

Wai Choi Cheung v 48 Tenants' Corp.

2015 NY Slip Op 31857(U)

October 6, 2015

Supreme Court, New York County

Docket Number: 158886/2013

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
WAI CHOI CHEUNG

Plaintiff,

Index No.
158886/2013

**DECISION and
ORDER**

- against -

Mot. Seq. #002

48 TENANTS' CORP. AND THE SAINT FAUSTINA
REVOCABLE TRUST,

Defendants.

-----X
HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff, Wai Choi Cheung ("Plaintiff"), brings this action for personal injuries allegedly sustained in a construction site accident on December 14, 2012, at the construction site located at 48 Great Jones Street, New York, New York (the "Premises"). Plaintiff claims that the Accident took place during the course of Plaintiff's employment with a non-party company, which defendant, 48 Tenants' Corp. ("48 Tenants"), retained, to perform work at the Premises. Plaintiff further claims that defendants, 48 Tenants' and the Saint Faustina Revocable Trust ("Saint Faustina") (and together with 48 Tenants', collectively, "Defendants") own, manage, and/or control the Premises.

Plaintiff now moves for an Order, pursuant to CPLR § 3123, deeming as admitted certain items contained in Plaintiff's Notice to Admit dated February 4, 2015, regarding 48 Tenants' lack of surveillance video; and, pursuant to CPLR § 3126, precluding 48 Tenants' from using video surveillance footage at trial. In support, Plaintiff submits: a copy of Plaintiff's Notice to Admit, dated February 4, 2015; a copy of 48 Tenants' Response to Notice to Admit, dated March 5, 2015; a copy of Plaintiff's affidavit of good faith dated April 22, 2015; and, a copy of an Order in a Kings County action captioned *Arroyo v. Rubie's Costume Co.* (Kings Index No. 787/14).

48 Tenants' opposes.

CPLR § 3123 permits the service of a request for admission "of the genuineness of any papers or documents . . . or 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 which are within the knowledge of such other party or can be ascertained by him upon reasonable inquiry." (CPLR § 3123[a]).

CPLR § 3123 further provides:

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 time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a sworn statement either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully either admit or deny those matters.

(CPLR 3123[a]).

The purpose of a notice to admit is "to eliminate from the litigation factual matters which will not be in dispute at trial, not to obtain information in lieu of other disclosure devices." (*Taylor v. Blair*, 116 A.D.2d 204, 205-06 [1st Dep't 1986]). This device is used "to eliminate from contention factual matters which are easily provable and about which there can be no controversy" and "to expedite the trial by eliminating as issues that as to which there should be no dispute." (*Id.* at 206). Therefore, a notice to admit "may *not* be utilized to request admission of material issues or ultimate or conclusory facts, which can only be resolved after a full trial." (*Id.* [emphasis added] [internal citations omitted]). The notice to admit may not be employed as a "substitute" for other disclosure devices, such as examinations before trial, depositions upon written questions or interrogatories. (*Id.*).

The items, contained in Plaintiff's Notice to Admit, which Plaintiff's instant motion seeks to be deemed as admitted are as follows:

5. To Defendant 48 Tenants' Corp.'s knowledge there were no cameras capable of recording video footage in the

subject premises that would depict any portion of the premises located at 48 Great Jones Street, New York, New York on 12/14/02 and 24 hours prior.

6. Defendant 48 Tenants' Corp. does not have, in its possession or available to defendant, defendant's agents or employees, any surveillance video footage that depicts any portion of the premises located at 48 Great Jones Street, New York, New York on 12/14/02 and 24 hours prior.

(Pl's Ex. A [Notice to Admit]).

Here, Plaintiff argues that 48 Tenants' Response to Notice to Admit fails to satisfy CPLR § 3123, and that the matters contained in items number 4 and 5 in Plaintiff's Notice to Admit therefore must be deemed admitted.

48 Tenants' response to Plaintiff's Notice to Admit states, in relevant part:

5. . . . **Response:** 48 [Tenants'] hereby objects to this demand as it calls for admissions beyond the purview of a Notice to Admit as set forth in CPLR 3123(a). It further objects to this demand in so far as it is vague as to the location of the area referenced in said admission. *Without waiving this objection, 48 does not have any video footage of plaintiff or plaintiff's alleged accident.*

6. . . . **Response:** 48 [Tenants'] hereby objects to this demand as it calls for admissions beyond the purview of a Notice to Admit as set forth in CPLR 3123(a). It further objects to this demand in so far as it is vague as to the location of the area referenced in said admission. *Without waiving this objection, 48 does not have any video footage of plaintiff or plaintiff's accident.*

(Pl's Ex. B [Response to Notice to Admit] [emphasis added]). In addition, 48 Tenants' Response to Notice to Admit is signed by Jonathan Lanman, 48 Tenants' officer, on behalf of 48 Tenants'.

Even assuming that the matters contained in items number 4 and 5 in Plaintiff's Notice to Admit are within the scope of a Notice to Admit, 48 Tenants'

response is sufficient to satisfy CPLR § 3123(a). Accordingly, the matters of which an admission is requested need not be deemed admitted.

In light of the foregoing, Plaintiff fails to demonstrate that the sanction of precluding 48 Tenants' from introducing video surveillance evidence at trial is warranted at this time. (CPLR §§ 3123[c], 3126).

Wherefore, it is hereby

ORDERED that Plaintiff's motion is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: ^{OCT} ~~September~~ 6 2015



EILEEN A. RAKOWER, J.S.C.