

Samuel v 391 Broadway, LLC
2019 NY Slip Op 31594(U)
June 7, 2019
Supreme Court, New York County
Docket Number: 152687/2014
Judge: Barbara Jaffe
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM

Justice

-----X

NEIL SAMUEL and SANDRA SAMUEL,

Plaintiffs,

- v -

391 BROADWAY, LLC and KOAM 1 CORP.,

Defendants.

-----X

391 BROADWAY, LLC,

Third-Party Plaintiff,

- v -

MOHAMMAD ASLAN d/b/a R.A. CONTRACTING
CO., and KOAM 1 CORP.,

Third-Party Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 56-62, 72, 80, 81-84, 89-95, 115

were read on this motion to _____ compel _____.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 64-71, 73, 77-79, 85-88, 96-102, 116

were read on this motion to _____ vacate note of issue _____.

Third-party plaintiff 391 Broadway, LLC moves for an order compelling third-party defendant Koam 1 Corp. (Koam) to respond to discovery demands and produce a knowledgeable witness for an examination before trial (EBT), or in the alternative, an order striking its answer (mot. seq. 3). Koam opposes. 391 Broadway also moves for an order vacating the note of issue and certificate of readiness (mot. seq. 4). Plaintiffs and Koam oppose.

I. BACKGROUND

On March 7, 2016, plaintiffs filed a second amended verified complaint in which they allege that, on September 4, 2013, Neil was injured while working at **the premises at 391 Broadway** in Manhattan, allegedly owned by 391 Broadway. On February 11, 2016, 391 Broadway filed a third-party summons and complaint in which it alleges that before plaintiff's accident, it had entered into an agreement with third-party defendants to perform construction work where plaintiff was injured, and that Koam had agreed to defend, indemnify, and hold harmless 391 Broadway for any resulting damages. (NYSCEF 59).

Thereafter, Koam's counsel responded to 391 Broadway's discovery demands, one of which seeks information concerning a pending action for a declaratory judgment in which whereby a non-party insurance company denies that the general liability insurance policy it issued to Koam provides coverage for plaintiffs' claims. (NYSCEF 90). Koam's counsel stated, as pertinent here, that it did not represent Koam in that action nor did it submit discovery therein, and observed that all documents sought in that action are publicly available. (NYSCEF 83).

By order dated June 7, 2017, and so-ordered stipulations dated December 20, 2017, March 28, 2018, and August 15, 2018, Koam was to produce a witness for an EBT, or, if all members of the corporation had passed away, to produce death certificates. (NYSCEF 60).

By letter dated March 26, 2018, 391 Broadway reiterated its request for a witness for an EBT, or in the alternative, production of death certificates. In addition, it requested copies of all discovery supplied by Koam with respect to the declaratory judgment action. (NYSCEF 62).

On September 14, 2018, 391 Broadway sent Koam discovery demands seeking certain information about Koam, including, *inter alia*, copies of death certificates for deceased members of Koam, copies of insurance contracts, and copies of Koam's letters of incorporation. (NYSCEF

61).

On October 18, 2018, plaintiffs filed their note of issue and certificate of readiness.

(NYSCEF 71).

II. MOTION TO COMPEL (mot. seq. 003)

A. 391 Broadway's contentions (NYSCEF 57)

391 Broadway asserts that as Koam failed to produce a witness for an EBT, an order to compel, or in the alternative, an order striking its answer is necessary. At compliance conferences, Koam's counsel stated, without providing proof, that Koam's owner had passed away, and that she had hired investigators to locate witnesses. Nor did 391 Broadway receive any discovery pertaining to the declaratory judgment action in response to its March 2018 letter or responses to its September 2018 discovery demands.

B. Koam's contentions (NYSCEF 80)

Koam's counsel claims that she attempted to contact the client through its owner using information obtained from Koam's insurance application. She notes that her office is defending Koam under an insurance policy issued by a non-party and alleges that she unsuccessfully called Koam's listed phone number on the application multiple times. She also fruitlessly sent letters to Koam on November 15, 2016, March 24, 2017, June 23, 2017, August 30, 2017, and September 1, 2017, and an email on October 1, 2017, and a certified mail letter, return receipt requested, on September 1, 2017, which was returned as "unable to forward." (NYSCEF 81).

Counsel then hired an investigator to locate the client and offers an affidavit in which the investigator details his unsuccessful efforts to locate the owner, whom he was informed is deceased, or other Koam employees. (NYSCEF 82). Koam's counsel contends that she was unsuccessful in obtaining a copy of the death certificate for Koam's owner.

Koam claims that on November 16, 2016, it adequately responded to 391 Broadway's demands, and that as it does not represent Koam in the declaratory judgment action and submitted no documents therein, it could not comply with 391 Broadway's requests for information concerning it. In addition, Koam asserts that the pleadings in support of the declaratory judgment are publicly available.

Having responded to all outstanding discovery demands, and in light of counsel's good faith attempt to locate witnesses for an EBT, Koam argues that it would be inappropriate to strike its answer or issued an order of preclusion. It seeks leave to allow it to produce a witness for the EBT n no later than 30 days before trial, if further attempts to locate a witness are successful.

C. Reply (NYSCEF 89)

In reply, 391 Broadway asserts that the investigation to locate Koam's owner or employees is inadequate and unsupported, observing that no proof is offered of the letters or email sent, and to the extent the certified mailing was returned, the return receipt is marked "unclaimed." Thus, it contends that it is not clear if the person lived there or not. 391 Broadway notes that the insurance application on which Koam's counsel relies was never produced.

391 Broadway also claims that the investigator's efforts were inadequate, as he fails to offer specifics. Moreover, as the alleged owner of Koam has a "Korean surname," it is possible that the process server confused the first and last name. In support, it submits a Wikipedia article concerning the alleged surname of Koam's owner. (NYSCEF 93). 391 Broadway raises additional questions as to the thoroughness of the investigation and alleges that there are leads that should have been, but were not, investigated.

According to 391 Broadway, notwithstanding the public availability of the documents relating to the action for a declaratory judgment, it is Koam's responsibility to produce them.

D. Analysis

Section 3101(a) requires full disclosure of all evidence material and necessary to the prosecution or defense of an action. (*Andon ex rel. Andon v 302-304 Mott St. Assocs.*, 94 NY2d 740, 746 [2000]). What is “material and necessary” generally has been left to the sound discretion of the court and may include “any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity.” (*Id.*, quoting *Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 406 [1968]).

CPLR 3124 provides that a party may seek an order compelling compliance or a response to any request notice, interrogatory, demand, question, or order under CPLR article 31. While CPLR 3126 permits a court to issue an order striking pleadings, among other relief, upon a party’s failure to obey an order of disclosure or willful failure to disclose information, the drastic remedy of striking a pleading is generally considered unwarranted absent a party first moving to compel compliance with discovery demands and/or a showing that the other party’s failure to obey discovery orders was willful or contumacious. (*See Michaluk v New York City Health & Hosps. Corp.*, 169 AD3d 496, 496 [1st Dept 2019] [“Since defendant never sought to compel disclosure or to have preclusionary language added to any of the parties’ compliance orders, its motion to dismiss pursuant to CPLR 3126(3) was premature”]; *W&W Glass, LLC v 1113 York Ave. Realty Co. LLC*, 83 AD3d 438 [1st Dept 2011] [“there appear to be no prior motions by plaintiff to compel disclosure, rendering any motion to strike the answer pursuant to CPLR 3126 premature in this case.”]; *Double Fortune Prop. Investors Corp. v Gordon*, 55 AD3d 406 [1st Dept 2008] [as plaintiff responded to discovery requests, proper course was for defendant to move to compel further discovery rather than moving to strike complaint]; *see also Pehzman v Dept. of Educ. of City of New York*, 95 AD3d 625, 625-626 [1st Dept 2012] [striking of answer is

ultimate penalty that may be imposed only upon extreme conduct]; *Palmenta v Columbia Univ.*, 266 AD2d 90, 91 [1st Dept 1999] [striking answer inappropriate absent clear showing that failure to comply willful, contumacious, or in bad faith, which moving party must affirmatively establish]; *Commerce & Indus. Co. v Lib-Com, Ltd.*, 266 AD2d 142, 145 [1st Dept 1999] [striking of pleading “not a sanction to be routinely imposed whenever a party fails to comply with *any* item of discovery”] [emphasis in original]).

1. Discovery responses

That Koam’s counsel does not represent Koam in its action for a declaratory judgment does not relieve Koam of its obligation to produce the requested documents, as the discovery demand was not made on Koam’s counsel, but on Koam itself. Moreover, that the requested documents are publicly available is no ground for excusing their production (*Rawlins ex rel. Rawlins v St. Joseph’s Hosp. Health Ctr.*, 108 AD3d 1191, 1193 [4th Dept 2013], quoting *Alfaro v Schwartz*, 233 AD2d 281, 282 [2d Dept 1996] [that documents sought may be available in public records does not, in itself, preclude production]). Thus, Koam must comply with 391 Broadway’s demand.

2. Koam deposition

The striking of an answer is not appropriate if “good faith efforts have been made to locate a client.” (*Mason v MTA N.Y. City Tr.*, 38 AD3d 258 [1st Dept 2007]).

Here, Koam’s counsel establishes that she engaged in good faith efforts to locate Koam’s owner and employees. (See *Heyward v Benyarko*, 82 AD2d 751, 751 [1st Dept 1981] [declining to strike answer of defendants where counsel undertook good faith efforts to locate them, including hiring investigator]; cf *Reidel v Ryder TRS, Inc.*, 13 AD3d 170, 171 [1st Dept 2004] [striking defendant’s answer where counsel only submitted “bald statement that reasonable good

faith efforts had been made” to locate defendants, without affidavit from purported investigator]). That 391 Broadway believes that the investigator’s efforts were inadequate is inconsequential absent evidence that they were made in bad faith. Moreover, 391 Broadway offers no prescribed method for locating a client.

Nevertheless, 391 Broadway should not be disadvantaged as a result of Koam’s continuous failures to appear for an EBT. As good faith efforts have been made to locate a Koam witness, the appropriate remedy would ordinarily be to preclude Koam’s principal(s) or employee(s) from testifying at trial unless he or she submits to the EBT. (*Heyward*, 82 AD2d at 751; *Campbell v Peele*, 289 AD2d 141, 142 [1st Dept 2001] [precluding defendant from testifying at trial unless she appears for deposition prior to trial]; *Blake v Mamadou*, 281 AD2d 301 [1st Dept 2001] [same]). However, here, as Koam in effect concedes, in opposing 391 Broadway’s motion to vacate the note of issue, that it will never be able to produce a witness for an EBT (*see infra* at III.), it is precluded from producing a witness to testify at trial.

III. MOTION TO VACATE NOTE OF ISSUE (mot. seq. 004)

A. 391 Broadway’s contentions (NYSCEF 65)

391 Broadway asserts that plaintiffs’ note of issue should be vacated because discovery is not complete. In addition to the discovery items at issue in its motion to compel, 391 Broadway contends that plaintiff’s updated medical authorizations remain outstanding.

B. Plaintiffs’ contentions (NYSCEF 77)

Plaintiffs deny that they have not produced the outstanding medical authorizations, offering a cover letter dated November 19, 2018 reflecting such production. (NYSCEF 78).

C. Koam’s contentions (NYSCEF 85)

Koam opposes the motion and references its opposition to 391 Broadway’s motion to

compel. Koam’s counsel states that, on information and belief, Koam’s owner is deceased and no one else affiliated with Koam can be located.

D. Reply (NYSCEF 96)

In reply, 391 Broadway submits a copy of the affirmation it submitted in reply to its motion to compel.

E. Analysis

391 Broadway’s basis for vacating the note of issue is premised on Koam’s alleged failure to provide adequate discovery responses, Koam’s failure to appear for an EBT, and plaintiffs’ failure to provide updated authorizations for medical treatment. Plaintiffs have now provided the necessary authorizations, and Koam demonstrates its belief that it will be incapable of producing a witness for a deposition and producing any relevant documents. Thus, as no discovery remains outstanding, 391 Broadway’s motion to vacate the note of issue is denied.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, defendant/third-party plaintiff 391 Broadway, LLC’s motion to compel (seq. three) is granted to the extent of: (1) precluding defendant/third-party defendant Koam 1 Corp. from calling its principal(s) or employees to testify at the time of trial, and (2) precluding it from offering at trial any discovery produced by it in *Preferred Contractors Insurance Company v. Koam 1 Corp.*, (Index No. 153715/2017), currently pending in this court; and it is further

ORDERED, that the motion to vacate the note of issue (seq. four) is denied.

6/7/2019
DATE


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BARBARA JAFFE, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	DENIED	<input type="checkbox"/>	<input checked="" type="checkbox"/> OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE