

Ferrara v Pacolet Milliken Enters., Inc.
2018 NY Slip Op 30964(U)
May 18, 2018
Supreme Court, New York County
Docket Number: 154379/2016
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZPART 13*Justice*

STEPHEN FERRARA,

Plaintiff,

INDEX NO.

154379/2016

MOTION DATE

05/09/2018

-against-

MOTION SEQ. NO

001

MOTION CAL. NO

PACOLET MILLIKEN ENTERPRISES, INC., 7BP
 OWNER, LLC, HINES 1045 AVENUE OF THE AMERICAS
 INVESTORS LLC, HINES CONSOLIDATED INVESTMENTS,
 INC., TURNER CONSTRUCTION COMPANY, JP MORGAN
 CHASE & CO., JP MORGAN ASSET MANAGEMENT
 HOLDINGS INC., and COMPONENT ASSEMBLY SYSTEMS, INC.,
 Defendants.

The following papers, numbered 1 to 10 were read on this motion to compel a non-party to comply with a subpoena and cross-motion to compel discovery and leave to amend the Complaint.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1-3; 4 - 6

Answering Affidavits — Exhibits _____

4- 6; 7 - 8

Replying Affidavits _____

9 ; 10Cross-Motion: ☐ Yes ☒ No

Upon a reading of the foregoing cited papers, it is Ordered that Defendants Hines 1045 Avenue of the Americas Investors LLC, Turner Construction Company and Component Assembly Systems, Inc.'s (herein the "Moving Defendants") motion to compel non-party Karen Ferrara to comply with their Subpoena Duces Tecum and Subpoena Ad Testificandum, by providing documents and appearing for a deposition pursuant to CPLR §2308(b), is granted to the extent that Ms. Ferrara must provide documents responsive to Item #5 of their Subpoena Duces Tecum, and appear for a deposition. Plaintiff's cross-motion to amend the Complaint to add Ms. Ferrara as a Plaintiff to this action and add her cause of action for loss of consortium pursuant to CPLR §3025(b), is granted. The remainder of Plaintiff's cross-motion is denied.

Plaintiff, a carpenter for non-party Island Diversified, was working on a construction project located at 7 Bryant Park a/k/a 1045 6th Avenue, New York, New York when, on April 2, 2015, he was allegedly struck on the head and shoulder by a ladder causing severe injuries. Plaintiff was performing his work duties on the roof of a building when a wind blown extension ladder struck him. Plaintiff commenced this action on May 24, 2016 and amended his Complaint on May 31, 2016, seeking damages for injuries suffered, including a claim for lifetime lost wages.

The Moving Defendants served a non-party Subpoena Duces Tecum and Subpoena Ad Testificandum upon Karen Ferrara, Plaintiff's wife, on November 14, 2017 for the production of various records relating to her company, KLF Contracting Corp. ("KLF," Moving Papers Ex. E). During Plaintiff's deposition, he testified that he was vice president of KLF and helped build houses throughout the 1990's (*Id* at Ex. D). Plaintiff

further testified that his wife kept the books and tax records for KLF (*Id.*).

The Moving Defendants now move to compel non-party Karen Ferrara to comply with their Subpoena Duces Tecum and Subpoena Ad Testificandum by providing relevant documents and appearing as a non-party witness for a deposition pursuant to CPLR §2308(b). Plaintiff opposes the motion and cross-moves for the Moving Defendants to provide discovery pursuant to CPLR §3124, and for leave to amend the Complaint by adding Karen Ferrara as a Plaintiff to this action and adding her claim for loss of consortium pursuant to CPLR §3025(b).

CPLR §3101(a) allows for the “full disclosure of all evidence material and necessary in the prosecution or defense of an action regardless of the burden of proof.” Pursuant to CPLR §3124, the court may compel compliance upon failure of a party to provide discovery.

It is within the court’s discretion to determine whether the materials sought are “material and necessary” as a legitimate subject of inquiry or are being used for purposes of harassment to ascertain the existence of evidence (*Roman Catholic Church of the Good Shepherd v Tempco Systems*, 202 AD2d 257, 608 NYS2d 647 [1st Dept. 1994]. “The words ‘material and necessary’ as used in section 3101 must be interpreted liberally to require disclosure” (*Kapon v Koch*, 23 NY3d 32, 11 NE3d 709, 988 NYS2d 559 [2014]). The trial court is given broad discretion determining the scope and breath of discovery and must set reasonable terms and conditions (*Diaz v City of New York*, 117 AD3d 777, 985 NYS2d 695 [2nd Dept. 2014]). “Unlimited disclosure is not mandated, and the court may deny, limit, condition, or regulate the use of any disclosure device to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts” (*Diaz v City of New York*, 117 AD3d 777, 985 NYS2d 695 [2nd Dept. 2014]).

Upon failure to comply with a non-judicial subpoena, CPLR §2308(b) permits the moving party to file a motion in the supreme court to compel compliance. It is well settled that the purpose of a subpoena duces tecum is to compel the production of specific documents that are relevant and material to facts at issue in a pending judicial proceeding (*Velez v Hunts Point Multi-Serv. Ctr., Inc.* 29 AD3d 104, 811 NYS2d 5 [1st Dept. 2006] *citing* *Matter of Terry D.*, 81 NY2d 1042, 619 NE2d 389, 601 NYS2d 452 [1993]).

The Moving Defendants have shown that documents responsive to Item #5 in their November 9, 2017 Subpoena Duces Tecum, and Karen Ferrara’s testimony are both material and necessary to legitimately defend their action. Item #5 seeks KLF’s Articles of Incorporation, corporate structure, and certificate of incorporation (Moving Papers Ex. E). The Moving Defendants also seek Ms. Ferrara’s testimony, as president of KLF, who employed her husband as Vice President for a number of years. The demanded corporate documents and Ms. Ferrara’s testimony are both essential to defend against Plaintiff’s claims of full-time wage loss damages arising from his alleged accident since he testified that he was also vice president of KLF.

The Moving Defendants have not shown that the authorizations for the every accountant used by KLF is material and necessary. The authorizations sought are not a legitimate subject of inquiry of this action and unduly overbroad. These authorizations are unlikely to lead to any evidence that would aid the Moving Defendants in the defense of this action. The Moving Defendants are not entitled to these authorizations.

The Moving Defendants' are also not entitled to the Plaintiff and Ms. Ferrara's joint-tax returns from 2001-2009. In the Moving Defendants' papers, they request all joint-tax returns from the Plaintiff and Ms. Ferrara from 2001-2009. However, their Subpoena Duces Tecum only demanded tax returns from 2010 to present (*Id.*). Ms. Ferrara has already provided the demanded tax returns.

The Moving Defendants' waived their objection to Plaintiff's defect in his cross-motion by opposing the cross-motion on the merits (*Piquette v City of N.Y.*, 4 AD3d 402, 771 NYS2d 365 [2nd Dept. 2004] *citing* *Adler v Gordon*, 243 AD2d 365, 664 NYS2d 546 [1st Dept. 1997]; CPLR §2001). This Court will analyze Plaintiff's cross-motion on the merits.

Leave to amend pleadings pursuant to CPLR §3025(b) should be freely given "absent prejudice or surprise resulting directly from the delay" (*Anoun v City of New York*, 85 AD3d 694, 926 NYS2d 98 [1st Dept. 2011] *citing* *Fahey v County of Ontario*, 44 NY2d 934, 408 NYS2d 314, 380 NE2d 146 [1978]), "or if the proposed amendment is palpably improper or insufficient as a matter of law" (*McGhee v Odell*, 96 AD3d 449, 946 NYS2d 134 [1st Dept. 2012]). A party opposing a motion to amend "must overcome a heavy presumption of validity in favor of [permitting amendment]" (*Id.*). "Prejudice arises when a party incurs a change in position or is hindered in the preparation of its case or has been prevented from taking some measure in support of its position, and these problems might have been avoided had the original pleading contained the proposed amendment" (*Valdes v Marbrose Realty, Inc.*, 289 AD2d 28, 734 NYS2d 24 [1st Dept. 2001]). Defendants will not suffer any prejudice when an amended complaint adds a claim premised upon the very same subject matter alleged by the original complaint (*Brown v Blennerhasset Corp.*, 113 AD3d 454, 979 NYS2d 27 [1st Dept. 2014]).

Plaintiff's cross-motion for leave to amend his Complaint to add his wife, Karen Ferrara, as a Plaintiff to this action and add her cause of action for loss of consortium is granted. The Moving Defendants fail to demonstrate any prejudice or surprise. Furthermore, since Ms. Ferrara's cause of action for loss of consortium is a derivative claim arising from the original Complaint, it is not insufficient as a matter of law and makes the required minimal showing of merit. The Plaintiff has not alleged any new facts and discovery remains ongoing. With Plaintiff alleging that he sustained a traumatic brain injury and spinal injury that would result in a dramatic change in quality of life, the Moving Defendants, who originally subpoenaed Ms. Ferrara, cannot claim surprise or prejudice to Plaintiff's intention to amend his Complaint.

Plaintiff's cross-motion to compel the Moving Defendants' to produce discovery documents is denied. The documents Plaintiff demanded in his March 15, 2017 Notice to Produce were either provided in Moving Defendants' August 11, 2017 Response (Reply Papers Ex. B), or their supplemental Responses on December

28, 2017 (*Id* at Ex. C). Furthermore, the Moving Defendants annexed in their Reply papers as Exhibit D a second supplemental response to Plaintiff's March 15, 2017 Notice to Produce (*Id* at Ex. D). Therefore, Plaintiff's cross-motion to compel the Moving Defendants to provide discovery, is denied as moot.

Accordingly, it is ORDERED, that Defendants Hines 1045 Avenue of the Americas Investors LLC, Turner Construction Company and Component Assembly Systems, Inc.'s motion to compel Karen Ferrara to comply with their Subpoena Duces Tecum and Subpoena Ad Testificandum and provide relevant documents and appear for a deposition pursuant to CPLR §2308(b), is granted to the extent that Ms. Ferrara must provide a response to Item #5 for corporate records for KLF Contracting Corp., and appear for a deposition, and it is further,

ORDERED, that Karen Ferrara is to provide a response to Item #5 in Hines 1045 Avenue of the Americas Investors LLC, Turner Construction Company and Component Assembly Systems, Inc.'s November 9, 2017 Subpoena Duces Recum within thirty (30) days of service of this Order with notice of entry, and it is further,

ORDERED, that Karen Ferrara is to appear as a witness for a deposition within ninety (90) days of service of this Order with notice of entry, and it is further,

ORDERED, that the remainder of Defendants Hines 1045 Avenue of the Americas Investors LLC, Turner Construction Company and Component Assembly Systems, Inc.'s motion is denied, and it is further,

ORDERED, that Plaintiff's cross-motion to amend the Complaint pursuant to CPLR §3025, is granted, and it is further,

ORDERED, that KAREN FERRARA is added as a Plaintiff in this action, as reflected in the Amended Verified Complaint annexed to Plaintiff's Moving Papers as Exhibit E, and it is further,

ORDERED, that the pleadings as amended in Plaintiffs' Amended Verified Complaint annexed in the Plaintiff's cross-moving papers as Exhibit E, shall constitute the pleadings in this action, and it is further,

ORDERED, that the caption is amended as reflected in the cross-moving papers annexed as Exhibit E and the action shall bear the following caption:

STEPHEN FERRARA and KAREN FERRARA,

Plaintiffs,

-against-

PACOLET MILLIKEN ENTERPRISES, INC., 7BP OWNER, LLC, HINES 1045 AVENUE OF THE AMER CAS INVESTORS LLC, HINES CONSOLIDATED INVESTMENTS, INC., TURNER CONSTRUCTION COMPANY, JP MORGAN CHASE & CO., JP MORGAN ASSET MANAGEMENT HOLDINGS INC., and COMPONENT ASSEMBLY SYSTEMS, INC.,

Defendants.

It is further,

ORDERED, that the remainder of Plaintiff's cross-motion is denied, and it is further,

ORDERED, that Plaintiffs' Amended Verified Complaint annexed in the Plaintiff's cross-moving papers as Exhibit E shall be deemed served on the Defendants upon service on their attorneys of a copy of the Plaintiffs' Amended Verified Complaint together with a copy of this order with notice of entry, and it is further,

ORDERED, that Defendants shall serve and file an answer to the Verified Amended Complaint within thirty (30) days of service, and it is further,

ORDERED, that within twenty (20) days from the date of this order Plaintiffs' shall serve a copy of this order with notice of entry, upon all parties appearing, the General Clerk's Office Trial Support Clerk (Room 119) and the County Clerk (Room 141B), who are directed to add Karen Ferrara as a party-Plaintiff to this action, amend the caption and the court's records accordingly.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: May 18, 2018

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE