

Perron v Hendrickson/Scalamandre/Posillico (TV)

2006 NY Slip Op 30050(U)

May 16, 2006

Supreme Court, Suffolk County

Docket Number: 0004668/4668

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

P R E S E N T :

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 1/31/06
ADJ. DATE 3/3/06
Mot. Seq. # 023 - MG

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DAVID PERRON and LINDA PERRON,	:	ROSENBERG & GLUCK, L.L.P.
	:	Attorneys for Plaintiffs
Plaintiffs,	:	1176 Portion Road
	:	Holtsville, New York 11742
- against -	:	
	:	
HENDRICKSON/SCALAMANDRE/POSILLICO	:	
(TV), HENDRICKSON BROS., INC., PETER	:	
SCALAMANDRE & SONS, INC., J.D. POSILLICO,	:	WILSON, ELSER, MOSKOWITZ,
INC., URS GREINER CONSULTANTS, INC.,	:	EDELMAN & DICKER LLP
ESCHBACHER & ASSOCIATES, SCI ENGINEERING:	:	Attorneys for Tri-Venture, Hendrickson
AND SURVEYING, P.C., A&H ENGINEERS, P.C.,	:	Bros., Scalamandre & Posillico
JAC PLANNING CORP. and MABEY BRIDGE, INC.,	:	150 East 42 nd Street
	:	New York, New York 10017-5639
Defendants.	:	

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HENDRICKSON/SCALAMANDRE/POSILLICO,	:	
a tri-venture,	:	
	:	
Third-Party Plaintiff,	:	
	:	
- against -	:	
	:	
RICE MOHAWK U.S. CONSTRUCTION CO., LTD.,	:	
	:	
Third-Party Defendant.	:	

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Upon the following papers numbered 1 to 15 read on this motion to compel; Notice of Motion/ Order to Show Cause and supporting papers 1 - 9; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 10 - 13; Replying Affidavits and supporting papers 14 - 15; Other _____; (and after hearing counsel in support and opposed to the motion) it is,

Perron v Hendrickson

Index No. 98-4668

Page 2

ORDERED that this motion by defendants Hendrickson/Scalamandre/Posillico (TV), Hendrickson Bros., Inc., Peter Scalamandre & Sons, Inc. and J.D. Posillico, Inc. for an order pursuant to CPLR 3124 compelling plaintiff to appear for a further examination by a vocational rehabilitation expert is granted.

This is an action to recover damages, personally and derivatively, for injuries plaintiff David Perron allegedly sustained on November 25, 1996 at a construction site located on the eastbound side of the Long Island Expressway near Exit 43. Plaintiff, an iron worker, was helping to disassemble a temporary bridge when a steel beam allegedly fell onto his foot. Plaintiff was evaluated by a vocational rehabilitation expert, James M. Pascuiti, M.A., on May 14, 2002, resulting in a ten-page report dated June 6, 2002. Plaintiff was deposed on September 28, 2005. This action was certified as ready for trial on December 13, 2005. The compliance conference order of said date indicates that counsel for the parties stipulated that defendant may make a motion for a further vocational rehabilitation examination prior to January 3, 2006.

Defendants Hendrickson/Scalamandre/Posillico (TV), Hendrickson Bros., Inc., Peter Scalamandre & Sons, Inc. and J.D. Posillico, Inc. (hereinafter "Tri-Venture") now timely move for an order compelling plaintiff to appear for a further examination by a vocational rehabilitation expert on the grounds that plaintiff's deposition testimony revealed changes in his employment circumstances since the original examination in 2002. Specifically, defendant Tri-Venture points to plaintiff's testimony that he is now actively seeking employment in areas related to maintenance on his own and through the New York State Department of Vocational Rehabilitation (VESID) and that he took two BOCES courses, one in computers and the other in home inspections. In support of its motion, defendant Tri-Venture submits, among other things, the complaint, its answer, the report by vocational rehabilitation expert James M. Pascuiti, M.A., the compliance conference order with certification (Molia, J.) and attached stipulation dated December 13, 2005, and plaintiff's deposition transcript dated September 28, 2005.

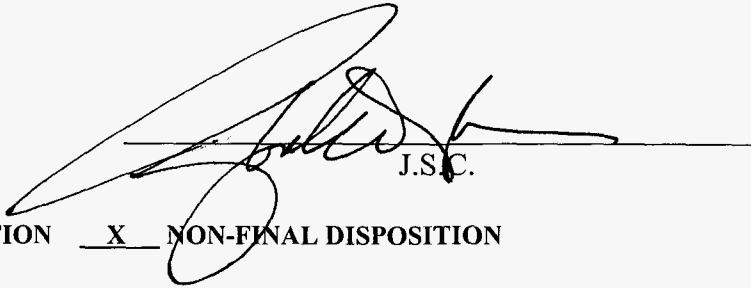
In opposition to the motion, plaintiffs contend that there has been no change in plaintiff's circumstances and that plaintiff is doing what the vocational rehabilitation expert determined that he was capable of doing in his lengthy report. Plaintiffs add that the request for a second examination is designed to harass and annoy the plaintiffs and that defendants have already been provided with authorizations for plaintiff's records from VESID and BOCES. In support of their opposition to the motion, plaintiffs submit the original report by vocational rehabilitation expert and plaintiff's deposition transcript dated September 28, 2005.

The vocational rehabilitation expert had opined in his report of June 2002 that plaintiff was capable of working in the competitive labor market earning \$30,000 to \$35,000 annually and that he had the ability to pursue additional education and/or vocational training which would increase his marketable skills and future earnings. Plaintiff testified at his September 28, 2005 deposition that since his last deposition in March 2002, he has been sending resumes to apply for maintenance-related jobs and that he has taken two separate classes from BOCES, one in basic computer and the other in basic home inspection. He also testified that he has been to the VESID office several times. Under the circumstances of this case, defendants have demonstrated that a further examination of plaintiff by a vocational rehabilitation expert is warranted and will yield information that is material and necessary to

Perron v Hendrickson
Index No. 98-4668
Page 3

the defense of the action (*see, Scotto v M.D. Carlisle Constr. Corp.*, 18 AD3d 459, 797 NYS2d 96 [2 Dept 2005]). In addition, plaintiff has not demonstrated that he will be prejudiced or burdened by the examination (*see, id.*). Therefore, the instant motion is granted. Plaintiff's further examination by a vocational rehabilitation expert shall be conducted on ten (10) days' written notice as to time and place to be completed within forty (40) days of the date of this order.

Dated: MAY 16 2006



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION