

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

PRESENT: HON. ROBERT DAVID KALISH PART IAS MOTION 29EFM

Justice

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NICHOLI JOHNSON and LISA JOHNSON,

Plaintiffs,

- v -

TIME WARNER CABLE NEW YORK CITY LLC and
CONSOLIDATED EDISON COMPANY OF NEW YORK,
INC.,

Defendants.

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INDEX NO. 155531/2017

MOTION DATE 5/27/2020

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84

were read on this motion to/for DISCOVERY.

Motion by Plaintiffs Nicholi Johnson and Lisa Johnson (collectively, "Plaintiffs"), pursuant to CPLR 3124, to compel Defendant Time Warner Cable New York City LLC (TWC") and its counsel Hurwitz & Fine, P.C. ("H&F") to: (a) produce for examination by remote means, non-party Mike Sicsko ("Sicsko"); (b) produce for examination by remote means, non-party Javier Duque ("Duque"); (c) produce for examination by remote means a TWC witness ("the Field Services Witness") with knowledge of its Field Services Department and related CATV operations on Staten Island, New York at or about the time of the subject incident, August 21, 2014; and (d) remove the subject "midspan clamp" and remaining "messenger" wire from the site of the incident for expert inspection, evaluation and testing. In the alternative, Plaintiffs move for an order pursuant to CPLR 3126 prohibiting TWC from supporting or opposing its claims or defenses by introducing any affidavit or testimony of Sicsko, Duque or TWC in evidence; or introducing evidence of the conditions at the site and time of the incident sought to be determined at trial.

For reasons that will be explained below, Plaintiffs' motion is granted in part to the extent that the parties are to take the depositions of Sicsko, Duque, and the Field Services Witness (collectively, the "Remote Witnesses") by remote means – through a service such as Veritext Virtual or one of similar functionality as agreed upon by the parties – upon Plaintiffs serving the parties with a copy of this decision and order with notice of entry. With regard to the branch of the motion seeking to compel TWC and H&F to remove the subject "midspan clamp" and remaining "messenger" wire from the site of the incident for expert inspection, evaluation and testing, this branch is denied without prejudice to Plaintiffs making a renewed application for said relief upon the Phase 2 reopening of Staten Island.

BACKGROUND

This is an action for common law negligence and violations of the Labor Law. In sum and substance, on August 21, 2014, Plaintiff Nicholi Johnson (“Nicholi”) allegedly fell 25-30 feet from his ladder as he was performing repair work on cable wires in Staten Island. At the time Nicholi was employed by Midtown Express, LLC (“Midtown”), a “field services” subcontractor of TWC. Plaintiffs assert that the accident occurred because the portion of the cable wires known as the “Suspension Strand was improperly installed and improperly tensioned, causing excessive movement in the strand and consequently, dangerous movement of the ladder which Nicholi was required to use.” (NYSCEF Doc. No. 50 [Affirm in Supp] ¶ 11.)

On the instant motion, Plaintiffs seek to compel depositions of the following witnesses by remote means:

- (a) Sicsko, the former Vice-President of Operations for Midtown;
- (b) Duque, the former Safety Foreman for Midtown; and
- (c) The Field Services Witness.

TWC does not oppose having the above depositions taken, but argues that these depositions should occur in the traditional, in-person format, after social distancing restrictions related to the current COVID-19 pandemic have been lifted. Indeed, prior to the onset of the pandemic, the parties had agreed that Duque’s deposition would be held in the town of his residence Alpharetta, Georgia and that Sicsko’s deposition would be held in New York. (NYSCEF Doc. No. 58 [January 14, 2020 CC Order].)

In addition to seeking the depositions of the aforesaid Remote Witnesses, Plaintiffs also request that the Court compel TWC to remove and preserve certain portions of the subject cable wires known as the subject “midspan clamp” and the “messenger wire.” TWC notes that the parties previously agreed to additional non-destructive inspection + testing of remaining clamps/wires at Incident Location on or before 3/31/20; the parties will consult on destructive testing upon completion of inspection.” (NYSCEF Doc. No. 64 [Memo in Opp] at 10, quoting January 14, 2020 CC Order[.]) TWC argues that it “must have its designated representative present at all stages of the inspection and testing, which will require that representative to be able to do so under the then existing executive order and restrictions in place relative to the COVID-19 pandemic.” (Id. at 11.)

DISCUSSION

I. Depositions of the Remote Witnesses

Pursuant to CPLR 3103 (a), the trial court may regulate “any disclosure device” in order to “prevent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice.” (Id.) “The decision to allow a party or witness to testify via video conference link is left to a trial court's discretion.” (*Am. Bank Note Corp. v Daniele*, 81 AD3d 500, 501 [1st Dept 2011].) When a party seeks to appear for a deposition in a manner other than by appearing in person within the

state of New York, as required by CPLR 3110 (a), that party must demonstrate that so appearing would cause “undue hardship.” (*LaRusso v Brookstone, Inc.*, 52 AD3d 576, 577 [2d Dept 2008].)

Here, there is no dispute that appearing for a deposition in person during the current COVID-19 pandemic would cause the Remote Witnesses, the lawyers, and the court reporter “undue hardship,” place them in potential danger, and is not feasible as practical matter. The dispute here is how to address this hardship and danger. Plaintiffs argue that the depositions should occur via video-conference as this is a safe and legal alternative to appearing in person and complies with social distancing requirements. TWC’s counsel argues that the depositions should be postponed indefinitely until the pandemic restrictions are lifted. Currently, there is no prediction for when all of the pandemic restrictions will be lifted.

While no side claims that it lacks the ability to conduct these depositions by video—and, indeed, during a pre-motion Skype for Business conference, TWC’s counsel noted that he had recently conducted a six-hour deposition by remote means in another case—TWC’s counsel argues that the depositions of the Remote Witnesses should be taken in-person because he himself, TWC, Sicsko and Duque “do not feel comfortable participating in a deposition conducted by videoconference technology.” (NYSCEF Doc. No. 62 [Sicsko Aff.] ¶ 4.) During a Skype for Business conference with this Court, TWC’s counsel argued that he would be prejudiced if he was not able to sit next to the Remote Witnesses during their depositions; and he further stated that he was unable to travel during the pandemic. TWC’s counsel argues that the prejudice would be particularly acute in this case because of the nature and severity of Nicholi’s injuries.

TWC's counsel further argues that the parties also need to conduct an inspection of the incident location, which cannot occur until the pandemic restrictions are relaxed. As such, TWC's counsel argues that the action cannot be put on the trial calendar until the pandemic restrictions are relaxed, regardless. Furthermore, TWC’s counsel argues that even if the case is put on the trial calendar, it remains unclear when jury trials will resume in New York County. TWC’s counsel argue that,, as such, there is no rush to take the depositions of the Remote Witnesses.¹

This Court disagrees with TWC’s counsel. To delay discovery until a vaccine is available or the pandemic has otherwise abated would be unacceptable. It goes without saying that business as usual is no longer the normal. The legal profession and its clients are currently coming to grips with the “new normal” brought about by the COVID-19 pandemic. Among other things, this “new normal” means that it is no longer safe and practical for depositions to be taken in person, as was the default during the “old normal.” TWC’s counsel suggests that this case should simply be put on hold until the “old normal” returns.

However, as in any case, there is always a concern that a witness may become unavailable to testify for any number of reasons, including illness or death. During a pandemic,

¹ Although neither Duque or Sicsko are employed by TCW, they are represented by TWC’s counsel and TWC’s counsel previously agreed to produce them. As such, this Court rejects any assertion by TWC’s counsel that he lacks sufficient control of Duque or Sicsko to produce them for depositions by remote means.

this concern is stronger. Moreover, it remains uncertain how soon the “old normal” will return—if it ever does.²

Although TWC’s counsel feels that he will be prejudiced by not being able to physically sit next to the Remote Witnesses during their depositions, this order does not prohibit him from doing so. To the extent that the law and social distancing guidance allow, TWC’s counsel (or a co-counsel of his choosing) may be in the same room sitting next to these Remote Witnesses while Plaintiff’s counsel appears by remote means.

As such, this Court exercises its discretion to order that the Remote Witnesses be deposed by remote means.

II. Removal of the Subject Midspan Clamp and Messenger Wires

Given that the New York City area has not begun any phase of reopening its economy—unlike the upstate regions—it would be ill-advised for this Court to compel any removal of the subject wires and clamps at this time. To do so might unnecessarily require certain individuals to work in close proximity or it might redirect TWC personnel away from essential operations.

It would appear to the Court that the better course is for the parties, as previously agreed during the January 14, 2020 compliance conference, to conduct “additional non-destructive inspection + testing of remaining clamps/wires at [the] Incident Location” within thirty (30) days of Staten Island entering Phase 2 of reopening its economy pursuant to New York State’s PAUSE Order.

Further, pursuant to the May 19, 2020 telephone conference, the parties have agreed to the examination of the clamp at a date to be agreed upon.

To the extent that the parties cannot agree on whether or not to remove certain hardware from the Incident Site, Plaintiffs shall have leave to renew the branch of the instant motion seeking such removal, upon Staten Island entering Phase 2 of reopening its economy pursuant to New York State’s PAUSE Order.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion by Plaintiffs Nicholi Johnson and Lisa Johnson (collectively, “Plaintiffs”), pursuant to CPLR 3124, to compel Defendant Time Warner Cable New York City LLC (TWC”) and its counsel Hurwitz & Fine, P.C. (“H&F”) to: (a) produce for examination by remote means, non-party Mike Sicsko (“Sicsko”); (b) produce for examination by remote means, non-party Javier Duque (“Duque”); (c) produce for examination by remote means a TWC

² In a similar vein, as the United States Supreme Court explained to one president seeking to stay a lawsuit against him until the end of his presidency, delaying litigation “would increase the danger of prejudice resulting from the loss of evidence, including the inability of witnesses to recall specific facts, or the possible death of a party.” (*Clinton v Jones*, 520 US 681, 707-08 [1997].)

witness (“the Field Services Witness”) with knowledge of its Field Services Department and related CATV operations on Staten Island, New York at or about the time of the subject incident, August 21, 2014; and (d) remove the subject “midspan clamp” and remaining “messenger” wire from the site of the incident for expert inspection, evaluation and testing is GRANTED IN PART to the extent that this Court orders that upon service of a copy of the instant decision and order with notice of entry, TWC’s counsel H&F shall produce Sicsko, Duque, and the Field Services Witness (“the Remote Witnesses”) for depositions by remote means, which will occur on Veritext Virtual or a similar platform for remote depositions as agreed upon by the parties, and the motion is otherwise denied without prejudice to Plaintiffs’ having leave to renew the branch of said motion seeking removal of certain hardware from the incident location upon Staten Island entering Phase 2 of reopening its economy pursuant to New York State’s PAUSE Order; and it is further

ORDERED that depositions of the Remote Witnesses shall take place as follows:

- a) TWC’s counsel shall produce Sicsko on or before June 26, 2020;
- b) TWC’s counsel shall produce Duque on or before July 17, 2020; and
- c) TWC’s counsel shall produce Field Services Witness on before July 24, 2020 (and if there is no such witness available, TWC’s counsel shall so inform Plaintiff’s counsel via an affidavit from a person with knowledge within five (5) days of being served with notice of entry of the instant decision and order);

And it is further

ORDERED that Plaintiffs’ counsel shall serve a copy of the instant decision and order with notice of entry within five (5) days of the NYSCEF filing date of the instant decision and order.

The foregoing constitutes the decision and order of this Court.

5/28/2020
DATE


ROBERT DAVID KALISH, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
			<input type="checkbox"/>	DENIED	
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"/>
					<input type="checkbox"/>
					REFERENCE