SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

XIANG FU HE,

Plaintiff,

-against-

TROON MANAGEMENT, INC., FLUSHING-THAMES REALTY COMPANY, NOEL LEVINE, DARYL GERBER, As Executor for the Estate of ABRAHAM HERSON, HARRIETTE LEVINE, As Executor for the Estate of ABRAHAM HERSON, and NOEL LEVINE, As Executor for the Estate of ABRAHAM HERSON,

Defendants.

TROON MANAGEMENT, INC., FLUSHING-THAMES REALTY COMPANY, NOEL LEVINE, DARYL GERBER, As Executor for the Estate of ABRAHAM HERSON, HARRIETTE LEVINE, As Executor for the Estate of ABRAHAM HERSON, and NOEL LEVINE, As Executor for the Estate of ABRAHAM HERSON,

Third-Party Plaintiffs,

-against-

JFD TRADING, INC. and SDJ TRADING, INC.,

Third-Party Defendants.

Index No.: 111331/09

Motion Seq. No. 002

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action for personal injuries, plaintiff Xiang Fu He ("plaintiff") moves pursuant to CPLR 3217(a)(2) for an order nullifying a stipulation of discontinuance filed with respect to the third-party action against SDJ Trading, Inc. ("SDJ"), and a further order compelling SDJ to produce Enrique Guadarrama Perez ("Perez") and to provide other outstanding discovery. Defendants/Third-Party Plaintiffs (collectively, "Troon") oppose the motion.

Factual Background

The complaint arises from allegations that on January 22, 2007, plaintiff slipped and fell on an icy sidewalk in front of 1177A Flushing Avenue, Brooklyn, New York, which Troon owned and managed (the "premises"). At the time, plaintiff was employed by SDJ, which leased a portion of the premises from Troon.[1]

On April 1, 2013, Troon and SDJ executed a Consent to Change Attorneys form, whereby SDJ's counsel replaced Troon's original counsel.

Subsequently, plaintiff moved to obtain the deposition of Perez, who worked for SDJ and allegedly observed the accident, as well as the deposition of Lloyd Nelson ("Nelson"), who allegedly worked for Troon.

Before the motion was returnable, Troon and SDJ executed a stipulation of discontinuance purporting to discontinue Troon's third-party action against SDJ. Plaintiff did not sign the stipulation.

Subsequently, Troon opposed plaintiff's motion, averring that the third-party action against SDJ had been discontinued and that Nelson no longer worked for Troon. Notwithstanding, Nelson was later deposed as a non-party witness. At his deposition, Nelson was represented by independent counsel, Howard Caretto ("Caretto"). When plaintiff's counsel sought to ascertain who was paying Caretto's fee, both Caretto and Troon's counsel objected, and the issue was marked for a ruling.

Thereafter, pursuant to a subpoena, Perez and a second SDJ witness, Frank Lin ("Lin"),

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[1] Thereafter, Troon commenced a third-party action against JFD Trading, Inc. ("JFD"), also an alleged lessee of the premises, and SDJ for contribution and indemnification. Prior to the instant motion practice, Troon discontinued its third-party action against JFD; however, this discontinuance is not at issue.

were deposed. Both witnesses were represented by independent counsel, Mr. Stephen K. Blunda, Esq. ("Blunda"). As at Nelson's deposition, when plaintiff's counsel sought to ascertain who was paying Blunda's fee, both Blunda's and Troon's counsel objected, and the issue was marked for a ruling.

On or about February 25, 2014, plaintiff served upon Troon's current and prior counsel a notice for discovery and inspection, purportedly in follow up of Perez's and Lin's depositions. To date, SDJ has not responded to this set of demands.

Arguments

In the moving papers, plaintiff argues that the stipulation of discontinuance between Troon and SDJ is a nullity because it was not executed by plaintiff and served on all parties as required by CPLR 3217. In any event, this act is not the first instance of defendants seeking to prevent plaintiff from obtaining relevant discovery.

Furthermore, the circumstances surrounding the consent to change attorney form as it relates to the stipulation of discontinuance are troubling. Specifically, the form is dated April 1, 2013, while the stipulation was executed three months later. Thus, a conflict lies in the fact that Troon and SDJ agreed that SDJ's counsel would assume Troon's representation at a time when Troon still had a pending action against SDJ. This conflict mandates the disqualification of defense counsel and establishes collusion on behalf of both parties and their respective counsels as a matter of law.

Based on Nelson's deposition, plaintiff has a good-faith belief that Caretto was paid by Troon's counsel (*i.e.*, SDJ's prior counsel). Such conduct is inappropriate, as it seeks to frustrate the legitimate disclosure sought by plaintiff.

Additionally, mid-stream switching of counsel raises serious ethical issues with respect to conflict or intent. Attorneys should be disqualified at the mere hint of a breach of fiduciary duty towards their clients, a duty which remains in place even after representation has terminated. And, attorneys who engage in manipulation of discovery with the intent to secure an unfair advantage should be subject to professional discipline.

In sum, because the stipulation of discontinuance was not executed as required by the CPLR and is therefore ineffective as to plaintiff, SDJ is still a party to the action, and should be required to produce Perez for a deposition and to comply with all outstanding discovery.

In opposition, Troon maintains that in making the instant motion, plaintiff's sole motivation was to obtain discovery from SDJ (which is currently based in New Jersey) without having to make a motion for an open commission.

Also, not only is it improper for plaintiff to attempt to force SDJ to continue to appear and defend itself in a case in which there are no claims pending against it, there is no mechanism by which an entity with no claims asserted against it can remain a party to an action.

In addition to not having any claims against SDJ, plaintiff could not assert any claims against SDJ because SDJ was plaintiff's employer. Here, it is undisputed that plaintiff's accident occurred during the course of his employment with SDJ; thus, his sole remedy against SDJ would be through workers' compensation. Thus, even if the stipulation of discontinuance is deemed invalid, plaintiff should still be compelled to sign the stipulation because plaintiff has no interest in the third-party action.

Regarding the branch of plaintiff's motion which seeks production of Perez for a deposition, not only did Perez appear for a deposition on January 28, 2014, but a second SDJ

witness, Lin, appeared as well on that date. Plaintiff's counsel was present at both depositions.

Not only is there no legitimate basis for plaintiff to force SDJ to remain part of the lawsuit, but since the subject stipulation was signed, plaintiff has operated as though the stipulation was valid and effective. Plaintiff's belated attempt to have the stipulation nullified is a transparent attempt to avoid having to make a motion to obtain discovery from SDJ, which plaintiff considered a non-party when the subject stipulation was signed.

Finally, plaintiff's cited cases are distinguishable from the case at bar. In any event, it is telling that when plaintiff served post-deposition discovery demands on SDJ, he twice referred to both Lin and Perez as "non-parties." As such, Troon requests that the motion be denied in its entirety.

In reply, plaintiff maintains that Troon and SDJ are colluding in an effort to forestall discovery and to harm plaintiff while unfairly benefitting them. Furthermore, the fact that plaintiff did manage to secure some discovery from what Troon terms "non-party" witnesses exemplifies the strength of plaintiff's claim.

Upon information and belief, the insurance company representing Troon paid the fees charged by Blunda for the representation of Perez and Lin at their prior depositions. It is unlikely that either Lin or Perez paid for those services out of their own pockets, or that they managed to appear fortuitously by the same counsel, which is likely why Blunda improperly refused to allow them to answer the relevant question of who was paying his legal fees. This question entailed no privilege because it involved no confidential information. And, during Nelson's deposition, the exact same tactics were employed. The same firm procured another supposedly independent attorney to represent Nelson. At his deposition, that attorney obstructed the same line of

questioning as to who hired him and as to privilege between purported non-parties and parties, who were all acting in collusion.

Here, it is undisputed that the third-party action was not properly discontinued. Yet, after partially executing the stipulation of discontinuance, SDJ's counsel assumed representation of Troon, who had previously brought the third-party action against SDJ. This entails a clear conflict of interest which could not have been waived and was designed to damage plaintiff's claims; in other words, to prevent plaintiff from deposing witnesses who were employed by the "parties" to the action, and to prevent plaintiff from obtaining other necessary discovery. Moreover, Perez's deposition testimony conflicts with a signed statement regarding the accident.

There exist real and genuine conflicts of interest between Troon and SDJ that foreclose SDJ from being discontinued out of the action, as Troon has independent and non-delegable duties under New York City Administrative Code § 7-210. Troon has not sufficiently proven that those obligations were passed solely onto SDJ, or that its clients were informed of any potential conflicts of interest, or about excess exposure. There is also relevant case law to support the condemnation of collusive agreements between insurance companies and attorneys or between attorneys whose interests should be adverse. The same is true of attempts to stifle disclosure based on allegations of confidentiality. Troon should be required to respond to the February 2014 notice for discovery and inspection because the disclosure called for is material and necessary to the prosecution of plaintiff's claims.

All parties must sign a stipulation of discontinuance unless the Court grants a motion to order such a stipulation. This is not a case in which defendants can be trusted to comply with disclosure if they are allowed to merge their status. In addition to changing what he said in his

signed statement during his deposition testimony, Perez marked different photographs differently with respect to where the accident occurred, in an obvious attempt to cover up for his company. Both Troon and SDJ clearly knew about his statement in 2010, so the delay of his deposition to January 2014 is all the more inappropriate, especially in light of the fact that it was only after years of delay and noncompliance with court orders. And, it is only after SDJ moved to New Jersey that the parties attempted to remove them from the case and obstruct plaintiff from his discovery.

Discussion

CPLR 3217(a)(2) provides, in relevant part, that a party may discontinue a claim without an order by filing a "stipulation in writing signed by the attorneys of record for all parties . . . provided that . . . no person not a party has an interest in the subject matter of the action . . ." (*see also Phillips v. Trommel Const.*, 101 A.D.3d 1097, 957 N.Y.S.2d 359 [1st Dept 2012]).

Here, the subject stipulation of discontinuance, executed on or about July 26, 2013, was not signed by plaintiff's counsel, and was executed only by Aschettino Struhs LLP (then-counsel for Troon) and Rosenbaum & Taylor, P.C. (then-counsel for SDJ). Moreover, there is no clear indication on the face of the stipulation or affidavit of service that it was duly served upon plaintiff's counsel. As such, the stipulation appears to be facially invalid under CPLR 3217(a)(2).

However, in an action where the defendant commences a third-party action against the plaintiff's employer, plaintiff's consent to the defendant's discontinuance of the third-party action is not required if the plaintiff is not a party to the third-party action and is not interested in its subject matter (*see Gonzalez v. U.P.S.*, 272 A.D.2d 129, 709 N.Y.S.2d 390 [1st Dept 2000]).

In other words, the term "all parties" contained in CPLR 3217(a)(2) means all parties *to the claim being discontinued* (*see Toledo v. New York Times Bldg., LLC*, 2011 WL 121656, 2011 N.Y. Slip Op. 30019(U) [Sup Ct New York Cty 2011], *citing Gonzalez* and *Hoag v. Chase Pitkin Home & Garden Ctr.*, 252 A.D.2d 953, 675 N.Y.S.2d 724 [4th Dept 1998]; *see also* Siegel Practice Commentaries, C3217:9 [2012]) (emphasis added)).

This concept applies even if the plaintiff seeks to keep the third-party defendant in the action to facilitate disclosure. For example, the First Department in *Gonzalez* noted that discontinuance of the third-party action did not prevent the plaintiff from calling the president of his employer (the third-party defendant) as a subpoenaed witness and examining him with respect to: (a) his company's relationship with the defendant; and (b) the subject machine (owned by the employer) alleged to have caused the plaintiff's injury (*Gonzalez*, 272 A.D.2d at 130). In *Hoag*, the court found that the plaintiffs' discovery demand against the third-party defendant was not the type of "interest" contemplated by the statute so as to affect the validity of the stipulation of discontinuance as to the third-party defendant, and that plaintiffs could still depose one of its representatives and obtain documentary discovery from it as a non-party (*Hoag*, 252 A.D.2d at 953-954).

It is undisputed that an employee's exclusive remedy is workers' compensation for injuries sustained in the workplace, in the absence of proof of employer's specific intent to harm the employee (*see Acevedo v. Consolidated Edison Co. of New York*, 189 A.D.2d 497, 596 N.Y.S.2d 68 [1st Dept 1993]). There is no indication of such intent, or that plaintiff's objection to discontinuance against SDJ has anything to do with a desire to assert claims against SDJ.

Thus, the stipulation by which Troon discontinued its third-party action against SDJ is

valid despite lacking plaintiff's signature, and plaintiff's motion is denied.[2] Plaintiff's cited cases are distinguishable as they all concern scenarios in which a party in the primary action did not execute the stipulation of discontinuance despite the fact that the party seeking nullification had a live, actual claim in the action against the party to be released in that same action.

As to the discovery issues raised in the motion, it is undisputed that in January of 2014, plaintiff deposed two SDJ employees -- Perez and Lin. Additionally, plaintiff concedes in his moving papers that in its most recent discovery order dated August 6, 2013, the court did not order relief against SDJ "on the basis that it was no longer a party to the action" (Isaac Aff., p. 3). Moreover, plaintiff does not explicitly request further depositions of Perez or Lin in his moving papers or reply.

Therefore, no outstanding discovery is directed against, or references, SDJ, except for the February 25, 2014 notice for discovery and inspection. However, this document was served long after Troon discontinued the third-party action against SDJ, and was served upon only Troon's prior and current counsel. Thus, SDJ, as a non-party, has no obligation to respond to these demands at this juncture, and plaintiff must follow the proper channels for obtaining further non-party discovery.[3]

Troon, of course, must respond to the notice to the extent it has not previously done so. And, to the extent Troon has knowledge pertaining to plaintiff's inquiries with respect to what

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[2] Plaintiff raises various contentions that the stipulation should be nullified because of the existence of "real and genuine conflicts of interest" with respect to, among other things, SDJ's/Troon's counsel, and Troon's non-delegable duties under New York Administrative Code 7-210. The Court finds that these claims, although potentially warranting further inspection, do not justify vacatur --the relief sought by plaintiff -- and are not the subject of the instant motion.

[3] On this note, if plaintiff seeks further testimony on behalf of, or other discovery from, the non-party SDJ, he may move for an open commission pursuant to CPLR 3108 (*see Rose v. Da Ecib USA*, 259 A.D.2d 258, 686 N.Y.S.2d 19 [1st Dept 1999]).

entity hired and/or paid counsel regarding the depositions of the witnesses Nelson, Lin and Perez, fee arrangements are generally not considered confidential or privileged; thus, Troon may not object to such demands on those grounds (*see Priest v. Hennessy*, 51 N.Y.2d 62 [1980]).

Conclusion

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion is denied in its entirety; and it is further

ORDERED that Troon respond to plaintiff's February 25, 2014 notice for discovery and inspection within 20 days to the extent not previously done; and it is further

ORDERED that Troon serve a copy of this decision and order with notice of entry within 20 days.

This constitutes the decision and order of the Court.

Dated: June 27, 2014

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD