

Broughton v 553 Marcy Ave. Owners LLC
2018 NY Slip Op 31328(U)
May 7, 2018
Supreme Court, Bronx County
Docket Number: 302956/2015
Judge: Lucindo Suarez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART LPM

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TYRELL BROUGHTON,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 302956/2015

553 MARCY AVENUE OWNERS LLC, CASCADE 553
LLC, ROCK GROUP NY CORP., BLUE ROCK
CONTRACTING INC. and EMPIRE ID CONSTRUCTION,

Defendants.

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CASCADE 553 LLC and EMPIRE ID CONSTRUCTION
CORP.,

Third-Party Index No.

Third-Party Plaintiffs,

84037/2015

- against -

METRO INDUSTRIAL CONTRACTING, INC. and
METRO INDUSTRIAL WRECKING & WRECKING
ENVIRONMENTAL CONTRACTORS, INC.,

Third-Party Defendants.

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PRESENT: Hon. Lucindo Suarez

Upon the February 6, 2018 notice of motion of defendants and third-party plaintiffs Cascade 553 LLC and Empire ID Construction Corp. and the affirmation and exhibits submitted in support thereof; plaintiff's affirmation in opposition dated April 12, 2018 and the exhibit submitted therewith; movants' affirmation in reply dated April 30, 2018; and due deliberation; the court finds:

Movants seek an order compelling plaintiff to submit to a further examination for trial regarding plaintiff's prior arrests and convictions, on the ground that plaintiff's counsel improperly directed his client not to answer any such questions, except to acknowledge certain convictions, and to strike the complaint if plaintiff does not so appear. The portions of the transcript alluded to indicate that plaintiff's counsel conceded that questions regarding

convictions were not improper in the abstract and that plaintiff's counsel blocked all questioning regarding arrests. Plaintiff's counsel also stated that he would not permit plaintiff to testify as to the facts and circumstances of convictions unless directed by the court. Defendant refers to a 2008 conviction for sexual assault with minor, to which plaintiff pled guilty, and a conviction for possession of a weapon, to which plaintiff pled guilty. Plaintiff additionally raises a 2004 conviction for drug use which was "dropped."

Criminal convictions are admissible at trial to impeach a witness' credibility, *see* CPLR 4513; *Vernon v. New York City Health & Hosp. Corp.*, 167 A.D.2d 252, 561 N.Y.S.2d 751 (1st Dep't 1990), as are the facts underlying the convictions, *see* *Dance v. Southampton*, 95 A.D.2d 442, 452-53, 467 N.Y.S.2d 203, 210 (2nd Dep't 1983). Furthermore, as "the credibility of a witness is always in issue, a witness can be cross-examined with respect to specific immoral, vicious or criminal acts that bear on his or her credibility." *1515 Summer St. Corp. v. Parikh*, 13 A.D.3d 305, 788 N.Y.S.2d 322 (1st Dep't 2004). "While a cross-examiner may not inquire concerning an indictment or arrest, there may be good-faith inquiry concerning a specific immoral, vicious or criminal act, if there is a reasonable factual basis for it." *Dance*, 95 A.D.2d at 453, 467 N.Y.S.2d at 210. Furthermore, "[w]hile the fact of an arrest itself cannot be raised during cross-examination, the cross-examiner may raise the 'acts underlying' an arrest to impeach the witness." *Ransom v. Knable*, 2015 NY Slip Op 31643(U), at *3 (Sup Ct N.Y. County Aug. 28, 2015).

The scope of permissible deposition topics is not limited by what may be admissible at trial. *See* *White v. Martins*, 100 A.D.2d 805, 474 N.Y.S.2d 733 (1st Dep't 1984). "All questions posed at depositions should be fully answered unless they invade a recognized privilege or are palpably irrelevant." *Tardibuono v. County of Nassau*, 181 A.D.2d 879, 881, 581 N.Y.S.2d 443,

445 (2d Dep't 1992); *Kaye v. Tee Bar Corp.*, 151 A.D.3d 1530, 58 N.Y.S.3d 695 (3rd Dep't 2017). The procedure dictated by the Uniform Rules for the Conduct of Depositions, and required by the stipulations to which the parties agreed to in the conduct of plaintiff's deposition, states:

A deponent shall answer all questions at a deposition, except (i) to preserve a privilege or right of confidentiality, (ii) to enforce a limitation set forth in an order of a court, or (iii) when the question is plainly improper and would, if answered, cause significant prejudice to any person. An attorney shall not direct a deponent not to answer except as provided in CPLR Rule 3115 or this subdivision.

22 NYCRR § 221.2. Objections as to admissibility at trial are not waived if not made at the deposition, *see* CPLR 3115(d), and the deposition proceeds subject to the right to apply for a protective order, *see* CPLR 3113(b). Thus, plaintiff is not without recourse after testifying fully and completely at the deposition. In opposition to defendant's motion to compel responses to the deposition questions regarding arrests and convictions, however, plaintiff did not cross-move for a protective order or for preclusion of evidence.

Defendant was entitled to inquire as to both convictions and "any prior criminal charges to determine if there is a factual basis for impeaching him by a specific immoral, vicious, or criminal act." *Reiner v. City of New York*, 2011 NY Slip Op 30149(U), at *5 (Sup Ct N.Y. County Jan. 21, 2011). Whether any such testimony would ultimately be admissible at trial is not before this court.

Defendants were not permitted to inquire sufficiently to satisfy plaintiff's obligation. According, he shall appear to answer the questions previously blocked by his counsel regarding the nature of the acts underlying his arrests and convictions.

Accordingly, it is

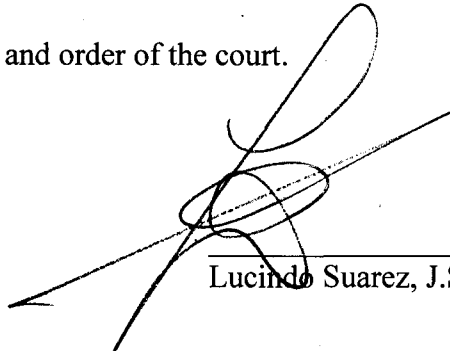
ORDERED, the motion of defendants and third-party plaintiffs Cascade 553 LLC and Empire ID Construction Corp. for an order compelling plaintiff's further deposition is granted to

the extent set forth below; and it is further

ORDERED, that within forty-five (45) days after service of a copy of this order with written notice of its entry, plaintiff shall appear for a deposition at which he will answer the questions previously blocked by his counsel regarding the nature of the acts underlying his arrests and convictions.

This constitutes the decision and order of the court.

Dated: May 7, 2018



Lucindo Suarez, J.S.C.