

Zambrano v Fabregas
2021 NY Slip Op 30937(U)
March 24, 2021
Supreme Court, New York County
Docket Number: 158571/2016
Judge: Adam Silvera
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ADAM SILVERA

PART

Justice

-----X

KRISS ZAMBRANO,

Plaintiff,

- v -

VIDAL FABREGAS, EAN HOLDINGS LLC

Defendant.

-----X

INDEX NO. 158571/2016

MOTION DATE N/A

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 66, 67, 68, 69, 70, 71, 72, 73, 75

were read on this motion to/for DISCOVERY.

Upon the foregoing documents, and after oral arguments, it is ordered that plaintiff's order to show cause seeking to preclude surveillance videos taken of plaintiff is denied for the reasons set forth below.

Plaintiff moves to preclude defendant from using surveillance videos at trial or alternatively ordering a deposition of the videographer, arguing that the video footage was taken in February and October of 2020 and should have been exchanged earlier. Plaintiff further argues that defendant failed to disclose a contemporaneous log to accompany the videos and that there are periods of time missing from the videos. According to plaintiff, the sole reason for the delay in exchanging the surveillance videos was to put plaintiff at a disadvantage in preparing for trial.

In opposition, defendant argues that the CPLR §3101(i) exchange was timely as it was prepared and exchanged shortly after counsel were informed that this action would be placed on the trial calendar. Defendant further argue that there was no intent to disadvantage plaintiff and that plaintiff has failed to establish any prejudice. According to defendant, a type-written log was

exchanged along with the videos and the exchange set forth that defendant was in possession of no additional footage or outtakes. Plaintiff replies.

Preliminarily, the Court notes that CPLR §3101(i) states that “there shall be full disclosure of any films, photographs, video tapes or audio tapes, including transcripts or memoranda thereof... There shall be disclosure of all portions of such material, including outtakes, rather than only those portions a party intends to use.” Notably, CPLR §3101(i) is silent as to the timing of such video disclosure. Thus, as no deadline is set by the Legislature, defendants’ disclosure of the video surveillance is timely.

As to plaintiff’s argument that the subject videos must be precluded as there is no contemporaneous log, such argument fails as plaintiff’s own papers concede that “[t]here is a type written explanation of what is seen on the videos.” Notice of Motion, Aff. in Support of Lee Huttner, p. 2-3. Plaintiff, however, argues that such type written document is not a log, is not contemporaneous to the time of the surveillance, and calls into question the accuracy of such type written document “as it is done much later.” *Id.* at p. 3. However, plaintiff has failed to provide any reason or explanation as to the allegation that the type written document is not contemporaneous with the taking of the videos. Moreover, plaintiff has failed to even allege any facts, let alone any facts supported by evidence, with regards to the statement that the type written document was done much later. Thus, plaintiff’s pure conjecture as to the contemporaneous log fails to establish that the videos must be precluded.

With regards to plaintiff’s argument concerning missing portions of video, a review of the papers reveals that defendants are not in possession of any additional videos. Aside from plaintiff’s allegations, there is no indication that defendants are withholding any portion of the

videos requiring preclusion. Thus, plaintiff's motion seeking to preclude the surveillance videos taken of plaintiff is denied.

As to the portion of plaintiff's motion seeking a deposition of the videographer is denied. It is well settled that "[t]rial courts are authorized, as a matter of discretion, to permit post-note of issue discovery without vacating the note of issue, so long as neither party will be prejudiced." *Cuprill v Citywide Towing & Auto Repair Servs.*, 149 AD3d 442, 443 (1st Dep't 2017); *see also Hickey v City of New York*, 159 AD3d 511, 511 (1st Dep't 2018). Here, plaintiff has failed to establish that unusual and extraordinary circumstances exist such that post-note of issue discovery is required. In fact, there has been no showing that there is anything unusual about the instant case. Here, discovery was completed and a note of issue was filed. The case went through the usual channels and was placed on a trial list due to the global pandemic caused by Covid-19. As jury trials are set re-commence in the New York State courts today, the instant case was scheduled for a trial. A mere four days after the parties were informed that the case was scheduled for trial, defendant timely exchanged videos pursuant to CPLR §3101(i) as indicated above. Notably, plaintiff has failed to even allege how he would be prejudiced by the inclusion of the video surveillance. In fact, plaintiff will have ample opportunity during the trial to cross-examine defendant's witnesses and evidence. Thus, plaintiff's motion seeking post-note of issue discovery is denied.

Lastly, during oral arguments, an issue arose as to the introduction of a rental agreement, by defendant, during trial without the need for a witness authentication. Plaintiff objected on the grounds that the rental agreement would be used to bolster the anticipated testimony of defendant's witness. However, plaintiff does not object to the authenticity of the rental agreement. As there is no dispute as to the document's authenticity, the Court hereby dispenses

with the need for a witness at trial to authenticate the rental agreement. As such, defendant is permitted to introduce the rental agreement at trial, and have such agreement entered into evidence without the need of a witness to authenticate the document. Any and all further issues with regards to the subject rental agreement shall be raised before the trial judge.

Accordingly, it is

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

ORDERED that defendant is permitted to introduce the rental agreement at trial, and such document shall be entered into evidence without the need of a witness to authenticate the document; and it is further

ORDERED that the parties shall appear on April 12, 2021 at 9:30am, in room 300 of 60 Centre Street, New York, NY, to pick a jury or at any earlier date set by the trial judge; and it is further

ORDERED that within 30 days of entry, defendant shall serve a copy of this decision/order upon all parties with notice of entry.

This constitutes the Decision/Order of the Court.



<u>3/24/2021</u>		<u>HON. ADAM SILVERA, J.S.C.</u>	
DATE			
CHECK ONE:	☐ CASE DISPOSED	☒ NON-FINAL DISPOSITION	
	☐ GRANTED ☒ DENIED	☐ GRANTED IN PART	☐ OTHER
APPLICATION:	☐ SETTLE ORDER	☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN	☐ FIDUCIARY APPOINTMENT	☐ REFERENCE