

Baker v 29-10 Hunters Point Ave. Co. LLC.
2017 NY Slip Op 32782(U)
December 4, 2017
Supreme Court, Bronx County
Docket Number: 302346/2014
Judge: Doris M. Gonzalez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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PATRICK BAKER,

Plaintiff,

Index No. 302346/2014

v.

DECISION AND ORDER

29-10 HUNTERS POINT AVE. CO. LLC., 29-01
BORDEN REALTY CO. LLC, AURORA
CONSTRUCTION, INC. and LEX SUNCAP HP L.P.,

Defendants.

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29-10 HUNTERS POINT AVE. CO. LLC., 29-01
BORDEN REALTY CO. LLC, AURORA
CONSTRUCTION, INC. and LEX SUNCAP HP L.P.,

Third-Party Plaintiffs,

Third-Party

Index No. 83919/2016

v.

PATROL AND GUARD ENTERPRISES, INC.,

Third-Party Defendant.

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GONZALEZ, D.:

Upon: i) the Order to Show Cause, by Maria Sestito, Esq., attorney for defendants/third-party plaintiffs 29-10 Hunters Points Ave. Co. LLC. ("Hunters"), 29-01 Borden Realty Co. LLC. ("Borden"), Aurora Construction Inc. ("Aurora") and Lex Suncap HP L.P. ("Lex") for an Order: 1) pursuant to CPLR Rule 3126, striking third-party defendant Patrol and Guard Enterprises, Inc.'s answer for failing to appear for an Examination before Trial; or 2) in the alternative, pursuant to CPLR Rule 3124, compelling third-party defendant Patrol and Guard Enterprises, Inc.'s to appear for an Examination before Trial; and 3) granting such other and further relief as this Court may deem just and proper; ii) the Affirmation in Opposition, dated September 19, 2017, by Stacia J.

Ury, Esq., attorney for third-party defendant Patrol and Guard Enterprises, Inc. ("Patrol"); iii) the Reply Affirmation, dated October 16, 2017, by Maria Sestito, Esq.

PROCEDURAL HISTORY

The action was commenced by the filing of a Summons and Verified Complaint on April 28, 2014. Issue was joined by service of an Answer by defendant Aurora, on or about June 19, 2014. Issue was joined by service of an Answer by defendant Lex, on or about July 17, 2014. Issue was joined by service of an Answer by defendants Hunters and Borden, on or about August 22, 2014.

A Note of Issue was filed and served on or about June 27, 2016. Thereafter, a third-party action was commenced by defendants/third-party plaintiffs Hunters, Borden, Aurora and Lex, against third-party defendant Patrol, without Court approval. Pursuant to the preliminary conference order, dated January 12, 2015, impleaders were to be commenced 60 days after the completion of all examinations before trial.

The third-party action was commenced by the filing of a third-party Summons and Verified Complaint on September 29, 2016. Issue was joined by service of a third-party Answer by Patrol, on or about March 17, 2017.

On August 31, 2017, a motion to sever was made by Patrol to sever the third-party action since the third-party action was filed after the note of issue was filed in the main action and without Court permission. By order, dated December 4, 2017, the third-party action was severed from the main action to continue as a pre-note of issue case to engage in the discovery process.

FACTUAL BACKGROUND

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff arising from a slip and fall accident that occurred on February 10, 2013, at premises

located at 2910 Hunters Point Avenue, in the County of Queens, City and State of New York. It is alleged that the plaintiff was caused to slip and fall on ice while performing his duties as a security guard.

At the time of the accident, the plaintiff was employed by third-party defendant Patrol. It is alleged that the defendants/third-party plaintiffs were constructing a FEDEX facility at the location in question at the time of the accident.

The defendants/third-party plaintiffs move to strike third-party defendant Patrol's answer based on Patrol's failure to appear for a deposition. The defendants/third-party plaintiffs contend that a deposition of Patrol is necessitated to show that Patrol failed to properly train the plaintiff. In the alternative, the defendants/third-party plaintiffs seek to compel Patrol to appear for a deposition.

Patrol opposes the motion arguing that the defendants/third-party plaintiffs must be deposed before Patrol. Patrol contends that it noticed the defendants/third-party plaintiffs of depositions with its answer to the third-party complaint.

DISCUSSION OF LAW

The striking of an answer is an extreme and drastic measure to be invoked only where the refusal to obey an order for disclosure or failure to disclose is clearly contumacious or deliberate (*Berman v Szpilzinger*, 180 AD2d 612 [1st Dept 1992]). "The drastic sanction of striking a pleading is inappropriate absent a clear showing that the failure to comply with discovery directives was willful, contumacious or the result of bad faith" (*Banner v New York City Housing Authority*, 73 AD3d 502, 503 [1st Dept 2010]; *see also Delgado v City of New York*, 47 AD3d 550 [1st Dept 2008]).

It is undisputed that Patrol failed to appear for a deposition. Patrol contends it had priority to take depositions of the defendants/third-party plaintiffs first since it served the notice of deposition with its answer. It is well settled that, in the absence of special circumstances, priority of deposition belongs to the defendant if a notice for examination is served with the answer. (CPLR § 3106(a); *Bucci v. Lydon*, 116 A.D.2d 520 [1st Dept 1986]) Accordingly, the defendants/third-party plaintiffs have failed to show that Patrol engaged in a pattern of “willful, contumacious behavior or bad faith” especially since Patrol has priority (*Hernandez v City of New York*, 100 AD3d 433, 434 [1st Dept 2012]; *Figdor v City of New York*, 33 AD3d 560, 561 [1st Dept 2006]) Accordingly, the defendants’/third-party plaintiffs’ motion to strike Patrol’s answer or, in the alternative, compel Patrol to appear for a deposition is denied.

ACCORDINGLY, after consideration of the foregoing, the applicable law, a review of the Court file, and due deliberation; it is hereby

ORDERED, the defendants’/third-party plaintiffs’ motion to strike the third-party defendant’s answer is denied; and it is further

ORDERED, that the parties to the third-party action are to appear for an examination before trial within 45 days of this order, commencing with the third-party plaintiffs.

This constitutes the Decision and Order of the Court.

Dated: December 4, 2017
Bronx, New York

E N T E R:



HON. DORIS M. GONZALEZ, J.S.C.