

Discover Prop. & Cas. Ins. v City of New York

2007 NY Slip Op 32413(U)

August 1, 2007

Supreme Court, New York County

Docket Number: 0108873/2005

Judge: Eileen A. Rakower

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

PRESENT: HON. EILEEN A. RAKOWER
Justice

PART S

DISCOVER
- v -
City of New York

INDEX NO. 108873/05
MOTION DATE _____
MOTION SEQ. NO. 03
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1</u>
Answering Affidavits — Exhibits _____	<u>2</u>
Replying Affidavits _____	<u>3</u>

Cross-Motion: Yes No

FILED

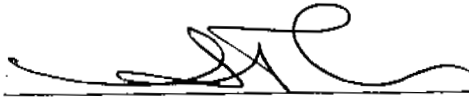
AUG 06 2007

NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

Dated: 8/1/07



HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

-----X
DISCOVER PROPERTY AND CASUALTY INSURANCE
a/s/o EATWELL ENTERPRISES, LP d/b/a AUREOLE and EATWELL
ENTERPRISES, LP d/b/a AUREOLE,

Plaintiff,

Index No.
108873/05

- against -

FILED
AUG 06 2007
DECISION/ORDER

NEW YORK
COUNTY CLERK'S OFFICE
THE CITY OF NEW YORK AND CITY OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Defendants.

-----X
HON. EILEEN A. RAKOWER

Plaintiffs bring this action for property damage suffered by plaintiff, Eatwell Enterprises, LP d/b/a Aureole, ("Aureole"), a restaurant, after a water main break, street collapse and sewage backup flooded the premises on April 8 and April 9, 2004. Aureole is located at 34 East 61st Street, New York, New York. Plaintiff Discover Property and Casualty Insurance ("Discover") brings a subrogation action against defendants the City of New York and the City of New York Department of Environmental Protection ("City"). Discover now moves to strike the City's answer pursuant to CPLR §3126 and seeks costs. City opposes the motion.

Discover, in support of its motion, submits an initial Case Scheduling Order ("CSO") which was entered into on February 14, 2006, requiring defendants to produce maintenance, repair and inspection records and written complaints, incident and accident reports and other records within 90 days of the order. Depositions were scheduled for June 12, 2006. Discover argues that the CSO was not complied with. On July 18, 2006 a compliance conference was held which produced an order directing the City to respond to the CSO within thirty days. Depositions were scheduled for August 4, 2006 or, alternatively, October 10, if records were not produced by the City before that date. A compliance conference was held on October 17, 2006 and an order was issued. That order stated that City "claims full compliance

with prior orders of the court, other than Sprint records. . .City shall produce these records on or before November 17, 2006.”

Discover argues that, as of the October 17, 2006 order, only some of the previously ordered documents had been produced and that the City had not appeared at its scheduled deposition. Also on October 17, 2006, Discover served City with a notice to produce, claiming that it had not received complete records from the City. The notice lists fifty-two items (See Discover Ex. 6). City responded by serving a motion for a protective order striking Discover’s notice to produce. An order was issued on February 2, 2007 which directed depositions to take place on April 5, 2007. All parties could serve post-deposition D&I’s within thirty days of receipt of the transcripts. Additionally, after Discover received the transcripts, it could request City respond to the October 17, 2006 Notice to Produce by letter within thirty days of receipt.

Discover next argues that although City did produce Joseph Anzueta, for deposition On April 5, 2007, the deposition was cut short because the witness was “double booked” and had to leave. Mr. Anzueta was a Supervisor of Field Operations for the Department of Environmental Protection (“DEP”) in 2004. Discover claims, the witness produced did not have knowledge of the case and that he referred to several other witnesses who would provide essential information about the case.

Q: Did you respond to a street collapse and water main break on April 7, 2004 about the location of 61st Street and Madison Avenue?

A: No, I did not.

Q: Do you have any personal knowledge about that occurrence?

A: No, I don’t. (Anzueta Deposition, Page 12, Lines 9-15).

Q: Now I intended to ask the City witness who appeared today certain questions regarding maintenance of the particular water main that was the subject of this incident in April of 2004. Do you have any personal knowledge of the maintenance of the water main at issue?

A: No, I do not.

Q: Who would?

A: That would be the water department. (Anzueta Deposition, Page 21, Lines 3-11).

...

Q: In the chain of command within the water department who is the person most senior?

...

A: Would be a chief.

Q: Do you know the person's name?

A: Steve Camiore.

...

Q: Was he employed by DEP in April of 2004?

A: Yes, he was. (Anzueta Deposition, Page 21, Lines 16-24).

...

...

Q: As chief of field operations within the water department of the borough of manhattan in April of 2004 has Mr. Camiore been made aware of a water main break occurring at or about East 61st Street and Madison Avenue in April of 2004?

A: Yes.

...

Q: As chief would Mr. Camiore have personally responded to the location of the water main break? Is that part of his duties?

A: Yes. (Anzueta Deposition, Page 23, Lines 1-4).

Mr. Anzueta also refers to another supervisor, Mr. Baerga, who responded to a complaint that there was a sinking manhole at the subject location in August, 2003. Mr. Anzueta states that Mr. Baerga is still employed by the DEP. (Anzueta Deposition, Page 31, Lines 19-25, Page 32, Lines 1-7). Jeffrey Venezia, was another supervisor whose name was on the papers in response to the complaint, and who is still employed by the DEP. (Anzueta Deposition, Page 35, Lines 13-23).

Mr. Anzueta refers to several documents that existed which the City did not previously provide including: a handwritten report made by a supervisor; the back page of a "complaint ticket" which includes a supervisors report; a detailed investigation report that Mr. Anzueta stated supervisors normally keep; and a "sewer analysis" report.

City, in opposition, acknowledges that its witness testified to the existence of additional documents but that it was not aware that such documentation existed until that time. City argues that it did not "double book" its witness on April 5, 2006.

Rather, it claims that the witness was scheduled for another deposition at 1:00 p.m. and that he was late for Discover's 10:00 a.m. deposition. Thus, City argues, it had to cut the deposition short. City offered to make the witness available for a continued deposition on April 26, 2007 but City claims that Discover refused to appear. Further, City argues that it has the right to identify a witness who had sufficient knowledge and that it produced such a witness.

CPLR §3126states:

If any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or wilfully 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:

(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.

In order to show that additional depositions are necessary, the moving party must show (1) that the representatives already deposed had insufficient knowledge, or were otherwise inadequate, and (2) there is a substantial likelihood that the persons sought for depositions possess information which is material and necessary to the prosecution of the case. (*Saxe v. City of New York*, 250 A.D.2d 751, 752 [2nd Dept. 1998]). Plaintiffs must demonstrate a substantial likelihood that the witness they desired to depose possessed information material and necessary to the prosecution of their case. (*Duhe v. Midence*, 1 A.D.3d 279[1st Dept. 2003]).

The City witness stated that there were specific additional documents available. City acknowledges that it is now aware of the existence of the documents referred to in Mr. Anzueta's testimony. Further, Discovery has shown that there is a substantial likelihood that the additional witnesses named during Mr. Anzueta's deposition possessed information material and necessary to the prosecution of their case.

Wherefore it is hereby

ORDERED that defendant the City of New shall produce: the handwritten report made by a supervisor; the back page of the "complaint ticket" which includes a supervisors report; a detailed investigation report that Mr. Anzueta stated supervisors normally keep; and the "sewer analysis" report referenced in the April 5, 2007 deposition, to the extent that they exist. If such documents do not exist, defendant the City of New York shall provide an affidavit detailing their attempts to locate the documents by SEPTEMBER 10, 2007, and it is further

ORDERED that defendant the City of New York shall provide all other outstanding discovery, and it is further

ORDERED that defendant the City of New York shall produce Steve Camiore, Mr. Baerga, and Mr. Venezia, the three witnesses referenced in the deposition of Joseph Anzueta, for further deposition.

This constitutes the Decision and Order of this Court. All other relief requested is denied.

DATED: AUGUST 1, 2007



EILEEN A. RAKOWER, J.S.C.

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AUG 06 2007
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