

Moura v City of New York

2014 NY Slip Op 31680(U)

June 27, 2014

Sup Ct, New York County

Docket Number: 106289/2008

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 5

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CELIO MOURA and GABRIELLA PRATA MOURA,

Plaintiffs,

DECISION/ORDER
Index No. 106289/2008
Seq. No. 002

-against-

CITY OF NEW YORK, NEW YORK CITY
DEPARTMENT OF TRANSPORTATION, SKANSKA
KOCH, INC., and B&H ENGINEERING, P.C.,

Defendants.

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B&H ENGINEERING, P.C.,

Third-Party Plaintiff,

-against-

ROVI CONSTRUCTION CORP.,

Third-Party Defendant.

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HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	1-3(Exs.A-F)
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....
ANSWERING AFFIDAVITS.....
REPLYING AFFIDAVITS.....
EXHIBITS.....
OTHER.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

Defendant/Third-Party Plaintiff B&H Engineering, P.C. (“B&H”) moves for an order, pursuant to CPLR 3126, striking the complaint of plaintiffs Celio Moura and Gabriella Prata Moura due to their failure to comply with discovery demands and to provide court-ordered discovery. In the alternative, B&H moves, pursuant to CPLR 3124, to compel defendants to provide the outstanding discovery. Plaintiffs do not oppose the motion. After a review of the papers presented, all relevant statutes and case law, the Court **grants** the motion to the extent of directing plaintiffs to provide the discovery outstanding by August 5, 2014.

Factual and Procedural Background:

This case arises from an incident on October 9, 2012 in which plaintiff, Celio Moura, an employee of third-party defendant Rovi Construction Corp. (“Rovi”), was injured while working at the Manhattan Bridge. Plaintiff’s wife, plaintiff Gabriella Prata Moura, asserts a claim for loss of consortium. Plaintiff initially commenced this action against defendants the City of New York, the New York City Department of Transportation, and Skanska Koch, Inc. on or about January 2, 2013. On September 12, 2013, plaintiff filed a supplemental summons and amended complaint naming B&H as an additional defendant. B&H joined issue by service of its answer on October 24, 2013. It subsequently commenced a third-party action against Rovi on or about November 18, 2013. Rovi has yet to appear in this action.

Concomitantly with the service of its answer, B&H served a set of combined discovery demands on all parties and a demand for a bill or particulars on plaintiff’s counsel on October 24, 2013. No response was provided by plaintiff’s counsel.

On February 4, 2013, the parties entered into a so-ordered stipulation at a preliminary

conference. The order required, inter alia, that plaintiff was to respond to B&H's discovery demands and demand for a bill of particulars within 30 days.

On April 28, 2014, after B&H still had not received any discovery responses from plaintiff, counsel for B&H wrote to plaintiffs' counsel to request that the outstanding discovery be provided. Despite this written request, plaintiffs still did not provide the discovery requested.

B&H now moves, pursuant to CPLR 3126, to strike the complaint given plaintiffs' failure to provide discovery or, in the alternative, pursuant to CPLR 3124 to compel plaintiffs to provide all outstanding discovery.

Position of B&H:

B&H argues that the complaint must be stricken due to plaintiffs' failure to provide the discovery demanded. Alternatively, B&H seeks an order compelling plaintiffs to provide the outstanding discovery.

Legal Conclusions:

"In furtherance of the policy favoring resolution of actions on the merits, the drastic remedy of striking a party's pleadings should only be imposed when the discovery noncompliance was willful, contumacious, or in bad faith. (*Corner Realty 30/7 v Bernstein Mgt. Corp.*, 249 AD2d 191, 193)." *Postel v New York Univ. Hosp.*, 262 AD2d 40 (1st Dept 1999). The party seeking to strike a pleading pursuant to CPLR 3126 has the burden of establishing that the conduct of the party which failed to respond to a discovery demand or court order was willful, contumacious, or in bad faith. See *Palmenta v Columbia Univ.*, 266 AD2d 90, 91 (1st Dept 1999). Here, B&H has failed to

establish that plaintiffs' conduct rose to the level necessary to warrant the striking of the complaint. Indeed, B&H does not even argue in its motion that plaintiffs' conduct was willful, contumacious, or in bad faith.

This Court does find, however, that plaintiffs are required to respond to B&H's discovery demands, demand for bill of particulars, and to the so-ordered stipulation of February 4, 2014. Pursuant to CPLR 3124, plaintiffs are hereby directed to provide these responses to B&H, in hand, by August 5, 2014. Failure to do so could result in sanctions pursuant to CPLR 3126.

Therefore, in accordance with the foregoing, it is:

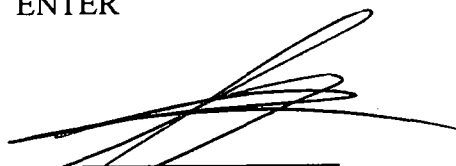
ORDERED that the motion by defendant/third-party plaintiff B&H Engineering, P.C. is granted to the extent of ordering plaintiffs to respond to B&H's combined discovery demands and demand for a bill of particulars dated October 24, 2013, and to the preliminary conference order dated February 4, 2014, by serving such responses to B&H's counsel, in hand, by August 5, 2014; and it is further,

ORDERED that the parties are to appear for a compliance conference in this matter at 80 Centre Street, Room 103, on August 12, 2014 at 2 p.m.; and it is further,

ORDERED that this constitutes the decision and order of this Court.

Dated: June 27, 2014

ENTER



KATHRYN E. FREED,
J.S.C.