

Berkovich v Judlau Contr., Inc.
2021 NY Slip Op 31530(U)
May 5, 2021
Supreme Court, New York County
Docket Number: 151498/2019
Judge: Frank P. Nervo
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANK P. NERVO PART IAS MOTION 4

Justice

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ALBERT BERKOVICH,

Plaintiff,

- v -

JUDLAU CONTRACTING, INC.,KONE, INC.,KONE
ELEVATORS & ESCALATORS OF NEW YORK CITY, AB
CONSULTANTS, INC.

Defendant.

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INDEX NO. 151498/2019
MOTION DATE 02/10/2021
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 50

were read on this motion to/for DISCOVERY.

This matter was recently transferred to Part IV. Defendant Kone, Inc. seeks an order compelling "proper responses" to its interrogatories numbered 82, 83, and 85. Movant contends that a plaintiff alleging a product's defect must provide the precise nature of the defect, or face preclusion. Plaintiff opposes, contending the answers served are complete, apprise movant of the defects and negligence alleged, and he is not required to allege the defect of the precise component(s) causing the injury.

CPLR § 3101(a) directs that there "shall be full disclosure of all matter material and necessary to the prosecution or defense of an action, regardless of the burden of proof" (Forman v. Henkin, 30 NY3d 656, 661 [2018]). The test

utilized is “one of usefulness and reason” (*id.*). The Uniform Civil Rules for the Supreme Court require a party’s response or objection to a request for documents state with particularity the grounds for any objection to production (22 NYCRR § 202.20-c). Where a party fails to respond or comply with a demand, the party seeking disclosure may move to compel such response (CPLR § 3124).

Contrary to movants’ position, the Appellate Division’s three sentence decision in *Cornachio v. General Motors Corp.* does not set forth a standard that a plaintiff must identify a specific design or manufacturing defect under threat of preclusion (63 AD2d 941 [1st Dept 1978]). Furthermore, as the Appellate Division, First Department held more than two decades later, a plaintiff may properly allege, via circumstantial evidence, that but for a product/design defect, the injury would not have occurred (*Mines v. American Honda Motors Co.*, 305 AD2d 271 [1st Dept 2003]; *citing Peerless Ins. Co. v. Ford Motor Co.*, 246 AD2d 949 [3d Dept 1998]).

The Court of Appeals has repeatedly found that evidence a product failed to perform as intended is sufficient to maintain a products liability action (*see e.g. Codling v. Paglia*, 32 NY2d 330 [1973]; *McDermott v. City of New York*, 55

NY2d 211, 220-21 [1980])). Put simply, “plaintiff is not required to prove the specific defect, especially where the product is complicated in nature. Proof of necessary facts may be circumstantial” (*Codling v. Paglia*, *supra* t 339).

Disregarding those portions of the papers dedicated to ad hominem vitriol between counsel, the Court finds no basis to compel further responses from plaintiff. Plaintiff has alleged that the escalator at issue moved suddenly, without warning, and on its own, and that such movement was a defect causing his injuries. He is not required, as movants contend, to identify the failure/defect of individual components.

As this matter has been recently transferred to Part IV, and in lieu of adjourning or holding the status conference scheduled for May 6, 2020 by Part XXXIII, the Court issues the following discovery schedule.

Accordingly, it is

ORDERED that the motion is denied; and it is further

ORDERED that all parties shall serve a courtesy copy of any unanswered demand within 14 days of notice of entry of this decision and order, and

responses thereto shall be served within 20 days of receipt of said courtesy copy;
and it is further

ORDERED that failure to provide a timely answer to a demand shall result in sanctions, including but not limited to the striking of pleadings, in the Court's discretion and upon further application; and it is further

ORDERED that defendants' deposition shall occur on or before June 30, 2021, and such deposition shall occur either in-person or via electronic means; and it is further

ORDERED that post-deposition demands shall be served within 20 days of completion of EBT and responses thereto shall be served within 20 days of receipt of demand; and it is further

ORDERED that failure to timely serve post-deposition demands shall constitute waiver of same, and failure to timely serve answers to same shall result in sanctions, including but not limited to the striking of pleadings; and it is further

ORDERED that defendants shall notice plaintiff's IME within 30 days of notice of entry of this decision and order; plaintiff shall appear for exam within 30 days of receipt of notice; and defendants shall exchange the IME report within 30 days of exam; and it is further

ORDERED that failure to notice the IME, as above, shall constitute waiver of same; and it is further

ORDERED that failure to appear for a timely noticed IME or timely provide a copy of the IME report shall result in sanctions, including but not limited to the striking of pleadings, in the Court's discretion upon further application; and it is further

ORDERED that the parties are reminded of the Part Rules requiring extension of the NOI deadline be brought by motion; and it is further

ORDERED that the discovery schedule and deadlines herein may not be adjourned or extended absent further order of the Court; and it is further

ORDERED that the end date for discovery shall be October 1, 2021; and it is further

ORDERED that plaintiff shall file a note of issue (NOI) on or before October 21, 2021; and it is further

ORDERED that the parties shall appear for a compliance conference on October 20, 2021 at 2:15pm via Microsoft Teams.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

5/5/2021
DATE


FRANK P. NERVO, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE