 A.D.3d 772, 959 N.Y.S.2d 735 (2d Dept. 2013); *Romance v. Zavala*, 98 A.D.3d 726, 950 N.Y.S.2d 390 (2d Dept. 2012).

Furthermore, pursuant to CPLR § 3124, disclosure provisions are to be liberally construed. Ultimately, a trial court is afforded broad discretion in managing disclosure. *See CPLR §§ 3124, 3101(a); Kavanagh v. Ogden Allied Maintenance Corp., supra*.

In the instant matter, the Court finds that counsel for defendant Nassau has provided a Supplemental EBT Response which reiterates, amongst other things, that defendant Nassau has provided all documents and things in its possession relating to the subject catch basin. *See Defendant Nassau’s Affirmation in Opposition Exhibit C*. Since defendant Nassau is making such a representation, it would be futile for the Court to order it to produce further discovery with respect to same, despite the fact that counsel for plaintiff is arguing that such representation by defendant Nassau is disingenuous.

Consequently, the branches of plaintiff's motion, pursuant to CPLR § 3124, for an order compelling defendant Nassau to produce further discovery in response to plaintiff's Post-EBT Demands, dated July 17, 2018, regarding the sidewalk slab containing a sewer and manhole cover, and the surrounding area; and for an order staying the trial of this matter until defendant Nassau fully responds to plaintiff's July 17, 2018 discovery demand; or, in the alternative, pursuant to 22 NYCRR 202.21(e), for an order vacating the Note of Issue, are hereby **DENIED**.

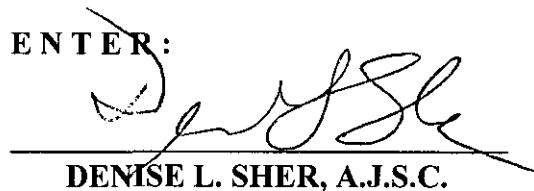
And it is further

**ORDERED** that the *interim stay* granted in plaintiff's instant Order to Show Cause is hereby *lifted*. And it is further

**ORDERED** that the parties shall appear for Trial, in Nassau County Supreme Court, Central Jury Part, at 100 Supreme Court Drive, Mineola, New York, on April 20, 2020, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:



DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York  
March 3, 2020

**ENTERED**  
MAR 04 2020  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE