

Fusco v Dhimolea

2023 NY Slip Op 34986(U)

July 24, 2023

Supreme Court, Bronx County

Docket Number: Index No. 30121/2019E

Judge: Myrna Socorro

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART IA 9

FUSCO, JOSPEH

Index No. 30121/2019E

-against-

Hon. MYRNA SOCORRO

JON DHIMOLEA, DAVID REYES ALVAREZ
and CASTAWAYS YACHT CLUB, INC.

Justice Supreme Court

The following papers numbered 1 to _____ were read on this motion (Seq. No. 002)
for COMPEL noticed on JUNE 7, 2023.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s). 50-60
Answering Affidavit and Exhibits	No(s). 62-63
Replying Affidavit and Exhibits	No(s). 65

Upon the foregoing papers, it is ordered that this motion is granted to an extent per Decision & Order attached and made a part hereof

Motion is Respectfully Referred to Justice:

Dated:

Dated: 7/24/23

Hon. 
MYRNA SOCORRO, J.S.C.

- 1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
- 2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE
- FIDUCIARY APPOINTMENT REFEREE APPOINTMENT

SURPEME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART IA9

-----X
JOSEPH FUSCO,

Plaintiff,

-against-

DECISION AND ORDER
Motion Seq. #2

JON DHIMOLEA, DAVID REYES ALVAREZ and
CASTAWAYS YACHT CLUB, INC.,

Index No. 30121/2019E

Defendants.

-----X
Hon. Myrna Socorro, J.S.C.

For the reasons stated below, plaintiff’s motion to compel is GRANTED TO THE FOLLOWING EXTENT:

Plaintiff commenced the above captioned action on August 28, 2019, for injuries allegedly sustained on June 22, 2019. Plaintiff now moves for an Order compelling defendant Castaways Yacht Club Inc. (hereinafter “Castaways”) to respond to plaintiff’s post EBT notice for discovery and inspection with responsive documents, which were served on November 22, 2022.

Per plaintiff’s testimony at deposition, on June 22, 2019, plaintiff went to Castaways with his friend Jon Dhimolea¹ to test drive David Reyes Alvarez’s (hereinafter “Mr. Alvarez”) jet ski. When they arrived at the Castaways’ marina, they encountered an employee named “Phil”. Plaintiff saw Phil on the phone with Mr. Alvarez, who instructed Phil to give Jon Dhimolea, who did not have a New York boating safety certificate, the keys to the jet ski. While out in the water, Jon Dhimolea drove Mr. Alvarez’s jet ski into plaintiff’s jet ski causing plaintiff to suffer property damage and personal injury.

¹ This action has been discontinued as to Jon Dhimolea and David Reyes Alvarez upon reaching a settlement.

On November 11, 2022, William Michaelis, the owner of Castaways, testified at a deposition. He testified that approximately six or seven years prior to the subject accident, David Reyes Alvarez was a full-time employee of Castaways, however, he denied that on the date of the subject accident Mr. Alvarez was employed by Castaways. Mr. Michaelis further testified that Mr. Alvarez had formed his own company and that Castaways would hire him to service boats that are docked at the marina. After he stopped working for Castaways, Mr. Alvarez became a club member of Castaways and docked his jet ski in the marina. He also testified that an employee by the name of Philip Dionisio previously worked for Castaways, however, Mr. Michaelis was unsure as to whether Philip was employed by the company at the time of the accident.

On November 22, 2022, plaintiff served Castaways with a post EBT notice for discovery and inspection requesting the following: (1) the last known address of Philip Dionisio and David Reyes Alvarez (hereinafter “request #1”), (2) a copy of the complete file kept for current Castaways Yacht Club member David Alvarez Reyes (hereinafter “request #2”), (3) copies of all payroll records for former employees of Castaways Philip Dionisio and David Alvarez Reyes for three years leading up to and including the subject accident (hereinafter “request #3”), and (4) the date on which David Alvarez Reyes ceased employment at Castaways (hereinafter “request #4”). In its motion papers, plaintiff argues that “the requested documents and information are necessary, material, and probative for plaintiff to prove liability in that they will show the scope and timing of the aforementioned employer/employee relationship between defendant, David Reyes Alvarez, and Phil Dionisio.” Plaintiff further argues that the requested employment documents will “prove that defendant through their agents, servants, and employees acted with negligence, carelessness and recklessness in the ownership, management, and control of the aforementioned jet ski and

marina by providing the keys to Jon Dhimolea without ensuring that he had a New York boating safety certificate and personal watercraft license.”

In opposition, Castaways states that the motion is moot as they have attached a response to plaintiff’s discovery demand.

Plaintiff’s Request #1

Plaintiff has demanded the last known address of Philip Dionisio and David Reyes Alvarez, which Castaways has provided in his response attached to his affirmation in opposition. Thus, this branch of plaintiff’s motion to compel is deemed moot.

Plaintiff’s Request #2

In his second request, plaintiff demands a copy of the complete file kept for current Castaways Yacht Club member David Alvarez Reyes. Castaways has objected to the demand as overbroad in scope. Upon a review of the Court papers, this Court grants plaintiff’s request only to the extent that Castaways is directed to turnover the file kept for current Castaways Yacht Club member David Alvarez Reyes for the two years leading up to and including the subject accident and any files thereafter related to the subject accident.

Plaintiff’s Request #3

In his third request, plaintiff demands copies of all payroll records for former employees Philip Dionisio and David Alvarez Reyes for three years leading up to and including the subject accident. As to this request as it relates to David Alvarez Reyes, Castaways has objected to it as irrelevant since William Michaelis testified that Mr. Reyes was not employed by Castaways on the date of the accident. In reply, plaintiff argues that he “should not be forced to rely on defendant’s representations about a witness’ employment status or yacht club membership status,

when records exist that are dispositive as to these key issues.” Plaintiff argues that in order to prove Castaways’ negligence under a theory of respondeat superior or vicarious liability, issues as to Mr. Alvarez’s and Mr. Dionisio’s employment and club membership are relevant.

The Court notes that during his deposition, Mr. Michaelis could not recall an exact year as to when Mr. Alvarez ceased employment with Castaways and could not recall whether Mr. Dionisio was employed or not by Castaways on the date of the subject accident. As plaintiff highlights, there are records readily available to Castaways that exist on the subject matter of the demand requested and can corroborate the employment status of Mr. Alvarez and Mr. Dionisio. Accordingly, Castaways is hereby directed to provide plaintiff copies of all payroll records (including but not limited to W-2s, 1099s, 941, etc.) for former employees David Alvarez Reyes and Philip Dionisio for three years leading up to and including the subject accident.

Plaintiff’s Request #4

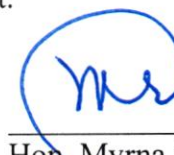
In his fourth request, plaintiff demands the date on which David Alvarez Reyes ceased employment at Castaways. Castaways has objected to this request as irrelevant as William Michaelis testified that Mr. Reyes was not employed by Castaways on the date of the accident. However, the Court disagrees for the same reasons discussed in request #3. Therefore, Castaways is directed to provide the date on which David Alvarez Reyes ceased employment at Castaways.

Accordingly, it is

ORDERED that Castaways is to provide the disclosure in accordance with this Decision and Order by no later than August 24, 2023.

This constitutes the Decision and Order of the Court.

Dated: July 24, 2023



Hon. Myrna Socorro, J.S.C.