

Guido v 730 Fifth Upper, LLC
2022 NY Slip Op 31761(U)
June 3, 2022
Supreme Court, New York County
Docket Number: Index No. 151582/2018
Judge: Arlene Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE BLUTH PART 14

Justice

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ANTHONY GUIDO

Plaintiff,

- v -

730 FIFTH UPPER, LLC,

Defendant.

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INDEX NO. 151582/2018
MOTION DATE 06/02/2022
MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 111, 112, 113, 114, 115, 116 were read on this motion to/for DISCOVERY.

The motion by plaintiff for an order directing defendant to produce another witness for a deposition and to compel defendant to provide responses to outstanding discovery demands is denied.

Background

Plaintiff claims he was electrocuted due to a live wire underneath a grate while he was on duty as a police officer. The grate was located on a sidewalk in front of a property owned by defendant. Plaintiff moves to compel defendant to produce another witness for a deposition. He claims that the witness defendant produced does not work for defendant and that she only manages the budgets for various retail operations in her portfolio, one of which included the location where plaintiff's purported accident occurred.

Plaintiff insists that he wants Matthew Sevak to testify, who apparently was the witness' predecessor and who was in that role when the accident took place. Plaintiff also requests a

witness from CBRE, the apparent manager for the building at the time of plaintiff's incident as well as responses to his outstanding discovery demands.

In opposition, defendant contends that it responded to plaintiff's demands and so this branch of the motion is moot. With respect to the request for additional depositions, defendant argues that the witness produced (Lea Yamaguchi) was an urban portfolio manager for the property. It explains that she is employed by Brookfield Properties Rait Services, LLC who is the owner of 730 Fifth Retail LLC (the correct name for defendant). Defendant points out that Ms. Yamaguchi coordinated discovery responses on behalf of defendant and that is why she was picked for the deposition.

Defendant observes that the deposition transcript is only 27 pages and insists that the attorney for plaintiff was unprepared for the deposition. It maintains that non-party CBRE was responsible for maintaining the common elements of the building and suggests that plaintiff should seek discovery from that entity.

In reply, plaintiff contends the discovery responses are still deficient. He argues that the supplemental responses all contain objections that the requests are overbroad and not calculated to lead to the discovery of relevant information. Specifically, plaintiff points out that there were permits for "the Sassoon at 730 5th Avenue" and that the Aman Residences are also a part of the property, meaning defendant would have had to give permission for any work to be done on the site. Plaintiff also takes issue with a prior Jackson affidavit and claims it does not relate to the most recent set of demands. He then lists the outstanding issues he wants resolved.

Discussion

"For purposes of depositions, a corporate entity has the right to designate, in the first instance, the representative who shall be examined. To show that additional depositions are

warranted, the moving party must demonstrate that the representatives already deposed had insufficient knowledge, or were otherwise inadequate, and that there is a substantial likelihood that the persons sought for depositions possess information which is material and necessary to the prosecution of the case” (*Giordano v New Rochelle Mun. Hous. Auth.*, 84 AD3d 729, 731, 922 NYS2d 518 [2d Dept 2011] [internal quotations and citations omitted]).

As an initial matter, the Court denies the branch of the motion that seeks to compel defendant to produce another witness. As noted above, defendant was entitled to select a witness to be deposed in the first instance. This witness, as evidenced in the deposition transcript, claimed that she reviewed the summons in this case and testified that the maintenance log books for the property are kept with CBRE (NYSCEF Doc. No. 107 at 11). Ms. Yamaguchi observed that “CBRE is the third-party manager that has been hired by the condominium Board at 730 Fifth Avenue to maintain the common elements of the building” (*id.*). She added that CBRE was the manager at the time of plaintiff’s accident in April 2017 (*id.* at 12). Ms. Yamaguchi added that she did not find anything in defendant’s records about the accident nor did she find an accident report (*id.* at 13).

After reviewing the deposition transcript, the Court finds that there is no need for another deposition. Ms. Yamaguchi worked for the entity that owns defendant and she had access to (and reviewed) defendant’s records about the building. The fact is that defendant appears to have delegated responsibility for managing the building to CBRE, a non-party. As defendant suggests, plaintiff can seek discovery from CBRE. It is not surprising that defendant would not have a plethora of records or knowledge about an accident that happened more than five years ago when it had little day-to-day control over the property.

Plaintiff's suggestion that defendant produce Ms. Yamaguchi's predecessor for a deposition is without merit. There is no evidence that Mr. Sevak was an eyewitness to the accident, spoke with plaintiff after the accident, or had any role in how an alleged live wire contacted plaintiff. His testimony would likely be, at best, cumulative. And, as defendant argues, defendant cannot force CBRE (a non-party) to produce a witness. There is also no basis to force defendant to produce an "engineer/electrician/maintenance person responsible for the electric."

Simply because Ms. Yamaguchi was not working at the building at the time of the incident is not a reason to force defendant to produce another witness. She answered the questions posed by counsel for plaintiff—that she did not give the answers plaintiff desired is not a basis for an additional deposition.

A similar analysis applies to plaintiff's discovery demands. Defendant attached a number of Jackson affidavits signed by Ms. Yamaguchi (NYSCEF Doc. No. 113) that address the material and relevant issues in this case. Ms. Yamaguchi explains that she searched for records in defendant's possession and did not find responsive documents. She added that she looked for records about a door man at the property, she spoke with multiple officers for defendant, and spoke with the engineers at the building and did not find responsive documents. Ms. Yamaguchi insisted that there "was no sidewalk replacement or renovation performed in 2017. Therefore, there is no repair records, payments permits or contracts for the same" (*id.* at 6). She also searched for photos and could not find any.


Simply put, the Court cannot force defendant to produce records it does not possess no matter how many different ways plaintiff asks for documents. The record before this Court demonstrates that defendant hired a management company to handle the property. For some reason, plaintiff continues to insist that defendant has records that are, according to defendant,

within the management company's possession or some other non-party. The Court is satisfied that defendant has substantially complied with all outstanding discovery responses.

Given the age of this case and the fact that all discovery appears to be complete, the Court directs that a note of issue be filed on or before August 2, 2022. This gives plaintiff time to subpoena third parties, if he chooses to do so.

Accordingly, it is hereby

ORDERED that the motion by plaintiff for various discovery relief is denied.

<u>6/3/2022</u> DATE	<input type="checkbox"/> CASE DISPOSED <input type="checkbox"/> GRANTED <input type="checkbox"/> SETTLE ORDER <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input checked="" type="checkbox"/> DENIED	 _____ ARLENE BLUTH, J.S.C.	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION <input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> SUBMIT ORDER <input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> OTHER <input type="checkbox"/> REFERENCE
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