

Sumba v Small

2014 NY Slip Op 32986(U)

September 29, 2014

Supreme Court, Westchester County

Docket Number: 50558/12

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
FREDDY SUMBA,

Plaintiff,

-against-

DAVID SMALL, PAMELA SMALL, COMSTOCK
RESIDENTIAL CONTRACTING LLC AND ROBERT
CARDUCCI D/B/A RMC EXCAVATION & BLACKTOP,

Defendants.

-----X
DAVID SMALL AND PAMELA SMALL,

Third-Party Plaintiffs,

-against-

CUSTOM DESIGNS LANDSCAPING, LTD,

Third-Party Defendants.

-----X
LEFKOWITZ, J.

DECISION & ORDER

Index No. 50558/12

Motion Date: Sept. 29, 2014

Seq. No. 1

The following papers were read on this motion by plaintiff for (1) an order compelling defendants David Small and Pamela Small to produce copies of all checks written by, signed by, and or tendered by them to each and every contractor and/or subcontractor who performed work in connection with the subject construction project at 182 Sarles Street, Bedford Corners, New York, and to each and every company, individual, or entity that supplied materials, equipment or tools used in connection with the subject construction project at 182 Sarles Street, Bedford Corners, New York; and (2) an order holding nonparty HM Builders Corp. in contempt for its willful failure to obey a judicial subpoena duces tecum.

Order to Show Cause - Affirmation in Support - Exhibits A-K

Affirmation in Opposition - Exhibits A-F

Affidavits of Service of the Order to Show Cause and Supporting Papers

In this action, plaintiff alleges claims under the Labor Law to recover damages for personal injuries he sustained on September 21, 2011, when he fell into a trench at 182 Sarles

Street, Bedford Corners, New York. Defendants David Small and Pamela Small owned the property. The Small defendants had lived in a single family residence on the property for years. They retained defendant Comstock Residential Contracting LLC (hereinafter “defendant Comstock”) to act as the construction manager with respect to the demolition of the residence and the construction of a new home on the property.

David Small testified at his deposition that he is self employed and had been a member of Stoneridge Partners which owned, managed and developed real estate, and was currently a member of Legacy Holding Partners, LLC, which purchases real estate. He testified that as a member of Stoneridge Partners, he and the other member of Stoneridge Partners purchased property for a condominium project, hired the architect, hired the construction manager, who ran the trades on the project, paid the trades upon completion of the work, and marketed the condominiums. At the time of plaintiff’s accident, Stoneridge Partners was selling the completed condominium units and David Small also managed a commercial building in New York City and was looking at deals in the City.

With respect to the subject construction project, David Small testified as follows: Defendant Comstock was retained to oversee the construction as the construction manager and it brought the subcontractors/trades in for approval by the Small defendants to work on the project. The Small defendants did not retain a general contractor. Pursuant to the construction management agreement with defendant Comstock, David Small signed contracts with the subcontractors and paid them after defendant Comstock approved the subcontractors’ work. He paid third-party defendant Custom Designs Landscaping for site work. He knew Robert Carducci, but did not know his role with Custom Designs Landscaping or that he was a subcontractor of Custom Designs Landscaping. David Small did not have an agreement with Robert Carducci and only paid Custom Design Landscaping. Robert Carducci dug a trench on the Smalls’ property during the construction project.

The parties appeared for a conference in the Compliance Part on June 25, 2014. Thereafter, the court issued a Compliance Conference Referee Report & Order of the same date, which directed the Small defendants to produce (1) checks paid by them to the subcontractors and Comstock with the account number redacted, or (2) an affidavit attesting as to whether the Small defendants paid any subcontractors and, if so, which subcontractors and for what work.

In compliance with the order, an affidavit of David Small was served. In the affidavit, David Small averred as follows: “I wrote the preponderance of checks to the subcontractors who performed work on the construction of my home. The checks were drawn as directed by Comstock. I provided those checks to the particular subcontractor if the work was approved, liens released and proofs of insurance were exchanged in accordance with the contracts.” David Small also averred therein that he reviewed Comstock’s Check Register, which was enclosed as an exhibit, and concluded that the register appeared to be accurate regarding the checks he wrote to both Comstock and the subcontractors. The register set forth the date the check was written, the number of the check, the amount of the check, the payee on the check and the “Budget Category,” which included the type of work. Checks payable to Comstock read “Builder Fee” and checks payable to Custom Designs Landscaping prior to plaintiff’s accident read “Site Work

& Excavation” and “Chimneys and stone facades.” In the affidavit, David Small further averred that copies of the checks are not readily available, nor are they able to be recreated.

At the next compliance conference, plaintiff’s counsel objected to the affidavit on the ground that it was unclear what David Small meant by “the preponderance of the checks.” By Compliance Conference Referee Report & Order so ordered on July 22, 2014, this court directed the Small defendants to provide a further response, including reference to or the provision of all checks.

Defendant David Small served another affidavit wherein he averred that all checks were drawn against account belonging to both himself and/or Pamela Small, and Pamela Small may have written some of the checks to the contractors towards the project’s conclusion. He further averred that no checks other than those listed on the Comstock Check Register exist.

Thereafter, at the next compliance conference, the parties were unable to resolve the issue as to the discovery of the checks and a briefing schedule for the present motion was issued. In addition to relief with respect to the checks, plaintiff also sought to make a motion seeking an order of contempt against nonparty HM Builders Corp., a subcontractor retained by the Small defendants. HM Builders Corp. failed to respond to a judicial subpoena duces tecum which demanded the names and addresses of its workers who were present at the construction site on the date of plaintiff’s accident.

Motion to Compel Production of the Checks

On this motion, plaintiff first seeks an order compelling the Small defendants to produce copies of all checks which they wrote to the subcontractors and to any person or entity who provided materials, equipment or supplies in connection with the construction project. Plaintiff contends that the checks may lead to relevant evidence regarding whether the Small defendants controlled the work of the subcontractors, such that they would not fall within the exception for homeowners set forth in the Labor Law. Plaintiff contends that important information can be gleaned from the checks themselves, and can be used to show the Small defendants day-to-day direction and control of the project. Plaintiff specifically contends that the memo portion of the check may include information as to how involved the Small defendants were in overseeing all aspects of the construction project. Plaintiff notes that the Small defendants have a great amount of knowledge and sophistication in real estate and construction, and are not the type of individuals that the Labor Law exception was intended to protect. Plaintiff’s counsel further asserts that counsel for Comstock informed him that not all the checks given to Comstock were from the Small defendants’ personal accounts, and may have been checks from David Small’s real estate business. Plaintiff also contends that the checks are necessary to defend any summary judgment motion. Plaintiff finally argues that there should be no hardship in obtaining the copies of the checks since banking records are maintained electronically and copies of checks should be readily accessible.

The Small defendants oppose that branch of the motion. They contend that copies of the checks are not material and necessary insofar as David Small admitted to making the payments to

the subcontractors and Comstock. The Small defendants further contend that the copies of the checks “cannot possibly reveal any information related to the work on the alleged premises and will shed no additional light on the facts surrounding ... [the] accident.” They note that parties are not entitled to uncontrolled and unfettered disclosure. Here, they contend that plaintiff has not demonstrated that the checks are material and necessary for the prosecution of the action since plaintiff’s counsel merely concludes, without citation or factual support, that the checks issued by the Smalls to the various contractors are “material and necessary” since they may have written words on the memo line of the checks and may demonstrate a pattern of supervision and control. The Small defendants contend that the checks cannot demonstrate direction and control of the work and no new facts can be gleaned from the checks. They contend that there is no factual issue as to whether they paid the contractors. Finally, the Small defendants argue that the demand to recreate approximately 375 checks, which do not exist in hard copy and are electronically stored, is burdensome and a waste of time and resources.

CPLR 3101(a) requires “full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof.” The phrase “material and necessary” is “to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason” (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 406 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). The court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*Mironer v City of New York*, 79 AD3d 1106, 1108 [2d Dept 2010]; *Auerbach v Klein*, 30 AD3d 451, 452 [2d Dept 2006]).

The record before this court on the motion demonstrates that copies of the checks issued by the Small defendants in connection with the construction project may lead to relevant and material evidence regarding their control over the construction work being performed. Notably, unlike most owners of single family residences for whom the exception from strict liability of the Labor Law is intended, the record demonstrates that defendant David Small professionally develops and manages real estate. Moreover, the record demonstrates that the Small defendants approved each subcontractor and directly paid each subcontractor and supplier. Finally, the checks themselves may demonstrate that the Small defendants exercised control over the subcontractors and the work performed. Contrary to the contention of the Small defendants, the fact that they do not have the actual checks and the checks are stored electronically does not make the production of copies of the checks unduly burdensome. Accordingly, plaintiff is entitled to copies of the checks issued by the Small defendants to the contractors, Comstock and any suppliers.

Motion Seeking an Order of Contempt

Plaintiff also seeks an order holding nonparty HM Builders Corp. in contempt for failing to respond to a judicial subpoena duces tecum. This court so ordered the subpoena duces tecum on June 26, 2014, which demanded the nonparty to produce the names, addresses, and telephone

numbers of its employees who were working at the construction site on the day of plaintiff's accident. Plaintiff asserts that, to date, HM Builders Corp. has willfully failed to provide the demanded information, and the information is vital as it may uncover witnesses to the subject accident.

Although HM Builders Corp. was duly served with the present motion, it has not opposed the motion and did not appear at oral argument.

CPLR 2308 (b) provides, *inter alia*, that the court, upon motion, may compel compliance with a non-judicial subpoena. However, the party seeking enforcement must first demonstrate the subpoena was properly served (*see generally Wagner v Wagner*, 115 Misc2d 764 [Sup Ct, Westchester County, 1982]). With respect to the service of a subpoena, CPLR 2303 provides that a subpoena shall be served in the same manner as a summons, but does not address the timing of the service of a subpoena. CPLR 3120 (2), however, provides that the return date of a subpoena duces tecum shall not be less than twenty days from service of the subpoena. CPLR 3120 (2) does not grant the court the authority to modify the twenty day time period mandated by the statute. Where service of a subpoena is not made within the statutorily required time period, service is invalid and a motion to compel compliance or for contempt will be denied (*Id.*).

Here, the subpoena demanded a response on or before July 31, 2014. The affidavit of service submitted by plaintiff on his motion, however, establishes that the nonparty was only given six days notice as the subpoena was served on July 25, 2014. Accordingly, nonparty HM Builders Corp. was only given six days notice and service of the subpoena was not made within the statutorily required time period. Accordingly, the service is invalid and the motion to compel compliance must be denied on that ground. Additionally, this court notes that the subpoena was facially defective as it failed to provide notice to the nonparty of the circumstances or reason the disclosure was being sought or was required as required by CPLR 3101 (a)(4). Finally, the contempt branch of the motion must be denied insofar as the face of the Order to Show Cause did not contain the contempt warning as mandated by Judiciary Law § 756.

In view of the foregoing, it is hereby

ORDERED that the branch of the motion seeking an order compelling defendants David Small and Pamela Small to produce copies of all checks demanded by plaintiff is granted, and, on or before October 15, 2014, the Small defendants shall provide copies of all checks written by, signed by and/or tendered by them to each and every contractor and/or subcontractor who performed work in connection with the subject construction project, as well as any checks to any entity or person who supplied materials, equipment or tools for the construction project; and it is further

ORDERED that the branch of the motion seeking an order of contempt against nonparty HM Builders Corp. is denied; and it is further

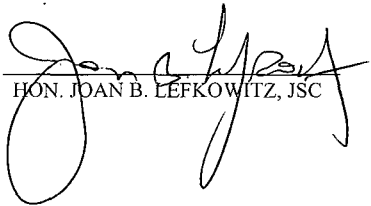
ORDERED that counsel for defendant Comstock Residential Contracting LLC shall either consent to e-filing on the NYSCEF website or file a Notice of Opt-Out from Participation

in Action Subject to Mandatory E-Filing form (EFM-2) with the Westchester County Clerk's Office within 10 days of the date of this order; and it is further

ORDERED that all parties shall appear for a conference in the Compliance Part, Courtroom 800, on October 23, 2014 at 9:30 A.M.; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon all parties and nonparty HM Builders Corp. within 10 days of entry.

Dated: White Plains, NY
September 29, 2014


HON. JOAN B. LEFKOWITZ, JSC

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