

**Nagan Constr., Inc. v Monsignor McClancy Mem.  
High Sch.**

2013 NY Slip Op 33674(U)

July 10, 2013

Sup Ct, Queens County

Docket Number: 009543 2011

Judge: Marguerite A. Grays

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This opinion is uncorrected and not selected for official publication.



Memorial High School, East Elmhurt, N.Y.” (FAA/PA Grant Project Nos. 3-36-0068-67-99, 3-36-0068-80-02); on the motion by defendant MMHS pursuant to CPLR 3103, for a protective order with regard to the materials and information requested in the plaintiffs’ interrogatories to MMHS dated January 4, 2013, and plaintiffs’ disclosure demands to MMHS dated January 4, 2013; on the motion brought by order to show cause by the defendant MMHS pursuant to CPLR 2304, quashing a subpoena dated January 4, 2013 and served upon J.P. Morgan Chase, N.A., and pursuant to CPLR 3103, for a protective order denying use of any disclosure device to prevent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice to any person or the courts; and on the motion by defendant John Ciardullo Associates, P.C. pursuant to 22 N.Y.C.R.R. § 202.21(e) of the Uniform Rules- Trial Courts, striking and vacating the plaintiffs’ Note of Issue and Certificate of Readiness, pursuant to CPLR 3124 and Uniform Court Rule § 208.13 compelling the plaintiffs to comply with all outstanding discovery, and pursuant to CPLR 3212(a) to extend the time to move for summary judgment for an additional 60 days following the completion of discovery.

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Upon the foregoing papers it is ordered that these motions are determined as follows:

Plaintiffs Nagan Construction, Inc. (Nagan) and Conair Corporation (Conair) formed a joint venture (Joint Venture) and entered into a construction contract, dated June 30, 2005 with MMHS to perform noise abatement work at the school, for the sum of \$7.2 million dollars. Travelers Casualty and Surety Company of America (Travelers) issued a performance and payment bond in connection with said construction project on June 16, 2005. The Joint Venture, and others, each executed an indemnity agreement in favor of Travelers dated June 16, 2005, and Conair and others also executed an indemnity agreement in favor of Travelers dated March 14, 2006.

MMHS, in a letter dated October 29, 2007, terminated the Joint Venture’s right to proceed due to its default under the contract and made a demand on the surety Travelers to complete the contract pursuant to its performance bonds. Travelers, with the consent of MMHS initially attempted to use the Joint Venture to complete the project, but these efforts were not successful. MMHS then retained a company to conduct an evaluation of the quality of the work performed by the Joint Venture.

In December 2007, Travelers retained Lovett-Silverman Construction Consultants Inc. (Lovett-Silverman), a surety and construction claim consultant, to assist it in obtaining bids to complete the remaining work on the project. In June 2009, MMHS and Kenstar Construction Corp. (Kenstar) entered into a tender agreement whereby Travelers tendered Kenstar as the completion contractor. Kenstar furnished its own surety bonds, and Travelers funded the \$1,954,544.72 shortfall between the remaining contract balance and Kenstar's completion price.

On March 21, 2008, Travelers commenced an action in Queens County Supreme Court, entitled *Travelers Casualty and Surety Company of America v Stransky*, Index No. 7359/08, for reimbursement pursuant to the two indemnity agreements. Nagan and Conair were named defendants in that action. The court, in an order dated October 2010, and a judgment entered December 28, 2010, granted Travelers' motion for summary judgment against the defendants in its favor in the sum of \$2,536,775.70. A stipulation of settlement was entered into by the parties on January 24, 2011, which expressly reserved the defendants' right to appeal the court's order and judgment, and a satisfaction of judgment was filed with the court. The court therein, in an order dated January 19, 2012, denied the defendants motion to renew Travelers' motion for summary judgment. The defendants appealed and the Appellate Division, Second Department, affirmed the Supreme Court's order and judgment (*Travelers Cas. & Sur. Co. of Am. v Stransky*, 93 AD3d 781 [2d Dept 2012]).

Nagan and Conair commenced this action on April 18, 2011, alleging breach of contract, fraud and unjust enrichment. There are now multiple discovery motions before this Court. In particular, the defendants MMHS is seeking a protective order from further disclosure and in a separate motion, to quash a subpoena served on J.P. Morgan Chase, while the plaintiffs seek to compel discovery from MMHS.

While CPLR 3101(a) requires full disclosure of all matter material and necessary from parties and non-parties in the prosecution or defense of an action, the principal of full disclosure does not give a party the right to uncontrolled and unfettered disclosure and trial courts have broad power to regulate discovery to prevent abuse (*Gilamn & Ciocia v Walsh*, 45 AD3d 531 [2007]). Trial courts possess broad discretion to deny disclosure demands that are unduly burdensome or seek irrelevant or improper information (*Feger v Warick Animal Shelter*, 59 AD3d 68 [2008]; *Scalone v Phelps Mem. Hosp. Ctr.*, 184 AD2d 65 [1992]). It is within the sound discretion of the trial court to make a protective order denying, limiting, conditioning or regulating the use of any disclosure device (CPLR 3103[a]; *Tornheim v Blue & White Food Prods. Corp.*, 73 AD3d 745 [2010]; *Feger*, 59 AD3d at 70; *Scalone*, 184 AD2d at 69).

Here, the defendant MMHS argues that discovery requests from plaintiff that it has not responded to are improper because they seek the disclosure of information pertaining to issues which were resolved in the *Travelers* action. In particular, the requests seek information pertaining to the amounts paid to MMHS by Travelers and how MMHS spent such money. This Court previously held, when granting the pre-answer motion to dismiss of Lovett-Silverman, “[h]ere, the court in the *Travelers* action, in granting summary judgment in favor of the surety, necessarily determined that the payments made by the surety were made in good faith and reasonable as to the amount paid....Plaintiffs in the *Travelers* action had a full and fair opportunity to raise their objections to Travelers’ payments, including the reasonableness of the payments and are now precluded from relitigating this claim....” Thus, the issue of whether the payments made by Travelers were reasonable has been determined and a further determination on the issue is barred by the doctrine of res judicata. As such, to the extent the disclosure requests seek information that pertains to the amount paid by Travelers and further information such as how MMHS spent the money received from Travelers, these requests are precluded and these documents are subject to a protective order and do not have to be produced. Furthermore, the motion to quash the subpoena served upon J.P. Morgan Chase is granted. The stated purpose of the subpoena is to learn how funds received from the surety was used. Since the amount of that Travelers paid on the bond has been found to be reasonable, the plaintiffs are not entitled to discovery on how those funds were spent.

However, not all of the requests by the plaintiffs relate to the funds received from Travelers. The plaintiffs seek minutes from any meeting concerning the construction project and other documents relating to the decision to terminate the plaintiffs. If these minutes or other documents exist they would not fall under the protective order and must be produced by MMHS. Therefore, the defendant MMHS is ordered to produce any such minutes or other documents or state under oath that they are not in possession of these documents and cannot using due diligence locate a copy of such documents (*see Castillo v Henry Schein*, 259 AD2d 651 [1999]; *Mirabile v Profy*, 135 AD2d 618 [1987]). While, MMHS has produced an affidavit from Nicholas Melito stating that there are no more documents which are responsive to the plaintiff’s disclosure demands, it does not specifically address whether MMHS possesses any minutes from meetings. Therefore, a further affidavit should be produced stating no such minutes exist. Thus, the branch of the motion by plaintiffs to compel the production of documents demanded is granted only to the extent that any further documents unrelated to the payments made by Travelers, or an affidavit attesting that such documents do not exist or are not in defendant’s possession, must be produced within 20 days of service with a copy of this Order, together with notice of entry.

The plaintiffs also seek an order directing the defendant MMHS to produce certain witnesses for depositions. Inasmuch as the plaintiffs seek the testimony of Brother Rocco

concerning the decision to terminate the plaintiffs, such testimony is relevant and not precluded. Additionally, the plaintiffs seek to question Brother Connolly regarding the decision not to have a construction manager attend to the project. Such testimony is also material and necessary. Therefore, the defendant MMHS is directed to produce Brothers Rocco and Connolly for depositions on **August 27<sup>th</sup>, 2013 at 9:30 a.m.**, at such place as the parties mutually agree upon. The examinations shall continue day to day until completed. **There shall be no adjournment of the examinations without Order of this Court.** To the extent a further deposition of Nicholas Melito is necessary, he shall be produced, but the plaintiffs are prohibited from questioning him as to any information regarding the payments received from Travelers. On the other hand the plaintiffs claim that the testimony of Brother Holthaus is related to the repairs to work done by the plaintiffs and paid for by Travelers. In light of the above discussion that any further determination regarding the expenditures to repair are barred by the doctrine of res judicata this witness shall not be produced.

Finally, the Court will turn to the motion by defendant John Ciardullo Associates, P.C. to strike the note of issue due to alleged outstanding discovery in this action. The motion to strike is denied. Here, there have been multiple adjournments in filing the note of issue. The plaintiffs finally filed the note of issue during the pendency of the discovery motions. Inasmuch as these discovery issues have now been resolved and there does not remain substantial discovery, this case should remain on the trial calendar pending completion of discovery (*see National Lease Income Fund 6 L.P. v George*, 222 AD2d 662 [2d Dept 1995]; *Torres v New York City Tr. Auth.*, 192 AD2d 400 [2d Dept 1993]).

In light of the outstanding discovery remaining as set forth above, the branch of the motion by John Ciardullo Associates, P.C. to extend the time to make summary judgment motions until 60 days after the completion of all discovery in this action, is granted.

The branch of the motion by defendant John Ciardullo Associates, P.C. to compel plaintiff to comply with outstanding discovery is denied. Said defendant failed to annex a copy of any demands which it claims plaintiff failed to respond to.

Accordingly, the motion by MMHS for a protective order is granted to the extent that the plaintiff is not entitled to any disclosure related to the payments made by Travelers and how MMHS spent such money. To the extent any remaining discovery exists unrelated to payments made by Travelers, MMHS is directed to comply with all outstanding discovery demands as discussed below. The motion by MMHS to quash the subpoena served upon J.P. Morgan Chase is granted.

The motion by the plaintiffs to compel the production of documents demanded is granted only to the extent that any further documents unrelated to the payments made by

Travelers must be produced within 20 days of service of this order with notice of entry. Additionally, MMHS must produce Brothers Rocco and Connolly and Nicholas Melito for depositions as set forth above. The plaintiffs are not entitled to a deposition of Brother Holthaus. The plaintiffs are directed to serve a copy of this order with notice of entry upon all parties.

The branch of the motion by John Ciardullo Associates, P.C. to vacate the note of issue is denied. The branch of the motion by John Ciardullo Associates, P.C. to extend the time to make summary judgment motions until 60 days after the completion of discovery is granted.

Dated: JUL 10 2013

  
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J.S.C.

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QUEENS COUNTY CLERK  
FILED