

Guaman v 1963 Ryer Realty Corp.

2014 NY Slip Op 30761(U)

February 21, 2014

Sup Ct, Bronx County

Docket Number: 307124/10

Judge: Laura G. Douglas

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX - PART IA-11

-----X
NICOLAS GUAMAN and PAULA MAYANCELA,

Plaintiff,

-against-

1963 RYER REALTY CORP., GAZIVODA REALTY
CO., INC. and A SAAD CONTRACTING, INC.,

Defendants.
-----X

DECISION & ORDER
Index No. 307124/10

HON. LAURA G. DOUGLAS

Third-party defendants AP Tek Construction Inc. and AP Tek Restoration Inc.¹ seek, among other things, to vacate the note of issue and certificate of readiness. Defendant A Saad Contracting, Inc.² also seeks to vacate the note of issue and certificate of readiness; additionally, A Saad requests an extension of time to move for summary judgment, and for relief under CPLR 3126.

On August 26, 2010, plaintiffs commenced this action against, among others, defendants 1963 Ryer Realty Corp. and A Saad Contracting, Inc. to recover damages for violations of the Labor Law; several impleader actions were subsequently commenced, all of which involve AP Tek Construction Inc. and AP Tek Restoration Inc. (the AP Tek parties).

On September 30, 2011, the AP Tek parties served notices for discovery and inspection on 1963 Ryer and A Saad Contracting, seeking copies of contracts, invoices, work orders, and the like related to the construction project giving rise to this lawsuit. Both 1963 Ryer and A Saad Contracting objected to the notices. A further notice for document discovery was served by the AP Tek parties on November 4, 2011 on 1963 Ryer. On August 15, 2012, the AP Tek parties served a notice to take the deposition of A Saad's principal, Nasir Mahmood. Between August 24 and August 28, 2012, defendant A Saad Contracting issued non-party deposition

¹The AP Tek parties are also parties to the other two impleader actions associated with this action and first third-party action.

²A Saad Contracting is also a party to two of three impleader actions associated with this action.

subpoenas to three non-party witnesses (Shetty, Crescenzo and Ahmed). The depositions of Mahmood, Shetty, Crescenzo and Ahmed have not been conducted.

Plaintiffs moved for summary judgment on or about August 24, 2012; other parties cross-moved for summary judgment. Those motions are pending in Part 22. A note of issue was filed on December 15, 2012.

The AP Tek parties argue that plaintiffs should not have filed the note of issue because of the material outstanding disclosure requested by the AP Tek parties. Moreover, the AP Tek parties assert that the note of issue and certificate of readiness inaccurately states that all disclosure is completed or waived. The AP Tek parties explain that they did not obtain the disclosure they seek because plaintiffs' August 2012 motion for summary judgment stayed disclosure proceedings from the time the motion was made.

With respect to that aspect of its motion to vacate the note of issue and certificate of readiness, defendant A Saad Contracting makes arguments similar to the ones advanced by the AP Tek parties (e.g., note of issue and certificate of readiness contains material misstatement regarding completion of disclosure). In addition to the depositions of Shetty, Crescenzo and Ahmed, defendant A Saad Contracting asserts that another non-party deposition (Paumaqueza), which was demanded in January 2013, has yet to be conducted, and that plaintiff Guaman has not appeared for a prosthetic independent medical examination (IME), which defendant A Saad Contracting indicated in January 2013 that it wished to conduct.

Plaintiffs oppose both motions. With respect to the AP Tek parties' motion, plaintiffs note that the disclosure the AP Tek parties seek is from the defendants, not plaintiffs. Plaintiffs assert that the AP Tek parties waived any right to obtain disclosure from the defendants because the AP Tek parties did not pursue it prior to the filing of the note of issue. With respect to A Saad Contracting's motion, plaintiffs argue that, under the court's December 12, 2011 compliance conference order, non-party depositions may be conducted post-note of issue, and therefore vacatur of the note of issue and certificate of readiness on the ground that the

depositions of Shetty, Crescenzo, Ahmed, and Paumaqueza did not occur before the filing of the note of issue is unwarranted. With respect to the prosthetic IME of plaintiff Guaman, plaintiffs note that the request for that IME (which did not identify the physician who would perform the IME) was made after the filing of the note of issue, and that defendant A Saad Contracting did not demand that IME in accordance with the parameters set by the December 12, 2011 compliance conference order ("Defendant A Saad to designate prosthetic expert within 2 weeks + Plaintiff to submit to such exam within 2 weeks thereafter.").

Based on representations made at the conference on this motion, the only disclosure issues that need to be resolved at this juncture are (1) whether A Saad contracting should produce its principal, Mahmood, for a deposition; (2) whether plaintiff should appear for a prosthetic IME; and (3) whether the note of issue should be vacated to allow for non-party depositions.

Defendant A Saad Contracting need not produce Mahmood for a deposition. A Saad Contracting already produced a witness for deposition, and the AP Tek parties have not identified any reason why the deposition of another A Saad Contracting agent is necessary (see *Gelda v Costco Wholesale Corp.*, 89 AD3d 1058 [2d Dept 2011] [a corporation has the right to designate, in the first instance, which of its employees will appear for a deposition; a party seeking an addition deposition must demonstrate that the corporation's employee who was already deposed had insufficient knowledge or was otherwise inadequate, and that there was a substantial likelihood that the additional employee sought for deposition possessed information that was material and necessary to the prosecution of the action]). Although the AP Tek parties submitted the affidavit of Mahmood, which was submitted by A Saad Contracting in connection with the parties' summary judgment practice, that affidavit does not establish that the witness produced by A Saad Contracting for deposition had insufficient knowledge or was otherwise inadequate. The court notes too that the deposition testimony of that witness was not submitted on these motions.

Plaintiff need not appear for a prosthetic IME. The court's December 12, 2011 compliance conference order states, among other things, that "Defendant A Saad to designate prosthetic expert within 2 weeks + Plaintiff to submit to such exam within 2 weeks thereafter." But A Saad Contracting did not indicate that it was interested in conducting such an IME until January 2013, over one year after the deadline set by the compliance conference order, and after the note of issue was filed.

The note of issue will not be vacated to accommodate non-party depositions, since the "additional directives" page of the court's December 12, 2011 compliance conference order provides that "All Parties Reserve the Right to Conduct Non-Party Depositions, even post note of issue filing."³

Accordingly, it is hereby ordered that the motions are denied.

This constitutes the decision and order of the court.

Dated: 2-21-14



LAURA G. DOUGLAS, J.S.C.

³Because there does not appear to be any extant non-party subpoenas, the court declines to address the AP Tek parties' contention that the non-party deposition of Crescenzo should not be permitted because his testimony would involve material prepared in anticipation of litigation. Should Crescenzo be served with a non-party subpoena, a motion to quash that subpoena may be made.