

**Colletti v Silverstein Props., Inc.**

2015 NY Slip Op 30981(U)

June 8, 2015

Supreme Court, New York County

Docket Number: 158117/2012

Judge: Peter H. Moulton

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Peter H. Moulton

PART 50

*Justice*

*(Formerly Part 57)*

THOMAS COLLETTI and IRENE COLLETTI

INDEX NO. 158117/2012

Plaintiffs

v.

MOTION SEQ. NO. 005

SILVERSTEIN PROPERTIES, INC., 4  
WORLD TRADE CENTER LLC and  
TISHMAN CONSTRUCTION

Defendants.

PETER H. MOULTON, J.:

Defendant moves, post-note of issue and pursuant to CPLR § 2308 and Judiciary Law § 753, for an Order compelling Marty Dehosson (“Dehosson”), a resident of Port Chester, New York, to appear for a non-party deposition or in the alternative holding him in contempt for willfully failing to comply with an attorney subpoena compelling him to appear for a non-party deposition. Plaintiff Thomas Colletti (“plaintiff”) opposes the motion.

BACKGROUND

This action arose from a work-related accident in which plaintiff tripped and fell on construction debris at defendants’ work site, Four World Trade Center. As a result of the accident, plaintiff claims that he sustained injuries to his neck, right shoulder, and right bicep. He underwent surgery to treat those injuries on May 4, 2012. Plaintiff filed a summons and complaint on November 19, 2012. Following the start of the action, preliminary, compliance, and status conferences facilitating the exchange of discovery were held on March 25, 2013, July 19, 2013, October 15, 2013, March 3, 2014, and May 15, 2014, respectively. During the course of that discovery, plaintiff provided defendants with a Verified Bill of Particulars. Supplemental Bill of

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Particulars, deposition dates, tax and wage authorizations, and other discoverable materials.

Following the completion of discovery in this matter, plaintiff's counsel filed a note of issue on June 9, 2014. Nevertheless, the action remains pending, in part, due to a series of motions that defendants have filed. Indeed, defendants have filed four motions in this action. Collectively, those motions have extended the life of this case. The first, made on June 20, 2013, requested internet access information from plaintiff. That motion was withdrawn on July 9, 2013. The second, a Motion to Vacate dated June 30, 2014, came following plaintiff's filing of the note of issue on June 9, 2014. The court denied that motion, noting that plaintiff had provided defendants with outstanding discovery sought and that it would not "permit fishing expeditions" with respect to plaintiff's social media based on generalized assertions. Shortly thereafter, on September 5, 2014, defendants made a motion to compel Dehosson to appear for a non-party deposition, or in the alternative, to hold him in contempt and to extend the time to file a motion for summary judgment. By Decision and Order dated October 30, 2014, the court denied the motion regarding the extension request and denied the motion with leave to renew regarding the non-party deposition, stating that "[t]here is no evidence the non-party testimony is material and necessary to this case. No explanation is provided as to why defendants could not have taken any action until after the Note of Issue is filed for such an allegedly crucial witness." Following the court's denial of defendants' motion to compel, defendants filed the instant motion on November 17, 2014.

Defendants now assert, upon information and belief, that Dehosson worked with plaintiff as an electrician running conduit pipe at the time of plaintiff's alleged injury, and therefore was an eyewitness to the incident. That information stems from

defendants' revelation, for the first time in this motion, that on December 11, 2012, just one month after plaintiff filed the summons and complaint, defendants obtained a written statement from Dehosson. In that statement, Dehosson stated that he worked with plaintiff, and was running conduit pipe with plaintiff at the time of his injury. Defendants do not provide a specific reason for why they failed to depose Dehosson in the two years following his initial written statement, and prior to plaintiff's filing of the note of issue on June 9, 2014. After the note of issue was filed, defendants chose to serve a subpoena upon Dehosson by personal delivery at his home. That subpoena directed Dehosson to appear for a non-party deposition on August 8, 2014. Dehosson did not appear for a deposition on that date, providing defendants with a basis for their prior motion to compel, dated September 5, 2014, as well as the instant motion to compel upon renewal, dated November 17, 2014.

### DISCUSSION

Discovery that is sought after the filing of a note of issue is governed by a different set of procedural principles than discovery that is sought prior to the filing of a note of issue. Pre-note discovery includes disclosure of "all matter material and necessary in the prosecution or defense of an action" (*see* CPLR § 3101[a]), which is to be liberally construed (*see Allen v. Crowell–Collier Publ. Co.*, 21 NY2d 403, 406 [1968]; *Byck v. Byck*, 294 AD2d 456, 457 [2d Dept. 2002]; *U.S. Ice Cream Corp. v. Carvel Corp.*, 190 AD2d 788 [2d Dept. 1993]). Post-note discovery, on the other hand, may only be sought under two procedural circumstances set forth in 22 NYCRR 202.21. The first method of obtaining post-note discovery is to vacate the note of issue within 20 days of its service pursuant to 22 NYCRR 202.21[e], by merely showing that discovery is incomplete and the matter is not ready for trial. The second

method, beyond that 20 days, requires that the movant, pursuant to 22 NYCRR 202.21[d], meet a more stringent standard and demonstrate “unusual or unanticipated circumstances and substantial prejudice” absent the additional discovery (*see Schroeder v. IESI N.Y. Corp.*, 24 AD3d 180, 181 [1st Dept. 2005]). For purposes of this motion, only the second method is applicable, as defendants’ motion to vacate the note of issue was previously denied for the reasons specified above. Additionally, CPLR § 2308 provides, in relevant part, that the “[f]ailure to comply with a subpoena issued by a judge...shall be punishable as a contempt of court.” Similarly, Judiciary Law § 753 states, in relevant part, that “[a] court of record has the power to punish, by fine or imprisonment...A person subpoenaed as a witness, for refusing or neglecting to obey the subpoena.”

Defendants claim that their post-note of issue request for discovery here is appropriate stems from the “unusual or unanticipated circumstances and substantial prejudice” generated by not being able to depose Dehosson, a potential eyewitness to plaintiff’s injury. Other than arguing that Dehosson’s testimony as potential eyewitness is material and relevant, which it is, defendants do not articulate a viable reason for failing to depose him after they obtained a written statement from him on December 11, 2012, one month after plaintiff filed the summons and complaint in this action. Defendants had almost two years prior to the filing of the note of issue to depose Dehosson and elected not to do so. That decision, strategic or otherwise, shall not be disturbed at this juncture in the litigation as the post note of issue discovery sought here is improper (*Schroeder*, 24 AD3d at 181). Defendants have failed to demonstrate any “unusual or unanticipated circumstance” to warrant post note of issue discovery (*see Maron v. Magnetic Construction Group Corp.*, – NY3d –, 2015 App. Div. LEXIS 3752 [1st Dept. 2015] [holding that defendants failed to demonstrate

"unusual or unanticipated circumstances" where "record supports the court's finding that defendants were dilatory in commencing the third-party action and in seeking discovery from the third-party defendants...after the note of issue in the main action had been filed"; *Nikqi v. Dedona Contr. Corp.*, 117 AD3d 620, 620 [holding that defendants failed to demonstrate "unusual or unanticipated circumstances" where record showed a lack of diligence on defendants' part in seeking plaintiff's medical authorizations where defendants were aware of plaintiff's alleged injuries prior to filing of note of issue and had ample time to request said authorizations]). The court finds that Dehosson is not in violation of CPLR § 2308 and Judiciary Law § 753, as his deposition was improperly sought.

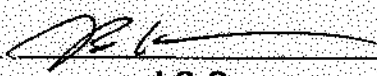
Accordingly, it is hereby

ORDERED that defendants' motion is denied in its entirety.

This Constitutes the Decision and Order of the Court.

Dated: 6/8/15 \_\_\_\_\_

New York, New York



J.S.C.

PETER H. MOULTON

1. Check one: .....  Case Disposed  Non-Final Disposition

2. Check as Appropriate: ..... Motion is:  Granted  Denied  Granted in Part  Other