

Langer v MTA Capital Constr. Co.
2018 NY Slip Op 30790(U)
April 30, 2018
Supreme Court, New York County
Docket Number: 159912/2014
Judge: Kelly A. O'Neill Levy
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KELLY O'NEILL LEVY
JSCSUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19-----X
CARL LANGER, TARA LANGER,

Plaintiffs,

- V -

MTA CAPITAL CONSTRUCTION COMPANY, PLAZA
CONSTRUCTION CORP., PLAZA CONSTRUCTION LLC,
SCHIAVONE CONSTRUCTION CO. LLC,

Defendants.

INDEX NO. 159912/2014MOTION DATE 12/20/2017MOTION SEQ. NO. 003**DECISION AND ORDER**-----X
MTA CAPITAL CONSTRUCTION COMPANY, PLAZA
CONSTRUCTION CORP., PLAZA CONSTRUCTION LLC,
SCHIAVONE CONSTRUCTION CO. LLC,

Third-Party Plaintiffs,

- V -

E-J ELECTRIC INSTALLATION COMPANY, HATZEL AND
BUEHLER, INC.,

Third-Party Defendants.

-----X
HON. KELLY O'NEILL LEVY:

The following e-filed documents, listed by NYSCEF document number 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 165, 166, 167, 168, 169, 171, 172, 173, 174, 175, 176, 177, 178, 179, 181, 182, 183, 184

were read on this motion to/for

VACATE/STRIKE - NOTE OF ISSUE

This is a personal injury action arising from an accident where the plaintiff, an electrician, was allegedly sprayed with water while he was drilling into a concrete floor above him which caused him to slam into a guard rail.

Defendants/Third-Party Plaintiffs MTA Capital Construction Company, Plaza Construction Corp., Plaza Construction LLC, and Schiavone Construction Co. LLC (collectively, defendants) move for an Order: (1) pursuant to 22 NYCRR § 202.21(e), vacating and striking

plaintiffs Carl Langer and Tara Langer's Note of Issue and Certificate of Readiness, as well as striking this matter from the trial calendar on the grounds that discovery remains outstanding, (2) pursuant to CPLR § 3124, compelling plaintiff Carl Langer and third-party defendants E-J Electric Installation Company (hereinafter, E-J) and Hatzel and Buehler, Inc. (hereinafter, Hatzel & Buehler) (collectively, third-party defendants) to provide outstanding discovery, and (3) extending defendants' time to move for summary judgment until 120 days after the completion of all discovery. Plaintiffs oppose and Hatzel & Buehler supports the motion only to the extent that defendants request outstanding discovery from plaintiffs.

Similarly, E-J cross-moves for an Order: (1) pursuant to 22 NYCRR § 202.21(e), vacating and striking plaintiffs' Note of Issue and Certificate of Readiness, and striking this matter from the trial calendar on the grounds that discovery from the plaintiffs remains outstanding, (2) pursuant to CPLR § 3124, compelling plaintiff Carl Langer to provide outstanding discovery, and (3) pursuant to CPLR § 3212(a), extending E-J's time in which to move for summary judgment until 120 days after the completion of all discovery.

BACKGROUND

Plaintiffs brought this action alleging that defendants' negligence at a construction site caused Carl Langer to be injured after sludgy water sprayed onto his face while he was drilling into a concrete floor above him, causing him to twist his neck while being slammed into a guard rail.

On February 1, 2017, the court ordered that the Note of Issue be filed on or before June 2, 2017. Carl Langer filed the Note of Issue on June 1, 2017. At the status conference on June 7, 2017, plaintiffs consented to withdraw their Note of Issue. At the status conference on October 4, 2017, the court ordered that the Note of Issue be filed on or before December 7, 2017 and that

the deposition of non-party Nicholas Monafis, Carl Langer's foreman, be held on October 27, 2017, and that post-EBT discovery be demanded within 30 days of the deposition. Plaintiffs assert that at the October 27, 2017 status conference, defendants did not communicate either to the court or any of the parties that any other discovery was outstanding, other than the deposition of Nicholas Monafis. On December 5, 2017, plaintiffs filed the Note of Issue. On December 21, 2017, defendants filed the instant motion.

Plaintiffs contend that defendants filed the motion to delay this action and to extend their time to file for summary judgment. Defendants assert that the Note of Issue was prematurely filed as there was a status conference scheduled for December 6, 2017, and that the timing of the Note of Issue filing prior to the conference unfairly precluded discussion of the ongoing discovery issues.

DISCUSSION

Vacating/Striking Note of Issue and Certificate of Readiness

Defendants and E-J move and cross-move, respectively, for an order pursuant to 22 NYCRR § 202.21(e), vacating and striking plaintiffs' Note of Issue and Certificate of Readiness, and striking this matter from the trial calendar because discovery remains outstanding.

22 NYCRR § 202.21(e) (Note of issue and certificate of readiness) states in part:

(e) *Vacating note of issue.* Within 20 days after service of a note of issue and certificate of readiness, any party to the action or special proceeding may move to vacate the note of issue, upon affidavit showing in what respects the case is not ready for trial, and the court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some material respect.

Defendants contend that the Note of Issue must be vacated as discovery is incomplete, in that defendants still seek an authorization to the IRS and/or copies of Carl Langer's tax returns

from 2008 to the present; a fresh, corrected authorization for Carl Langer's Local 3 union and benefit fund records; and an admission as to a photograph that Carl Langer took prior to the accident. Plaintiffs argue that all discovery is complete; that at the October 4, 2017 status conference, defendants did not communicate that any further discovery was outstanding other than the deposition of non-party Nicholas Monafis, Carl Langer's foreman; that Carl Langer had communicated that he does not know the exact date that the subject photograph was taken, but estimates that it was taken about a month prior to the accident; and that, in terms of third-party defendants' discovery, third-party defendants already stated that the items sought do not exist. E-J agrees that the Note of Issue was prematurely filed and that discovery is outstanding, citing all the discovery that defendants claim is outstanding as well as plaintiffs' authorizations for the Electrical Employers Self Insurance Safety Plan of the Joint Industry Board of the Electrical Industry, for members of Local Union 3, as well as certain missing records from several medical providers and all authorizations attached as E-J's Exhibit C [Demand Letter (ex. C to the Sparling aff.)]. E-J also states that it is not in possession of any materials sought by defendants and that any additional drawings sought, if they exist, would probably be in Hatzel & Buehler's possession.

Plaintiffs do not state in the Certificate of Readiness that discovery is complete but rather state, "Plaintiff does not waive any outstanding discovery" [Note of Issue and Certificate of Readiness (ex. BB to the Zecca aff.)]. While there is no material incorrect statement in the Certificate of Readiness, the court finds that there is outstanding discovery as discussed below, which is material and necessary to the defense of this action (CPLR § 3101(a)). Considering the potential delay that would be occasioned by vacating the Note of Issue and finding no prejudice to defendants and third-party defendants in that this action will not be scheduled for trial for a

number of months, the court denies the branches of defendants' and E-J's respective motion and cross-motion requesting an order vacating and striking plaintiffs' Note of Issue and Certificate of Readiness.

Outstanding Discovery

Defendants and E-J respectively move and cross-move, pursuant to CPLR § 3124, for production of specific outstanding discovery.

CPLR § 3124 (Failure to disclose; motion to compel disclosure) states, "If a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, except a notice to admit under section 3123, the party seeking disclosure may move to compel compliance or a response."

Defendants seek from plaintiffs an authorization to the IRS and/or copies of Carl Langer's tax returns from 2008 to the present; a fresh, corrected authorization for Carl Langer's Local 3 union and benefit fund records; and an admission as to a photograph that Carl Langer took prior to the accident. Defendants seek from third-party defendants a response to the Notice of Discovery and Inspection for production of all responsive documents, including various shop drawings, and a response for all contracts, agreements, purchase orders, change orders, invoices, time and materials quotes, and all other agreements between E-J and Hatzel & Buehler reflecting Hatzel & Buehler's work performed at the accident site. E-J seeks plaintiffs' authorizations for the "Electrical Employers Self Insurance Safety Plan of the Joint Industry Board of the Electrical Industry, for members of Local Union 3," and for Dr. Choi, as well as certain missing records from several medical providers and new authorizations for all previously provided medical providers outlined in its demand letter dated March 6, 2018 [Demand Letter (ex. C to the Sparling aff.)].

1. Tax Returns or Authorization to IRS for Tax Returns. The court denies defendants and E-J's requests for an authorization to the IRS for Carl Langer's federal and state tax returns from 2008 to the present. The court also denies defendants and E-J's requests from plaintiffs for copies of Carl Langer's federal and state income tax returns from 2008 to the present. "The disclosure of tax returns is disfavored due to their confidential and private nature. Consequently, a party seeking to compel their production must make a strong showing of overriding necessity." *Matthews Indus. Piping Co., Inc. v. Mobil Oil Corp.*, 114 A.D.2d 772, 772 (1st Dep't 1985). Here, defendants and E-J have not demonstrated that their need for Carl Langer's tax returns is indispensable and that the information contained therein cannot be obtained through other means. *See id.* (citing *Britton v. Knott Hotels Corp.*, 111 A.D.2d 62, 63 [1st Dep't 1985]).

Plaintiffs have already provided defendants a copy of each employer authorization for 5 years prior to the date of the accident as well as several W-2s. Defendants contend that in their initial Combined Demands dated December 15, 2014, they sought the federal and state income tax returns filed by Carl Langer for 1998 to the present or an authorization permitting defendants to obtain the tax returns, but that they never received the documents or authorizations [Demand for Production of Tax Records (ex. X to the Zecca aff.)]. Defendants concede that plaintiffs provided limited W-2s, including for Madison Square Garden for 2010, Petrocelli for 2010, Nead Electric for 2011, Hatzel & Buehler for 2013, and Fred Geller for 2013. Defendants contend that they never received Carl Langer's W-2s for 2012. Plaintiffs provided authorizations for W-2s to each of Carl Langer's prior employers on March 16, 2016, including for Kleinknecht Electric Co., Electrotech Electrical, Five Star Electric Corporation, Egg Electric Inc., Forest Electric Inc., Welsbach Electric Corp., Madison Square Garden, Nead Electrical Company, and Jacob K. Javits Center, and on December 17, 2014 for Hatzel & Buehler. Defendants assert that they are

still not in possession of W-2s from plaintiffs or in response to the authorizations processed relating to Carl Langer's employment for the following employers: Kleinknecht Electric Co. for 2003, Electrotech Electrical Ctg. for 2003 and 2004, Five Star Electric for 2004, 2005, and 2006, Egg Electric Inc. for 2006 and 2007, Stanco Systems Electrical for 2007, Gallagher Electric for 2007, Forest Electric Corp. for 2007, 2008, and 2009, Welsbach Electric Corp. for 2009, Nead Electric Co. Inc. for 2012, and Convention Center Corp. for 2012. Defendants assert that they have been unable to obtain Carl Langer's complete W-2s from his employers directly. "An affidavit regarding the unavailability of documents that are the subject of a discovery order must document a thorough search conducted in good faith. It should include details such as 'where the subject records were likely to be kept, what efforts, if any, were made to preserve them, whether such records were routinely destroyed, [and] whether a search [was] conducted in every location where the records were likely to be found.'" *Henderson-Jones v. City of New York*, 87 A.D.3d 498, 505 (1st Dep't 2011), quoting *Jackson v. City of New York*, 185 A.D.2d 768, 770 (1st Dep't 1992); see also *Vazquez v. Lambert Houses Redevelopment Co.*, 110 A.D.3d 450, 451-452 (1st Dep't 2013).

Thus, plaintiffs shall provide an affidavit on or before May 22, 2018 concerning what efforts plaintiffs have made to locate the missing W-2s from Nead Electric Co. Inc. for 2012 and Convention Center Corp. for 2012 and the results of the search for these two W-2s. If plaintiffs possess the W-2s from Nead Electric Co. Inc. for 2012 and Convention Center Corp. for 2012, then they are required to produce them. If plaintiffs are unable to produce the W-2s from Nead Electric Co. Inc. for 2012 and Convention Center Corp. for 2012, then plaintiffs shall produce Carl Langer's 2012 federal and state income tax returns. If plaintiffs are unable to produce Carl Langer's 2012 federal and state income tax returns, then plaintiffs shall provide an authorization

to the IRS for defendants to obtain copies of Carl Langer's 2012 federal and state income tax returns.

2. Union Authorization. Defendants and E-J also seek further union and benefit records for Carl Langer, who previously provided a union authorization for his entire medical record.

Defendants previously demanded from Carl Langer corrected authorizations to Local 3, with only the box for "other" selected for the release for Carl Langer's entire union file and benefit fund records [Demand Letters (ex. CC to the Zecca aff.)]. As defendants are not in possession of information from the union such as the number of hours worked by plaintiff per year, benefits earned, union dues history, membership card and certifications, training courses, wage and benefit scales, pension benefits, vacation benefits, annuity benefits, and welfare benefits, the court grants defendants and E-J's request for a fresh authorization for Local 3.

3. Supplemental Response for Photograph. Defendants and E-J also request a supplemental response from plaintiffs regarding a photograph of the general construction site taken by Carl Langer. On October 27, 2017 and December 5, 2017, defendants sent letters to Carl Langer requesting a supplemental response to defendants' Combined Demands, dated December 15, 2014 and to the Preliminary Conference Order dated May 20, 2015 directing Carl Langer to disclose the date the photograph was taken, the specific project plaintiff was working at when he took the photograph, and the precise location of the photograph [Photograph (ex. Z to the Zecca aff.)] or an affidavit that Carl Langer cannot recall the aforementioned information, as well as a statement that Carl Langer is not in possession of any additional photographs, or, in the alternative, the production of any and all additional photographs. The court grants defendants and E-J's request for this supplemental response to the extent that Carl Langer shall include in his affidavit a statement addressing the above, on or before May 22, 2018.

4. Requests from Third-Party Defendants. Defendants also request a response to their Notice for Discovery and Inspection to E-J dated October 27, 2017, the Notice for Discovery and Inspection to Hatzel & Buehler dated October 6, 2015, multiple requests for clarification regarding the Hatzel & Buehler shop drawings, as well as any and all documents in Hatzel & Buehler's possession regarding the specifics of its work at the Fulton Street Transit Center (including for the North and South of Levels 2 and 3) in accordance with the October 6, 2015 demand, including all contracts, agreements, purchase orders, change orders, invoices, time and materials quotes, and all other agreements between E-J and Hatzel & Buehler reflecting Hatzel & Buehler's work performed at Fulton Street Transit Center in effect on April 8, 2013. Defendants also request Hatzel & Buehler shop drawings for Level 3 North and South for Conduit & Rack Layout, IACS System Device Layout, Voice & Data Systems Device Layout, and Voice & Data Systems Device Layout. E-J responded that it is not in possession of any of the materials sought by defendants and suggested that any responsive documents, to the extent they exist, are most likely in Hatzel & Buehler's possession. The court grants defendants' request for the above information and documents from Hatzel & Buehler.¹

5. Subpoena for James Petry. On May 3, 2017, defendants served a Subpoena Duces Tecum and Ad Testificandum for a non-party deposition of former E-J employee James Petry. On August 3, 2017, Mr. Petry did not appear for the deposition. Defendants wish to serve another subpoena upon Mr. Petry for his testimony, or alternatively, bring a motion for contempt in light of Mr. Petry's no-show. The court denies this request, as defendants had the opportunity to bring a motion for contempt months prior to the Note of Issue filing, and could have raised

¹ Some of this discovery was already directed in court on March 28, 2018.
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issue with Mr. Petry's no-show at the compliance conference dated October 4, 2017, where the court ordered the non-party deposition of Nicholas Monafis, but defendants failed to do so.

6. Authorizations and Medical Records. E-J requests that plaintiffs provide authorizations for the "Electrical Employers Self Insurance Safety Plan of the Joint Industry Board of the Electrical Industry, for members of the Local Union 3," in accordance with the June 3, 2017 order. E-J further requests from plaintiffs authorizations for certain medical records. These include: (a) from Bayshore Hospital: August 28, 2013, cervical spine; February 11, 2014, MRI of cervical spine; May 2, 2013, MRI of cervical spine, (b) from Dr. Desai: May 14, 2015, X-ray of cervical spine, (c) from Riverview Medical Center: August 7, 2006, records of right knee surgery, and (d) Orthopedic and Spine of New Jersey: August 17, 2017, X-rays of neck and spine. Further, given that E-J has retained new counsel, E-J requests HIPAA-compliant authorizations for the release of Carl Langer's records and OCA-approved *Arons* authorizations from the list of medical providers listed in a Demand Letter dated March 6, 2018 [Demand Letter (ex. C to the Sparling aff.)] and for Dr. Choi. The court grants E-J's requests for these authorizations and medical records.

With the exception of Carl Langer's affidavit, which as discussed shall be produced on or before May 22, 2018, all of the discovery ordered above shall be produced on or before May 31, 2018.

Extension of Time to Move for Summary Judgment

Defendants and E-J move, pursuant to CPLR § 3212(a), extending their time to move for summary judgment until 120 days after the completion of all discovery.

CPLR § 3212(a) states,

"Time; kind of action. Any party may move for summary judgment in any action, after issue has been joined; provided however, that the court may set a date after

which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown.”

Here, as certain discovery remains outstanding, good cause is shown to extend the time for parties to move for summary judgment. Thus, the court grants defendants and E-J’s request only to the extent that any motions for summary judgment shall be filed on or before June 29, 2018.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that Defendants/Third-Party Plaintiffs MTA Capital Construction Company, Plaza Construction Corp., Plaza Construction LLC, and Schiavone Construction Co. LLC’s motion for an order and Third-Party Defendant E-J Electric Installation Company’s cross-motion for an order, pursuant to 22 NYCRR § 202.21(e), vacating and striking plaintiffs Carl Langer and Tara Langer’s Note of Issue and Certificate of Readiness, as well as striking this matter from the trial calendar are denied; and it is further

ORDERED that Defendants/Third-Party Plaintiffs MTA Capital Construction Company, Plaza Construction Corp., Plaza Construction LLC, and Schiavone Construction Co. LLC’s motion for an order, pursuant to CPLR § 3124, compelling plaintiff Carl Langer and third-party defendants E-J Electric Installation Company and Hatzel and Buehler, Inc. to provide outstanding discovery is granted in part, as set forth above; and it is further

ORDERED that Third-Party Defendant E-J Electric Installation Company’s cross-motion for an order, pursuant to CPLR § 3124, compelling plaintiff Carl Langer to provide outstanding discovery is granted in part, as set forth above; and it is further

ORDERED that Defendants/Third-Party Plaintiffs MTA Capital Construction Company, Plaza Construction Corp., Plaza Construction LLC, and Schiavone Construction Co. LLC's motion and Third-Party Defendant E-J Electric Installation Company's cross-motion for an order extending defendants' time to move for summary judgment is granted to the extent that any summary judgment motions shall be filed on or before June 29, 2018.

This constitutes the decision and order of the court.

April 30, 2018
DATE

Kelly O'Neill Levy
KELLY O'NEILL LEVY, J.S.C.

KELLY O'NEILL LEVY
JSC.

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CASE DISPOSED
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NON-FINAL DISPOSITION
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SUBMIT ORDER
FIDUCIARY APPOINTMENT

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REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: