

Caguana v 111 W. 57th Prop. Owner, LLC

2025 NY Slip Op 34244(U)

November 6, 2025

Supreme Court, New York County

Docket Number: Index No. 158637/2016

Judge: Richard Tsai

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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. RICHARD TSAI PART 21

Justice

-----X

JORGE CAGUANA and ROSA ARQUI,
Plaintiffs,

INDEX NO. 158637/2016

MOTION DATE 11/3/25

MOTION SEQ. NO. 015

- v -

111 WEST 57TH PROPERTY OWNER, LLC, and
JDS CONSTRUCTION GROUP, LLC,
Defendants.

DECISION + ORDER ON MOTION

-----X

111 WEST 57TH PROPERTY OWNER, LLC, and
JDS CONSTRUCTION GROUP, LLC,
Third-Party Plaintiffs,

Third-Party
Index No. 595876/2021

-against-

SAFETY & QUALITY PLUS, INC. and SITE SAFETY LLC,
Third-Party Defendants.

-----X

The following e-filed documents, listed by NYSCEF document numbers (Motion 015) 391, 578-584, 586, 590, 591, 592, 600, 609, 610

were read on this motion to/for DISCOVERY.

Upon the foregoing documents, it is ORDERED that defendants' motion, by order to show cause, is GRANTED IN PART as follows:

- (1) the branch of the motion to compel non-party Elizabeth Gonzalez to appear for a further deposition to answer certain questions is GRANTED, and non-party Elizabeth Gonzalez is directed to appear for a further non-party deposition not exceeding one hour, within 7 days after service of a copy of this order with notice of entry;
(2) the branch of the motion to compel non-party Cristofer Caguana is GRANTED without opposition, and the non-party Cristofer Caguana is directed to appear for a non-party deposition not exceeding one hour, within 7 days after service of a copy of this order with notice of entry; and

(3) the trial is stayed pending the completion of the non-party depositions or until further order of this court; and is further

ORDERED that the remainder of the motion, including for sanctions against plaintiff's counsel, Frank Kelly, Esq., is **DENIED**.

In this action alleging violations of Labor Law §§ 200, 240 (1), 240 (2), 240 (3), 241 (6), plaintiffs were granted summary judgment in their favor as to liability on their Labor Law § 240 (1) claim against defendants (see NYSCEF Doc. No. 391). On September 22, 2016, while working as a carpenter on the ninth-floor of a construction site located at 111 West 57th Street, New York, New York, he stepped onto a plywood-covered hole and fell to the floor below (*id.* at 1).

According to the bill of particulars, plaintiff Jorge Caguana suffered, among other injuries, “[l]imitations, diminution and/or impairment of functions, activities, vocation, avocation and other activities which plaintiff engaged in prior to this accident” and “has and will continue to experience impairment, disruption and difficulty with daily activities, way of life and enjoyment of life including significant impairment of numerous daily activities that plaintiff had previously taken for granted” (see Eighth Supplemental Verified Bill of Particulars ¶ 19 [NYSCEF Doc. No. 598]).

This action is now assigned to this court for trial.

Prior to the assignment of this action to this court, defendants purportedly served subpoenas for non-party depositions upon plaintiffs' daughter and son, Elizabeth Gonzalez and Cristofer Caguana, respectively (see Exhibit C in support of mot, subpoenas and affirmations of service [NYSCEF Doc. No. 581]). Gonzalez's deposition was held on October 9, 2025 (see Exhibit D in support of mot, Gonzalez EBT [NYSCEF Doc. No. 582]).

On the eve of trial, defendants now move to compel a further deposition of Elizabeth Gonzalez and other related relief, on the ground that plaintiffs' counsel and Gonzalez's counsel improperly objected and obstructed Gonzalez's deposition. Defendants also seek sanctions against plaintiffs' counsel for the alleged conduct. Plaintiffs oppose the motion, but Gonzalez and Cristofer Caguana do not.

BACKGROUND

A claims officer from defendants' insurer claims that, on April 18, 2025, he received a call from plaintiffs' daughter, Elizabeth Gonzalez, and that during the call, Gonzalez purportedly told the claims officer that her father was committing fraud in this lawsuit and purportedly agreed to exchange photographs and videos of her father engaging in work and performing physically strenuous activity (see Exhibit B in support of mot, Turner affirm. ¶¶ 1, 3-4, 6 [NYSCEF Doc. No. 580]). Gonzalez purportedly told the claims officer that her brother, Cristofer, also wanted “to speak about the fraud committed by their father's, Jorge Caguana [sic]” (*id.* ¶ 7).

According to the claims officer, he received an e-mail dated April 18, 2025 purportedly from Cristofer Caguana (*id.* ¶ 8). The email states:

Outlook

(EXTERNAL) P220-145078

From Cristofer Caguana <[REDACTED]>
Date Fri 4/18/2025 10:15 AM
To Turner, Jeffrey <[REDACTED]>

My father had a construction accident 6-7 years ago while working for Parkside. His case is very serious, and we have evidence against them. I would like to speak with you to understand what type of evidence you need against them.

My phone number is 929-[REDACTED].

My sister's number is +1 (347) [REDACTED] (Elizabeth).

(see Exhibit A to Turner affirm.).

On or about September 11 and 15, 2025, defendants served Gonzalez and Cristofer to appear for non-party depositions on October 9, 2025 (see Exhibit C in support of mot).

Gonzalez's deposition was held on October 9, 2025 (see Exhibit D in support of mot). Plaintiffs' counsel, Frank Kelly, Esq., was present at the deposition, and Joshua W. Skillman, Esq. represented Gonzalez (see Gonzalez EBT, at 2 [NYSCEF Doc. No. 582]).

Plaintiffs' counsel objected when Gonzalez was asked to provide her telephone number, and Gonzalez's counsel directed the witness not to answer (see Gonzalez EBT, at 14, line 22 through 15, line 8).

Additionally, Gonzales declined to answer several other questions. Gonzalez declined to provide the name of her husband, the person who purportedly was served with Gonzalez's subpoena (*id.* at 16, line 23). She also declined to answer questions about the photographs she had taken of her father since the accident (*id.* at 76, line 25 through 77, line 3; at 78, lines 7-11). She declined to answer any questions about any social media accounts that she might maintain (*id.* at 79, lines 18-19). Lastly, Gonzalez declined to provide the name of her cell phone carrier (*id.* at 84, line 22; at 86, lines 6-7).

During the deposition, plaintiffs' counsel asserted an "interfamilial privilege" and directed Gonzalez's counsel to instruct the witness not to answer (Gonzalez EBT, at 26, line 21 through 27, line 13). Plaintiffs' counsel asserted the privilege in response to a question that plaintiffs' counsel believed was based on information from conversations between plaintiffs and Gonzalez (*id.* at 26, lines 21-25). Plaintiff's counsel raised the "interfamilial privilege" six more times during the deposition, and Gonzalez's counsel

directed the witness not to answer (*id.* at 32, lines 6-8; at 34, line 24; at 35, line 25 through 36, line 2; at 40, lines 17-18; at 74, lines 8-11; at 74, lines 20-22).

Defendants' counsel claims that she attempted to contact the judge previously assigned to the case for rulings at the deposition, but she was instructed to mark the issues for a ruling and to request a discovery conference for rulings (Gonzalez EBT, at 14, lines 15-23). According to defendants' counsel, defendants brought the order to show cause because they were still waiting for a discovery conference and rulings from the judge previously assigned to his case.

DISCUSSION

As a threshold issue, the court rejects the argument of plaintiffs' counsel that the court cannot consider the affirmation of the claims officer at all because it contains hearsay. In the context of this motion, the court is not considering the statements made to the claims officer for their truth, but rather to explain the actions of the defendants in seeking post-note of issue depositions of the two nonparties on the eve of trial, long after the note of issue was filed.

The branch of defendants' motion to compel Elizabeth Gonzalez to appear for a further deposition is granted, because those objections that plaintiffs' counsel and the witness asserted that are challenged on this motion are overruled.

Gonzalez had no valid basis to decline to answer a question about her telephone number. The telephone number can corroborate whether Gonzalez contacted defendants' insurance carrier and can corroborate whether the email purportedly from Cristofer Caguana was authentic. Gonzalez had no valid basis to decline to answer questions about photographs she had taken of her father since the accident or questions about any social media accounts that she might maintain (where she might have posted photographs of her father after the accident). The question about Gonzalez's cell phone provider was utterly irrelevant, but Gonzalez would not suffer any significant prejudice had she provided her cell phone provider's identity (see 22 NYCRR 221.2).

Plaintiffs' reliance upon an "interfamilial privilege" is unavailing. The authorities that plaintiffs' counsel cites recognize a "parent-child privilege," which is discussed in the Guide to NY Evidence:

"5.50 Parent-Child Privilege

(1) Subject to the remaining provisions of this rule, a parent or person legally responsible for the care of a child shall not be compelled or allowed, without the consent of the child, to disclose a confidential communication by the child to the parent or person legally responsible for the care of a child for the purpose of obtaining support, advice, or guidance.

(2) A child for purposes of the privilege set forth in this rule is, at least, a person who has not attained the age of 18 years.

(3) The privilege is normally waived when the communication is knowingly made in the presence of a third party. The privilege, however, will not be waived when the child is in police custody and the police decline to afford the parties privacy or in the alternative to warn them that if their communications are overheard, they may be testified to by the person who overhears them.

(4) A communication by a child to his or her parent or person legally responsible for the child's care is not privileged if the communication was contrary to the maintenance of familial relationships and the societal interest in protecting and nurturing the parent-child relationship, such as a communication about a crime committed against a member of the family or household" (Guide to NY Evid rule 5.50, Parent-Child Privilege, https://nycourts.gov/JUDGES/evidence/5-PRIVILEGES/5.50_Parent-child_Privilege.pdf [last accessed Nov. 5, 2025] [emphasis supplied]).

The rationale for the parent-child privilege was set forth in *Matter of A & M*, 61 AD2d 426 [4th Dept 1983]), the seminal decision that recognized the privilege, which plaintiffs' counsel had cited at the deposition (Gonzalez EBT, at 27, lines 3-4). There, the court reasoned,

"It would be difficult to think of a situation which more strikingly embodies the intimate and confidential relationship which exists among family members than that in which a troubled young person, perhaps beset with remorse and guilt, turns for counsel and guidance to his mother and father. There is nothing more natural, more consistent with our concept of the parental role, than that a child may rely on his parents for help and advice. Shall it be said to those parents, 'Listen to your son at the risk of being compelled to testify about his confidences?' . . .

"Surely the thought of the State forcing a mother and father to reveal their child's alleged misdeeds, as confessed to them in private, to provide the basis for criminal charges is shocking to our sense of decency, fairness and propriety. It is inconsistent with the way of life we cherish and guard so carefully and raises the specter of a regime which encourages betrayal of one's offspring" (*Matter of A & M*. at 429, 433-434.)

The parent-child privilege does not apply here because Gonzalez is not a child under the age of 18. Additionally, the parent-child privilege applies to a confidential communication by the minor child, not to communications that the child received from a parent. The court is unpersuaded that the parent-child privilege should be either

enlarged to apply to adult children or expanded to the equivalent of a marital/spousal privilege.

Thus, Gonzalez was improperly instructed not to answer questions on the ground of “interfamilial privilege.” Defendants are therefore entitled to a further deposition of Gonzalez because of the improper directions not to answer and because of her refusal to answer questions that did not implicate any privilege, limitation, or significant prejudice.

Plaintiffs’ counsel nevertheless argues that defendants’ counsel “continued to badger the witness and ask repetitive questions in an attempt to change her answers” (affirmation of plaintiffs’ counsel in opposition ¶ 20 [NYSCEF Doc. No. 600]). Having reviewed the deposition transcript, the court disagrees with plaintiffs’ counsel’s characterization of what transpired. It is the court’s view that, on balance, defendants’ counsel was not badgering the witness, but rather defendants’ counsel had properly repeated certain questions to the witness in order to obtain a clear, uninterrupted record that was free of the interjections from plaintiffs’ counsel and the witness’s counsel.

Neither is the court persuaded that Gonzalez’s testimony would be “hopelessly collateral.” The affirmation of the claims officer is an offer of proof that Gonzalez possesses personal knowledge and/or documentary evidence that would bear and/or refute any physical limitations that her father claims to have suffered after the accident.

However, the court does agree with plaintiffs’ counsel that certain questions were irrelevant to the issues of the action, such as how the witness came to be represented by counsel and the role of plaintiffs’ counsel, if any, in obtaining such representation (see Gonzalez EBT, at 20, line 20 through 22, line 24). Additionally, contrary to the contentions of defendants’ counsel, plaintiffs’ counsel did not direct the witness not to answer questions. In the three instances which defendants’ counsel cites (see affirmation of defendants’ counsel in support ¶ 35), plaintiffs’ counsel raised an objection and stated that the witness may answer (see Gonzalez EBT at 63, lines 19-20; at 66, lines 9-10; at 94, lines 2-3). This cannot be interpreted as a direction not to answer.

Thus, the court exercises its discretion to limit the further deposition of Gonzalez to one hour.¹

The branch of defendants’ motion seeking a determination that Gonzalez had no attorney-client relationship with plaintiffs’ counsel, Gorayeb & Associates, P.C., for the purpose of asserting attorney-client privilege is denied.

¹ The court notes that the subpoena for Gonzalez’s deposition scheduled the deposition for 10 a.m. on October 9, 2025, while the subpoena for Cristofer Caguana’s deposition scheduled the deposition for 11:30 a.m. on the same day, which leads to the conclusion that defendants’ counsel only needed 1.5 hours for Gonzalez’s deposition.

Gonzalez testified that, when she received a subpoena, "I immediately called my father's attorneys and they advised me that they cannot represent me and they gave me Mr. Skillman's contact information" (Gonzalez EBT, at 16, lines 11-17). Defendants' counsel appears to acknowledge that, under Rule 1.18 of the Rules of Professional Conduct (22 NYCRR 1200.0), Gonzalez could be considered as a prospective client. "[T]he attorney-client relationship can encompass a preliminary consultation even where the prospective client does not ultimately retain the attorney" (*Pellegrino v Oppenheimer & Co., Inc.*, 49 AD3d 94, 99 [1st Dept 2008]). Additionally, Rule 1.18 (b) states, "Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client." Thus, it does not follow from the fact that Gonzalez was not accepted as a client that defendants' counsel may inquire as to all communications that Gonzalez had with Gorayeb & Associates, P.C.

The court cannot give an advisory opinion to defendants' counsel as to which questions would be permissible.

The branch of defendants' motion to compel Cristofer Caguana to appear for a deposition is granted without opposition. It is undisputed that Cristofer left the building before his deposition could commence (affirmation of defendants' counsel in support ¶ 16 [NYSCEF Doc No. 586]). According to defendants' counsel, Cristofer Caguana's counsel agreed to reschedule, but had not provided an alternate date (*id.*).

The court exercises its discretion to limit the Cristofer Caguana's deposition to one hour, which is sufficient time for defendants' counsel to ask Cristofer Caguana to authenticate the email that was purportedly sent to the claims officer and to inquire as to what "evidence against them [plaintiffs]," if any, Cristofer had to offer.

Lastly, the branch of defendants' motion for sanctions against plaintiffs' counsel is denied. Although plaintiffs' counsel's assertion of "interfamilial privilege" was unavailing, the conduct of plaintiffs' counsel at the deposition "was not so egregious as to constitute frivolous conduct within the meaning of 22 NYCRR 130-1.1" (*Nugent v City of New York*, 189 AD3d 631, 632 [1st Dept 2020]). The allegations concerning the existence of "Ring doorbell video" are not considered, as they were raised for the first time in reply.

This constitutes the decision and order of the court.



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<u>11/6/2025</u>				<u>RICHARD TSAI, J.S.C.</u>	
DATE					
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		