

Mooney v City of New York
2021 NY Slip Op 31260(U)
April 14, 2021
Supreme Court, New York County
Docket Number: 150169/2018
Judge: J. Machelie Sweeting
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.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. J. MACHELLE SWEETING PART IAS MOTION 62

Justice

-----X

JOAN MOONEY, WILLIAM MOONEY,
Plaintiff,

- v -

CITY OF NEW YORK, NEW YORK CITY TRANSIT
AUTHORITY, METROPOLITAN TRANSPORTATION
AUTHORITY, RHC OPERATING LLC,

Defendant.

-----X

RHC OPERATING LLC

Plaintiff,

-against-

CONSOLIDATED EDISON COMPANY OF NEW YORK INC.,
REGENCY ANTIQUES & GEMS INC.

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 31, 32, 33, 34, 35, 36, 37, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101

were read on this motion to/for

MISCELLANEOUS

Pending before the court is an order to show cause (the “OTSC”) filed by defendant RHC which seeks an order modifying the January 23, 2020 order (Love, J.) by deleting paragraphs 5 and 6 therein, that directed the further deposition of RHC’s Director of Security on February 24, 2020, and its General Manager on February 25, 2020. Also pending before the court is a cross-motion filed by plaintiffs Joan C. Mooney and William M. Mooney (the “plaintiffs”) seeking to strike the pleadings of RHC and of defendant City of New York (the “City”), or alternatively, to

preclude defendants from offering evidence at trial regarding the issues relating to items in plaintiffs' demands – namely, issues of notice, cause and creation of the defect, and whether a tenant of Roosevelt was responsible for the location of the defect that caused plaintiff to fall.

Oral arguments on the motion and cross-motion were heard before the court. Pursuant to the filings with respect to this motion and the arguments made on the record, this court finds as follows:

Plaintiffs argue that they are prejudiced by defendants' willful failure to comply with the terms and conditions of the January 23, 2020 order that directed the deposition of the Director of Security and the General Manager, who plaintiff contends are no longer within his control.

By order dated January 23, 2020, the court (Love, J.) had issued an order directing the deposition of RHC's General Manager to be held on February 24, 2020 and the Director of Security to be held on February 25, 2020.

In the Order to Show Cause, dated February 20, 2020, defendant's counsel moved for an order deleting that part of the above order directing said depositions and for such depositions to be stayed pending a determination by the court. The OTSC was signed by the court on February 26, 2020 and made returnable on March 12, 2020.

Both the timing of counsel's order to show cause and the contents therein, strongly suggest that counsel did not intend to produce the witnesses on the dates as directed in the January 23, 2020 court order. In his affirmation, counsel states: "The undersigned was present at the January 23rd Status Conference and crossed my name off the proposed Order because I did not agree to produce the additional depositions of employees RHC because we had produced John Meade for examination before the trial the preceding day, January 22, 2020." Further, counsel Fouy argues: "Producing the General Manager and Director of Security would prejudice RHC by taking them

away from their employment duties for several hours for no demonstrable reason. . . . Accordingly, RHC should not be compelled to bear expense and inconvenience of producing them.”

In his “Reply Affirmation” dated February 11, 2021 counsel further contends that Judge Love stayed the taking of further depositions, as was requested by defendant in its OTSC. However, this is contrary to the record, as no interim relief had been either granted or requested in the OTSC.

Not only does defendant completely disregard the fact that a court order was in effect that directed that the depositions take place, but counsel’s arguments about the sufficiency of Meade’s testimony is belied by the record. Although defendant claims that the testimony of John Meade, the Director of Engineering gave “full and complete testimony obviating the necessity of the depositions of RHC’s Director of Security and its General Manager,” such claims are contradicted by the record.

In fact, in his “Affirmation in Support,” defendant’s counsel states that: “Mr. Meade testified that he does not know whether any other Roosevelt Hotel Employees are tasked with regularly inspecting sidewalks. He testified that he does not know whether the Director of Security maintains information regarding trip and fall accidents on the sidewalks abutting the hotel. He testified that he does not know whether the General Manager maintained information regarding trip and fall accidents on the sidewalks abutting the Hotel.” (Fouhy Affirmation dated February 20, 2020 at ¶6) (citations to the deposition transcription are omitted).

The Executive Orders issued by New York State Governor Andrew Cuomo are not applicable, since they were issued subsequent to the date of the court’s order and the dates of the deposition.

For all of the aforementioned reasons, IT IS HEREBY ORDERED that defendant RHC's request to delete paragraphs 5 and 6 is DENIED. At the conference before the court, defendant's counsel was unsure whether the witnesses remain within defendant's control.

To the extent that they are IT IS HEREBY ORDERED that no later than 30 days from the date of this order, defendant shall produce for a deposition, on a date noticed by the plaintiff, the General Manager and the Director of Security.

With regard to plaintiff's cross motion for preclusion, IT IS HEREBY ORDERED that that part of the motion is GRANTED to the extent that the failure of the defendant RHC to produce the witnesses for depositions, as indicated above, shall result in the preclusion of the defendant from calling these witnesses at trial or from offering any testimony or documentary evidence prepared by or relating to these witnesses.

It was also reported at the conference that the City had produced additional discovery in response to plaintiffs demands and is now in compliance.

Accordingly IT IS HEREBY ORDERED that that part of plaintiff's cross motion seeking to strike the City's answer is withdrawn or hereby DENIED as moot.

This is the order of the court.

<u>4/14/2021</u>			
DATE		J. MACHEL SWEETING, J.S.C.	
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