Doe v Davis
2024 NY Slip Op 35077(U)
September 25, 2024
Supreme Court, Westchester County
Docket Number: Index No. 57283/2020
Judge: Alexandra D. Murphy
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To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. ALEXANDRA A D. MURPHY, J.S.C.

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JOHN DOE 1, JOHN DOE 2, JOHN DOE 3, AND CATHERINE WEBB,

Index No. 57283/2020

Plaintiffs,

DECISION & ORDER

-against-

Motion Seq. Nos. 3 & 4

OSCAR DAVIS, JR., in his individual and official capacity, MOUNT VERNON CITY SCHOOL DISTRICT, BOARD OF TRUSTEES OF THE MOUNT VERNON PUBLIC LIBRARY, MOUNT VERNON PUBLIC LIBRARY, EVANIA THOMPSON, in her individual and official capacity,

Defendants.

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In an action sounding in negligence, battery, assault, intentional infliction of emotional distress, prima facie tort, respondeat superior, negligent hiring, supervision and retention, and violation of New York State Human Rights Law (gender discrimination, sexual harassment, and hostile work environment), the plaintiffs move pursuant to CPLR 3101, 3124, and 3126 to strike the answer of the defendant Mount Vernon Public Library or in the alternative to compel the deposition of Gary Newman and Nishan Stepak (motion sequence no. 3). The plaintiffs also move pursuant to CPLR 3101, 3124, and 3126 to strike the answer of the Board of Trustees of the Mount Vernon Public Library and Mount Vernon Public Library or in the alternative to compel Hope Marable for her deposition (motion sequence no. 4).

Papers Considered **NYSCEF Doc. Nos. 92-97; 99-106; 108-115**

1. Notice of Motion and Affirmation of Mark David Shirian, Esq./Exhibits A-C;
2. Notice of Motion and Affirmation of Mark David Shirian, Esq./Exhibits A-E;
3. Affirmation in Opposition of Michael A. Miranda, Esq./Exhibits A-E;
4. Affirmation in Reply of Mark David Shirian, Esq.
5. Affirmation in Reply of Mark David Shirian, Esq.

Factual and Procedural Background

The plaintiffs commenced this action on July 15, 2020, by filing a summons and complaint. As amended on August 11, 2022, the plaintiffs assert causes of action for negligence, battery, assault, intentional infliction of emotional distress, prima facie tort, respondeat superior, negligent hiring, supervision and retention, and violation of New York State Human Rights Law (gender discrimination, sexual harassment, and hostile work environment). Broadly, the complaint alleges that Oscar Davis, Jr. abused his power and sexually harassed the plaintiffs. The plaintiffs also allege that the other defendants were negligent in hiring and retaining Davis.

In motion sequence no. 3, the plaintiffs move to strike the answer of the defendant Mount Vernon Public Library ("the Library") for willful and intentional refusal to produce witnesses for depositions or in the alternative move to compel the depositions of Gary Newman and Nishan Stepak. In motion sequence no. 4, the plaintiffs move to strike the Library's answer for failure to produce an additional witness or in the alternative move to compel the deposition of Hope Marable.

The following witnesses have already testified: Catherine Webb, John Doe 1, John Doe 2, John Doe 3, Oscar Davis Jr., Cathlin B. Gleason (on behalf of Library and Board of Trustees of The Mount Vernon Public Library ["Board"]), and Timur A. Davis (on behalf of the Library and the Board).

The Court granted the plaintiffs permission to make a discovery motion limited to the issue of the depositions of the "two library employees" on March 28, 2024. Plaintiffs brought this motion on May 16, 2024, and subsequently stipulated to adjourn it to coincide with motion sequence no. 4. The plaintiffs neither requested nor received permission to make motion sequence no. 4.

In motion sequence no. 3, the plaintiffs argue that the depositions conducted to date have revealed that Newman and Stepak have knowledge of prior complaints to the Library regarding Davis. In motion sequence no. 4, the plaintiffs argue that Marable made public comments about the accusations against Davis, Jr. in a board meeting and thus, may very well have information regarding past complaints against him.

In an omnibus opposition, the Board and the Library oppose the plaintiffs' motions arguing primarily that the plaintiffs have not met their burden of showing why these depositions are necessary in light of the fact that they have already presented two witnesses in this case. Furthermore, the Board and the Library argue that the witnesses sought are non-party witnesses, rather than party witnesses.

Discussion

As an initial matter, and as the parties in this case are well aware, a party is not permitted to make a discovery motion without explicit permission of the Court:

> [n]o discovery-related motion (including a motion to dismiss predicated upon a discovery violation and including any discovery cross-motion) may be interposed and e-filed until a pre-motion conference has been requested and held…Motions filed before a pre-motion conference has been held may be denied unless there is shown good cause why such relief is warranted before the conference is held (22 NYCRR §202.12[h]).

(*see* Westchester Supreme Court Civil Case Management Rules[1]). Here, the plaintiffs' counsel obtained permission for only the first of the two motions pending before the Court regarding Newman and Stepak (NYSCEF Doc. No. 94 at p. 3). Indeed, the plaintiffs acknowledge as much in the affirmation of good faith for motion sequence no. 3 (NYSCEF Doc. No. 93). But, in the affirmation of good faith in motion sequence no. 4, the plaintiffs misrepresent that the Court also authorized motion practice as to "the depositions of employees" (NYSCEF Doc. No. 100). In this regard, the plaintiffs seek to circumvent the Court's rules. Thus, motion sequence no. 4 is denied on these grounds alone. Even if the merits of the arguments in motion sequence no. 4 were considered, the motion would have been denied for the same reasons as set forth below.

Turning to motion sequence no. 3, pursuant to CPLR 3124,

> [i]f a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, except a notice to admit under section 3123, the party seeking disclosure may move to compel compliance or a response

(*see* CPLR 3124). Similarly, pursuant to CPLR 3126,

> "If any party…refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them:
>
> 1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or
> 2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or

[1] WestchesterCivilRules.pdf (nycourts.gov)

> 3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party

(*see* CPLR 3126). "Disclosure in civil actions is generally governed by CPLR 3101(a), which provides that there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action" (*Sereda v. A.J. Richard & Sons, Inc.*, 219 AD3d 1458 [2d Dept 2023] [internal citations and quotations omitted]). Indeed, the Courts have "wide discretion" in determining what is "material and necessary" (*id.*). "Material and necessary" has been defined as "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason." (*Allen v. Crowell-Collier Publishing Co.,* 21 NY2d 403, 406 [1968]). "It is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims" (*Crazytown Furniture, Inc. v. Brooklyn Union Gas Co.*, 150 AD2d 420, 421 [2d Dept 1989]).

Furthermore, striking pleadings or preclusion is only appropriate when the party's refusal to turn over material and necessary discovery is willful and contumacious (*Bermudez v Laminates Unlimited, Inc.,* 134 AD2d 314, 315 [2d Dept 1987]). Here, the plaintiffs have not established willful and contumacious behavior (*see e.g. Schneider v City of NY,* 217 AD2d 610, 611 [2d Dept 1995]). Therefore, the Court focuses on the request to compel the depositions:

> [a] further deposition may be allowed where the movant has demonstrated that (1) the employee already deposed had insufficient knowledge, or was otherwise inadequate, and (2) the employee proposed to be deposed can offer information that is material and necessary to the prosecution of the case

(*Schiavone v Keyspan Energy Delivery NYC*, 89 AD3d 916, 917 [2d Dept 2011]; *see also Spohn-Konen v Town of Brookhaven*, 74 AD3d 1049, 1049 [2d Dept 2010]).

Here, the plaintiffs focus only on the second prong of their burden. Indeed, the plaintiffs argue that Newman and Stepak previously complained about Davis, Jr. and thus, "may likely" have knowledge of his "sexual propensity and possible other complaints" (NYSCEF Doc. No. 94 at pp. 5-6). However, the plaintiffs fail to establish why the prior depositions of the Library/Board employees were inadequate or why those individuals had insufficient knowledge. Indeed, they do not reconcile these prior witnesses' testimonies at all. The only reference to the prior depositions is a statement that the depositions of Gleason and Davis "revealed that additional discovery is needed as well as witnesses that are required to testify…" (*id.* at p. 3). On reply, the plaintiffs only argue that:

> [f]urthermore, the defendant's argument that the Library has already produced two witnesses and therefore has no obligation to produce additional witnesses is flawed. The plaintiffs have the right to depose witnesses with relevant knowledge, regardless of whether the defendant believes their testimony will be favorable. The *Zollner, Cea*, and *Gomez* cases cited by the defendants do not support their position and are distinguishable from the present case

(NYSCEF Doc. No. 114 at p. 5). The plaintiffs do not expand on their blanket statement that these cases are distinguishable. However, in each of the cases mentioned, the Second Department recites the same or substantially similar standard as to the necessity of additional depositions, including that the moving party must show that the prior witnesses had insufficient knowledge or were otherwise inadequate (*Zollner v City of NY*, 204 AD2d 626, 627 [2d Dept 1994] [movant met his burden when deposed witness testified that he did not witness how the accident occurred and instead identified two additional witnesses who actually observed the accident]; *Cea v Zimmerman*, 142 AD3d 941, 944 [2d Dept 2016] [burden met when movant established that on-scene EMTs each took different actions towards the plaintiff, and only two of those EMTs had been deposed]; *Gomez v State of NY*, 106 AD3d 870, 872 [2d Dept 2013] [burden met when the witness produced was not actually employed by the party, but rather a non-party, and had insufficient knowledge of the contract between the defendant and the plaintiff's employer in a labor law action]).

As such, because the plaintiffs have failed to establish that the testimony of Gleason and Davis were inadequate or that Gleason and Davis had insufficient knowledge, they have failed to meet their burden as to the necessity of further depositions. Furthermore, both parties have alluded to, but not substantiated, arguments regarding the party status of Newman and Stepak for purposes of production of the witnesses. This issue is one that the parties should be able to resolve without the Court's intervention and take the appropriate next steps accordingly.

The Court has considered the remaining arguments, which are found to be without merit.

Accordingly, it is

ORDERED that the plaintiffs' motions to compel (motion sequence nos. 3 & 4) are DENIED with leave to renew upon a proper showing and with permission of the Court.

Counsel shall virtually appear for the previously scheduled **Compliance Conference** on September 26, 2024 at **11:00 A.M.** Prior to the conference, a TEAMS link will be sent by Brenda Jordan-Williams, the Part Clerk

Dated: White Plains, New York
September 25, 2024

HON. ALEXANDRA D. MURPHY, J.S.C.