

Castilla v City of New York

2017 NY Slip Op 30874(U)

April 28, 2017

Supreme Court, New York County

Docket Number: 152863/2012

Judge: Gerald Lebovits

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This opinion is uncorrected and not selected for official publication.

NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7

WILLIAM CASTILLA,

Plaintiff,

-against-

THE CITY OF NEW YORK, NEW YORK CITY
DEPARTMENT OF DESIGN & CONSTRUCTION,
NEW YORK CITY DEPARTMENT OF EDUCATION,
NEW YORK CITY DEPARTMENT OF CULTURAL
AFFAIRS, NEW YORK CITY DEPARTMENT OF
CITYWIDE ADMINISTRATIVE SERVICES, BQE
INDUSTRIES, INC., and XAREN CORPORATION,

Defendants.

Index No.: 152863/2012
DECISION/ORDER
Motion Seq. No. 8

BQE INDUSTRIES, INC.,

Third-Party Plaintiff,

-against-

DOSANJH CONSTRUCTION CORP. and XAREN
CORPORATION,

Third-Party Defendants.

BQE INDUSTRIES, INC.,

Second Third-Party Plaintiff,

-against-

SUPERSTRUCTURES ENGINEERING + ARCHITECTURE,
PLLC,

Second Third-Party Defendants.

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing third-party defendant Dosanjh Construction Corp. motion to compel under CPLR 3124 and third party-plaintiff BQE Industries, Inc.'s cross-motion for a protective order under CPLR 3103.

Papers	Numbered
Third-Party Defendant's Amended Notice of Motion	1
Third-Party Plaintiff's Notice of Cross-Motion and Affirmation in Opposition	2
Third-Party Defendant's Affirmation in Opposition to Cross-Motion and in Further Support	3

Third-Party Plaintiff's Affirmation in Reply¹.....4

Capehart & Scatchard, P.A. New York (Alyson L. Knipe of counsel), for defendant/third-party plaintiff/second third-party plaintiff BQE Industries, Inc.
Miranda Samburksy Slone Sklarin Verveniotis, LLP, Mineola, (Frank C. Lanzo of counsel), for defendant/third-party defendant Dosanjh Construction Corp.

Gerald Lebovits, J.

On November 10, 2011, plaintiff, William Castilla, allegedly sustained physical injuries when he fell while working on a roof at 107 Suffolk Street in New York County (the premises). Castilla asserts claims against defendants for negligence and Labor Law violations.

In its third-party complaint, BQE Industries, Inc. (BQE), a contractor, asserts indemnification and contribution claims against Dosanjh Construction Company (Dosanjh), a subcontractor. Dosanjh asserts an affirmative defense in its third-party answer that BQE may not seek contribution and indemnification.

Dosanjh moves under CPLR 3124 to compel BQE to comply with its Notice of Deposition, dated October 25, 2016, in producing BQE's president, Pankas Kumar, for an examination before trial (EBT) to explain a document — the Subcontractor Information Request Form (the subcontractor form) — that Dosanjh received during disclosure from defendant City of New York (the City). Dosanjh asserts that it received documents from the City 18 months after Dosanjh deposed BQE's Project Manager, Nehru Kataru.

BQE objects to producing Kumar for an EBT and cross-moves for a protective order under CPLR 3103. BQE argues that it has already produced a witness, Kataru, for an EBT on three separate dates: May 15, 2014; November 18, 2014; and March 4, 2015. BQE argues that it is unnecessary to produce Kumar to explain the form. BQE further asserts that the document speaks for itself and no need exists for an additional EBT.

Dosanjh never asked Kataru about the subcontractor form because Dosanjh received the document from the City 18 months after Dosanjh deposed Kataru. (*See* Defendant's Affirmation in Support of Motion, at 8.).

According to Dosanjh, the subcontractor form shows that Dosanjh might not have performed any work at the premises from October 7, 2011, through April 17, 2013. Dosanjh

¹ In a letter dated January 19, 2017, third-party defendant sought permission to file a sur-reply; third-party defendant also uploaded on the e-filing system its sur-reply. The court did not give third-party defendant permission to file its sur-reply and therefore will not consider it.

Likewise, this court will not consider third-party plaintiff's argument that third-party defendant is collaterally estopped from arguing that it is not Castilla's employer given a determination at the Workers' Compensation Board. This argument was raised for the first time in its reply papers.

interprets the form to mean that BQE made no payments to Dosanjh for any work for that time period, including November 10, 2011, the day that Castilla was injured. According to Dosanjh, BQE's form shows that Dosanjh was not working on the premises on the day of the accident. Dosanjh points to the discrepancy between the certified payrolls of Jaidan Industries — another subcontractor BQE used at the premises — and the subcontractor payroll form. The certified payrolls show that Jaidan Industries was present for certain dates; the subcontractor request form, however, provides that Jaidan Industries received \$0 for outstanding work for those same dates. According to Dosanjh, this points to a discrepancy in BQE's records and that BQE should produce Kumar for an EBT.

Dosanjh argues that the subcontractor form is unclear and that it contradicts information contained in certified payroll records. Dosanjh believes that the discrepancies in the documents justifies deposing Kumar to explain the information contained in the subcontractor form.

For a party to obtain an additional EBT, it must show that "(1) the representatives already deposed had insufficient knowledge, or were otherwise inadequate, and (2) there is a substantial likelihood that the persons sought for [the EBT] possess information which is material and necessary to the prosecution of the case." (*Nunez v Chase Manhattan Bank*, 71 AD3d 967, 968 [2d Dept 2010].) A party seeking to depose additional witnesses must make a detailed showing of the necessity for taking a further EBT. (*Colicchio v City of New York*, 181 AD2d 528, 528 [1st Dept 1992].)

Kataru had insufficient knowledge about the subcontractor form and Dosanjh's work at the premises. Kataru testified at his EBT that he "didn't see them [Dosanjh workers] arrive on the day of [the] accident." When Kataru was asked, "Do you know who they [Dosanjh] sent," Kataru responded, "I don't know." (Plaintiff's Affirmation in Support of Cross-Motion and In Opposition to Dosanjh's Motion, Exhibit A, Nehru Kataru EBT, at 163.) When asked whether sign-in sheets would indicate whether Dosanjh personnel worked on the day of the accident, Kataru responded yes. Kataru testified that his duties included "attend[ing] meetings . . . [and] coordinat[ing] between Department of Design and Construction and BQE." (Plaintiff's Affirmation in Support of Cross-Motion and In Opposition to Dosanjh's Motion, Exhibit A, Nehru Kataru EBT, at 12.) When asked whether he was responsible for office work, entertain bids, and interviewing potential subcontractors, he answered no. Kataru's EBT testimony shows that his responsibilities do not include paying and bidding subcontractors. Kataru testified that 90 percent of Dosanjh's work was completed when the accident occurred. (Plaintiff's Affirmation in Support of Cross-Motion and In Opposition to Dosanjh's Motion, Exhibit B, Nehru Kataru EBT, at 354.)

Only Kumar can testify about what the subcontractor form means and what its implications are. If BQE did not pay Dosanjh for work performed on the date of the accident, then Dosanjh might not have been present on the day of the accident. Kumar signed the subcontractor form. He is the best person to depose to determine whether Dosanjh performed any work on the premises. The information Dosanjh seeks is material and necessary. The information Kumar can provide is necessary to Dosanjh's defense — that it is not liable for Castilla's injuries and that BQE may not obtain contribution or indemnification from Dosanjh.

A court may issue a protective order to prevent abuse. CLPR 3103 provides:

“(a) Prevention of Abuse. The court may at any time on its own initiative, or on motion of any party or of any person from whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.”

CPLR 3103 is meant to ensure fair and just litigation. BQE’s cross-motion for a protective order is granted only to the extent that the court limits Kumar’s EBT: Dosanjh may ask Kumar questions about the subcontractor form as they relate to Dosanjh’s presence at the premises on the day of the accident. Although Dosanjh states that discrepancies exist about Jaden Industries — which is not a party in this case — Dosanjh’s questions are limited to Dosanjh’s work at the premises. This limitation is meant to prevent unreasonable annoyance, expense, disadvantage, and prejudice to BQE.

Accordingly, it is

ORDERED that Dosanjh Construction Company’s motion to compel the EBT of Pankas Kumar is granted. BQE Industries, Inc., must produce Pankas Kumar for an EBT within 45 days of service of this decision and order with notice of entry; and it is further

ORDERED that BQE Industries, Inc.’s cross-motion for a protective order under CPLR 3103 is granted only to the extent that Dosanjh Construction Company may ask Pankas Kumar questions about the subcontractor form as they relate to Dosanjh Construction Company’s work at the premises; and it is further


ORDERED that Dosanjh Construction Company shall serve a copy of this decision and order with notice of entry on all parties; and it is further

ORDERED that the parties shall appear for a status conference on June 21, 2017, at 10:00 a.m. in Part 7, Room 1127A, at 111 Centre Street; and it is further

ORDERED that plaintiff shall file its note of issue on or before September 1, 2017; and it is further

ORDERED that the parties may file dispositive motions 60 days from filing of the note of issue.

Dated: April 28, 2017


J.S.C.
HON. GERALD LEBOVITS
J.S.C.