Lamonica v S311 Tunnel Constructors

2016 NY Slip Op 32953(U)

August 30, 2016

Supreme Court, New York County

Docket Number: 113946/2011

Judge: Michael D. Stallman

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This opinion is uncorrected and not selected for official publication.

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN
Justice

PART 21

RICHARD LAMONICA,

Plaintiff,

-v-

S311 TUNNEL CONSTRUCTORS, a Joint Venture of SHEA CONSTRUCTION INC, SKANSKA USA CIVIL NORTHEAST, INC., SCHIAVONE CONSTRUCTION CO., LLC, MEUSHAR 34TH STREET, LLC, THE CITY OF NEW YORK, METROPOLITAN TRANSIT AUTHORITY, MTA CAPITAL CONSTRUCTION COMPANY, and THE NEW YORK CITY AUTHORITY,

Defendants.

INDEX NO. 113946/2011

MOTION DATE 8/25/16

MOTION SEQ. NO. 003

FILED
SEP 02 2016
COUNTY CLERK'S OFFICE
NEW YORK

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The following papers, numbered 1 to 8, were read on this motion to strike defendants' answer

Notice of Motion —Affirmation—Good Faith Affirmation—Affirmation of Service — Exhibits 1-5	No(s). 1-4
Affirmation in Opposition—Affidavit of Service	No(s). 5-6
Reply Affirmation—Affidavit of Service	No(s). 7-8

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Upon the foregoing papers, it is ordered that plaintiff's motion is granted as follows: if defendants do not produce Jim Rosteck for a deposition within 90 days, then defendants' answer shall be stricken.

On February 28, 2011, a pipe attached to a cement hopper allegedly burst and struck plaintiff, a cement truck driver, during construction of the 7 Line Extension. Plaintiff now moves to strike defendants' answer due to noncompliance with six prior discovery orders for the deposition of Jim Rosteck, and an additional person "having personal knowledge of the concrete hopper" involved in this alleged incident. Defendants oppose the motion.

(Continued...)

> "[I]t is well settled that the drastic remedy of striking a party's pleading pursuant to CPLR 3126 for failure to comply with a discovery order is appropriate only where the moving party conclusively demonstrates that the non-disclosure was willful, contumacious or due to bad faith. Willful and contumacious behavior can be inferred by a failure to comply with court orders, in the absence of adequate excuses."

(*Henderson-Jones v City of New York*, 87 AD3d 498, 504 [1st Dept 2011] [internal citation and quotation marks omitted].)

Here, by so-ordered stipulations dated January 22, 2015 and March 19, 2015, defendants agreed to produce Jim Rosteck for a deposition, or to provide the last known address if no longer employed. (*See* Fein Affirm., Ex 3.) By so-ordered stipulations dated June 2, 2015, July 23, 2015, November 12, 2015, and January 28, 2016, defendants agreed to produce "a witness with knowledge of the maintenance, repair & control of subject concrete hopper & pump." (*Id.*)

At the compliance conference on March 24, 2016 after argument before Justice Stallman, the Court issued the following order, which states, in relevant part:

> "Within 90 days, [Defendants] to produce another person having personal knowledge of the concrete hopper. If no such person exists within S3ll, [Defendants] will so state explaining why and will be precluded from calling any employee from testifying at trial.
>
> [Defendants] to produce Jim Rosteck in New York for deposition at a mutually agreeable time and place within 90 days."

(Fein Affirm., Ex 4.)

(Continued...)

It is undisputed that defendants did not produce Jim Rosteck, who apparently lives in California, for a deposition in New York. Defendants do not dispute that they neither produced "another person having personal knowledge of the concrete hopper" nor explained why there is no person with such knowledge within the control of defendant S3ll Tunnel Constructors. Rather, defendants argue that there has been no behavior that would support a finding of willful, deliberate or contumacious conduct on the part of defendants, and that striking the answer is not commensurate with their noncompliance.

Defendants' pattern of unexplained noncompliance with six prior so-ordered stipulations gives rise to an inference of willfulness. (*See Henderson-Jones*, 87 AD3d at 504.)

As defendants indicate, a discovery penalty should be "appropriately tailored to achieve a fair result." (*Krin v Lenox Hill Hosp.*, 88 AD3d 597 [1st Dept 2011][citation and quotation marks omitted].) It is true that "a party that disobeys court-ordered disclosure is subject to preclusion of relevant portions of its evidence (CPLR 3126)." (*Emmitt v City of New York*, 66 AD3d 504, 505 [1st Dept 2009]; *Holliday v Jones*, 36 AD3d 557, 557-558 [1st Dept 2007].)

In this case, the Court already issued a conditional order of preclusion at the compliance conference on March 24, 2016, which was self-executing. Thus, defendants have been precluded from calling any employee from testifying at trial, based on their failure to produce another person having personal knowledge of the concrete hopper, and for not having explained why no such person within S3ll Tunnel Constructors JV was available for a deposition.

The thornier question presented is whether defendants' answer should be stricken because defendants again failed to produce Jim Rosteck for a deposition. Rosteck is an employee of one of the defendants. Precluding Rosteck from testifying at trial would be duplicative of the conditional order of preclusion that was already

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granted at the March 24, 2016 conference. On the other hand, striking the answer might be excessive, based on the record before the Court; it is not clear from the record that Rosteck's deposition is critical to proving plaintiff's claims at trial.

As plaintiff indicates, plaintiff previously moved to strike defendants' answer because defendants did not respond to plaintiff's previous discovery demands, and it took seven court orders for defendants to produce the discovery sought and before plaintiff was willing to withdraw his motion. (Fein Affirm., Ex 2.)

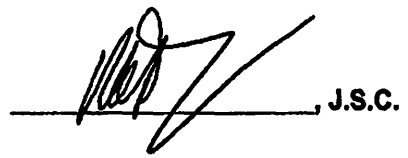
Under the circumstances, the drastic remedy of striking defendants' answer due to defendants' dilatory conduct is warranted. (*See Reidel v Ryder TRS, Inc.*, 13 AD3d 170, 171 [1st Dept 2004]; *Frank Parlamis, Inc. v Piccola Pizza Cafe-Times Sq., Inc.*, 259 AD2d 334 [1st Dept 1999]; *Helms v Gangemi*, 265 AD2d 203, 204 [1st Dept 1999].)

The Court exercises its discretion to grant a conditional order striking the answer, "to encourage the cooperation of neglectful parties so that their claims can be litigated on the merits." (*Granibras Granitos Brasileiros, Ltda. v Farber*, 34 AD3d 230 [1st Dept 2006].)

If defendants do not produce Jim Rosteck for a deposition in New York within 90 days, then defendants' answer shall be stricken.

Copies to counsel.

Dated: 8/30/16
New York, New York



_______________, J.S.C.

1. Check one: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. Check if appropriate: MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check if appropriate: ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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MICHAEL D. STALLMAN
J.S.C.