Henry v P. DeBlasio, Inc.

2011 NY Slip Op 30135(U)

January 4, 2011

Supreme Court, Suffolk County

Docket Number: 7541/2008

Judge: Joseph Farneti

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SHORT FORM ORDER

INDEX NO. 7541/2008

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

COPY

PRESENT:
HON. JOSEPH FARNETI
Acting Justice Supreme Court

GEORGE HENRY and JULIE HENRY,

Plaintiffs,

-against-

P. DEBLASIO, INC. and SMR CONSTRUCTION, INC.,

Defendants.

P. DEBLASIO, INC.,

Third-Party Plaintiff,

-against-

TRUE MECHANICAL CORP. and SMR CONSTRUCTION, INC.,

Third-Party Defendants.

ORIG. RETURN DATE: FEBRUARY 24, 2010
FINAL SUBMISSION DATE: MAY 20, 2010
MTN. SEQ. #: 003
MOTION: MOT D

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Upon the following papers numbered 1 to 6 read on this motion TO COMPEL OR STRIKE ANSWER. Order to Show Cause and supporting papers 1-3; Affirmation in Opposition and supporting papers 4, 5; Reply Affirmation 6; it is,

ORDERED that this motion by defendant/third party plaintiff P. DEBLASIO, INC. ("third-party plaintiff") for an Order:

(1) pursuant to CPLR 3124, directing third-party defendant, TRUE MECHANICAL CORP. ("third-party defendant"), to produce to third-party plaintiff full and complete copies of all liability insurance and excess/ umbrella liability insurance policies in effect on or about November 13, 2007, together with all endorsements, riders or attachments, including additional insured endorsements;

(2) pursuant to CPLR 3124, directing third-party defendant to comply with third-party plaintiff's Notice for Discovery and Inspection dated September 17, 2009;

(3) pursuant to CPLR 3124, directing third-party defendant to comply with third-party plaintiff's Notice for Discovery and Inspection dated September 25, 2009; and

(4) pursuant to CPLR 3124, directing third-party defendant to produce Dena Jacobs and Jose Matias for oral depositions in connection with this matter; or

(5) pursuant to CPLR 3126 (3), striking the answer of third-party defendant or entering a default judgment against it on the third-party action,

is hereby **GRANTED** solely to the extent provided hereinafter. The Court has received opposition to the instant application from third-party defendant.

This Labor Law action arises out of an accident that occurred on November 13, 2007, during the renovation/extension of the premises commonly

known as 1 King Arthurs Court, East Setauket, New York. Plaintiff, GEORGE HENRY ("plaintiff"), was engaged in HVAC (heating, ventilation, air conditioning) work and alleges that he fell down an elevator shaft, sustaining injuries. Plaintiffs have asserted causes of action sounding in negligence, and violation of Labor Law §§ 200, 240, 241 (6) and 241 (8), and Industrial Code of the State of New York 12 NYCRR 23-1.5, 23-1.7, 23-1.8, 23-1.15, 23-1.16, 23-1.17, 23-2, 23-2.4, 23-2.5, and 23-5, along with a derivative claim on behalf of the plaintiff's spouse, JULIE HENRY. Third-party plaintiff commenced a third-party action against third-party defendant and SMR CONSTRUCTION, INC. ("SMR"), alleging, among other things, that SMR entered into an agreement with third-party plaintiff to perform certain construction work and services at the premises, and in connection therewith, executed a hold harmless and indemnification agreement in favor of third-party plaintiff.

Third-party plaintiff alleges that it had an agreement with the homeowner to perform certain work at the premises, and in connection therewith, hired third-party defendant to perform the HVAC work for the project. Plaintiff has indicated that his employer was third-party defendant "TRUE MECHANICAL CORP.," and that he was the project manager therefor, although the actual identity of plaintiff's employer is an issue in this case.

Third-party plaintiff has now filed the instant application seeking the relief described hereinabove. Initially, the Court notes that third-party defendant has provided third-party plaintiff with the relevant insurance policies, and has produced Jose Matias for a deposition. As such, those branches of the instant motion seeking to compel the production of all liability insurance and excess/umbrella liability insurance policies, and to compel the production of Jose Matias for deposition, are **DENIED** as moot.

Next, third-party plaintiff seeks an Order directing third-party defendant to produce Dena Jacobs for oral deposition pursuant to its Notice of Examination Before Trial dated September 17, 2009, as well as to comply with its Notice for Discovery and Inspection of even date, which sought, among other things, job files/project files and any accident reports prepared in connection with the subject incident. Third-party plaintiff indicates that during the deposition of Louis Desantis, president of third-party defendant, Mr. Desantis testified that Ms. Jacobs is an administrative assistant with the company in charge of investigating accidents, preparing accident reports, and searching the company's records, and that he was unaware whether such reports were prepared with regard to plaintiff's accident.

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Third-party defendant has responded to the Notice for Discovery and Inspection dated September 17, 2009, providing much of the requested documentation, but indicating that it is "presently unaware" of any accident/ incident reports prepared by third-party defendant. Further, third-party defendant objects to producing Ms. Jacobs for deposition, arguing that her deposition is not material and necessary to the prosecution of the third-party action for contractual indemnification, and that it has already produced two fact witnesses for deposition.

As noted hereinabove, there is an issue in this matter regarding plaintiff's employer on the date of the subject accident. Mr. Desantis testified that he formed two separate corporations, to wit: third-party defendant "TRUE MECHANICAL CORP." as well as "True Air Conditioning Corp." In addition, third-party plaintiff indicates that on the "Employers Report of Work-Related Accident" form, authored by Dena Jacobs relative to plaintiff's Workers' Compensation claim, plaintiff's employer was originally listed as third-party defendant but then crossed out and replaced with "True Air Conditioning Corp." As such, third-party plaintiff served the Notice for Discovery and Inspection dated September 25, 2009, seeking the name and address of the accountant/tax preparer for both third-party defendant and "True Air Conditioning Corp.," as well as tax returns for those entities for the period of 2005-2008. Third-party defendant served a response thereto on or about February 24, 2010, objecting to the demands as vague, overbroad, unduly burdensome, and/or improper.

With respect to that branch of the instant application to strike third-party defendant's answer, CPLR 3126 provides that a court may, in its discretion, impose a wide range of penalties upon a party which either: (a) refuses to obey an order for disclosure; or (b) willfully fails to disclose information which the court finds ought to have been disclosed (CPLR 3126). The penalties proposed by the statute include: (1) deciding the disputed issue in favor of the prejudiced party; (2) precluding the disobedient party from producing evidence at trial on the disputed issue; or (3) either striking the pleadings of the disobedient party, or staying the proceedings until the ordered discovery is produced, or rendering a default judgment against the disobedient party (CPLR 3126). It is appropriate to strike a party's pleading where there is a clear showing that its failure to comply with discovery demands is wilful, contumacious, or in bad faith (*see Denoyelles v Gallagher*, 40 AD3d 1027 [2007]; *Fellin v Sahgal*, 268 AD2d 456 [2000]; *Harris v City of New York*, 211 AD2d 663 [1995]). Generally, "willfulness" is inferred from a party's repeated failure to respond to demands and/or to comply with disclosure

orders, coupled with inadequate excuses for its defaults (*see Siegman v Rosen*, 270 AD2d 14 [2000]; *DiDomenico v C & S Aeromatik Supplies, Inc.*, 252 AD2d 41 [1998]; *Frias v Fortini*, 240 AD2d 467 [1997]).

On this record, the Court finds that third-party defendant's failure to fully respond to third-party plaintiff's discovery demands was not wilful or contumacious. As such, striking third-party defendant's answer is not warranted at this juncture. Accordingly, that branch of third-party plaintiff's motion to strike third-party defendant's answer is **DENIED**.

Regarding those branches of the instant application to compel, CPLR 3101 (a) provides for disclosure of "all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof" (CPLR 3101 [a]). Although CPLR 3101 favors liberal disclosure, such disclosure must be material and necessary to the prosecution or defense of the action (CPLR 3101; *Gill v Mancino*, 8 AD3d 340 [2004]; *DeStrange v Lind*, 277 AD2d 344 [2000]). "If there is any possibility that the information is sought in good faith for possible use as evidence-in-chief or in rebuttal or for cross-examination, it should be considered evidence material in the prosecution or defense" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 407 [1968]). Moreover, "New York has long favored open and far-reaching pretrial discovery" (*DiMichel v South Buffalo Ry. Co.*, 80 NY2d 184 [1992], *cert denied sub nom Poole v Consolidated Rail Corp.*, 510 US 816 [1993]), and "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof" (CPLR 3101 [a]; *Northway Eng'g v Felix Indus.*, 77 NY2d 332 [1991]).

Although third-party defendant claims that third-party plaintiff's demands are "improper and burdensome," third-party defendant had not moved for a protective Order with respect to these discovery demands. The failure of third-party defendant to move for a protective Order, pursuant to CPLR 3122, within twenty (20) days after service of the demands forecloses all inquiry concerning the propriety of the demands and the information sought to be discovered thereunder, except as to demands seeking privileged matter under CPLR 3101, or demands that are palpably improper (*see* CPLR 3122, 3101; *Anonymous v High School for Envtl. Studies*, 32 AD3d 353 [2006]; *Holness v. Chrysler Corp.*, 220 AD2d 721 [1995]; *Alaten Co. Inc. v Solil Management Corp.*, 181 AD2d 466 [1992]).

As third-party defendant failed to timely move with respect to third-party plaintiff's demands, third-party defendant is precluded from producing all documents and things requested, except to the extent that they infringe on the attorney-client privilege or are palpably improper (*see e.g Handy v Geften Realty, Inc.*, 129 AD2d 556 [1987]). A disclosure request is palpably improper if it seeks information of a confidential and private nature that does not appear to be relevant to the issues on the case (*see Saratoga Harness Racing, Inc. v Roemer*, 274 AD2d 887 [2000]; *Titleserv, Inc. v Zenobio*, 210 AD2d 314 [1994]). Here, third-party defendant has not asserted privilege, and under the circumstances presented, the Court does not find third-party plaintiff's demands to be palpably improper.

Accordingly, this motion is **GRANTED** to the extent that third-party defendant shall provide third-party plaintiff with further responses to third-party plaintiff's Notices for Discovery and Inspection, dated September 17 and 25, 2009, within thirty (30) days of service upon third-party defendant of the within decision and Order with notice of entry. However, with respect to the tax returns sought, the Court hereby limits third-party plaintiff's demand to calendar year 2007, as third-party plaintiff acknowledges that it seeks such tax returns to identify which corporation claimed plaintiff as an employee on its tax records for the year 2007.

In addition, third-party defendant shall produce Dena Jacobs for oral deposition within sixty (60) days of service upon third-party defendant of the within decision and Order with notice of entry, in accordance with third-party plaintiff's Notice of Examination Before Trial dated September 17, 2009.

The foregoing constitutes the decision and Order of the Court.

Dated: January 4, 2011

HON. JOSEPH FARNETI
Acting Justice Supreme Court

_____ **FINAL DISPOSITION** ____X____ **NON-FINAL DISPOSITION**