

Eggert v Torres

2022 NY Slip Op 31058(U)

April 4, 2022

Supreme Court, New York County

Docket Number: Index No. 155360/2018

Judge: Arlene Bluth

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. ARLENE BLUTH **PART** **14**

Justice

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ANDREW EGGERT,

Plaintiff,

- v -

AMADO TORRECILLA TORRES, TALKHOUSE INC., THE
FIVE DWARFS, INC., SOLDIER RIDE INC.

Defendants.

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INDEX NO. 155360/2018

MOTION DATE 04/01/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 47, 48, 49, 50, 51, 52, 53, 54, 63, 64, 65, 66, 67, 69

were read on this motion to/for DISCOVERY.

The motion by plaintiff to compel defendants Talkhouse, Inc. and The Five Dwarfs, Inc. (“Motion Defendants”) to designate and produce a corporate witness pursuant to plaintiff’s rule 202-20-d notice is denied and the cross-motion by these defendants for a protective order relating to this notice is granted.

Background

Plaintiff claims he was at a concert in Amagansett, New York on July 28, 2017 when he was attacked by drunk patrons at an establishment owned and operated by defendants. Plaintiff brings Dram Shop claims against defendants for failing to prevent the attack. In this motion, plaintiff contends that he did a deposition of Peter Honerkamp (a witness for defendants) on January 31, 2020 but that this witness lacked adequate knowledge for the Motion Defendants. He insists he later sent out a notice for a corporate deposition on October 26, 2021 pursuant to 202.20-d.

In opposition and in support of their cross-motion for a protective order, the Motion Defendants argue that discovery was nearly completed and now plaintiff wants to reopen discovery and prolong this litigation by seeking an unnecessary deposition. They point out that party depositions were done in January 2020 and non-party depositions were discussed in September 2020 but plaintiff did not actually pursue them. The Motion Defendants also complain about the substance of the discovery demands made along with the 202.20-d notice. They claim the demands were 1) already testified about, 2) previously disclosed, 3) documents responsive to these demands do not exist or 4) they are completely unrelated to the incident at issue.

The Motion Defendants contend that plaintiff is not entitled to a deposition under 202.20-d because the stated objective of this type of deposition was to promote a cost-effective and fair adjudication of cases. They claim it is not a chance for plaintiff to restart discovery and get another deposition.

Discussion

Administrative Order 270/2020 directed a series of new procedural rules in the Supreme Court effective February 1, 2021. One of these rules, 202.20-d, incorporated a Commercial Division Rule (which is also Federal Rule of Civil Procedure 30[b][6]) regarding the designation and deposition of a corporate witness on behalf of a corporate party. As an initial matter, this Court must decide whether plaintiff was entitled to serve a notice under this new trial rule.

It is undisputed that the parties completed party depositions in January 2020 and that plaintiff did not attempt to serve a 202.20-d notice until October 26, 2021. In other words, when this case began and when the parties completed party depositions, there was no provision for this

type of notice. The Court finds that under these circumstances, plaintiff was not permitted to seek discovery under this notice.

The purpose of implementing these rules, according to the Administrative Order 270/20, was to incorporate Commercial Division rules that promoted “the cost-effective, predictable and fair adjudication of complex commercial cases” (Administrative Order 270/20). Permitting plaintiff, who has already been pursuing discovery for nearly four years, to get an additional deposition because a new trial rule was implemented during the pendency of this case makes little sense. This rule became effective over a year *after* plaintiff took defendants’ deposition. It is not cost-effective to make defendants produce an additional witness and comply with additional discovery demands contained in the 202.20-d notice based on these facts.

The instant analysis is similar to cases exploring whether legislation should have retroactive effect. “It has long been a primary rule of statutory construction that a new statute is to be applied prospectively, and will not be given retroactive construction unless an intention to make it so can be deduced from its wording” (*30 E. 33rd St. Realty LLC v PPF Off Two Park Ave. Owner, LLC*, 105 AD3d 515, 515, 963 NYS2d 106 [1st Dept 2013] [internal quotations and citation omitted]). Applying these principles here, the Court finds no reason to retroactively apply this trial rule in a situation where its effect would be the exact opposite intention of the law. Forcing a defendant to expend additional time, money and resources to do another deposition was not the point of this new rule.

And, of course, plaintiff did not seek an additional deposition of a witness for defendants based on this witness’ alleged inadequate knowledge at the time of the deposition or soon thereafter. Rather, plaintiff waited almost two years to suddenly argue that the initial witness’ deposition was not sufficient. The timeline suggests plaintiff recently learned about the new

corporate witness trial rule and viewed it as a way to get another deposition and more documents. The Court cannot condone these types of sharp litigation tactics.

Accordingly, it is hereby

ORDERED that the motion by plaintiff to compel defendants to comply with his 202.20-d notice is denied; and it is further

ORDERED that the cross-motion by defendants Talkhouse, Inc. and The Five Dwarfs, Inc. for a protective order is granted and these defendants need not respond to the subject 202.20-d notice; and it is further

ORDERED that plaintiff shall file a note of issue on or before April 27, 2022.

4/4/2022
DATE


ARLENE BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: