

Galluzzi v Hugh L. Carey Battery Park City Auth.
2020 NY Slip Op 32570(U)
August 7, 2020
Supreme Court, New York County
Docket Number: 160158/2017
Judge: Robert D. Kalish
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ROBERT D. KALISH PART IAS MOTION 29EFM

Justice

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DOMINIQUE GALLUZZI,
Plaintiff,

- v -

THE HUGH L. CAREY BATTERY PARK CITY AUTHORITY,
BATTERY PARK CITY PARKS CONSERVANCY
CORPORATION and DWIGHT WILLIAMS,

Defendants.

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INDEX NO. 160158/2017
MOTION DATE 8/06/2020
MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 72

were read on this motion to/for DISCOVERY.

Motion by Plaintiff Dominique Galluzzi ("Plaintiff"), pursuant to CPLR 3124 and CPLR 3101 (a), for an order compelling Defendants The Hugh L. Carey Battery Park City Authority ("BPCA"), Battery Park City Parks Conservancy Corporation ("BPCPC"), and Dwight Williams ("Williams") (collectively "Defendants") to produce documents/records demanded in the Notices to Produce dated July 30, 2019, and February 7, 2020 is granted in part to the extent that Defendants are directed to serve upon Plaintiff pages 58-60/102, 74-75/102 and 88-91/102 of Defendant Williams' personnel file, and is otherwise denied, without prejudice to a motion to renew following the completion of Defendants' search for responsive documents, for the reasons stated herein.

BACKGROUND

Plaintiff commenced the instant negligence action on November 8, 2017, alleging that an incident occurred in the morning of July 13, 2017, at approximately 8:30 AM on Albany Street between South End Avenue and West Street in New York County when she was struck by a small maintenance cart owned by Defendant CPCPA and operated by Defendant Williams while walking on the sidewalk at the subject location. (Affirm in Supp, Ex C [Verified Complaint]; see also Affirm in Supp, Ex F [Plaintiff Aff] ¶ 3.) It is undisputed that the maintenance cart was operated by Defendant Williams as an employee of Defendant BPCA at the time and location of the alleged incident. Nevertheless, Plaintiff and Williams have different versions as to how the alleged incident occurred. Specifically, Williams avers that the maintenance cart did not make any contact with Plaintiff at the time and location of the accident and that statements suggesting otherwise in a police accident report are incorrect. (Affirm in Supp, Ex G [Williams Aff] at 132:08-148:08; 161:23-164:25.)

Plaintiff filed the instant motion requesting that the Court issue an order compelling Defendants to provide the discovery demanded in the Notices to Produce dated July 30, 2019, and February 7, 2020, or, in the alternative, to produce the employee personnel file of Defendant Williams for an *in camera* review. Plaintiff argues that any information that bears upon proving that Mr. Williams' "careless, negligent, destructive or unsafe operation" of the vehicle is material and necessary in the prosecution of plaintiff's action." (Affirm in Supp ¶ 37.) Plaintiff argues that the requested discovery is relevant to show whether Williams was competent to operate the BPCA vehicle and is further necessary for the jury to assess Williams' credibility. Plaintiff argues that this information "should be in the possession of BPCA whether or not within a 'personnel file.'" (*Id.* ¶¶ 34, 35.)

In opposition, Defendants argue that [Williams'] personnel file is not material or necessary to any claim by Plaintiff, "particularly here where BPCA's liability is predicated upon its vicarious liability having employed [Williams]." (Affirm in Opp ¶¶ 4, 5.)

Defendants further argue that "evidence of prior negligent acts is not relevant to a separate alleged act of negligence." Defendants add that Plaintiff may not "obtain discovery of an employee's personnel file where there is no claim of negligent hiring." (*Id.* ¶ 6.) Defendants explain that Williams' "prior driving history is not relevant to whether he was negligent in operating a vehicle at the time of [P]laintiff's alleged accident." (*Id.* ¶ 7.)

Defendants lastly assert that Williams "denies having struck [Plaintiff]" but states instead that he "swerved the maintenance cart out of her direction and into scaffolding that was in the vicinity of the accident." (*Id.* ¶¶ 4, 5.) Defendants argue that to the extent there is a credibility issue regarding Williams' statements, credibility is not a permissible basis to seek Williams' personnel file. (*Id.* ¶ 14.)

July 30, 2019 Notice to Produce & Defendants' responses

On July 30, 2019, Plaintiff demanded the following documents as allegedly referred to in the BPCA's Employee Handbook under the heading "Use of Vehicles," and Defendants provided the following responses:

- (1) "[A]ll operating instructions, safety standards and guidelines,"

RESPONSE: Objection. Plaintiff's request is overbroad and requests information that is not relevant to the plaintiff's claims. Notwithstanding, and without waiver of any objection, the deposition testimony has established that the Taylor-Dunn operators manual is readily available to all employees and that the employees are provided with verbal instructions on the safe operation and use of the subject vehicles.

- (2) All documents and evidence of searches conducted two times a year of Williams driving record by Defendants for the years Williams was employed since 2012,

RESPONSE: Objection, Plaintiff's request is overbroad and requests information that is not relevant to plaintiff's claims. Further, Defendants object to the disclosure of information which maybe contained in the personnel file of Mr. Dwight Williams. Plaintiff's request for information, which may be contained in Mr. Williams personnel file is palpably improper since there is no claim of negligent hiring.

(3) The written "consent" form signed by Williams as an applicant allowing Defendants to check his driving record at any time during his employment,

RESPONSE: Objection, Plaintiff's request is overbroad and requests information that is not relevant to plaintiff's claims. Further, Defendants object to the disclosure of information which maybe contained in the personnel file of Mr. Dwight Williams. Plaintiff's request for information, which may be contained in Mr. Williams personnel file is palpably improper since there is no claim of negligent hiring.

(4) All reports of DWI, DUI and accidents submitted to Defendants by Williams or any reporting such incidents since his employment began until the present date, and

RESPONSE: Objection, Plaintiff's request is overbroad and requests information that is not relevant to plaintiff's claims. Further, Defendants object to the disclosure of information which maybe contained in the personnel file of Mr. Dwight Williams. Plaintiff's request for information, which may be contained in Mr. Williams personnel file is palpably improper since there is no claim of negligent hiring.

(5) A copy of the valid driver's license produced by Williams during the application process for his employment, as well as copies of all reports submitted by Williams of any suspensions or revocation of his driver's license.

RESPONSE: Objection, Plaintiff's request is overbroad and requests information that is not relevant to plaintiff's claims. Further, Defendants object to the disclosure of information which maybe contained in the personnel file of Mr. Dwight Williams. Plaintiff's request for information, which may be contained in Mr. Williams personnel file is palpably improper since there is no claim of negligent hiring.

(Affirm in Supp, Ex A [Notice to Produce dated July 30, 2019].)

In addition to the above specific objections, Defendants made the following general objections:

- A. Responding Defendant objects to each demand to the extent that it purports to require the disclosure of information beyond the scope required by Article 31 of the Civil Practice Law & Rules.
- B. Responding Defendant objects to each demand to the extent that it seeks production of documents that are protected by the attorney-client privilege, the attorney work product doctrine, or any other applicable privilege or doctrine limited discovery. Responding Defendant does not intend to waive by production any privileges associated with documents that are produced in this action. In the event that privileged or confidential documents are produced, the production, unless otherwise expressly stated to the contrary in writing at the time of production, is inadvertent and shall be deemed to be null, void and of no legal consequence. Parties and their counsel are directed to refrain from reading or copying any such document if they have been advised of the privileged or confidential nature of the document by Responding Defendant. Parties and their counsel are further directed to return each such document to Responding Defendant without making copies of the document(s) or divulging the substance or contents of such document(s) to any person, including, but not limited to, any parties or representatives of parties or any party's counsel.
- C. Responding Defendant objects to each demand insofar as it seeks information that is not relevant to the subject matter of this litigation and/or is not reasonably calculated to lead to the discovery of admissible evidence; that cannot be produced without undue burden to Responding Defendant; and/or that requires an unreasonable investigation on the part of Responding Defendant in order to be produced.
- D. Responding Defendant objects to Plaintiff's demands in their entirety to the extent that they seek to require Responding Defendant to organize its response to the requests by any method other than that in which the records are kept in the normal course of business on the grounds that to do otherwise would impose an undue burden and unreasonable expense on Responding Defendant.
- E. Responding Defendant objects to each and every request in Plaintiffs combined demands to the extent that they are vague, ambiguous and/or ill-defined.
- F. Responding Defendant objects to Plaintiff's demands to the extent that they seek information not within the Responding Defendant's possession, custody or control, on the grounds that said discovery is overly broad, unduly burdensome and could require Responding Defendant to search for non-party information and answer on behalf of non-parties.
- G. Responding Defendant objects to Plaintiff's demands to the extent that they seek information that is already in the possession of the Plaintiff.
- H. Responding Defendant objects to Plaintiff's demands to the extent that they seek information, which is properly the subject of expert testimony. Responding Defendant

reserves the right to utilize all such expert discovery at the time of trial, including information not referenced in these responses.

- I. Responding Defendant expressly reserves the right to supplement, clarify, revise or correct any and all of the responses herein at any time. By making the following responses to plaintiff's demands, Responding Defendant does not waive, and hereby expressly reserves the right to assert any and all objections as to the admissibility of such responses into evidence at trial of this action, or in any proceedings, on any and all grounds, including, but not limited to, competency, relevancy, materiality and privilege. Further, Responding Defendant provides the responses herein without in any manner implying or admitting that any response is relevant or material to the subject matter of this action.

(Affirm in Supp, Ex A [October 8, 2019 Response to Plaintiff's July 30, 2019 Notice to Produce].)

February 7, 2020 Notice to Produce

On February 7, 2020, Plaintiff demanded the following documents as allegedly referred to in the BPCA's Employee Handbook:

- (1) Records or reports of any prior similar accidents of Williams,
- (2) BPCA evaluations of Williams regarding his performance of his work duties in the context of all stated expectations in the Employee Handbook including but not limited to the Use of Vehicles section and all subheadings there under on pages 61 and 62 of the Employee Handbook such as Unacceptable Driving Records, Use of Cellular Telephones While Driving, Motor Vehicle Record Checks, Reporting of Traffic Incidents and Driver's License,
- (3) Complaints about Williams, including but not limited to complaints made by BPCA Supervisors, fellow employees or citizens of the general public relative to his performance of his work duties in the context of all stated expectations in the Employee Handbook including but not limited to the Use of Vehicles section and all subheadings there under on pages 61 and 62 of the Employee Handbook such as Unacceptable Driving Records, Use of Cellular Telephones While Driving, Motor Vehicle Record Checks, Reporting of Traffic Incidents and Driver's License, and
- (4) The entire personnel file of Williams including all documents relative the issues and claims in this case excluding any medical information.

(Affirm in Supp, Ex M [Notice to Produce dated Feb 7, 2020].)

By an interim order dated July 17, 2020 (“Interim Order”), the Court directed Defendants to submit an electronic copy of the personnel file of Defendant Williams for an *in camera review* and further directed Defendants to submit for an *in camera review* any other documents responsive to the aforesaid two notices to produce, along with a Jackson’s Affidavit stating that all of the discovery requested by Plaintiff in the underlying motion is kept in the submitted documents and is not otherwise kept in another location by Defendants. (*See Jackson v City of New York*, 185 AD2d 768, 770 [1st Dept 1992].) The Court explained in the Interim Order that such an affidavit will remove the issue that records might exist but are at a place other than the submitted documents contained in Williams’ personnel file or that an adequate search was not made.

On August 5, 2020, responding to the Interim Order, Defendants have submitted to the Court a copy of Williams’ personnel file but have informed the Court, via email on the same date, that due to the ongoing pandemic, Defendants are unable to conduct a further search to ensure that the requested information is not kept in any other type of file.

DISCUSSION

CPLR 3101 (a) directs that “[t]here shall be full disclosure of all material and necessary in the prosecution or defense of an action.” Courts have interpreted the words “material and necessary” liberally “to require the disclosure of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity.” (*Forman v Henkin*, 30 NY3d 656, 661 [2018]; *see also Conway v Bayley Seton Hosp.*, 104 AD2d 1018, 1019 [2d Dept 1984].) “The test is one of usefulness and reason, measured by whether the information sought is sufficiently related to the issues in litigation to make the effort to obtain it in preparation for trial reasonable.” (*Williams Real Estate Co., Inc. v Viking Penguin, Inc.*, 216 AD2d 27, 28 [1st Dept 1995] [internal citation omitted]; *see also Allen v. Crowell-Collier Publ. Co.*, 21 N.Y.2d 403, 407 [1968].) CPLR 3101 “embodies the policy determination that liberal discovery encourages fair and effective resolution of disputes on the merits, minimizing the possibility for ambush and unfair surprise.” (*Spectrum Sys. Intern. Corp. v Chem. Bank*, 78 NY2d 371, 376 [1991].) “A trial court is vested with broad discretion in its supervision of disclosure.” (*MSCI Inc. v Jacob*, 120 AD3d 1072, 1075 [1st Dept 2014].)

“Although the discovery statutes are to be construed liberally so that there should be disclosure of any material that is even arguably relevant unlimited disclosure is not required, and supervision of disclosure is generally left to the Supreme Court’s broad discretion. The essential test is usefulness and reason.” (*Levine v City Med. Assoc., P.C.*, 108 AD3d 746, 747 [2d Dept 2013] [internal quotations and citations omitted].)

Although there is no negligent hiring claim in the present action, the Court finds, in its discretion, that the requested discovery may nevertheless still be relevant to the issues presented or may be reasonably calculated to lead to evidence relevant to the issue of Defendant Williams’ purported negligence.

As discussed above, the Court’s Interim Order dated July 17, 2020 directed Defendants to submit the records requested to the Court for an *in camera review*. Defendants have submitted

Defendant Williams' personnel file which the Court has reviewed but Defendants have not indicated whether the requested information might be filed under a different name or heading or location.

Considering what was reviewed in the personnel file, Defendants are directed to serve Plaintiff with the following documents from the file. As to their admissibility, that will be an issue for the trial court. Based on a review of the record and William's personnel file as submitted to the Court as part of an *in camera review*, Defendants are directed to serve upon Plaintiff the following pages:

- 1) Pages 58-60/102;
- 2) Page 74-75/102; and
- 3) Pages 88-91/102.

Based upon the email response of Defendants that a complete search has not been made, a final response to the Court's Interim Order has not been submitted as of this time. Defendants are directed within 45 days of this date to submit for further *in camera review* any additional records located and/or a Jackson affidavit stating that there are no further records in compliance with this Court's Interim Order and/or responsive to the aforesaid two notices to produce. Defendants shall submit any additional records/documents/information going back to Defendant Williams' starting employment date. If additional records are submitted at that time, the Court will review them and issue a further order.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the motion by Plaintiff Dominique Galluzzi ("Plaintiff"), pursuant to CPLR 3124 and CPLR 3101 (a), for an order compelling Defendants The Hugh L. Carey Battery Park City Authority ("BPCA"), Battery Park City Parks Conservancy Corporation ("BPCPC"), and Dwight Williams ("Williams") (collectively "Defendants") to produce documents/records demanded in the Notices to Produce dated July 30, 2019, and February 7, 2020 is granted in part to the extent that Defendants are directed to serve upon Plaintiff pages 58-60/102, 74-75/102 and 88-91/102; and is otherwise denied, without prejudice to a motion to renew following the completion of Defendants' search for responsive documents; and it is further,

ORDERED that counsel shall serve, via NYSCEF, a copy of this order with notice of entry upon all parties within 20 days of the filing of the instant decision and order; and it is further,

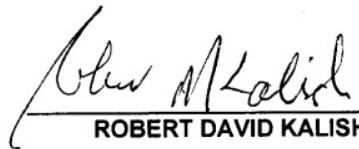
ORDERED that within thirty (30) days of service of copy of the instant decision and order with notice of entry, Defendants shall produce the aforesaid pages 58-60/102, 74-75/102, and 88-91/102 in compliance with the instant order; and it is further,

ORDERED that within forty-five (45) days of this date, Defendants shall submit for further *in camera review* any additional records located and a Jackson affidavit in compliance with this Courts prior Interim Order; and it is further,

ORDERED that this action is adjourned to August 20, 2020, at 2 PM for a conference with the Court. The Court requests counsel to join a virtual conference on August 20, 2020, at 2 PM via the following link: <https://meet.lync.com/nycourts/ehaksal/2B52U5SZ>

The foregoing constitutes the decision and order of the Court.

8/07/2020
DATE


ROBERT DAVID KALISH, J.S.C.

CHECK ONE: CASE DISPOSED GRANTED DENIED NON-FINAL DISPOSITION GRANTED IN PART OTHER

APPLICATION: SETTLE ORDER SUBMIT ORDER FIDUCIARY APPOINTMENT REFERENCE

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN