Jackson v U.S. Specialty Ins. Co.
2014 NY Slip Op 32423(U)
August 29, 2014
Supreme Court, New York County
Docket Number: 156616/2012
Judge: Joan A. Madden
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

---------------------------------------x

ALBERT JACKSON, ANDREW MITCHELL, and MICHAEL BARKER, individually and on behalf of all other persons similarly situated who were employed by Zoria Housing LLC and/or any other entities affiliated with or controlled by Zoria Housing LLC,

Plaintiffs,

Index No. 156616/2012

-against-

DECISION AND ORDER

U.S. SPECIALTY INSURANCE COMPANY d/b/a HCC SURETY GROUP, LAKHI ZORIA, and ZORIA HOUSING LLC and any related corporate entities,

Defendants.

---------------------------------------x

Joan Madden, J.:

Defendants Lakhi Zoria (Zoria) and Zoria Housing LLC (ZH), moves, pursuant to CPLR 3123, to vacate any admission to a notice to admit. Plaintiffs oppose the motion.[1]

Background

In August 2010, ZH entered into a publicly-financed construction contract (the contract) with the New York City School Construction Authority (SCA) to perform renovation work for a public works project at P.S. 76 (the Public Project). For the Public Project, and in connection with the contract, HCC

[1]The motion was submitted without oral argument at defendants' request as plaintiff failed to appear at the scheduled time.

Surety furnished labor and material payment bonds, and, under the terms of each, HCC Surety agreed, among other things, that in the event ZH does not pay wages and benefits under the contract, it would undertake these contractual obligations on behalf of ZH.

Plaintiffs commenced this action on or about September 24, 2012, by filing a summons and verified complaint, alleging that they furnished labor to ZH and Zoria, ZH's president, for the Public Project, and that ZH failed to pay or ensure payment of prevailing wages and supplemental benefits, as guaranteed by Labor Law § 220, to plaintiffs. Plaintiffs assert claims against ZH for breach of contract, quantum meruit and unjust enrichment. Plaintiffs assert a claim for trust diversion against defendant Zoria.[2]

Subsequently, on or about December 7, 2012, plaintiffs filed a supplemental summons and an amended verified complaint to add claims for a class action. On January 28, 2013, plaintiffs served a notice to admit on ZH, which requested that within 20 days, ZH admit the following:

> 1. Admit that [ZH] did not pay the plaintiffs prevailing wages on the [SCA] construction project known

---

[2]Plaintiffs moved for class certification of their claims against HCC Surety, Zoria and ZH, which alleged failure to pay a prevailing rate of wages, supplements and overtime. By decision and order dated January 21, 2014, the court granted the motion only to the extent of directing pre-certificate disclosure regarding whether plaintiffs satisfy numerosity, commonality and superiority requirements of CPLR 901.

as SCA's P.S. 76, Solicitation No. SCA11-13274D-1 (The Project).

2. Admit that the records maintained by [ZH] do not provide [ZH] with a basis for determining the precise number of hours worked by plaintiffs on the Project.

3. Admit that the records maintained by [ZH] do not provide [ZH] with a basis for determining the wages paid by [ZH] to plaintiffs on the Project.

4. Admit that [ZH] did not maintain any daily time records, time slips, time cards or other documents evidencing the time the plaintiffs arrived at work on the Project or departed from work on the Project.

5. Admit that the payroll records of [ZH] reflect all remuneration or compensation paid to the plaintiffs for work for [ZH] on the Project.

6. Admit that [ZH] reported all remuneration or compensation paid to the plaintiffs by [ZH] correctly to the IRS and the SCA.

7. Admit that [ZH] paid no part of plaintiffs' remuneration or compensation in the form of cash for work performed by plaintiffs on the Project.

On March 27, 2013, defendants Zoria and ZH filed an Answer to the Amended Complaint, in which ZH denied allegations that it did not pay plaintiffs prevailing wages. On June 25, 2013, ZH filed a response to the notice to admit in which it objected to the requests on various grounds, including that the requests implied or assumed that plaintiffs were employed by ZH, and that ZH was therefore required to maintain records or pay wages to plaintiffs.

By letter dated June 25, 2013, counsel for plaintiffs replied to ZH's response that "defendants are deemed to have

[* 4]

admitted the facts contained in plaintiffs' Notice to Admit" based on the failure to respond in 20 days as required under CPLR 3123.

Zoria and ZH now move to "vacate an admission to the notice to admit," arguing that its failure to answer within 20 days should be excused as the notice to admit contained improper requests.

Plaintiffs oppose the motion, asserting that the notice to admit was not improper or unduly burdensome and as ZH failed to timely respond to the notice to admit, the statements in the notice are deemed admitted.

Discussion

CPLR 3123 (a) provides, in part, with respect to a notice to admit, that:

> At any time after service of the answer or after the expiration of twenty days from service of the summons, whichever is sooner, and not later than twenty days before the trial, a party may serve upon any other party, a written request for admission by the latter of the genuineness of any papers or documents, or the correctness or fairness of representation of any photographs, described in and served with the request, or of the truth of any matters of fact set forth in the request, as to which the party requesting the admission reasonably believes there can be no substantial dispute at the trial and are within the knowledge of such other party or can be ascertained by him upon reasonable inquiry...Each of the matters of which an admission is requested shall be deemed admitted unless within twenty days after service thereof or within such further times

[* 5]

> as the court may allow, the party to whom the request is directed services upon the party requesting admission a sworn statement wither denying specifically the matters of which an admission is requested or setting forth in detail the reasons why [it] cannot truthfully with admit or deny those matters.

"[T]he purpose of a notice to admit is to crystallize issues and to eliminate from trial those that are easily provable or not really in dispute." Hodes v City of New York, 165 AD2d 168, 170 (1st Dept 1991). see also, The Hawthorne Group v RRE Ventures, 7 AD3d 320, 324 (1st Dept 2004)(a notice to admit "is to be used only for disposing of uncontroverted questions of fact or those that are easily provable"); Meadowbrook-Richman, Inc. v. Cicchiello, 273 AD2d 6 (1st Dept 2000)(same). In addition, a notice to admit "is not intended as simply another means for achieving discovery." Id. See also, Taylor v. Blair, 116 AD2d 204, 206 (1st Dept 1986) ("a notice to admit may not be used as a substitute for other disclosure devices..."). Thus, requests for admissions to "fundamental and material issues or ultimate facts" are improper and should be stricken. New Image Constr., Inc. v TDR Enterprises Inc., 74 AD3d 680, 681 (1st Dept 2010).

Here, the court finds that the requests in plaintiffs' notice to admit go to the essence of the parties' dispute as they concern ZH's alleged failure to pay plaintiffs a prevailing wage and to maintain appropriate records in connection with the Project, and are more properly addressed using other disclosure devices. Under these circumstances, ZH's failure to timely

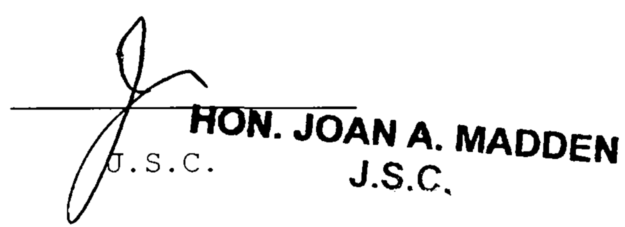
[* 6]

respond to the plaintiffs' notice to admit does not constitute an admission to the facts contained in the notice. See National Union Fire Ins. Co. Of Pittsburgh, Pa. v. Allen, 232 AD2d 80 (1st Dept 1997)(holding that untimely response to plaintiff's improper notice to admit should not result in a finding of liability in favor of plaintiff); Riner v. Texaco, Inc., 222 AD2d 571, 572 (2d Dept 1995)(excusing defendant's failure to respond to notice to admit where such failure was inadvertent and "the allegation in the request was at the heart of the controversy"); Burnside v. Foglia, 208 AD2d 1085 (3d Dept 1994)(finding that "[r]equests for admissions with respect to contested facts that go to the very essence of the dispute being palpably improper, defendant's failure to respond thereto does not transform those requests into admissions...").

In view of the above, it is

ORDERED THAT defendants' motion is granted to the extent of striking the notice to admit.

DATED: August 29, 2014



J.S.C.