

Suculanda v Gamma Master Framers Inc.

2013 NY Slip Op 33764(U)

December 2, 2013

Supreme Court, Westchester County

Docket Number: 53351/12

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

-----X
LUIS SUCULANDA,

Plaintiff,

-against-

DECISION & ORDER

Index No. 53351/12
Motion Date: Nov. 4, 2013

Seq. No. 6 & 7

GAMMA MASTER FRAMERS INC., WB STONE HILL ASSOCIATES LLC and WILDER BALTER PARTNERS, INC.,

Defendants.

-----X
WB STONE HILL ASSOCIATES LLC and WILDER BALTER PARTNERS, INC.,

Third-Party Plaintiffs,

-against-

GAMMA CONSTRUCTION,

Third-Party Defendant.
-----X

LEFKOWITZ, J.

The following papers were read on: (1) motion by defendants/third-party plaintiffs WB Stone Hill Associates LLC and Wilder Balter Partners, Inc. for an order pursuant to CPLR 3126 striking the answer of third-party defendant Gamma Construction to the third-party complaint, or precluding the third-party defendant from offering evidence at trial; and (2) motion by third-party defendant Gamma Construction for an order pursuant to CPLR 3126 dismissing the third-party complaint, or precluding the third-party plaintiffs from introducing evidence at trial against third-party defendant, or, alternatively, compelling third-party plaintiffs to provide full and complete responses to third-party defendant's discovery demands.

Motion Seq. No. 6: Order to Show Cause - Affirmation in Good Faith
Memorandum of Law in Support
Affirmation in Support - Exhibits A-O
Third-Party Defendant's Affirmation in Opposition-Exhibits A-I
Plaintiff's Affirmation
Affidavits of Service

Motion Seq. No. 7: Order to Show Cause - Good Faith Affirmation
Affidavit in Support -Exhibits A-Q
Third-Party Plaintiffs' Affirmation in Opposition - Exhibit 1
Plaintiff's Affirmation
Affidavits of Service

Upon the foregoing papers and the proceedings held on November 4, 2013, these motions are determined as follows:

Plaintiff seeks to recover damages for injuries allegedly sustained on October 18, 2010 when he fell from a ladder while constructing a deck at the Stone Hill Apartments (hereinafter "the apartments"). Plaintiff alleges that WB Stone Hill Associates LLC and Wilder Balter Partners, Inc. were, respectively, the owner and manager of the subject premises. Plaintiff further alleges that WB Stone Hill Associates contracted with defendant Gamma Master Framers Inc.¹ to demolish old decks and install new decks at the apartments. Plaintiff also alleges that defendant Gamma Master Framers Inc. contracted with AJK Homes, Inc., plaintiff's employer, to act as the subcontractor to demolish old decks and install new decks at the premises.

The third-party action was commenced on or about August 29, 2012. In the third-party complaint, it is alleged that third-party defendant Gamma Construction was a subcontractor for the third-party plaintiffs at the apartments on and before October 18, 2010, and entered into a subcontract with AJK Homes to perform deck replacement at the premises.

Third-party plaintiffs now seek to strike the third-party defendant's answer for its willful and contumacious disobedience of discovery demands and court orders directing it to produce witnesses for depositions and to provide demanded documents. On February 15, 2013, the parties appeared for a compliance conference and the court directed that depositions of all parties be completed by March 29, 2013. On February 19, 2013, third-party plaintiffs served a Notice for Discovery and Inspection upon third-party defendant. On April 4, 2013, counsel for third-party plaintiffs sent a letter to counsel for third-party defendant requesting a response to the February 19, 2013 Notice for Discovery and Inspection.

Third-party plaintiffs allege that while in court on another motion in this action, their

¹ By decision dated August 20, 2012 (Bellantoni, J.), a default judgment was entered against defendant Gamma Master Framers, Inc.

counsel and counsel for plaintiff and third-party defendant agreed on April 23, 2013 as the date that third-party defendant would produce its witness for a deposition. Third-party plaintiffs further allege that on April 15, 2013, when their counsel attempted to confirm the deposition, counsel for third-party defendant advised that it would not be producing the witness since the witness had not received a formal Notice for a Deposition. Additionally, third-party plaintiffs assert that counsel for third-party defendant also indicated that he would not be providing responses to third-party plaintiffs' discovery demands. On April 15, 2013, counsel for third-party plaintiffs sent a letter to counsel for third-party defendant which included, *inter alia*, a Notice To Take Deposition Upon Oral Examination for third-party defendant's witness on May 22, 2013. Also on April 15, 2013, third-party defendant's counsel served third-party defendant's response to third-party plaintiffs' Notice for Discovery and Inspection. Third-party plaintiffs contend that the responses therein were not meaningful and were non-responsive.

In the interim, by orders dated May 6, 2013 and June 13, 2013, this court (Bellantoni, J.) denied third-party defendant's motions for summary judgment.

On May 22, 2013, a compliance conference was held and an order issued which directed, *inter alia*, that the depositions of third-party defendant and nonparty Michael Scirbona were to be completed by June 21, 2013, and that third-party plaintiffs and third-party defendant were to provide responses to all outstanding discovery within three weeks of the order. On or about June 13, 2013, third-party plaintiffs served their Supplemental Response to Demand for a Third-Party Bill of Particulars. On June 23, 2013, third-party defendant produced for deposition Andrzej Mlynarski, who identified Gregory Stachnik as the owner of the company. On June 26, 2013, third-party plaintiffs served a post-deposition Notice to Produce for Discovery and Inspection. Third-party plaintiffs assert that third-party defendant never responded to those demands.

On July 2, 2013, a compliance conference was held at which time the court ordered that the depositions of Scirbona and Stachnik were to be completed by August 23, 2013, and that any paper discovery ordered at the May 22, 2013 conference was to be completed by July 19, 2013. The order further provided that failure to comply would "presumed to be sanctionable by the CPLR."

Third-party plaintiffs now bring this motion to strike third-party defendant's answer, preclude or compel on the grounds that third-party defendant has failed to respond to third-party plaintiffs' discovery demands in contravention of multiple court orders despite third-party plaintiffs' attempts to resolve the discovery issues by letter and by telephone on July 15, 2013, July 23, 2013, and September 9, 2013.

A review of the history of this case and the present motion papers convinces the Court that third-party defendant has been remiss in honoring its obligation to produce necessary and relevant information as well as in stalling necessary examination. However, it has been represented to the Court that, since the making of this motion, the deposition of Stachnik has taken place and any problem respecting the deposition of Scirbona is now moot.

On or about February 19, 2013, third-party plaintiffs served a notice for discovery and inspection upon third-party defendant which sought twelve specific categories of documents, each of which relate to the primary issues in controversy, i.e., what was the true legal nature of Gamma Construction and what, if anything, was its relationship to Gamma Framers. To date, the only response has been that each demand is “overly broad, vague, unduly burdensome, subject to various interpretations, outside the scope of the specific time frame relative to the alleged action, materials prepared in anticipation of litigation and not likely to lead to discoverable information.” While this was the general objection made as a preface, the subsequent individual answers were each preceded by the objection that the demand was “palpably improper”. Even so, some of the answers did contain a specific factual response. Thus, for example, the request for a telephone number stated that information is in the “Public dominion (sic) and assessable (sic) to third party plaintiff (sic)”; of course, this would not be a ground for not providing the actual telephone number. Moreover, there is no claim that third-party defendant is not in possession or knowledge of the documents or information itemized.

Third-party plaintiffs are entitled to the documents and information sought by their notice for discovery and inspection. The blunderbuss objections thereto are inappropriate. Third-party plaintiffs seek information with respect to their claim, in effect, that Gamma Framers and Gamma Construction should be considered the same legal entity for purposes of this lawsuit. That this material is relevant to this lawsuit is underlined by the apparent chronology concerning the creation of Gamma Construction, the similarity of names of the two Gamma entities (so as to convince customers of their seeming continuity), the identity of the principals involved, and the same addresses (and, considering the evasive response to the request therefor, maybe the same telephone number).

Thus, on or before December 13, 2013, third-party defendant is directed to provide the documents and information sought by the third-party plaintiffs in the aforesaid notice for discovery and inspection. It has been represented to the Court that it was testified to at the deposition of Mr. Stachnik that, if the information and documents exist, they will be at the office of the third-party defendant. To the extent that any of the information or documents are not in third-party defendant’s possession, third-party defendant shall furnish an affidavit from a knowledgeable person describing the search made therefor and the reason for its non-existence.

Third-party defendant’s motion is addressed to the response to its demand for a bill of particulars. Prior to dealing with the specifics of this claim, third-party defendant’s attorney has set forth an impassioned factual argument that is repetitive of the recurring theme that his client is entitled to summary judgment dismissing the third-party complaint. The two previous motions therefor were denied, albeit on procedural grounds, and never renewed a third time, despite permission having been granted therefor.

The third-party plaintiffs were previously instructed to provide a meaningful response to the demand for a bill of particulars and supplemental responses were attempted. However, a close scrutiny of the demand for a bill that the present motion requires discloses that the information sought thereby is the very same information that can only be ascertained by third-

party plaintiffs after the full and complete disclosure which third-party defendant has been at pains to avoid.

Besides being beset by prolixity, the demand by third-party defendant for a bill of particulars sounds in the nature of interrogatories. Worse still is the fact that the demand suffers from the same ill that previously herein mandated the striking of said party's notice to admit – it seeks admissions of ultimate issues.

In short, the Court finds that there is no basis for holding that third-party plaintiffs have willfully, or otherwise, failed to respond to third-party defendant's discovery requests.

In view of the foregoing, it is

ORDERED that on or before December 13, 2013, third-party defendant is directed to provide the documents and information sought by the third-party plaintiffs in the February 19, 2013 notice for discovery and inspection; and it is further

ORDERED that, in the event any such documents or information are not in the possession of third-party defendant, third-party defendant shall furnish an affidavit from a knowledgeable person describing the search made therefor and the reason for its non-existence; and it is further

ORDERED that the motions of third-party plaintiffs and third-party defendant are otherwise denied; and it is further

ORDERED that counsel are directed to appear in the Compliance Part, Room 800, for a conference on December 17, 2013 at 9:30 AM.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
December 2, 2013



HON. JOAN B. LEFKOWITZ, J.S.C.

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BY NYSCEF