

Hills v Newton
2021 NY Slip Op 33733(U)
August 5, 2021
Supreme Court, Westchester County
Docket Number: Index No. 65783/2019
Judge: Terry Jane Ruderman
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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER-COMPLIANCE PART

-----X
CYNTHIA M. HILLS,

Plaintiff,

-against-

LENZELL D. NEWTON, TOWN MOTOR CAR CORP.,
ANTHONY PARKING GARAGE and CARCIERGE VALET,

Defendants.

-----X
TOWN MOTOR CAR CORP.,

Third-Party Plaintiff,

-against-

ANTHONY PARKING GARAGE and CARCIERGE VALET,

Third-Party Defendants.

-----X
RUDERMAN, J.

The following papers were read on the motion (sequence 2) of defendants Lenzell D. Newton (“Newton”) and Anthony Parking Garage d/b/a Carcierge Valet (“Anthony Parking”) for an order: (1) pursuant to CPLR § 3103(a) for a protective order in relation to the deposition of Anthony Parking’s principal, Anthony Fonti (“Fonti”); and (2) for such other and further relief as this Court deems just and proper:

- Notice of Motion; Affirmation in Support; Exhibits A-F
- Affirmation in Opposition; Exhibits 1-2
- Reply Affirmation
- NYSCEF File

The following papers were read on the motion (sequence 3) of defendant Town Motor Car Corp. (“Town Motor”) for an order: (1) pursuant to CPLR § 3103(a) for a protective order in relation to the deposition of Town Motor’s principal, Ted Siebold (“Siebold”); and (2) for such other and further relief as this Court deems just and proper:

- Notice of Motion; Affirmation in Support; Exhibits A-L

DECISION & ORDER

Index No. 65783/2019
Motion Date: May 24, 2021
Seq. Nos. 2, 3

Affirmation in Opposition; Exhibits 1-2
Reply Affirmation
NYSCEF File

Upon the foregoing papers, these motions are determined as follows:

Relevant Facts and Procedural History

The plaintiff commenced this action by filing a Summons and Complaint on October 1, 2019. In this action for negligence and negligent hiring and supervision as against Newton, Anthony Parking, and Town Motor, the plaintiff alleges that she suffered personal injuries as a result of a motor vehicle accident that occurred on February 4, 2019. Specifically, the plaintiff alleges that her automobile was struck by a vehicle that was owned by Town Motor and that was being operated by Newton, who was an employee of Anthony Parking, and that, *inter alia*, Newton was negligently hired and/or supervised by Anthony Parking.

As relevant to the two related motions addressed herein, on September 25, 2020, this Court issued a Preliminary Conference Order directing that all depositions of the parties be completed by December 16, 2020.¹ At a December 17, 2020 Virtual Compliance Conference, counsel reported that depositions had not yet been conducted; as such, this Court issued a Compliance Conference Referee Report and Order dated December 17, 2020, *inter alia*, directing that the plaintiff's deposition be conducted by February 5, 2021 and that the defendants' depositions all take place by February 8, 2021. On March 1, 2021, counsel appeared for another Virtual Compliance Conference and reported, *inter alia*, that the plaintiff had been deposed and that Newton's deposition had been partially completed. By Compliance Conference Referee Report and Order dated March 1, 2021, this Court directed that Newton's deposition be completed by April 5, 2021, and that Town Motor's deposition be taken by that date as well.

Subsequently, counsel appeared for an April 27, 2021 Virtual Compliance Conference and reported that Newton's deposition had been completed, and that Town Motor had produced its general manager, Andrew Deterlizzi ("Deterlizzi") for deposition. However, plaintiff's counsel indicated that Newton (for Anthony Parking) and Deterlizzi (for Town Motor) were deficient witnesses in that they both lacked relevant knowledge that was highly material and important to this litigation. Accordingly, this Court issued a Compliance Conference Referee Report and Order dated April 27, 2021, in which it directed that Town Motor produce its principal, Siebold, for deposition on July 15, 2021, and that Anthony Parking produce its principal, Fonti, for deposition on July 16, 2021, subject to the defendants' right to move for protective orders in connection with such respective depositions. The Order stated, in relevant part, that "[a]ll parties are advised that they have **no authority** to adjourn Court-ordered depositions to later dates. Failure to conduct the Court-ordered deposition of an available witness can result in **waiver of the deposition**. Failure of a witness to appear can result in **preclusion, dismissal, or the striking of pleadings**." (emphases in original).

¹ In accordance with operative Administrative Orders of the Ninth Judicial District and in light of the COVID-19 pandemic, since the Spring of 2020 all depositions for matters pending in the Compliance Part have been proceeding virtually.

Relatedly, on April 28, 2021, this Court issued three Discovery Motion Briefing Schedules, in which it authorized Anthony Parking and Town Motor to each move for protective orders regarding the respective depositions of Fonti and Siebold, and authorized the plaintiff to move to compel certain testimony that had been blocked by counsel for Newton and Anthony Parking during Newton's deposition. The Court further directed that any such motions be filed by May 10, 2021 and be made returnable on submission on May 24, 2021.

Motions and Contentions of the Parties

On May 10, 2021, Newton and Anthony Parking timely moved (sequence 2) for an order: (1) pursuant to CPLR § 3103(a) for a protective order in relation to the deposition of Anthony Parking's principal, Fonti; and (2) for such other and further relief as this Court deems just and proper. In support thereof, they contend that Fonti should not be required to testify concerning the two topics referenced by plaintiff's counsel, i.e., (1) the negligent hiring, training and supervision of Newton, and (2) the contract between Anthony Parking and Town Motor, as these topics are not material nor necessary to the plaintiff's causes of action. Specifically, they contend that there is no need to depose Fonti concerning the alleged negligent hiring, training and supervision of Newton, because if Newton is ultimately determined to have acted negligently, then Anthony Parking as his employer will be held vicariously liable for Newton's negligence. With respect to the contract between Anthony Parking and Town Motor, they contend that there is no need to depose Fonti because the contract was produced in discovery, its terms speak for themselves, and the contract can be authenticated by notice to admit without the need for live testimony.

Also on May 10, 2021, Town Motor timely moved (sequence 3) for an order: (1) pursuant to CPLR § 3103(a) for a protective order in relation to the deposition of Town Motor's principal, Siebold; and (2) for such other and further relief as this Court deems just and proper. In support thereof, Town Motor contends that Siebold's deposition is unnecessary, as the contract between Anthony Parking and Town Motor has been produced in discovery and speaks for itself as to the relationship between the two corporate defendants, although Town Motor concedes that its General Manager, Deterlizzi, testified that he did not have any knowledge concerning such contract. Town Motor further contends that it has already produced Deterlizzi, who testified at his deposition as to Town Motor's practices and procedures and its general relationship with Anthony Parking. Town Motor also contends that because the plaintiff's cause of action for negligent hiring and supervision concerns Anthony Parking and not Town Motor, there is no need for Town Motor to produce a witness regarding issues of hiring practices and/or employee training and supervision.

In opposition papers jointly addressing both the motions of Newton and Anthony Parking (sequence 2) and Town Motor (sequence 3), the plaintiff contends that both motions for protective orders should be denied, as the depositions of Newton and Deterlizzi made clear that further testimony is required from the respective principals of Anthony Parking and Town Motor,

as the previous depositions painted an ambiguous picture as to the respective duties and responsibilities of each company. Moreover, the plaintiff contends that the defendants have attempted to mislead this Court in asserting that the production of the relevant contract moots any need for further depositions, as the contract furnished by the defendants in discovery was not in effect at the time of the February 4, 2019 accident underlying this litigation.

Specifically with respect to motion sequence 2 concerning the deposition of Anthony Parking's principal, Fonti, the plaintiff contends that Fonti has specific knowledge and information concerning the respective duties and responsibilities of Anthony Parking that is material and necessary to this action, and Fonti further has information that is essential to the litigation of the plaintiff's cause of action for the negligent hiring and/or supervision of Newton. The plaintiff further contends that Fonti, as Anthony Parking's principal, has material and necessary information concerning Anthony Parking's contractual and working relationship with Town Motor, and that Anthony Parking has disingenuously sought to avoid Fonti's deposition by producing a contract that expired on February 1, 2019, notwithstanding that the relevant automobile accident occurred thereafter, i.e., on February 4, 2019. The plaintiff also contends that Anthony Parking should not be permitted to avoid Fonti's deposition by unilaterally declaring that it will be held vicariously liable for Newton's negligence if he is found to be negligent, and by improperly pronouncing that Fonti therefore need not be deposed regarding the critical issues of Anthony Parking's negligence and/or negligent hiring and supervision of Newton.

Regarding motion sequence 3 concerning the deposition of Town Motor's principal, Siebold, the plaintiff contends that Siebold should be required to testify as he has knowledge and information that is material and necessary to this action. Specifically, the plaintiff contends that Deterlizzi was a highly inadequate witness, as he has no authority to bind Town Motor or to set policy concerning its interactions and corporate relationship with Anthony Parking, and Deterlizzi admitted that he had no knowledge of the relevant contract. The plaintiff contends that this issue is particularly critical because the only contract produced by the defendants in discovery expired on February 1, 2019, and was not in effect at the time of the relevant vehicular accident on February 4, 2019. The plaintiff contends that Deterlizzi was wholly incapable or unwilling to answer questions concerning the corporate entities' intent, practices and policies relating to Anthony Parking, and that Siebold's deposition is necessary to take discovery regarding same. The plaintiff further contends that Deterlizzi testified in vague terms that Anthony Parking was responsible for its own employees, but he had no understanding of Town Motor's duties and responsibilities vis a vis Anthony Parking; and that Siebold as Town Motor's principal would have material and necessary knowledge regarding same.

Analysis

CPLR § 3101(a) mandates full disclosure of all matter material and necessary in the prosecution or defense of an action. Unlimited disclosure is not mandated, however, and a court may issue a protective order pursuant to CPLR § 3103 denying, limiting, conditioning, or regulating the use of any disclosure device to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts (*see Slapo v Winthrop Univ. Hosp.*, 186 AD3d 1281, 1282-1283 [2d Dept 2020]). The party seeking a

protective order bears the burden of proof (*see Borgia v Rothberger*, 148 AD3d 1109, 1110-1111 [2d Dept 2017], citing *Vivitorian Corp. v First Cent. Ins. Co.*, 203 AD2d 452, 453 [2d Dept 1994]). The supervision of disclosure and the setting of reasonable terms and conditions thereof rests within the sound discretion of the trial court (*see Ligoure v City of New York*, 128 AD3d 1027, 1028 [2d Dept 2015]; *Allen v Yertle Operations LLC*, 70 Misc. 3d 934, 942 [Sup. Ct., Westchester Cty. 2020]).

With respect to motion sequence 2, Newton and Anthony Parking have not met their burden of demonstrating entitlement to a protective order in connection with Fonti's deposition. Although Newton, an individual defendant herein and a former employee of Anthony Parking, was deposed in this matter, Anthony Parking has not furnished any employee to be examined on behalf of the corporate entity. Particularly where, as here, the plaintiff alleges a cause of action against Anthony Parking sounding in the negligent hiring and/or supervision of Newton, Anthony Parking has improperly refused to produce for deposition a corporate witness with knowledge of Anthony Parking's hiring, training and supervision practices. The Court is troubled by Anthony Parking's seemingly unilateral declaration that it need not produce a corporate witness because it will be held vicariously liable if Newton is ultimately determined to have acted negligently; and Anthony Parking is reminded that the supervision of disclosure and the setting of reasonable terms and conditions thereof rests within the sound discretion of the trial court, and not with the parties' counsel (*see Ligoure*, 128 AD3d at 1028; *Allen*, 70 Misc. 3d at 942). The Court is also concerned by Anthony Parking's assertion that a corporate deponent is unnecessary because the contract between Anthony Parking and Town Motors has been produced in discovery and speaks for itself regarding the respective duties and responsibilities of those two defendants. Indeed, as asserted by the plaintiff in opposition, it is unambiguous that the contract furnished by the defendants expired on February 1, 2019, and was not in effect at the time of the relevant vehicular accident on February 4, 2019. Accordingly, given that Anthony Parking has not produced a deponent, such as Fonti, with knowledge and information concerning the contractual relationship among the parties and regarding Anthony Parking's hiring, training and supervision of Newton, the motion of Newton and Anthony Parking for a protective order concerning Fonti's deposition is denied, and Anthony Parking shall produce Fonti for a virtual deposition on or before September 30, 2021.

Regarding motion sequence 3, Town Motor has not met its burden of demonstrating entitlement to a protective order in connection with Siebold's deposition. It is well settled that a corporate entity has the right to designate in the first instance, the employee to be examined by deposition, as Town Motor did by producing Deterlizzi herein (*see Asprou v Hellenic Orthodox Community of Astoria*, 185 AD3d 638, 639 [2d Dept 2020]; *Schiavone v Keyspan Energy Delivery NYC*, 89AD3d 916, 917 [2d Dept 2011]). However, an additional deposition may be appropriate when it is demonstrated that the employee already deposed had insufficient knowledge, or was otherwise inadequate, and the employee proposed to be deposed can offer information that is material and necessary to the prosecution of the case (*Schiavone*, 89 AD3d at 917). "A party seeking additional depositions has the burden of demonstrating (1) that the representatives already deposed had insufficient knowledge, or were otherwise inadequate, and (2) there is a substantial likelihood that the persons sought for depositions possess information which is material and necessary to the prosecution of the case" (*Asprou*, 185 AD3d at 640, citing

Gomez v State of New York, 106 AD3d 870, 872 [2d Dept 2013]).

Here, the plaintiff demonstrated that Deterlizzi had insufficient knowledge regarding the relevant issue of Town Motor's interactions and corporate relationship with Anthony Parking, and Deterlizzi in fact admitted to having no knowledge regarding the operative contract between the parties, and expressly stated that Siebold would have knowledge concerning same (*see generally Giordano v New Rochelle Mun. Hous. Auth.*, 84 AD3d 729, 731-732 [2d Dept 2011]; *Aronson v Im*, 81 AD3d 577, 578 [2d Dept 2011]). As noted above, given that the only contract produced by the defendants in discovery had expired at the time of the February 4, 2019 vehicular accident at the heart of this litigation, it is incumbent upon Town Motor to furnish its principal, Siebold, whom the plaintiff demonstrated has knowledge to testify concerning Town Motor's intent, practices and policies relating to Anthony Parking, and the respective contractual responsibilities of Town Motor and Anthony Parking in the event of an act of negligence. Accordingly, Town Motor's motion for a protective order concerning Siebold's deposition is denied, and Town Motor shall produce Siebold for a virtual deposition on or before September 29, 2021.

Based upon the foregoing, it is hereby,

ORDERED that the motion of Newton and Anthony Parking (sequence 2) for a protective order is denied; and it is further

ORDERED that Fonti is directed to appear virtually for a full day of deposition on or before September 30, 2021; and it is further

ORDERED that in the event Fonti fails to appear virtually for his deposition as directed in a timely fashion, Anthony Parking shall be precluded from offering evidence or testimony at the time of trial or otherwise on the issues raised by the plaintiff in the demand for deposition; and it is further

ORDERED that the motion of Town Motor (sequence 3) for a protective order is denied; and it is further

ORDERED that Siebold is directed to appear virtually for a full day of deposition on or before September 29, 2021; and it is further

ORDERED that in the event Siebold fails to appear virtually for his deposition as directed in a timely fashion, Town Motor shall be precluded from offering evidence or testimony at the time of trial or otherwise on the issues raised by the plaintiff in the demand for deposition; and it is further

ORDERED that in the event that Fonti and/or Siebold fail to appear virtually for their respective depositions as directed in a timely fashion, the plaintiff shall upload to NYSCEF affirmation(s) or affidavit(s) of non-compliance together with proposed order(s) of preclusion on or before October 8, 2021; and it is further

ORDERED that the parties shall appear for the previously scheduled Virtual Compliance Conference on September 13, 2021 at 3:30 p.m.; and it is further

ORDERED that counsel for the plaintiff shall each serve a copy of this Order with notice of entry upon all parties via NYSCEF within five (5) days of entry.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, NY
August 5, 2021


HON. TERRY JANE RUDERMAN, J.S.C.

Service upon all counsel via NYSCEF

cc: Compliance Part Clerk