

Gonzalez v Vanguard Constr. & Dev. Co., Inc.

2014 NY Slip Op 30289(U)

January 23, 2014

Sup Ct, New York County

Docket Number: 105471/2011

Judge: Joan M. Kenney

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Joan M. Kenney
Justice

PART 8

Index Number : 105471/2011
GONZALEZ, MOISES
vs
VANGUARD CONSTRUCTION
Sequence Number : 001
DISMISS

INDEX NO. 105471/2011
MOTION DATE 2/11/13
MOTION SEQ. NO. 001

The following papers, numbered 1 to 25, were read on this motion to/for strike the complaint

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1-14
Answering Affidavits — Exhibits _____ | No(s). 15-24
Replying Affidavits _____ | No(s). 25

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE
WITH THE ATTACHED MEMORANDUM DECISION**

FILED
FEB 03 2014
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 1/23/2014

HON. JOAN M. KENNEY
[Signature], J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS Part 8

-----X
Moises Gonzalez,

Plaintiff,

-against-

Vanguard Construction and Development Company, Inc.,
Defendants.

-----X
Vanguard Construction and Development Company, Inc.,
Third-Party Plaintiff,

-against-

Phase I Removals, Inc.,
Third- Party Defendants.

-----X
KENNEY, JOAN M., J.

DECISION AND ORDER
Index Number: 105471/2011
Motion Seq. No. 001

FILED
FEB 07 2014
NEW YORK
CLERK'S OFFICE

Recitation, as required by CPLR 2219(a), of the papers considered in review of these motion to strike the complaint.

Papers	Numbered
Notice of Motion, Affirmation and Exhibits	1-14
Notice of Cross Motion, Opposition Affirmation and Exhibits	15-24
Opposition Affirmation, Reply Papers and Exhibits	25

In this matter sounding in contractual indemnification, contribution, and failure to procure insurance, third-party defendant, Phase I Removals, Inc. (Phase I), moves for an Order, pursuant to CPRL §3126, striking the third-party plaintiff, Vanguard Construction and Development Company, Inc.'s (Vanguard) complaint, or in the alternative, pursuant to CPLR §3124, compelling third-party plaintiff to respond to discovery demands.

Factual Background

Briefly, plaintiff Moises Gonzalez commenced this action on or about May 10, 2011, alleging that while working on the premises at 283 West Broadway, New York, New York (the premises),

he was caused to incur injuries when a wooden board came down a chute and struck his left hand. Gonzales further alleges that the accident occurred while in the employ of Phase I. Vanguard had hired Phase I for demolition and remedial work at the premises. On or about December 29, 2011, Vanguard filed a third-party complaint against Phase I asserting causes of action for contractual indemnification, contribution, and failure to procure insurance. On or about March 6, 2012, Phase I interposed an answer to the third-party complaint.

During a Compliance Conference held on March 22, 2012, this Court ordered that third-party plaintiff provide third-party defendant with daily logs and records for the date of the accident and one month prior to the accident to the extent such records exist and are available. The Order further directed that depositions of the third-party plaintiff and defendant be scheduled by July 12, 2012.

By a subsequent Order dated August 2, 2012, third-party plaintiff and defendant were directed to mutually exchange project documents in their possession including daily/weekly reports, meeting minutes, foreman/supervisory logs, photos, safety documents, and OSHA Investigation documents. The deposition dates of third-party plaintiff and defendant were postponed until on or before September 30, 2012. The third-party plaintiff and defendant were also directed to exchange insurance information.

On October 11, 2012, a status conference was held during which it was ordered that third-party plaintiff produce project supervisor/foreman Mario Zollo and project supervisor John Adams for depositions on or before January 15, 2013, and that third-party defendant produce Bobby Berrios for a deposition on or before January 18, 2013. Third-party plaintiff was again directed to provide all project documents in their possession, to the extent it had not already done so, as described in the previous Orders.

Third-party plaintiff responded to Phase I's combined demands by providing a copy of the contract between Vanguard and premises owner Hazelden/New York (Hazelden) for the subject premises. The contract stated that the construction manager was to keep records of the progress of the project, including, *inter alia*, written progress reports and daily logs. (See Hazelden and Vanguard Contract, movant's Exhibit I.) Phase I seeks the production of these documents, claiming that they are relevant to the extent that Vanguard's direction and control of the premises, work performed, and implementation of safety plans may be implicated in these documents. Phase I alleges that Vanguard has failed to produce such progress reports and daily logs, despite their numerous attempts to obtain them. Furthermore, Phase I alleges that Vanguard failed to produce Mario Zollo and John Adams for depositions on or before the dates set forth in the Court Order.

Vanguard alleges that it has produced all requested documents in its possession, or that the documents requested by Phase I do not exist. Vanguard produced more than 372 pages of documents and responded to each of Phase I's discovery demands of March 6, 2012. (See Supplemental Response to Third-Party Defendant's Notice fo Discovery and Inspection, nonmovant's Exhibit H.) Vanguard has provided Phase I with job site photographs, project blue prints, information related to former employees, e-mails between Vanguard employees regarding the incident, and other information. Vanguard is not in possession of any OSHA documents or any Tool Box Talk Minutes, and relayed this to Phase I.

Vanguard further asserts that the documents related to the entire project, including meeting minutes, logs, memos, and safety related documents, is overbroad, unduly burdensome, and beyond the scope of the Court's previous Orders. The documents referred to in the Hazelden/Vanguard Contract refers to written reports between the owner and architect and, according to Vanguard, are

irrelevant to this action and not likely to lead to any admissible evidence. Additionally, Vanguard denies withholding Mario Zollo and John Adams from being deposed. Vanguard asserts that Phase I only attempted scheduling those depositions one day prior to the deadline set in the Court Order. Once Vanguard was aware that Phase I was seeking these depositions, Vanguard did schedule them for February 5, 2013.

Arguments

Third-party defendant claims that third-party plaintiff has failed to sufficiently respond or produce documents in its possession that are directly relevant to the issues in this action despite numerous demands and Court Orders.

Third-party plaintiff contends that it has complied with all Court Orders by producing the requested documents, and that any additional documents sought are not relevant to the action, or do not exist.

Discussion

CPLR §3120(1)(i) states that “after commencement of an action, any party may serve on any other party a notice or on any other person a subpoena duces tecum: (i) to produce and permit the party seeking discovery, or someone acting on his or her behalf, to inspect, copy, test or photograph any designated documents or any things which are in the possession, custody or control of the party or person served.”

Under CPLR §3124, “if a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article...the party seeking disclosure may move to compel compliance or a response.” Generally, a “trial court is afforded broad discretion in supervising disclosure, and its determinations will not be disturbed unless that discretion has been

clearly abused.” (*Those Certain Underwriters at Lloyds, London v Occidental Gems, Inc.*, 11 NY3d 843 [2008]; *see, Mann v Cooper Tire Co.*, 33 AD3d 24 [1st Dept. 2006]).

CPLR §3126 imposes penalties upon parties for their refusal to comply with an order to disclose. CPLR §3126(3) states, in pertinent part, that:

“If any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them: an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.”

“CPLR §3126 is an enforcement mechanism, giving the court power to impose penalties for failure to obey a court order.” (*Patricia Postel et al. v New York University Hospital*, 262 AD2d 40 [1st Dept 1999]). That being said, striking the pleadings is a drastic measure and defendant has failed to demonstrate that plaintiff's non-compliance was willful, contumacious or due to bad faith. (*see Shirley Jones v New York City Transit Authority, et al.*, 2002 NY App Div Lexis 3605 [1st Dept. 2002]).

In regards to third-party defendant's demand for all project documents in its possession, including daily/weekly reports, meeting minutes, safety related documents and foreman/supervisory logs, as described in the Court's prior Orders, production is compelled.

In regards to third-party defendant's demand for all project documents in its possession as identified in the contract between Vanguard and Hazleden, which relate to progress reports and daily logs between the architect and owner of the premises, are not vague or overbroad, and have strong relevance to this case, and as such, production is compelled.

In regards to third-party defendant's demand for production of Mario Zollo and John Adams for depositions is compelled to the extent that depositions of named individuals has not already been completed.

Further, striking third-party plaintiff's complaint at this juncture would be harsh, and premature. Accordingly, it is

ORDERED, that third-party defendant's motion to compel discovery, is granted; and it is further

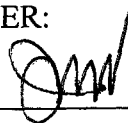
ORDERED, that third-party defendant's motion to strike third-party plaintiff's complaint is denied; and it is further

ORDERED, that the parties proceed to mediation forthwith.

Dated: 1/23/2014.

FILED
FEB 03 2014
NEW YORK
COUNTY CLERK'S OFFICE

ENTER:



Joan M. Kenney, J.S.C.