

Pete' s All Service Corp. v Colonial Sur. Co.
2012 NY Slip Op 30568(U)
February 23, 2012
Sup Ct, Nassau County
Docket Number: 5891/09
Judge: Denise L. Sher
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

PETE'S ALL SERVICE CORP.,

TRIAL/IAS PART 31
NASSAU COUNTY

Plaintiff,

- against -

Index No.: 5891/09
Motion Seq. No.: 04
Motion Date: 02/17/12

COLONIAL SURETY COMPANY,

Defendant.

COLONIAL SURETY COMPANY,

Third-Party Plaintiff,

- against -

EASTLAND CONSTRUCTION, INC.,
NANCY SCHULMAN and ALLAN SCHULMAN,

Third-Party Defendants.

The following papers have been read on this motion:

	Papers Numbered
Order to Show Cause, Affirmations and Exhibits	1
Affirmation in Opposition and Exhibits	2

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Third-party defendants move, pursuant to CPLR § 1007, for an order limiting third-party plaintiff's claims to the claims relating to the plaintiff's main cause of action; and move, pursuant

to CPLR § 3126, for an order precluding third-party plaintiff from calling a witness at trial when it failed to produce a witness with knowledge at a deposition and precluding third-party plaintiff from producing any documents at trial that are responsive to a previously served Discovery Notice; and move for an order staying the trial of this matter until such time as the Court determines the issues raised in the instant motion. Defendant/third-party plaintiff opposes the motion.

This is an action for breach of contract and payment on a bond brought by plaintiff, a subcontractor to third-party defendant, against defendant/third-party plaintiff, who was third-party defendants' payment and performance bond surety on the construction project on which plaintiff was the steel installation subcontractor. Plaintiff brought an action against defendant/third-party plaintiff who then implied third-party defendants.

Third-party defendants submit that there is an issue between themselves and defendant/third-party plaintiff as to the substance of the third-party claim, as well as with the procedural posture of the case. Counsel for defendant/third-party plaintiff has "stated that this claim was not just for the approximately \$50,000 that Pete's All Service had sued Colonial for, but for all the claims arising out of the Office of General Services (OGS) contract that Pete's was subcontracting for; he stated that this amount was just under \$1,000,000.00." Counsel for defendant/third-party plaintiff contends that the pleadings provided notice of the extent of the claim and that the discovery engaged in had also done so.

Counsel for third-party defendants argues that there was nothing in the file that he received from his clients that would indicate that the claim was for that value (just under \$1,000,000.00). He further argues that counsel for defendant/third-party plaintiff has never produced a witness with knowledge for an Examination Before Trial ("EBT").

In response to counsel for third-party defendants' contention that counsel for defendant/third-party plaintiff had never produced a witness with knowledge for an EBT, counsel for defendant/third-party plaintiff claims that defendant/third-party plaintiff had produced a

witness from Beacon Consulting Group, Inc. (“Beacon”), who had analyzed the claim and completed the work on the OGS project. However, counsel for third-party defendants submits that the deposition of the Beacon witness was terminated and held open because he had no personal knowledge of the facts surrounding plaintiff’s claim. *See* Third-Party Defendants’ Affirmation in Support Exhibit B. Counsel for third-party defendants further submits that, upon learning that defendant/third-party plaintiff was going to rely on Beacon as its witness in this matter, third-party defendant served a demand for documents upon defendant/third-party plaintiff which required production of all the Beacon records and analysis. *See* Third-Party Defendants’ Affirmation in Support Exhibit C.

Counsel for third-party defendants argues that the deposition of third-party defendant Allan Schulman “also exposes that this claim was never about anything other than Pete’s All Service. If this claim were really about all of the issues surrounding the OGS project, Mr. Schulman would not have been questioned exclusively about Pete’s All Service. When it was Colonial’s turn to depose Mr. Schulman in this action, the attorney for Colonial asked him precisely five (5) questions in total. All of them related to the value of the Pete’s All Service claim....It cannot be believed that in its litigation of a \$1,000,000.00 claim, that counsel for Colonial would ask five questions only about a \$50,000.00 portion of that claim.” *See* Third-Party Defendants’ Affirmation in Support Exhibit D.

Third-party defendants contend that there is nothing in the pleadings, discovery or depositions that would put anyone on notice that this claim was about anything other than the Pete’s All Service claim.

Third-party defendants add that “[t]he liability to be imposed upon a third-party defendant in an third-party action commenced pursuant to CPLR 1007 should ‘arise from or be conditioned upon the liability asserted against the third-party plaintiff in the main action.’”

Third-party defendants also submit that the lack of appropriate discovery in this case is the basis for the other component of their motion, specifically to preclude defendant/third-party

plaintiff from offering testimony of a witness with knowledge in this case due to its failure to produce a witness with knowledge at the EBT. Third-party defendants contend that, despite the existence of a Preliminary Conference Order, two separate Court Orders requiring production of a witness with knowledge and a side stipulation, defendant/third-party plaintiff never produced a witness with knowledge. Third-party defendants argue that “[a]llowing this matter to move forward to trial and at that trial to allow Colonial to produce a witness with knowledge and documents that are responsive to previously served discovery notices would be counter to the CPLR and the case law of this State....It would be fundamentally unfair to reward Colonial for violating repeated court orders and stipulations by letting it proceed to trial without having provided any of the discovery demanded and ordered.”

In opposition to the motion, counsel for defendant/third-party plaintiff submits that “[o]n February 8, 2012, counsel for Colonial and the Third-Party Defendants appeared before the Honorable Denise L. Sher, J.S.C., for the presentation of the instant Order to Show Cause at which time this Court refused to stay the trial and stated that the trial will go forward on March 2, 2012, as scheduled, limited to the scope of the trial to indemnity of the Pete’s payment bond claim and related expenses (as expressly permitted by the indemnity agreement). Accordingly, the only issues for this Court to address are whether Colonial should be permitted to introduce documentary and testimonial evidence regarding Colonial’s third-party contractual and common law indemnification claims related to Colonial’s settlement with the Plaintiff on May 4, 2011, after the dates for discovery were over, after the Note of Issue was filed, after the matter had appeared at trial calls and counsel marked the case ‘ready,’ and after counsel for the Third-Party Defendants had moved to withdraw.”

Counsel for defendant/third-party plaintiff argues that the Court should deny the instant motion because “(a) the Third-Party Defendants contractually consented to permit Colonial to establish its *prima facie* case through the submission of a sworn, itemized statement, or other evidence, of disbursements by Colonial, which documents the Third-Party Defendants *never* requested in discovery and many of which did not exist until *after* settlement with Pete’s; (b) the

Third-Party Defendants waived any rights to discovery – both expressly at the deposition of Allan Schulman, and implicitly by idly ‘sitting on their hands’ throughout the pendency of the action, failing to object to the filing of the Note of Issue, and waiting almost eighteen (18) months to raise the issue with the Court on the eve of trial; and, (c) the Third-Party Defendants’ eleventh-hour motion seeking preclusion of testimony and documents is procedurally deficient in light of the fact that the Third-Party Defendants never made a good-faith demand upon Colonial to resolve any discovery issues as required by the Uniform Court Rules, never requested the documents that will be at issue in the third-party action and never filed a motion to compel discovery under CPLR § 3124.”

Counsel for defendant/third-party plaintiff adds that this matter was originally managed by the Honorable Daniel Martin, A.J.S.C. when the parties appeared for status conferences during the fall and winter of 2009. In January 2010, the matter was transferred to this Court and, on January 29, 2010, this Court so-ordered a stipulation between the parties which directed the parties to exchange all discovery demands by February 9, 2010 and to provide responses to any outstanding demands by February 19, 2010. *See* Defendant/Third-Party Plaintiff’s Affirmation in Opposition Exhibit B. Counsel for defendant/third-party plaintiff contends that third-party defendants did not serve any discovery demands or deposition notices in accordance with the Court’s deadlines as set forth in the January 29, 2010 Order. Nor did the third-party defendants timely respond to defendant/third-party plaintiff’s discovery demands. Counsel for defendant/third-party plaintiff states that “the Third-Party Defendants have **never** - not even to this day- provided written responses to Colonial’s interrogatories and documents demands which were timely served in compliance with the January Order, this may explain why the Third-Party Defendants did not move to compel, since they lacked, and still lack, the ‘clean hands’ and statement of compliance with their own discovery obligations required by the rule.”

Counsel for defendant/third-party plaintiff further submits that, on March 30, 2010, at the end of third-party defendant Allan Schulman’s deposition, the third-party defendants, through their then counsel, expressly and unambiguously waived their appearance at the deposition of

defendant/third-party plaintiff's representative. "Specifically, Third-Party Defendants' counsel Joseph Harbeson, with Mr. Schulman seated next to him, stated on the record: 'I understand the representative of Colonial is here. I'm going to waive my attendance at that deposition. We don't really need to attend it and for good practical reasons, we're not going to.'" See Third-Party Defendants' Affirmation in Support Exhibit D. Defendant/third-party plaintiff's representative was deposed by plaintiff's counsel and plaintiff's counsel was the only one who adjourned the deposition and reserved the right to re-notice defendant/third-party plaintiff's deposition. Counsel for defendant/third-party plaintiff contends that this issue is moot since plaintiff and defendant/third-party plaintiff have settled their dispute in this matter. Furthermore, counsel for defendant/third-party plaintiff argues that they did not produce a witness without knowledge in order to thwart discovery or violate the Court's orders.

Counsel for defendant/third-party plaintiff states that, on May 18, 2010, less than two weeks prior to the trial certification deadline, third-party defendants, for the first time and after the expiration of the deadlines set forth in the Court's January and March Orders, served defendant/third-party plaintiff with a request for documents. See Third-Party Defendants' Affirmation in Support Exhibit C. Counsel for defendant/third-party plaintiff claims that said discovery request was "overly broad and non-specific" and "only sought documents pertaining to Beacon's work as a consultant on the Project. "The Third-Party Defendants **did not request** copies of bills or costs incurred by Colonial to date in litigating Pete's claims, which would obviously be relevant to the third-party indemnification action." See *id.* Third-party defendants objected to service of defendant/third-party plaintiff's May 18, 2010 Discovery Demand. See Defendant/Third-Party Plaintiff's Affirmation in Opposition Exhibit E.

As previously stated in defendant/third-party plaintiff's Affirmation in Opposition, on February 8, 2012, this Court refused to stay the trial of the instant matter, as requested in third-party defendants' instant Order to Show Cause, and held that said trial will go forward on March 2, 2012, as scheduled, and the scope of said trial will be limited to indemnity of plaintiff's payment bond claim and related expenses (as expressly permitted by the indemnity agreement).

[* 7]

Accordingly, that portion of third-party defendants' motion, pursuant to CPLR § 1007, for an order limiting third-party plaintiff's claims to the claims relating to the plaintiff's main cause of action is hereby **GRANTED**.

With respect to third-party defendants' motion, pursuant to CPLR § 3126, for an order precluding third-party plaintiff from calling a witness at trial when it failed to produce a witness with knowledge at a deposition and precluding third-party plaintiff from producing any documents at trial that are responsive to a previously served Discovery Notice, the Court finds that counsel for defendant/third-party plaintiff has demonstrated that the discovery demands made by third-party defendants that are at issue were made well after the expiration of the discovery deadlines set forth in the Court's January and March Orders. *See* Defendant/Third-Party Plaintiff's Affirmation in Opposition Exhibits B and C. Furthermore, counsel for defendant/third-party plaintiff has shown that counsel for third-party defendants expressly and unambiguously waived third-party defendants' appearance at the deposition of defendant/third-party plaintiff's representative, thereby making the argument that counsel for defendant/third-party plaintiff had never produced a witness with knowledge for an EBT one that lacks a good faith basis. *See* Third-Party Defendants' Affirmation in Support Exhibit D. Counsel for defendant/third-party plaintiff has additionally shown that third-party defendants failed to object to the filing of the Note of Issue and waited almost eighteen (18) months to raise the issue in its instant Order to Show Cause. Additionally, counsel for defendant/third-party plaintiff has shown that the third-party defendants never made a good-faith demand upon defendant/third-party plaintiff to resolve any discovery issues as required by the Uniform Court Rules, never requested the documents that will be at issue in the third-party action and never filed a motion to compel discovery under CPLR § 3124. Finally, counsel for defendant/third-party plaintiff has submitted documentary evidence that the Indemnity Agreement between the parties provides defendant/third-party plaintiff the right "[i]n any claim or suit hereunder, [to present] an itemized statement of [Colonial's] loss and expense, sworn to by an officer of [Colonial], or the vouchers or other evidence of disbursement by [colonial], shall be prima facie evidence of the fact and

extent of the liability hereunder of Indemnitor[s].” See Defendant/Third-Party Plaintiff’s Affirmation in Opposition Exhibit A at ¶ 4(d).

It is also noted that, at the January 11, 2012 status conference held before this Court, the Court issued a ruling denying counsel for defendant/third party plaintiff’s request that the Court re-open discovery and that challenged the sufficiency of defendant/third party plaintiff’s discovery responses. Said requests were rejected as the Court ruled that such challenge by third-party defendants should have been made in July of 2010, after the dates in the June Stipulation had expired, and/or within twenty days of the filing of the Note of Issue.

Accordingly, third-party defendants’ motion, pursuant to CPLR § 3126, for an order precluding third-party plaintiff from calling a witness at trial when it failed to produce a witness with knowledge at a deposition and precluding third-party plaintiff from producing any documents at trial that are responsive to a previously served Discovery Notice is hereby **DENIED.**

Defendant/third-party plaintiff and third-party defendants shall appear for Trial in IAS Part 31 of the Nassau County Supreme Court, 100 Supreme Court Drive, Mineola, New York, on March 9, 2012, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:



DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
February 23, 2012

ENTERED
FEB 28 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE