Jaramillo v Hellman Elec. Corp.
2020 NY Slip Op 33934(U)
October 15, 2020
Supreme Court, Richmond County
Docket Number: 150868/2015
Judge: Thomas P. Aliotta
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND: PART C2

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JOHN JARAMILLO,

Plaintiff,

-against-

HELLMAN ELECTRIC CORP., THE CITY OF NEW YORK and ROGER A. LEVY, as Limited Administrator of the Estate of Mildred Ceromello,

Defendants.

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HON. THOMAS P. ALIOTTA

DECISION AND ORDER

Index No.: 150868/2015
Motion No.: 005, 006 & 007

Recitation as required by CPLR 2219(a) of the following papers numbered were fully submitted on the 5th day of August 2020,

Papers Numbered

Notice of Motion by Defendants Hellman Electric Corp. (MS_005) and The City of New York for a Protective Order pursuant to CPLR 3103, with Exhibits (dated May 22, 2020 – NYSCEF 178 - 187) 1, 2

Defendants' Affirmation in Support (dated May 22, 2020 – NYSCEF 179)..3

Notice of Cross-Motion by Plaintiff John Jaramillo (MS_006) to Compel Discovery and for Sanctions, with Affirmation of Good Faith and Supporting Papers (dated June 1, 2020 – NYSCEF 188-189, 191-2018)..4, 5

Plaintiff's Affirmation in Support of Cross-Motion and in Opposition to Defendants' Motion for a Protective Order (dated June 1, 2020 – NYSCEF 190)..6

Notice of Motion by Defendants Hellman Electric Corp. (MS_007) and The City of New York to Dismiss the Complaint, to Preclude Plaintiff from Offering Evidence at Trial and to Compel Discovery, with Affirmation in Support (dated June 27, 2020 – NYSCEF 222-231) 7, 8

Defendants' Opposition to Plaintiff's Cross Motion
to Compel and for Sanctions
(dated July 20, 2020 – NYSCEF 210 - 220) 9

Plaintiff's Affirmation in Reply
(dated July 24, 2020 – NYSCEF 221) 10

Plaintiff's Affirmation in Opposition
(dated July 31, 2020– NYSCEF 234-245) 11

Defendants' Reply Affirmation
(dated July 31, 2020 – 233) 12

Defendants' Reply Affirmation
(dated August 3, 2020 – NYSCEF 247-249) 13

Plaintiff's Affirmation in Sur-Reply
(dated August 4, 2020 – NYSCEF 251) 14

Defendants' Sur-Reply Affirmation
(dated August 5, 2020 – NYSCEF 253-254) 15

Upon the foregoing papers, the motion (Seq. No. 005) of defendants Hellman Electric Corp. and The City of New York for a protective order pursuant to CPLR 3103 is granted; plaintiff's cross-motion (Seq. No. 006) pursuant to CPLR 3124 to compel discovery and for sanctions is granted in part, and denied, in part; and the motion (Seq. No. 007) of defendants Hellman Electric Corp. and The City of New York pursuant to CPLR 3126(3) to dismiss the complaint, preclude plaintiff from offering evidence or testimony at trial, and to compel outstanding discovery is denied as moot.

Background

This action arises out of a motor vehicle accident on February 28, 2014, at the intersection of Hylan Boulevard and North Narrows Road in Staten Island, New York. A vehicle operated by plaintiff John Jaramillo and a vehicle operated by defendant Mildred Ceromello

(deceased) entered the intersection perpendicular to one another and collided. Plaintiff maintains the traffic signal controlling the intersection was inoperable at the time of the occurrence. As a result of the accident, Mr. Jaramillo allegedly required surgery to his lumbar spine and left rotator cuff, and numerous epidural injections. He also sustained multiple herniations and bulges in his back and neck, right rotator cuff injuries, and psychiatric injuries.

The City of New York (hereinafter, the "City") retained Hellman Electric Corp. (hereinafter, "Hellman") to maintain and repair the traffic signals in Staten Island. The discovery exchanged by defendants allegedly reveals that the traffic signal at issue had a history of repeated outages in the two months preceding the accident, and in particular, it was inoperative three days prior to the incident.

Plaintiff commenced an action against the City and Mrs. Ceromello on or about August 11, 2014. The parties appeared for a Preliminary Conference on March 17, 2015. Shortly thereafter, on March 31, 2015, Mrs. Ceromello passed away, staying the litigation. While the lawsuit was stayed, plaintiff commenced a related action against Hellman under a separate index number. Following a lengthy delay in Surrogate's Court, by an Order dated April 23, 2019 this Court appointed Roger A. Levy as Limited Administrator of the Estate of Mildred Ceromello, consolidated the two actions and lifted the stay. On May 29, 2019, plaintiff filed an Amended Summons and Complaint against Hellman, the City, and Roger A. Levy as Limited Administrator.

The Motion of Defendants Hellman and the City for a Protective Order Pursuant to CPLR 3103 (Motion Seq. 005)

Plaintiff served a Supplemental Demand for Discovery and Inspection dated May 4, 2020, demanding (1) a physical inspection by plaintiff's expert of the traffic signal and its

component parts, controlling the intersection of Hylan Boulevard and North Narrows Road, and (2) post-accident repair records from February 28, 2014, to the present. Plaintiff maintains the discovery is necessary to enable its expert to properly identify any changes or repairs that were made to the traffic signal subsequent to the date of the accident.

In support of the motion for a protective order, defendants Hellman and the City maintain plaintiff's demand for an inspection of the subject traffic signal is overly broad, unduly burdensome, overly invasive, and unlikely to lead to the discovery of relevant material. Movants point out the accident occurred on February 28, 2014, over six years ago.[1] As such, they argue that the condition of the traffic signal at the present time is irrelevant, and the opinions of plaintiff's expert would be based on conjecture and pure speculation. Defendants further maintain that plaintiff has failed to demonstrate such a belated inspection would lead to discovery of material and necessary information pertinent to the claims in this action.

Furthermore, movants object to plaintiff's request for the production of repair records relating to the six-year period subsequent to the accident as overly broad, unduly burdensome, highly prejudicial, and unlikely to lead to the discovery of relevant material. They argue it is well recognized the admission of evidence concerning post-accident repairs is generally not admissible absent certain exceptions and may not be admitted as proof of admission of negligence.

Defendants point out they provided the pertinent records relating to the repairs that were made shortly after the accident occurred on February 28, 2014, *i.e.*, (1) the City's traffic

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[1] The initial action against the City was stayed for approximately four years after Mildred Ceromello's death in March 2015 until May 2019.

maintenance log for the period from July 1, 2013, to March 19, 2014, which lists any issues that were reported relating to the traffic signal and the date of the repairs, and (2) Hellman's traffic maintenance reports from January 7, 2014, to February 28, 2014. According to defendants, the records reveal there were no issues with the traffic signal after it was repaired on February 28, 2014, through March 10, 2014.[2] Thus, defendants contend the relevant post-accident repair records have already been produced, and subsequent records are not necessary. It is noted by defendants that plaintiff had the opportunity to depose defendant Hellman's employee, Carl Sutera, who responded to the scene of the accident to repair the traffic light after the accident occurred. Mr. Sutera testified as to his observations of the condition of the traffic signal, the repairs that were made on the date of the accident, and prior thereto.

In view of the foregoing, the moving defendants seek a protective order striking plaintiff's Supplemental Demand for Discovery and Inspection dated May 4, 2020 and denying a physical inspection of the traffic signal and the production of post-accident repair records.

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action." The principle of full disclosure, however, does not give a party the right to uncontrolled and unfettered disclosure (*see McAlwee v Westchester Health Assoc., PLLC*, 163 AD3d 547, 548 [2d Dept 2018]; *JPMorgan Chase, National Association v Levenson*, 149 AD3d 1053, 1054 [2d Dept 2017]). While discovery is intended to be broad, it is not unlimited. "Unlimited disclosure...is not required and the rules provide that the court may issue a protective order denying, limiting, conditioning or regulating the use of any disclosure device to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other

[2] These records were marked by plaintiff at defendants' examination before trial.

prejudice to any person or the courts" (*Accent Collections, Inc. v Cappelli Enters., Inc.*, 84 AD3d 1283, 1283 [2d Dept 2011]; CPLR 3103[a]). Thus, to prevent abuse or prejudice to the parties, the Court is vested with broad discretion to issue an appropriate protective order pursuant to CPLR 3103(a), vacating improper demands that seek irrelevant information, are overbroad and unduly burdensome (*see Feger v Warwick Animal Shelter*, 59 AD3d 68, 70 [2d Dept 2008]; *Scalone v Phelps Mem. Hosp. Ctr.*, 184 AD2d 65, 70 [2d Dept 1992]).

"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, and bare unsubstantiated allegations of relevancy are insufficient to establish the factual predicate regarding relevancy" (*Wadolowski v Cohen*, 99 AD3d 793, 794 [2d Dept 2012]). Plaintiff failed to meet this burden.

Plaintiff's unsubstantiated and bare allegations of the relevancy of a post-accident inspection of the traffic signal at issue lack merit. The proposition that the demanded inspection by an expert would "most likely" reveal discoverable information that will be "crucial" to plaintiff's case is based on conjecture and pure speculation. In particular, plaintiff surmises that an inspection would reveal "why the traffic signal was inoperable on February 28, 2014 and what relationship that outage had to the February 25, 2014 outage." Moreover, he argues an inspection would provide relevant information including how the traffic signal receives power, the location of the wires, splices, and the signal's component parts. The foregoing contentions are of no avail. The opinions of plaintiff's expert would constitute mere speculation.

Plaintiff further maintains post-accident records of the subsequent work performed on the traffic signal will reveal whether any "changes" were made to the traffic signal's "general condition." However, his failure to cite authority for the proposition that any such subsequent

"changes" or modifications to the traffic signal that postdated the accident are discoverable or admissible renders the request improper and highly prejudicial (*see Graham v Kone, Inc.*, 130 AD3d 770, 780 [2d Dept 2015]; *Orlando v City of New York*, 306 AD2d 453, 454 [2d Dept 2003]; *Klatz v Armor Elevator*, 93 AD2d 633, 637 [2d Dept 1983]; CPLR 3103[a]).

Here, plaintiff's bare assertion that the demanded discovery is "material and necessary" and defendants would not be unduly prejudiced or burdened is legally insufficient "to establish the factual predicate regarding relevancy" (*see Wadolowski v Cohen*, 99 AD3d at 794-795). The demands for an inspection and post-accident records are palpably improper in that they seek irrelevant information, are overbroad and burdensome (*see JPMorgan Chase Bank, N.A. v Levenson*, 149 AD3d at 1057; *Pesce v Fernandez*, 144 AD3d 653, 654 [2d Dept 2016]).

"Where the discovery demands are overbroad, the appropriate remedy is to vacate the entire demand rather than prune it" (*see Asprou v Hellenic Orthodox Community of Astoria*, 185 AD3d 638 [2d Dept 2020], citing *Pascual v Rustic Woods Homeowners Association, Inc.*, 173 AD3d 757, 758 [2d Dept 2019]; *JPMorgan Chase, National Association v Levenson*, 149 AD3d at 1054). Movants have made the requisite showing pursuant to CPLR 3103(a) to warrant the issuance of a protective order.

Accordingly, defendants have established their entitlement to a protective order denying the demanded discovery and vacating plaintiff's Supplemental Demand for Discovery and Inspection dated May 4, 2020.

Plaintiff's Cross Motion to Compel Discovery and for Sanctions against Defendants Hellman and the City (Motion Seq. 006)

Plaintiff cross moves for an order pursuant to CPLR 3124 compelling (1) certain documentary discovery from defendants Hellman and the City, (2) the identification and

deposition of "Hellman Employee 32," (3) the identification and deposition of the New York City Police Officer who first appeared at the accident scene, (4) the deposition of an individual with knowledge of the New York City Police Department 911 call logs, precinct record-keeping and traffic signal outage response, (5) the deposition of a Department of Transportation individual with knowledge of the agency's electrical inspection procedures on Staten Island in 2014, and (6) for sanctions against Hellman and the City for their failure to exchange discovery in compliance with discovery orders.

In support of the cross-motion, plaintiff maintains, *inter alia*, the City failed to exchange certain discovery in violation of this Court's Orders dated November 20, 2019, and January 9, 2020. Plaintiff alleges the following Court Ordered discovery has not been provided.

> (1) Per the Court's Order dated November 20, 2019, defendant Hellman was directed to exchange the name and contact information for Hellman Employee 32 (*i.e.*, the individual who repaired the traffic signal on February 25, 2014, three days before the accident), or if the information cannot be located, an affidavit of the search conducted from a person with knowledge of the search.

Plaintiff contends the affidavit of Hellman's Treasurer (dated January 8, 2020) which states, *inter alia*, defendant has no knowledge of the identity of Employee 32, is legally insufficient. To the contrary, upon reviewing the Treasurer's affidavit, it is clear the affiant conducted the search and has personal knowledge of the records he reviewed. Thus, Hellman's affidavit is legally sufficient to accomplish its intended purpose. Furthermore, in a Supplemental Response dated July 9, 2020, to the Court's Order, defendants note that Employee 31 was mistakenly referred to as Employee 32. They provided the name and last known address of Hellman's Employee 31, as shown on the Repair Entry Screen, which was marked as Exhibit 6A at the deposition of defendant Hellman's witness, Carl Sutera, on January 17, 2020.

(2) Per the Court's Order dated November 20, 2019, the City was directed to exchange the precinct log books for the two-week period prior to and including the date of the accident, or if the information is unavailable, an affidavit from the records custodian of the 120 Precinct of the search conducted.

The affidavit of Christopher Dickerson, Senior Insurance Claims Specialist in the Affirmative Litigation Division of the New York City Law Department, does not conform with the Court's Order and is legally insufficient. Mr. Dickerson's affidavit is based on information provided to him by the Civil Litigation Unit of the New York City Police Department. He was allegedly informed that a precinct condition log for the 120 Precinct does not exist; thus, his affidavit is not based on personal knowledge of the search conducted. If the precinct logbooks are unavailable, within 45 days, the City must produce a proper affidavit by a person with knowledge of the search conducted.

(3) Per the Court's Order dated November 20, 2019, the City was directed to exchange the name and contact information of the Police Officer present at the time of the accident, or if the information cannot be located, an affidavit from a person with knowledge of the search conducted.

The identity of the Police Officer who was present at the location when the accident occurred is still unknown. Although the City has not produced an affidavit from a person with knowledge of the search conducted, the Affirmation of the City's attorney, Josefina Belmonte, sufficiently establishes a reasonable excuse and a sufficient explanation of the difficulties she had encountered in attempting to identify the Police Officer who was present at the location when the accident occurred. Essentially, in view of the six-year passage of time, she is unable to locate any records pertaining to the particular officer on duty on February 28, 2014, at the subject location. Ms. Belmonte requests additional time to comply with the Court's Order in view of the effects of COVID-19, the re-opening of the City, and its handling of the protests. Under the circumstances, defendant's failure to exchange the name and contact information of the Police

Officer present at the time of the accident is excused. However, the City must diligently pursue its search, and if the information cannot be located, the City shall produce an affidavit from an individual with personal knowledge of the search conducted within 45 days.

The parties are advised, this Court's Order dated November 20, 2019, remains in full force and effect. "If any party learns the identity of any witness, the party shall exchange that information within 30 days of learning same."

(4) Per the Court's Order dated January 9, 2020, the City was directed to respond to plaintiff's Notice for Discovery and Inspection dated November 22, 2019.

On February 11, 2020, the City exchanged a Response to the Notice for Discovery and Inspection dated November 22, 2019. In particular, defendants provided responses to items 1 through 5, and with respect to items 6 through 10, the City responded by stating that a request for materials demanded was made, a search was being conducted, and any such materials requested will be provided in a Supplemental Response when and if the documents become available. On March 17, 2020, defendants served their Supplemental Response wherein specific objections were raised regarding items 6 through 9, with reasonable particularity as to each objection (*see e.g.*, *Roel v Joe Hsu*, 185 AD3d 1077, 1078 [2d Dept 2020]). Plaintiff's dissatisfaction with the responses is of no avail. Defendants have adequately responded to the demand at issue in compliance with the Court's Order dated January 9, 2020.

Plaintiff's request for additional depositions.

Aside from the foregoing discovery demands, which are the subject of the Court's Orders dated November 22, 2019, and January 9, 2020, plaintiff seeks to depose an individual with knowledge of the New York City Police Department's 911 call logs, precinct record-keeping and traffic signal outage response. Plaintiff also requests the deposition of a second Department of

Transportation witness with knowledge of the agency's electrical inspection procedures in Staten Island in 2014.

In view of the City's inability to produce the Police Officer who was present at time of the accident, the City shall produce for a deposition an individual with knowledge of the New York City Police Department's 911 call logs, precinct record-keeping, and traffic signal outage response which is relevant to the issues in this action.

However, the deposition of a second Department of Transportation witness is not warranted. Plaintiff maintains the witness lacked knowledge of the Staten Island supervisor's policy in 2014 concerning the performance of inspections. It bears noting, DOT's supervisor for the Staten Island office in 2014 has retired and was not available for the deposition on March 2, 2020. According to plaintiff, DOT's witness did not perform work in Staten Island in 2014. He was assigned to Brooklyn at the time; therefore, he lacks knowledge of the specific policies and procedures concerning the inspection of traffic signals and the record-keeping practices relevant to the matter at bar.

The Court reviewed the transcript of DOT's witness. Contrary to plaintiff's contention, the testimony of Jamie Clarke, an electrical inspector employed by DOT for 15 years, thoroughly addresses the standard operations and procedures implemented by the electrical inspectors with respect to traffic light outages, inspections, reports, and record-keeping practices throughout the City of New York. Mr. Clarke worked in Brooklyn from 2006 to 2012, thereafter, he worked in all 5 boroughs "until 2013-2014"; subsequently, he worked in Brooklyn, and as of 2019, he works in Staten Island. Pertinently, the witness testified that his role and responsibilities as an electrical inspector for DOT have not changed over the course of 15 years but for the amount of work and the advancement of technology. Mr. Clarke testified the electrical inspectors in all the

boroughs created records on "standard forms" that were submitted to the secretary's office located in the Bronx. He has personal knowledge of the relevant traffic signal inspection procedures and record-keeping practices implemented by DOT since 2006. Thus, a second deposition of an electrical inspector from the Department of Transportation is denied.

Sanctions

In opposing the branch of plaintiff's cross-motion, which is for sanctions against the City and Hellman for their alleged failure to exchange discovery in violation of the Court's Orders, defendants maintain they have made good faith and diligent attempts to comply in a timely manner with all discovery demands, have produced hundreds of pages of discovery and evidence, and additional supplemental discovery responses as more information became available. Defendants emphasize in order to accomplish this task, coordination and communication with various municipal agencies were necessary to obtain the responses to plaintiff's highly voluminous and specific discovery requests. As such, the delay in responding to certain discovery was due to the time and effort necessary to obtain the requested documentation. It bears noting this action was stayed for over 4 years due to the death of Mildred Ceromello on March 31, 2015, and the difficulties encountered by plaintiff's counsel in obtaining the appointment of an Administrator of the Estate. Understandably, such a long passage of time has made locating discovery extremely difficult for all parties to this litigation. Under these circumstances, defendants maintain sanctions are not warranted.

The Court agrees.

It is well established a Court may impose sanctions pursuant to CPLR 3126 in the event a party willfully and contumaciously fails to comply with discovery orders (*see Roel v Joe Hsu*, 185 AD3d 1077, 1078 [2d Dept 2020]). "The nature and degree of a penalty to be imposed on a

motion pursuant to CPLR 3126 is a matter generally left to the discretion of the Supreme Court" (*Candela v Kantor*, 154 AD3d 733, 733-734 [2d Dept 2017]; *see Pesce v Fernandez*, 144 AD3d at 654).

Here, the record clearly demonstrates defendants have substantially complied with the Court's Orders by providing adequate responses to the majority of the demands at issue and a reasonable excuse for their inability to identify the Police Officer present at the time of the accident. Plaintiff's dissatisfaction with the answers and objections proffered by defendants is insufficient to establish they willfully and contumaciously failed to comply with the Court ordered disclosure (*see Roel v Joe Hsu*, 185 AD3d at 1078; *Candela v Kantor*, 154 AD3d at 733-734; *Pesce v Fernandez*, 144 AD3d at 654).

Consonant with the foregoing, the branch of plaintiff's cross-motion, which is for sanctions against defendants is denied.

Defendants' Motion Pursuant to CPLR 3126 to Dismiss the Complaint (Motion Seq. 007)

Defendants move (1) to dismiss the complaint for plaintiff's failure to produce outstanding discovery, or in the alternative, (2) to preclude plaintiff from offering evidence or testimony at the time of trial due to his failure to produce outstanding discovery, and (3) compel plaintiff to provide the outstanding discovery. Defendants allege plaintiff's response to their post deposition demands and Demand for Authorizations dated March 17, 2020, has not been exchanged. The demand includes 23 items, *i.e.*, 19 requests for authorizations, copies of paystubs, copies of letters, medical liens, and plaintiff's union records.

Insofar as it appears on the papers before the Court, that during the pendency of these motions plaintiff exchanged responses on July 27, 2020, which included a vast majority of the

requested authorizations. Plaintiff's attorney advised defendants' attorney that a Supplemental Response was necessary pending the receipt of a handful of signed authorizations from the plaintiff. The attorneys continued to correspond via email and by letter concerning the remaining items. On August 2, 2020, defendants' attorney notified the Court of certain minor deficiencies in several authorizations. Since then, no further communications have been received by the Court concerning outstanding demands.

In view of the foregoing, defendants' motion is denied as moot.

Accordingly, it is hereby:

ORDERED, the motion (Seq. No. 005) of defendants Hellman Electric Corp. and The City of New York for a protective order pursuant to CPLR 3103 is granted in its entirety; and it is further

ORDERED, that plaintiff's Supplemental Demand for Discovery and Inspection dated May 4, 2020, is hereby vacated; and it is further

ORDERED, plaintiff's cross-motion (Seq. No. 006) pursuant to CPLR 3124 to compel discovery is granted to the following extent:

(a) The City shall exchange the precinct logbooks for the two week period prior to and including the date of the accident, and if the information is unavailable, the City shall produce a proper affidavit from the records custodian of the 120 Precinct or a person with knowledge of the search conducted, within 45 days of service of this Order with Notice of Entry electronically in NYSCEF; and

(b) The City must diligently pursue its search for the name and contact information for the Police Officer who was present at the time of the accident, and if the information cannot be located, the City shall produce an affidavit from an individual with personal knowledge of the

search conducted, within 45 days of service of this Order with Notice of Entry electronically in NYSCEF; and it is further

ORDERED, the branch of plaintiff's cross-motion which seeks the deposition of an individual with knowledge of the New York City Police Department's 911 call logs, precinct record-keeping, and traffic signal outage response is granted; plaintiff's request for a deposition of a second Department of Transportation electrical inspector is denied; and it is further

ORDERED, the branch of plaintiff's cross-motion which is for sanctions as against defendants Hellman Electric Corp. and The City of New York is denied; and it is further

ORDERED, the motion (Seq. No. 007) of defendants Hellman Electric Corp. and The City of New York pursuant to CPLR 3126(3) to dismiss the complaint, preclude plaintiff from offering evidence or testimony at trial, and to compel outstanding discovery is denied as moot; and it is further

ORDERED, the Clerk shall enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: October 15, 2020

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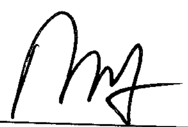

HON. THOMAS P. ALIOTTA, J.S.C.