

Valbuena v 650 Madison Owner, LLC

2018 NY Slip Op 32727(U)

October 26, 2018

Supreme Court, New York County

Docket Number: 156064/2015

Judge: Carmen Victoria St. George

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 34

GERMAN VALBUENA and JANNETH
CORREA HERNANDEZ,

Plaintiffs,

Index No.: 156064/2015
Motion Sequence No.: 001

- against -

DECISION/ORDER

650 MADISON OWNER, LLC, 650 MADISON
OFFICE MANAGER, LLC, AMERICON
CONSTRUCTION, INC., and VORNADO
MANAGEMENT, LLC,

Defendants.

ST. GEORGE, CARMEN VICTORIA, J.S.C.:

Plaintiffs commenced this Labor Law action alleging that German Valbuena sustained serious injuries on May 27, 2015 while working on a construction and renovation project on the 25th floor of the building at 650 Madison Avenue in Manhattan. Plaintiffs filed their complaint on June 16, 2015, and they filed an amended complaint on October 15, 2015. The parties appeared for discovery conferences on January 28, 2016, June 9, 2016, October 20, 2016, and January 26, 2017.

On February 23, 2017, 650 Madison Owner, LLC and 650 Madison Office Manager, LLC (collectively, 650 Madison) filed a third-party complaint against plaintiff's employer, Building Maintenance Services, LLC. (BMS). BMS filed its answer to the third-party complaint on March 30, 2017. BMS participated in status conferences on June 1, 2017, September 8, 2017, November 6, 2017, February 1, 2018, April 20, 2018, and June 8, 2018. Prior to the last of these conferences, on May 23, 2018, 650 Madison discontinued the third-party complaint. As a result, BMS is no longer a party to this lawsuit. The stipulation of discontinuance was filed on May 31, 2018.

At the June 8, 2018 discovery conference, plaintiffs stated that BMS was no longer a party but asserted that they were moving either for preclusion based on BMS's failure to appear for deposition or seeking to subpoena BMS as a non-party witness. Per plaintiffs' request, the Court noted this in the order. Less than a week later, plaintiffs brought this motion seeking to preclude BMS from testifying at trial or from opposing any summary judgment motion, and to obtain an adverse inference charge at the time of trial. In support, they point to BMS' repeated violations of this Court's orders and states that this constituted willful, contumacious behavior within the meaning of CPLR § 3126 [3]. They contend that this Court has the "discretion to remedy a violation by a party where it determines that a party has failed to comply with its discovery obligations" (Aff in Support, ¶ 21). Furthermore, they state, this discretion exists notwithstanding the fact that BMS is no longer a party to this lawsuit. They suggest that the third-party action was discontinued solely to thwart plaintiffs' attempts to depose BMS.¹

Non-party BMS opposes the motion.² It notes that its deposition was to proceed after the parties to the main action were deposed, and that these depositions concluded on December 14, 2017. At that point all parties, including plaintiffs, agreed to reschedule BMS' deposition so as not to interfere with the upcoming holidays. The parties agreed to select a new date on February 1, 2018 at the next discovery conference. At the conference, the parties selected a new date of April 4, 2018 for the BMS deposition. Prior to the deposition date, BMS requested an adjournment of the deposition due to the resolution of the indemnification issues and, after a conference call with the Court. Further adjournments, Although the April 19, 2018 conference order set a final date of

¹ BMS' argument that plaintiffs' filing of the Note of Issue should preclude plaintiffs from seeking a deposition has no merit. This Court allows parties to file their Notes of Issue with nonparty discovery outstanding.

² The Court rejects plaintiffs' argument that the Court should not read BMS' papers. For one thing, plaintiffs leveled accusations of misconduct against BMS specifically, and its counsel is the individual in the best position to respond. Before the Court grants sanctions, the Court must be able to evaluate plaintiffs' allegations. For another, 650 Madison and American rely on BMS' affirmation. The Court considers the papers as part of defendants' oppositions.

May 31 for the deposition, there was no mention of possible sanctions. Moreover, BMS' counsel states that as soon as he received this motion, he offered to produce a witness for deposition but that plaintiffs' counsel did not respond to his offer. BMS argues that its conduct has not risen to a level warranting sanctions.

Defendant Americon opposes the motion. It argues that there is no basis for plaintiffs' assertion that the third-party plaintiff and third-party defendant discontinued the third-party action to keep BMS' deposition from going forward. Americon relies on the affirmation of BMS' counsel to show that BMS' conduct does not merit sanctions, that the adjournments were for valid reasons, and that there were valid reasons – relating to indemnification – for the discontinuance. Significantly, Americon states that an order of preclusion would result in severe prejudice to it, and it had nothing to do with any delays by BMS.

650 Madison also opposes the motion. 650 Madison argues that plaintiffs overstate BMS' noncompliance, noting that plaintiffs partially relied on Court orders that were prior to BMS' appearance in the case, that the parties stipulated to at least some of the subsequent adjournments, and that BMS has provided valid reasons for its adjournment requests. Moreover, 650 Madison stated that it offered to produce BMS for deposition and plaintiffs did not respond to the offer, instead resorting to motion practice. It notes that plaintiffs are not prejudiced if the parties depose BMS now, but defendants all will suffer substantial prejudice in the event of preclusion.

In reply, among other things, plaintiffs state that they only seek preclusion against 650 Madison, which has “inherited” BMS' malfeasance by virtue of its indemnification. Although the motion is worded as a preclusion against BMS, therefore, the target of the motion is 650 Madison. It states that BMS did not appear despite the existence of four discovery conference orders and this is a sufficient justification for a Court order.

After careful consideration, the Court denies the motion on the condition that BMS is made available for deposition within 45 days of this order. As plaintiffs note, “[r]esolution of discovery disputes and the nature and degree of the penalty to be imposed pursuant to CPLR 3126 are matters within the sound discretion of the motion court” (*Morales v Zherka*, 140 AD3d 836, 236-37 [2nd Dept 2016]). Here, although BMS did not appear on a handful of court-ordered dates, most of the adjournments were made with consent or as part of a court order. In addition, BMS states it is available and willing to appear for a non-party deposition. Plaintiffs disregard this in their attempt to obtain sanctions. Furthermore, there are three upcoming motions in this case – one to vacate the note of issue, and two for summary judgment, which will not even be submitted until December 14, 2018. Therefore, plaintiffs cannot assert significant prejudice by the delay. Moreover, allowing BMS’ testimony to be introduced at trial for use by plaintiff and American but not for use by 650 Madison may result in jury confusion.

Nevertheless, plaintiffs are entitled to “a full and fair opportunity to conduct the cross examination of the [non-party] witness” (*Gonzalez v 231 Ocean Assoc.*, 131 AD3d 871, 872 [1st Dept 2015]). Accordingly, if BMS is not produced, plaintiffs may renew their motion based on the new facts and preclusion may result. Accordingly, it is

ORDERED that the motion is denied.

Dated:

10/26/2018

ENTER:



CARMEN VICTORIA ST. GEORGE, J.S.C.

HON. CARMEN VICTORIA ST. GEORGE