Chilinski v LMJ Contr. Inc.
2012 NY Slip Op 30268(U)
January 6, 2012
Supreme Court, Suffolk County
Docket Number: 09-47489
Judge: W. Gerard Asher
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SHORT FORM ORDER

COPY

INDEX No. 09-47489
CAL. No. 11-01075-OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 9/14/11 (#002)
MOTION DATE 9/23/11 (#003 & #004)
ADJ. DATE 9/23/11
Mot. Seq. #002 - MD
Mot. Seq. #003 - MD
Mot. Seq. #004 - XMD

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MAREK CHILINSKI,

Plaintiff,

- against -

LMJ CONTRACTING INC., UNITED BAKING CO., INC., d/b/a UNCLE WALLY'S, DUNBAR SYSTEMS, INC., and C&C MILLWRIGHT MAINTENANCE CO.,

Defendants.

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1-19-12

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UNITED BAKING CO., INC.,

Third-Party Plaintiff,

- against -

C&C MILLWRIGHT MAINTENANCE CO. and DUNBAR SYSTEMS, INC.,

Third-Party Defendants.

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Upon the following papers numbered 1 to 82 read on this motion to direct issuance of open commissions to take testimony; motion for protective order; cross motion to compel disclosure; Notice of Motion/ Order to Show Cause and supporting papers 1-7; 8-19 ; Notice of Cross Motion and supporting papers 20-44 ; Answering Affidavits and supporting papers 45-47; 48-49; 50-51; 52-59; 60-64; 65-67; 68-76 ; Replying Affidavits and supporting papers 77-78; 79-82 ; Other ______; it is,

ORDERED that these motions and cross motion are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion by defendant/third-party plaintiff United Baking Co., Inc. for an order pursuant to CPLR 3108 directing the issuance of open commissions to take the depositions of Roger Hatfield, 70 Williamson Valley Road, Chuckey, Tennessee, and Bert Cansler, 255 Haney Hill Road, Greeneville, Tennessee, as nonparty witnesses, and requesting the Circuit Court of the State of Tennessee to issue subpoenas to Roger Hatfield and Bert Cansler to appear for and submit to depositions at times, dates, and places to be set by the Circuit Court of the State of Tennessee, is denied; and it is further

ORDERED that the motion by defendant/third-party plaintiff United Baking Co., Inc. (i) pursuant to CPLR 3103, for a protective order striking the notice of deposition dated August 25, 2011 served by defendant/third-party defendant C&C Millwright Maintenance Co. upon United Baking Co., Inc. for the production of its employee, John Oliveri, for deposition, and directing that United Baking Co., Inc. need not produce John Oliveri for deposition, (ii) pursuant to CPLR 3103, for a protective order striking the demand of C&C Millwright Maintenance Co. for a second inspection of the premises of United Baking Co., Inc., and directing that United Baking Co., Inc. need not permit a second inspection of its premises by C&C Millwright Maintenance Co., (iii) pursuant to CPLR 3124, for an order compelling C&C Millwright Maintenance Co. to produce its employee, Roy Greene, for deposition pursuant to the notice of deposition dated August 11, 2011 served by United Baking Co., Inc., (iv) pursuant to CPLR 3124, for an order compelling C&C Millwright Maintenance Co. to respond fully to the notice for discovery and inspection dated April 20, 2011 served by United Baking Co., Inc., and (v)

pursuant to CPLR 3124, for an order compelling defendant/third-party defendant Dunbar Systems, Inc. to respond to the notices for discovery and inspection dated April 26, 2011 and July 13, 2011 served by United Baking Co., Inc., is denied; and it is further

ORDERED that the cross motion by defendant/third-party defendant C&C Millwright Maintenance Co. for an order pursuant to CPLR 3124 (i) compelling defendant/third-party plaintiff United Baking Co., Inc. to comply with the notice for discovery and inspection dated July 21, 2011, (ii) compelling United Baking Co., Inc. to produce John Oliveri for a deposition pursuant to the notice served on August 25, 2011, (iii) compelling United Baking Co., Inc. to make the accident premises available for inspection pursuant to the notice for entry and inspection dated August 16, 2011, and (iv) compelling the plaintiff to respond to the notice for discovery and inspection dated June 6, 2011, is denied.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff on September 3, 2009 during the course of a construction project at United Baking Co., Inc.'s commercial bakery plant located at 41 Natcon Drive, Shirley, New York. The plaintiff, an employee of a nonparty contractor, alleges that he was injured when he fell through an opening on a platform on which he was working; although a plywood cover had been placed over the opening by employees of C&C Millwright Maintenance Co., the cover was not secured to the floor and failed to support his weight. It appears that substantial discovery has taken place in the action and that, on May 23, 2011, a note of issue was filed.

Pursuant to a so-ordered stipulation dated May 19, 2011, the parties agreed, *inter alia*, for certain limited discovery to take place subsequent to the filing of a note of issue, namely, that all independent medical examinations be "designated and completed," that United Baking Co., Inc. ("United") produce for deposition its agent, Kevin Hopkins, and that C&C Millwright Maintenance Co. ("C&C") produce for deposition all persons still in its employ who were at the accident scene on the date of the plaintiff's accident, with all such discovery to be completed before September 13, 2011.

United now seeks the issuance of open commissions to depose two former C&C employees, Roger Hatfield and Bert Cansler, who currently reside in Tennessee. United separately moves for a protective order and to compel disclosure, and C&C cross-moves to compel disclosure.

"The purpose of a note of issue and certificate of readiness is to assure that cases which appear on the court's trial calendar are, in fact, ready for trial" (***Tirado v Miller***, 75 AD3d 153, 156, 901 NYS2d 358, 361 [2010]). Stated differently, "the filing of a note of issue denotes the completion of discovery, not the occasion to launch another phase of it" (***Arons v Jutkowitz***, 9 NY3d 393, 411, 850 NYS2d 345, 353 [2007]). Once a note of issue has been filed, the applicable standard for allowing additional discovery is governed by Uniform Rules for Trial Courts [22 NYCRR] § 202.21, which contemplates only two procedural methods by which post-note discovery may be sought (***Tirado v Miller***, *supra*). The first is a motion to vacate the note of issue, which must be made within 20 days after service of the note of issue, upon affidavit showing in what respects the case is not ready for trial (Uniform Rules of Trial Cts [22 NYCRR] § 202.21 [e]). The second, which is available beyond the 20-day period, requires a far more stringent showing, upon motion supported by affidavit, that "unusual or unanticipated

circumstances" developed subsequent to the filing of the note of issue justifying additional discovery "to prevent substantial prejudice" (Uniform Rules of Trial Cts [22 NYCRR] § 202.21 [d]).

Here, since no party moved to vacate the note of issue within the 20-day period set forth in Uniform Rules of Trial Courts (22 NYCRR) § 202.21 (e), any post-note discovery sought by the parties is subject a showing that the discovery is needed because of unusual or unanticipated circumstances developed subsequent to the filing of the note of issue, and that its absence causes substantial prejudice (Uniform Rules of Trial Cts [22 NYCRR] § 202.21 [d]).

The Court finds that United failed to make the required showing. Initially, with respect to United's request for the issuance of open commissions, United concedes that it was aware no later than April 14, 2011, the date on which C&C employee Kenneth Rednour was deposed, that Roger Hatfield and Bert Cansler were at the premises on the date of the accident and might have firsthand knowledge about the accident, the work performed, or the creation and installation of the plywood cover. Consequently, it cannot be said that the purported need for their deposition testimony developed from circumstances arising subsequent to the filing of the note of issue. Nor does it appear, parenthetically, that United made any effort to secure the witnesses' testimony voluntarily (*see* ***Sorrentino v Fedorczuk***, 85 AD3d 759, 925 NYS2d 150 [2011]; Connors, 2010 Supp Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3108:5, 2011 Pocket Part, at 6-8). Insofar as United seeks to compel responses to various notices for discovery and inspection, it has failed to demonstrate such discovery is warranted under the applicable standard. Instead, it argues that the documents and other items requested are relevant and necessary to the defense of the action, which is the standard governing *pre*-note discovery (*see* CPLR 3101 [a]; ***Tirado v Miller***, *supra*). Even had it argued the appropriate standard, it would not be entitled to the requested relief. To the extent that United claims that responses are outstanding to its notices for discovery and inspection dated April 20 and 26, 2011, it was surely aware of this claim prior to the filing of the note of issue. As for the July 13, 2011 notice, which seeks the production of an insurance policy, it again does not appear that United's purported need for the policy arose after the filing of the note of issue; the Court notes, in any event, that the attorney for Dunbar Systems, Inc. ("Dunbar"), the responding party, has represented his intent to disclose a complete copy of the policy once it has been fully assembled and delivered to him, and that United's attorney has since offered to withdraw that branch of its motion seeking relief against Dunbar.

C&C's showing is likewise deficient. While C&C has essayed to demonstrate the materiality and relevance of the disclosure sought, it has failed to establish the unusual or unanticipated circumstances arising subsequent to the filing of the note of issue which warrant additional discovery to prevent substantial prejudice. Notably, it appears that C&C's notice for discovery and inspection dated June 6, 2011 seeks information relating to portions of the plaintiff's deposition testimony given on March 22, 2011, well before the filing of the note of issue. Nor is there any explanation provided as to why the need for the remaining discovery sought–obtaining the United job file as requested by the July 21, 2011 notice for discovery and inspection, deposing John Oliveri (or any another knowledgeable employee from United's maintenance department), and inspecting the accident location as requested by the August 16, 2011 notice for entry and inspection–could not have been anticipated before the note of

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issue was filed.

Finally, while cognizant that the deposition of Roy Greene, a current C&C employee who was at the premises at the time of the accident, would otherwise fall within the parameters of the parties' May 19, 2011 stipulation, the Court notes that the affirmation of good faith submitted by United's attorney is insufficient. In fact, none of the affirmations submitted by the parties' attorneys, nor the letters referenced in those affirmations, refer to any issues discussed by the attorneys in an effort to resolve the issues raised by their respective motions (*see* Uniform Rules for Trial Cts [22 NYCRR] § 202.7 [a], [c]; ***Mironer v City of New York***, 79 AD3d 1106, 915 NYS2d 279 [2010]; ***148 Magnolia v Merrimack Mut. Fire Ins. Co.***, 62 AD3d 486, 878 NYS2d 727 [2009]). Since a "good faith" affirmation is required on all motions relating to disclosure (*see* Uniform Rules for Trial Cts [22 NYCRR] § 202.7 [a]), the Court is constrained to deny even United's request for protective orders relating to disallowed discovery.

Dated: Jan. 6, 2012

W. Gerard Asher
J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION