

Winitch v 150 TT RGG LLC

2010 NY Slip Op 32950(U)

October 12, 2010

Supreme Court, New York County

Docket Number: 109056/07

Judge: Martin Shulman

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

MARTIN SHULMAN

PRESENT: J.S.C.

PART 1

Index Number : 109056/2007

WINITCH, CHARLES

vs

150 TT RGG

Sequence Number : 003

VACATE

INDEX NO. 109056/07

MOTION DATE _____

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

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

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ... A-C

Answering Affidavits — Exhibits A-B

Replying Affidavits _____

PAPERS NUMBERED

1
2
3

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

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

FILED
OCT 20 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: Oct. 12, 2010

MARTIN SHULMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 1

-----X
CHARLES WINITCH,

Plaintiff,

-against-

150 TT RGG LLC, HIRO REAL ESTATE ASSOCIATES,
L.L.C., HIRO REAL ESTATE, L.L.C.,
PLAZA CONSTRUCTION CORP. and HENRY
BROS. ELECTRONICS, INC.
Defendant.

-----X
PLAZA CONSTRUCTION CORP.,

Third-Party Plaintiff,

-against-

HENRY BROS. ELECTRONICS, INC.,
Third-Party Defendant.
-----X

Index No.109056/2007

DECISION/ORDER

TP Index No: 590601/2008

FILED
OCT 20 2010
NEW YORK
COUNTY CLERK'S OFFICE

Defendant Plaza Construction Corp. ("Plaza") moves pursuant to CPLR §3103 for a protective order vacating and/or striking Plaintiff Charles Winitch's ("Plaza") Notice to Admit dated May 20, 2010. By striking Plaintiff's Notice to Admit, Plaza seeks to neither confirm nor deny the authenticity and truthfulness of e-mail correspondence between Jeffrey Allen ("Allen"), a former Plaza employee, and co-defendant Henry Bros. Electronics, Inc. ("Henry") dated July 14, 2005 (the "e-mail") (Plaintiff's Aff. in Opp. at Exh. A).¹ Plaintiff opposes this motion.

Plaintiff commenced this action alleging causes of action sounding in negligence against the above named defendants. Plaintiff's complaint alleges that he was injured

¹ Plaintiff's opposition to this motion provides the court with a copy of the subject Notice to Admit, which was omitted from Plaza's motion.

when the glass doors of a security turnstile at 150 East 42nd Street closed on his leg and caused him to fall. Through initial discovery, Plaintiff learned that changes were made to alter how long the glass doors stayed open and to quicken the opening and closing speed. Plaza and Henry were the general contractor and sub-contractor, respectively, responsible for the alleged alterations and the e-mail discusses this.

The Notice to Admit seeks sworn admission that the e-mail annexed thereto as Exhibit A is "a true and accurate copy of an e-mail communication involving Jeffrey Allen of Plaza Construction and Henry Brothers regarding the '150 (sic) East 42nd Street Turnstile Punchlist". Plaintiff obtained the e-mail from Henry, and Henry has admitted its authenticity.

Plaza filed this motion seeking a protective order vacating Plaintiff's Notice to Admit pursuant to CPLR §3103(a), which states:

The court may... on motion of any party... make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the court.

Trial courts have broad power to regulate discovery to prevent abuse. *Seaman v. Wyckoff Heights Med. Ctr., Inc.*, 25 A.D.3d 598, 599 (2nd Dept.), *lv. to app. disp.* 7 N.Y.3d 864 (2006). The moving party, Plaza, bears the burden of persuasion on this motion.

Plaza asserts two grounds for vacating Plaintiff's Notice to Admit. First, Plaza contends that Plaintiff's Notice to Admit is an "effort to obtain information in lieu of other discovery devices" (Plaza's Aff. in Supp. at ¶6). Plaza correctly notes that a Notice to Admit may not serve as a substitute for other discovery devices, such as interrogatories

[* 4]
or depositions. *Taylor v. Blair*, 116 A.D.2d 204 (1st Dept. 1986). Here, Plaza argues the information sought in the Notice to Admit can be obtained through deposing the parties to the e-mail, to wit, Allen and Henry. While this option is available to Plaintiff, it does not render the Notice to Admit improper.

Contrary to Plaza's claims, Plaintiff's Notice to Admit does not request that Plaza admit the truthfulness of the statements contained in the e-mail. Rather, it requests confirmation that the e-mail is a true copy of relevant electronic correspondence exchanged between Allen, Plaza's then employee, and Henry's employee via an e-mail address maintained by Plaza. As the e-mail was sent through Plaza's website, Plaza presumably has access to such employee e-mails, yet Plaza avoids addressing the availability of such electronic data.²

Clearly, it was not improper for Plaintiff to request that Plaza authenticate the e-mail. The fact that Allen is no longer Plaza's employee is irrelevant. Similarly unavailing is Plaza's argument that because the e-mail is a photocopy of a print-out and was not furnished by Plaza there is no way to assess its accuracy and completeness (Plaza's Aff. in Supp. at ¶17). Because Plaza has failed to persuade the court that Plaintiff's Notice to Admit is improper, Plaza's prayed for relief must be denied on this ground, and Plaza must either admit or deny that the e-mail is a true and accurate copy of correspondence maintained in its computer network.

² Plaintiff accurately argues that Plaza has a duty to preserve relevant information, including emails (Aff. in Opp. at ¶¶ 14, 15). While no affidavits or other evidence have been submitted on this point, it is likely that Plaza has a means of storing and accessing prior e-mails. In such event, confirmation of the accuracy of the e-mail at issue should take no more effort than comparing the e-mail to the corresponding version in Plaza's computer records.

Second, Plaza claims that the Notice to Admit improperly seeks admissions of material issues and ultimate facts in this case (Plaza's Aff. in Supp. at ¶11). Plaza wishes to have Plaintiff's Notice to Admit stricken because it seeks admission of "fundamental and material issues and ultimate facts that go to the heart of the case." It is settled law that a Notice to Admit is improper when it is used to obtain conclusions of "material and ultimate issues." *Singh v. G&A Mounting & Die Cutting, Inc.*, 292 A.D.2d 516 (2nd Dept. 2002); *DeSilva v. Rosenberg*, 236 A.D.2d 508 (2nd Dept. 1997).


Plaza asserts that if the e-mail is confirmed to be true and accurate, Plaintiff will use the same as evidence of proving Plaza's responsibility and/or knowledge of allegedly negligent installation, programing and/or maintenance of the glass doors at issue (Plaza's Aff. in Supp. at ¶15). Plaza reasons that because this evidence could weigh unfavorably against it at trial, it is an attempt by Plaintiff to determine the "ultimate issues" of the case.

As previously stated, the e-mail does not request that Plaza admit the truthfulness of the statements contained therein. Rather, it properly seeks confirmation that it is a true and accurate copy of electronic correspondence which Plaza may maintain. As such, Plaintiff's Notice to Admit does not seek to determine the ultimate issues of the case. For the foregoing reasons, Plaza's second ground for striking Plaintiff's Notice to Admit is unpersuasive and the motion to strike the Notice to Admit must be denied. Accordingly, it is hereby

ORDERED that Plaza's motion for a protective order is denied and Plaza is directed to respond to Plaintiff's Notice to Admit within 10 days of service of a copy of this Decision & Order with Notice of Entry.

The foregoing constitutes the Decision and Order of this Court. Copies of this Decision and Order have been sent to counsel for Plaintiff and Plaza.

Dated: New York, New York
October 12, 2010



Hon. Martin Shulman, J.S.C.

FILED
OCT 20 2010
NEW YORK
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