

Ormsten v Kiop Merrick L.P.

2023 NY Slip Op 33103(U)

September 8, 2023

Supreme Court, New York County

Docket Number: Index No. 154119/2018

Judge: Arlene P. Bluth

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

PRESENT: HON. ARLENE P. BLUTH PART 14

Justice

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MARION ORMSTEN, FRANK ORMSTEN,

Plaintiff,

INDEX NO. 154119/2018

MOTION DATE N/A

MOTION SEQ. NO. 014

- v -

KIOP MERRICK L.P., KIR MERRICK 028, LLC, KIMCO
INCOME OPERATING PARTNERSHIP, L.P., KIMCO
INCOME REIT, KIMCO REALTY CORPORATION, BEST
YET MARKET, INC., BEST MARKET OF MERRICK,
INC., BEST MARKET OF TRIBECA, INC., BEST YET
MARKET OF HARLEM, INC.

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 014) 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 505

were read on this motion to/for DISCOVERY.

Defendants KIOP MERRICK L.P., KIR MERRICK 02B, KIMCO INCOME OPERATING PARTNERSHIP, L.P., KIMCO INCOME REIT, KIMCO REALTY CORPORATION (collectively, “Movants”)’s motion for various relief related to a further deposition of plaintiff Marion Ormsten is granted only as described below.

Background

In this trip and fall case, the Court previously ordered that there be a further deposition of Ms. Ormsten in connection with plaintiffs’ filing of an amended bill of particulars (NYSCEF Doc. No. (NYSCEF Doc. No. 457). The Court struck the note of issue and observed that plaintiffs had not previously mentioned anything about visual confusion with respect to the

alleged defect that caused Ms. Ormsten to fall in a prior bill of particulars and that plaintiff also included nearly two pages of additional statutes (*id.* at 3). The deposition was to concern only these new topics and information raised in the amended bill of particulars (*id.* at 4).

Unfortunately, this further deposition did not go as the Court anticipated. Movants insist that counsel for plaintiffs routinely impeded the deposition by making numerous objections and soliloquies when Movants' counsel asked questions. At oral argument, Movants argue that counsel for plaintiffs made 23 speaking objections in a relatively short transcript (it was only 71 pages). They seek another deposition with a court-appointed referee to supervise, sanctions, and for an enlargement of time to complete this deposition.

In opposition, plaintiffs insist that all objections were proper and emphasize that the deposition was supposed to be limited. Counsel for plaintiffs maintains that he never directed his client not to answer and that the questions posed to the client sought re-inquiry into topics raised in a prior deposition.

In reply, Movants contend that they simply attempted to question Ms. Ormsten about the roadway, crosswalk, and curb as she approached the market prior to her accident and that counsel for plaintiffs improperly objected to these foundational questions. They claim that plaintiffs' opposition contains irrelevant arguments concerning "corroborating" evidence that has no bearing on raising objections at a deposition.

Discussion

The central issue in this motion is the deposition transcript and whether the Court finds that counsel for plaintiffs improperly impeded the deposition. A review of the transcript shows that counsel for plaintiffs did not merely state objections (which is of course permitted) and let

his client answer. Instead, he routinely launched into diatribes about the substance of Movants' questions to the point that it became a prolonged disagreement between the attorneys and ceased to be a deposition of Ms. Ormsten.

A few examples make this point clear. Movant's counsel asked the witness "Were you looking at the curb at the time of your accident?" (NYSCEF Doc. No. 274 at 25). This question is obviously important given that plaintiffs now claim that some sort of visual confusion caused or contributed to the fall. Counsel for Movants was absolutely entitled to ask the witness about the accident; this is not a case where these routine questions stretched on and on.

Counsel for plaintiffs responded with an objection and stated "That was covered extensively at the prior deposition. So we're not going to rehash it. You have to move on to something that is new material pursuant to the Judge's Order" (*id.*) After Movants' counsel responded, plaintiff's attorney continued "You don't need to move up to it to go over stuff that was covered extensively previously. She went into that-- you guys went into that in great length. We're not going to rehash that. It's beyond the scope of today's deposition" (*id.*).

After counsel for Movants insisted that this was impeding the deposition, plaintiff's attorney did not relent, stating that "I know that this is not [the] first deposition. It is a further deposition and pursuant to the Judge's Order, there were specific limitations in terms of what the sole content of today's -- scope of today's deposition was to cover and now you're going into things that were previously covered, not something -- you know, anything that was related to something that was claimed to be by your office to be new contentions of allegations" (*id.* at 26). The objections continue for the next few pages of the transcript.

After counsel for plaintiffs finally let his client answer a few questions, he began to raise lengthy objections again starting on page 30 and continuing through page 35. Ms. Ormsten does

not speak during this entire exchange (*id.* at 30-35). This back and forth characterizes the entire transcript. That counsel for plaintiffs insists he never instructed his client not to answer is of no moment because he filibustered Movants' questioning to the point where there were continual requests to "read back" questions. Understandably, the attorneys and the witness could not remember what question was asked given the lengthy objections lodged by counsel for plaintiffs. The Court emphasizes that the trial court rules provide that "Except to the extent permitted by CPLR Rule 3115 or by this rule, during the course of the examination persons in attendance shall not make statements or comments that interfere with the questioning" (22 NYCRR §221.1[b]).

No reasonable reader of this deposition transcript would think that Movants got a fair chance to question Ms. Ormsten about the amended bill of particulars and, specifically, the new theory or theories of liability. Therefore, Movants are entitled to another deposition of Ms. Ormsten. When nearly every question is accompanied by pages of discussion between attorneys, it can no longer be considered a deposition.

Although Movants request a court-appointed referee to supervise the next deposition, the fact is that such an appointment is often expensive and can be time consuming (especially if a party objects to a decision of that referee, as would be their right). Instead, the Court finds that the most efficient way to move this case and to facilitate a further deposition is to remove the limitation about the scope of the deposition. Movants may ask Ms. Ormsten any questions they like.

Hopefully, this will substantially reduce the discussion between the attorneys at the deposition and shift the focus back where it should be—to the witness. Of course, counsel for plaintiffs will be entitled to raise objections as permitted by the CPLR and the trial court rules.

But that does not mean that objections should be accompanied by long monologues about the substance of the case. This deposition must be completed on or before November 21, 2023.

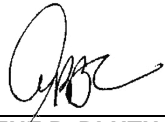
The Court denies the branch of the motion that seeks sanctions at this time. The fact is that the Court did limit the scope of the further deposition; while the Court finds that counsel for plaintiffs misinterpreted the breadth of that directive, the transcript does not rise to the level of sanctionable behavior. However, the Court stresses that impeding the next deposition, particularly given that there will be no limitation on its scope, may result in sanctions. Moreover, if there are substantial issues with this next deposition, the Court might order yet another deposition and reconsider Movants' request for a Court-appointed monitor (to be paid for by plaintiffs).

Accordingly, it is hereby

ORDERED that defendants KIOP MERRICK L.P., KIR MERRICK O2B, KIMCO INCOME OPERATING PARTNERSHIP, L.P., KIMCO INCOME REIT, KIMCO REALTY CORPORATION's motion is granted to the extent that they are entitled to another deposition of Ms. Ormsten, that this deposition shall not be subject to any limitations, it must occur on or before November 21, 2023 and the motion is denied with respect to the remaining relief requested.

The conference currently scheduled for October 12, 2023 is adjourned to December 13, 2023 at 11:30 a.m. By December 6, 2023, the parties are directed to upload 1) a discovery stipulation signed by all parties, 2) a stipulation of partial agreement that identifies the areas in dispute or 3) letters explaining why no agreement can be reached. If the additional deposition of

plaintiff Ormsten is completed, as well as any discovery that flows from this deposition, the parties may jointly request that the Court issue a new note of issue date. The failure to upload anything by December 6, 2023 will result in an adjournment of the conference.

<u>9/8/2023</u> DATE		 ARLENE P. BLUTH, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE