

Travelers Indem. Co. v AMX Cooling & Heating, LLC
2014 NY Slip Op 32881(U)
May 19, 2014
Sup Ct, Westchester County
Docket Number: 53539/2011
Judge: Joan B. Lefkowitz
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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER-COMPLIANCE PART

-----X
TRAVELERS INDEMNITY COMPANY aso
THE RESIDENCES AT THE RITZ-CARLTON WESTCHESTER,
RESIDENCES CONDOMINIUM II,
RENAISSANCE RENTAL PARTNERS, LLC, and
THE RESIDENCES AT THE RITZ CARLTON WESTCHESTER II

Plaintiffs

DECISION and ORDER

Index No. 53539/2011
Motion Date: May 19, 2014
Seq. No. 7

-against-

AMX COOLING & HEATING, LLC,
AMX CONTRACTING CORP.,
NORTHEAST MECHANICAL SERVICES, INC.,
and GEORGE A. FULLER COMPANY, INC.,

Defendants

-----X
NORTHEAST MECHANICAL SERVICES, INC.,
and GEORGE A. FULLER COMPANY, INC.

Third-Party Plaintiffs

-against-

THE RITZ-CARLTON HOTEL COMPANY, LLC

Third-Party Defendant

-----X
NORTHEAST MECHANICAL SERVICES, INC.,
and GEORGE A. FULLER COMPANY, INC.

Second Third-Party Plaintiffs

-against-

FLEET COMPANIES, FLEET PUMP & SERVICE
GROUP, INC., and FLEET EQUIPMENT CORPORATION

Second Third-Party Defendants

-----X
LEFKOWITZ, J.

The following papers were read on this motion by defendants/third-party plaintiffs, George A. Fuller Company, Inc., and Northeast Mechanical Services, Inc. (hereinafter "GAFCO and Northeast"), for an order vacating the note of issue and compelling depositions and further discovery of the third-party defendant, the Ritz Carlton Hotel Company, LLC (hereinafter "RCHC").

- Order to Show Cause dated April 15, 2014
- Affirmation in Support
- Exhibits A-J
- Affirmation in Opposition (Third-Party Defendant)
- Exhibits A- B
- Affirmation in Opposition (Plaintiffs) -
- Exhibits A-P

Upon the foregoing papers and oral argument heard on May 19, 2014 this motion is determined as follows:

This is a property subrogation action that arises from water damage sustained on December 10, 2010 at the Ritz Carlton Westchester located at One Renaissance Square in White Plains, New York by which plaintiffs seek in excess of \$ 5.8 million in property damage. This action was commenced in or about July 2011. The defendants' answer was served on or about August 14, 2012. The third-party action was commenced by GAFCO and Northeast on or about April 4, 2013. RCHC served its answer on or about September 9, 2013.

In its compliance conference order dated September 12, 2013 the court set forth a discovery schedule for the third party action. Among other directives, the court directed discovery demands be served on or before September 30, 2013, responses to any discovery demands be served on or before October 31, 2013 and the deposition of all parties be completed on or before November 29, 2013.

On or about September 27, 2013 GAFCO and Northeast served upon RCHC a Notice for Discovery and Inspection. RCHC responded thereto on or about December 3, 2013.

In the compliance conference order dated January 6, 2014 the court directed that the deposition of Northeast be conducted by January 17, 2014 and held that if Northeast did not appear for its deposition as provided in that order, at the next conference plaintiffs could request a briefing schedule to file a motion to strike the answer.

At his deposition on January 6, 2014 David Horowitz, an engineer with RCHC at the time of the subject accident, testified that he was not on the scene when the leak was reported but that when he showed up at work that day he immediately started vacuuming to suck up as much water as possible. He also testified that employees Ken DiLorenzo, Louis Laura and a third, unidentified person were on shift when the leak occurred. Horowitz also testified that the maintenance on the boiler system was done by an outsider contractor known as Fleet. He testified generally about the HVAC system at issue here and the response when the subject accident occurred.

On or about January 23, 2014, GAFCO and Northeast noticed the depositions of Ken DiLorenzo, Louis Laura and any other engineer working on the relevant shift on the day of the subject accident. The witnesses were directed to appear on January 31, 2014 but GAFCO and Northeast requested in the accompanying letter, that if this date was inconvenient, that RCHC provide alternative dates.

GAFCO and Northeast served post deposition discovery demands on or about January 23, 2014 seeking: (1) copies of the electronic and paper recordings from the meter and gauge readings from any and all equipment associated with the HVAC system conducted by RCHC employees; (2) copies of all loss prevention visitor log records from 2009 to December 10, 2010; (3) electronic copy of the Marriot's online Global source training course used on or prior to December 10, 2010; (4) copies of any documents and/or records from Loss Prevention in regards to changes in the operating conditions reported to the Engineering Department from 2009 to December 10, 2010; and (5) copies of any reports and/or records regarding any work performed by Fleet and A & C Furia at the Ritz Carlton Westchester from 2009 to December 10, 2010.

By letter dated January 27, 2014 RCHC noted that the deposition notice, served on Friday January 24, 2014 gave RCHC three business days to comply. RCHC further noted that the notice was in violation of the compliance conference order dated January 6, 2014. RCHC further noted that the post deposition discovery demands were served 18 days following the deposition of its witness. RCHC stated that if GAFCO and Northeast intended to comply with discovery scheduling orders, the demands should have been served earlier. RCHC went further and stated that in any event, some of the demands were duplicative and some were a fishing expedition.

GAFCO and Northeast commenced the second third-party action on or about January 31, 2014. They state (in their affirmation in support of this motion) that they commenced the second third-party action less than one month after discovering at Horowitz' deposition that the Fleet second third-party defendants, and not RCHC, serviced and maintained the HVAC boilers prior to December 10, 2010.

A note of issue was filed in this matter on or about February 17, 2014.

A compliance conference was held on March 17, 2014. According to GAFCO and Northeast it was at this time that RCHC first advised the parties that two of the three employees that they had noticed for a deposition were no longer employees. They further state that they unsuccessfully attempted to schedule further depositions and obtain responses to their post deposition demands. Another compliance conference was held on March 25, 2014 at which time the Briefing Schedule relating to the present motion was issued.

The court notes that the following motions are pending in this action:

1. By notice dated February 17, 2014 plaintiffs moved for an order dismissing the second third-party action or severing it;
2. By notice dated March 10, 2014 plaintiffs moved for an order granting them partial summary judgment on liability as against Northeast;
3. By notice dated April 14, 2014 GAFCO moved for an order granting it summary judgment;
4. By notice dated April 14, 2014 Northeast moved for an order granting it summary judgment;
5. By notice dated April 17, 2014 RCHC moved for an order granting it summary judgment dismissing the third-party compliant in its entirety;
6. By notice dated April 18, 2014 defendants AMX Cooling & Heating LLC and AMX Contracting Corp. moved for an order granting them summary judgment.

Presently GAFCO and Northeast are moving for an order to vacate the note of issue so that they may conduct further discovery. They assert that post deposition discovery and depositions from knowledgeable RCHC employees are still outstanding. They also assert that discovery from the Fleet second third-party defendants is still outstanding.

This motion is opposed by RCHC. It notes that GAFCO and Northeast served their answer in August 2012 and therefore had more than 16 months before the note of issue was filed to conduct discovery. RCHC further notes that GAFCO and Northeast had about five

months to conduct discovery in the third-party action before the note of issue was filed. RCHC asserts that its witness, Horowitz, was knowledgeable about the system that controlled the HVAC mechanical system and had knowledge of the response to the subject water leak. It also notes that it has produced records relating to the operation and management of the mechanical system, a log book which detailed the response to the water leak and other records and documents. RCHC notes that GAFCO and Northeast had the opportunity to question Horowitz about these documents since they had them in their possession one month before the EBT was conducted. RCHC also states that the post-deposition demands are not directly related to Horowitz' testimony and refer to records that should have been requested earlier in accordance with the compliance conference order dated September 12, 2013.

This motion is also opposed by plaintiffs. They assert that GAFCO and Northeast have failed to show that there was an occurrence after the note of issue was filed, not in their control, that requires additional discovery to avoid prejudice. Plaintiffs further note that they will be prejudiced if the motion to strike the note of issue is granted. They have fully complied with discovery and have a motion for summary judgment pending. They also note that the second third-party action was commenced nearly one year after the deadline imposed by this court for the commencement of third-party actions. Plaintiffs note that GAFCO, as general contractor on the Ritz construction project had knowledge of the various contractors involved as well as the inter-working of the building systems. Plaintiffs assert that it is GAFCO and Northeast who failed to diligently pursue third-party discovery. Plaintiffs state that the third-party action should be severed if this court deems that post note of issue discovery is necessary. They also note that five different summary motions have been filed already and are currently pending.

The note of issue states that discovery proceedings now known to be necessary were completed. "The purpose of a note of issue and certificate of readiness is to assure that cases which appear on the court's trial calendar are, in fact, ready for trial" (*Tirado v Miller*, 75 AD3d 153 [2d Dept 2010]). Once the note of issue has been filed and discovery presumably completed, the applicable standards for allowing additional discovery and vacating the note of issue are governed by Uniform Rules for Trial Courts [22 NYCRR] § 202.21(d)-(e). Pursuant to § 202.21(d), "[w]here unusual or unanticipated circumstances develop subsequent to the filing of the note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice, the court ... may grant permission to conduct such necessary proceedings." Section 202.21(e) provides that if more than 20 days has elapsed since the filing of the note of issue, good cause must be shown to warrant an order vacating the note of issue. Here, GAFCO and Northeast have failed to show that unusual and unanticipated circumstances arose after the note of issue was filed that require more discovery to avoid prejudice. The record does not support a finding of good cause to vacate the note of issue.

A review of the record in this matter demonstrates that extensive discovery has been conducted and plaintiffs and several parties already have moved for summary judgment. Moreover, contrary to the assertions of GAFCO and Northeast herein, a review of the deposition transcript of RCHC's witness demonstrates that he testified knowledgeably about the relevant

issues concerning this matter even if he wasn't on the scene at the exact time the leak started. Furthermore, the post deposition demands for training records, time sheets and/or alarm records are not really post deposition demands insofar as those documents could have been identified as relevant in this matter and should have been requested at the commencement of the third-party action. These "post deposition" demands do not support a motion to now strike the note of issue to permit discovery. Although Horowitz testified that there was training in HVAC system equipment maintenance through an online "Global Source" these are training records regardless of what they are called and whether the training is available on line and GAFCO and Northeast could have requested any and all training records earlier.

The court also notes that Northeast delayed discovery. Its failure to be deposed timely (as directed in the compliance conference order dated September 12, 2013), resulted in another compliance conference order dated January 6, 2014 directing it to appear for a deposition on a later date set forth therein or risk a motion to strike its answer.

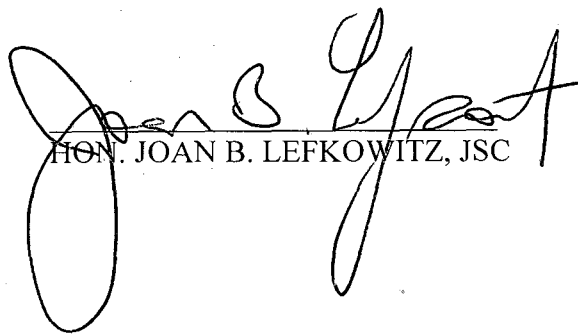
In its opposition, plaintiffs suggest that the third-party action(s) be severed if this court deems post note of issue discovery is necessary. The Westchester Supreme Court Differentiated Case Management Protocol, Part Rules, states that nothing stated therein prevents or limits counsel from making any motion deemed appropriate to best represent a party's interest. However, to foster the just, expeditious and inexpensive resolution of discovery disputes, pre-motion conferences are held to permit the court an opportunity to resolve issues before motion practice ensues. When motion practice is deemed necessary, a Briefing Schedule is established by the court attorney referee. No Briefing Schedule regarding this has been issued and the court declines to consider the issue at this time.

In light of the foregoing, it is:

ORDERED that the motion by defendants/third-party plaintiffs George A. Fuller Company, Inc., and Northeast Mechanical Services, Inc., to vacate the note of issue and compel further discovery is denied; and it is further,

ORDERED that defendants/third-party plaintiffs George A. Fuller Company, Inc., and Northeast Mechanical Services, Inc. serve a copy of this order with notice of entry on all parties within ten days of entry.

Dated: White Plains, New York
May 19, 2014


HON. JOAN B. LEFKOWITZ, JSC