

Total Bldg. Servs., Inc. v New York City Police Dept.
2008 NY Slip Op 33283(U)
December 1, 2008
Supreme Court, New York County
Docket Number: 111428/08
Judge: Kibbie F. Payne
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: KIBBIE F. PAYNE
Justice

PART 4

TOTAL BUILDING SERVICES, INC.

INDEX NO. 111428/08

- v -

MOTION DATE 09-25-08

NEW YORK CITY POLICE DEPARTMENT et al.

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to ___ were read on this motion for Pre-action Disc.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-motion: Yes No

Upon the foregoing papers, the petition is decided in accordance with the annexed Judgment Decision.

This judgment decision is subject to the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).
DEC 1 2008

CASE DISP

Dated: December 1, 2008

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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 4

-----X
TOTAL BUILDING SERVICES, INC.,

Petitioner,

Index No. 111428/08

-against-

Judgment/Decision

NEW YORK CITY POLICE DEPARTMENT,
BROOKFIELD FINANCIAL PROPERTIES,
SHEPARD INDUSTRIES, INC., JLG INDUSTRIES
INC. and SUNBELT RENTALS, INC.,

Respondents.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1415).

-----X
KIBBIE F. PAYNE, J.:

In this special proceeding, commenced by order to show cause, petitioner Total Building Services, Inc. ("TBS") seeks pre-action discovery in "a soon to be filed wrongful death action" (Affirmation of Kevin Page, ¶ 1). Specifically, petitioner seeks inspection of a "JLG 800AJ" articulating boom (hereinafter, the "Cherry Picker"), which was involved in an accident on August 5, 2008, pursuant to CPLR 3102 (c).

On August 5, 2008, at approximately 12:45 AM, Darin and Robert Fabrizio were working in the Cherry Picker at Two World Financial Center in New York, New York (the "Property"). At the time, the Fabricios—who were both employees of TBS—were elevated approximately 45 feet, performing window washing duties. For a yet unknown reason, the Cherry Picker then fell over, killing them both. The Cherry Picker is currently in the custody of respondent New York City Police Department ("NYPD").

TBS claims that, as the decedents' employer, it is a potential defendant and/or a third-party plaintiff in any lawsuit arising from the accident that claimed the Fabrizzios' lives. According to TBS, the subject Cherry Picker is owned by respondent Sunbelt Rentals, Inc. ("Sunbelt") and was manufactured by respondent JLG Industries, Inc. ("JLG"). TBS explains that pre-action disclosure is necessary here to preserve the condition of the Cherry Picker as it was on the night of the accident. Counsel for the estate of the decedents has submitted its affirmation in support of the instant petition.

Respondent Sunbelt, owner of the Cherry picker, opposes the petition, claiming that because the parties were permitted a visual and photographic inspection of the Cherry Picker, on August 28, 2008, the petition is moot.¹ However, Sunbelt has failed to demonstrate that such visual and photographic inspection—rather than any physical or expert inspection—provides the parties with sufficient pre-action discovery.

While Shepard Industries, Inc. ("Shepard"), the company that hired TBS to perform the maintenance work at the Property, and JLG have cross-moved for additional pre-action discovery, viz., the surveillance video of the subject accident, the parties have stipulated that Brookfield Financial Properties, L.P.

¹ In its opposition, Shepard seemingly seeks to compel parties to provide additional pre-action discovery. However, since Shepard has failed to cross-move for any such relief, the court cannot consider any such request.

("Brookfield"), the Property owner, will provide copies of that video to all parties. Consequently, the court grants permission for the withdrawal of those portions of Shepard's and JLG's cross-motions.

CPLR 3102 sets forth the methods of obtaining disclosure. Generally, the usual time for disclosure is after the commencement of an action. However, when a party seeks disclosure before an action is commenced CPLR 3102 expressly provides for pre-action disclosure by court order. In pertinent part CPLR 3102(c) expressly provides as follows:

Before an action is commenced, disclosure to aid in bringing an action . . . or to preserve information may be obtained, but only by court order.

To obtain an order directing pre-action discovery, petitioner must demonstrate (1) that it has a meritorious cause of action and (2) that the information sought is material and necessary to the actionable wrong (*Holzman v. Manhattan & Bronx Surface Tr. Operating Auth.*, 271 AD2d 346, 347 [1st Dept 2000]).

In this case, petitioner has demonstrated that a meritorious cause of action exists and that petitioner is a potential defendant in such action. Petitioner has also demonstrated that the expert inspection is material and necessary for the preservation of information, specifically the condition of the Cherry Picker as at the time of the accident. Additionally, as a potential defendant petitioner is entitled to use CPLR 3102 (c)

to obtain pre-action discovery in "in order to determine its defenses" (*Green v. Green's Auto Gear & Parts Co.*, 35 AD2d 924, 925 [1st Dept 1970]).

Although respondent Sunbelt claims that the instant petition is rendered moot by the fact that the parties have already had access to "a visual and photographic inspection of the subject [Cherry Picker] on August 28, 2008, at the NYPD Erie Basin Police Impound Lot in Brooklyn, New York" (Aff. Of Saul Wilensky, ¶ 3), the court disagrees. However, this "inspection" was not a full and complete inspection. The Civil Practice rules are to be liberally construed and the rules of procedure provide for the *full disclosure of all matter material and necessary in the prosecution or defense of an action regardless of the burden of proof* (see CPLR §§104, 3101[a]). Here, there is great potential that the moving the Cherry Picker prior to expert inspection may alter the condition of the Cherry Picker from its August 5, 2008 condition. Consequently, the petitioner's designated expert should have access to the Cherry Picker in order to permit the expert to conduct his/her appropriate inspection and to formulate an analysis of the Cherry Picker's condition prior to any removal from the custody of the New York City Police Department. Accordingly, it is

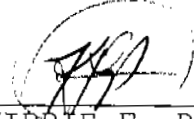
ORDERED that respondent shall, within twenty (20) days, provide petitioner and all parties, including the estate of the

decedents, with the opportunity to perform a full inspection of the subject Cherry Picker.

The foregoing constitutes the decision, order and judgment of the court.

Dated: December 1, 2008

ENTER:



KIBBLE F. PAYNE
J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).