

<b>Passantino v City of New York</b>
2023 NY Slip Op 35016(U)
January 19, 2023
Supreme Court, Bronx County
Docket Number: Index No. 22973/2014E
Judge: Wilma Guzman
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX

-----X  
JOSEPH PASSANTINO,

Plaintiff,

-against-

THE CITY OF NEW YORK, NEW YORK CITY  
SCHOOL CONSTRUCTION AUTHORITY, NEW  
YORK CITY DEPARTMENT OF EDUCATION, and  
ADMIRAL CONSTRUCTION LLC.,

Defendants.

-----X  
THE CITY OF NEW YORK and NEW YORK CITY  
DEPARTMENT OF EDUCATION,

Third-Party Plaintiffs,

-against-

VERIZON COMMUNICATIONS INC., and  
AT&T CORP.,

Third-Party Defendants.

-----X  
GUZMAN, J.

**DECISION AND ORDER**

Index No.: 22973/2014E

Motion Sequence No. 9

Plaintiff commenced this action to recover damages for personal injuries he allegedly sustained as a result of an accident on December 16, 2013, on the grounds of P.S. 277 located at 519 St. Ann Avenue, in Bronx, New York. Plaintiff, who was employed as a Lineman/Field Technician for Verizon at the time of the accident, alleges that he was installing fiber optic cable at the location, and was walking on top of scaffolding on the premises in order to access a cable box, when he tripped and fell.

At the time, construction at the subject school was being conducted by Defendant Admiral Construction LLC, pursuant to a contract with the New York City School Construction Authority. The City of New York contracted with AT&T to provide and install internet, cable, and related services at P.S. 277. AT&T entered into a subcontract with Verizon. The complaint alleges violation of Labor Law §§ 200, 240 (1), and 241 (6).

The City of New York and New York City Department of Education (“the City Defendants”) subsequently filed a third-party action against Verizon and AT&T for indemnification and breach of contract. Verizon moved for summary judgment on the grounds

that it was insulated from common law liability by Workers Compensation Law § 11, and had no agreement with the City Defendants, and thus owed no contractual indemnification. By Decision and Order dated July 9, 2021, this Court granted Verizon's motion for summary judgment and dismissed the City Defendants' third-party complaint against Verizon.<sup>1</sup>

The City Defendants' third-party complaint against AT&T alleges, *inter alia*, that AT&T entered into a contract with Verizon whereby Verizon was to install citywide internet and cable service; under the Master Services Agreement, Verizon, its employees, agents, and assigns, were acting as agents of AT&T; and Paragraph 8.1(d)(i)(a) of the Master Services Agreement required AT&T to perform installation, maintenance, and other agreed upon services in conformity with reasonable precautions designed to promote safety, avoid accident, and prevent injury to person or property at the locations of such service. The complaint alleges causes of action for breach of contract, declaratory judgment and contractual indemnification, common law indemnity and contribution. Insofar as is relevant here, the sixth cause of action alleges that AT&T had a common law duty to provide competent staff; Plaintiff "was not fit to be working as he was not a competent employee" and was not "properly trained," and AT&T breached the duty of care owed to the City Defendants by allowing Verizon to "provide" Plaintiff, who had sustained prior injuries that impeded his ability to work effectively and safely; it was reasonably foreseeable "that an injury would result from allowing Plaintiff to perform tasks for which he was not fit to partake; and "Verizon returned Plaintiff to work prematurely to perform installations causing him to sustain injuries, including but not limited to the undoing of his surgically repaired left shoulder."<sup>2</sup>

On May 25, 2022, Counsel for the City Defendants served a so-ordered subpoena on Verizon seeking the following:

- (1) documents authored by or in the possession of Verizon depicting its policies and procedures in effect from 2010-2013

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<sup>1</sup>Workers Compensation Law § 11 bars claims for contribution or indemnification (except for contractual indemnification claims) against an employer by any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment unless the injured person suffer a "grave injury," defined, *inter alia*, as death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia. Here, Plaintiff's injuries are not "grave injuries" and there is no contract between Verizon and the City Defendants, and hence no claim for contractual indemnification.

<sup>2</sup>At his deposition, Plaintiff testified that he had sustained several work-related injuries prior to his accident on December 16, 2013.

pertaining to line of duty injuries sustained by its employees;

(2) documents authored by or in the possession of Verizon regarding its policies and procedures in effect from 2010-2013 for any "return to work program" including policies regarding reporting injuries, employees returning to work after injury, fitness for duty, changes of duty due to physical incapacity, and policies regarding working in a physically restricted capacity and/or with modifications;

(3) documents authored by or in the possession of Verizon regarding its policies and procedures in effect from 2010-2013 for compliance with the ADA, and any policies and procedures governing circumstances when an employee's duties should be modified due to injury, incapacity or disability;

(4) a copy of the Verizon MSA;

(5) documents pertaining to the capabilities and qualifications of workers assigned work pursuant to the Verizon MSA;

(6) Communications, between Verizon and AT&T regarding the qualifications and capabilities of workers assigned by Verizon to perform work pursuant to the Verizon MSA, including but not limited to directions from AT&T to Verizon mandating that workers be physically capable of performing the work called for in the Verizon MSA;

(7) documents authored by or in the possession of Verizon related to any and all employment personnel records of Plaintiff including (a) Fitness for Duty Reports; (b) Records of work-related injuries and absences; (c) Performance evaluations; and (d) Workers' Compensation claims.

Most, if not all of these documents were also sought by the City Defendants during discovery when Verizon was still a party to this action, although no documents were produced. *See* NYSCEF Doc. No. 306. On September 3, 2021, the City Defendants also served a subpoena duces tecum on Verizon to obtain these documents. Verizon contended that the subpoena sought confidential and proprietary records. However, Verizon ultimately agreed to produce the documents pursuant to a confidentiality agreement drafted by Verizon's counsel. It appears that all parties agreed on the terms of the confidentiality agreement, with the exception of Plaintiff.

On the motion before the Court, Verizon now moves to quash the instant subpoena

pursuant to CPLR § 2304 on the grounds that the documents and information sought are irrelevant to this action. In the alternative, Verizon moves for a protective order pursuant to CPLR § 3103 on the grounds that the documents and information sought are confidential and require protection.

Pursuant to CPLR § 3101(a)(4), a party may obtain discovery from a nonparty of “matter material and necessary in the prosecution or defense of an action” in possession of a nonparty, providing the nonparty is apprised of the circumstances or reasons such disclosure is sought or required. The purpose of a subpoena duces tecum is to compel the production of specific documents that are relevant and material to facts at issue in a pending judicial proceeding. *Matter of Terry D.*, 81 N.Y.2d 1042, 1044, 601 N.Y.S.2d 452 (1993). “An application to quash a subpoena should be granted ‘[o]nly where the futility of the process to uncover anything legitimate is inevitable or obvious’ . . . or where the information sought is ‘utterly irrelevant to any proper inquiry.’” *Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d 327, 331-32, N.Y.S.2d 816 (1988), citing *Matter of Kapon v. Koch*, 23 N.Y.3d 32, 38, 988 N.Y.S.2d 559, 565 (2014).

A party or nonparty moving to quash a subpoena has the initial burden of establishing either that the requested disclosure is “utterly irrelevant” to the action or that the futility of the process to uncover anything legitimate is inevitable or obvious. *Id.* at 34. If the movant meets its initial burden, the subpoenaing party must then establish that the discovery sought is material and necessary to the prosecution or defense of the action. *Id.*

Here, Verizon has not met its initial burden of establishing that the requested documents are “utterly irrelevant.” As noted above, the third-party complaint alleges, *inter alia*, that AT&T had a common law duty to provide competent staff but Plaintiff “was not fit to be working as he was not a competent employee” or properly trained; Plaintiff sustained prior injuries that “impeded his ability to work effectively and safely,” and Verizon returned Plaintiff to work prematurely to perform installations causing him to sustain injuries. Verizon has not established that “the futility of the process to uncover anything legitimate is inevitable or obvious” or that the information sought is “utterly irrelevant to any proper inquiry.” *Matter of Kapon v. Koch*, 23 N.Y.3d 32.

However, inasmuch as Verizon, the City Defendants, and AT&T have already agreed that any responsive documents to the subpoena contain sensitive, confidential, protected, and/or proprietary information, and further agreed to preserve the confidentiality of responsive

documents through the use of a confidentiality order, the Court finds that a confidentiality order is warranted. *See* CPLR 3103 (a). Accordingly, it is hereby:

ORDERED AND ADJUDGED that the motion brought by non-party Verizon Communications Inc., to quash the subpoena is DENIED; and it is further

ORDERED AND ADJUDGED the motion brought by non-party Verizon Communications Inc., for a protective order pursuant to CPLR 3103 with respect to the documents sought in the subpoena is GRANTED to the extent that Verizon is directed to submit a proposed confidentiality order to the Court within twenty days of the date of this Decision and Order; and it is further

ORDERED AND ADJUDGED that Defendants shall serve a copy of this Decision and Order within ten days of the date of this Decision and Order.

The foregoing constitutes the Decision and Order of this Court.

Dated: Bronx, New York  
January 19, 2023



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HON. WILMAN GUZMAN, J.S.C.