

**Azmi v Mutual Redevelopment Houses, Inc.**

2023 NY Slip Op 31664(U)

May 17, 2023

Supreme Court, New York County

Docket Number: Index No. 152225/2018

Judge: Arlene P. 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 P. BLUTH PART 14

Justice

-----X

MARIAM AZMI,

Plaintiff,

- v -

MUTUAL REDEVELOPMENT HOUSES, INC.,

Defendant.

-----X

MUTUAL REDEVELOPMENT HOUSES, INC.

Plaintiff,

-against-

KRISHNA KUMARI LLC

Defendant.

-----X

INDEX NO. 152225/2018
MOTION DATE N/A
MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

Third-Party
Index No. 595772/2020

The following e-filed documents, listed by NYSCEF document number (Motion 004) 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220

were read on this motion to/for DISCOVERY.

Defendant Mutual Redevelopment Houses, Inc. ("Mutual")'s motion to inter alia preclude non-party Farhin Fatema from testifying at time of trial is granted as described below.

Background

In this trip and fall case, plaintiff (who contends she worked at a Dunkin' Donuts located in defendant's building) alleges that she fell on a wet condition on the floor in the basement hallway of the building. She insists that non-party Ms. Fatema knew about a recurring condition—puddles on the hallway where plaintiff allegedly fell.

Plaintiff maintains that Ms. Fatema also took photographs of the hallway right after plaintiff's accident and has relevant knowledge about the purported dangerous condition and that she "recently learned" that Ms. Fatema had this relevant information.

Mutual seeks to preclude Ms. Fatema from testifying at trial and from plaintiff's use of "hearsay" statements from Ms. Fatema in connection with a pending summary judgment motion. Mutual insists that plaintiff first identified Ms. Fatema six months after she filed the note of issue and four months after Mutual filed a summary judgment motion. It points to plaintiff's deposition testimony where she identified only two co-workers present and could not recall who took photos (plaintiff now says this was Ms. Fatema).

In opposition, plaintiff contends that preclusion is a drastic remedy and there is no evidence that plaintiff's belated disclosure of the identity of Ms. Fatema was done in bad faith. She insists that she was unaware of the information that Ms. Fatema possessed about the alleged dangerous condition that caused plaintiff's accident prior to the filing of the note of issue. Plaintiff raises concerns about Mutual's characterization of plaintiff's deposition testimony and stresses that she disclosed Ms. Fatema's status as an important witness shortly after discovering the information this witnesses possessed.

### **Discussion**

As an initial matter, the Court observes that plaintiff previously moved to stay Mutual's pending summary judgment motion and for a non-party deposition of Ms. Fatema (NYSCEF Doc. No. 163). The Court denied that motion and found that plaintiff clearly knew about the identity of the store manager at her workplace well before the note of issue was filed (*id.*). However, the Court declined to preclude Ms. Fatema in connection with that motion because

plaintiff did not have a chance to offer a substantive response for her failure to disclose Ms. Fatema as a fact witness.

The Court grants the instant motion because plaintiff still failed to offer any substantive reason for why she failed to disclose Ms. Fatema as a fact witness until well after the note of issue was filed (and after Mutual had filed a summary judgment motion). Critically, plaintiff did not submit an affidavit in opposition to explain the instant circumstances and offer a reasonable excuse. Instead, only her attorney claims that plaintiff did not know about Ms. Fatema's relevant knowledge concerning the condition.

Without an affidavit from plaintiff, the Court cannot ascertain how or when plaintiff came to realize that Ms. Fatema had this allegedly critical information or the circumstances surrounding why she did not think to inquire about a store manager who purportedly took photos of the condition on the day of the accident. The Court is left with an unsupported assertion by plaintiff's attorney that plaintiff did not know about this key witness. That is not enough to defeat Mutual's motion.

The Court observes that it grants the motion only to the extent that Ms. Fatema is precluded from testifying at trial or submitting affidavits in connection with any future motions. The Court also observes that the order to show cause filed in connection with this motion did not seek a stay of the summary judgment motion (now returnable on May 10, 2023) and Mutual has already submitted a reply. That motion is now fully briefed and so the Court finds that Mutual's request for an adjournment of that motion so it could reply is now moot.

Because there is no need to adjourn that motion any further, the Court will consider the summary judgment motion on the merits, including the extent to which the Court will (or will not) consider alleged hearsay statements from Ms. Fatema.

Accordingly, it is hereby

ORDERED that defendant Mutual Redevelopment Houses, Inc.'s motion to preclude is granted only to the extent that Ms. Fatema may not testify at trial or submit any affidavits in connection with any future motions.

5/17/2023

DATE



ARLENE P. 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: