

Sachem Cent. Sch. Dist. v Manville
2019 NY Slip Op 32282(U)
July 25, 2019
Supreme Court, Suffolk County
Docket Number: 014704/2011
Judge: James Hudson
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**Supreme Court of the County of Suffolk
State of New York - Part XLVI**

PRESENT:

HON. JAMES HUDSON
Acting Justice of the Supreme Court

x-----x
SACHEM CENTRAL SCHOOL DISTRICT, on its
own and as assignee of AURORA
CONTRACTORS, INC.,

Plaintiff,

-against-

JOHNS MANVILLE; GIANQUINTO
MASONRY, INC.; RESTOR TECHNOLOGIES,
INC.; HST ROOFING, INC.; GLASS, INC.; and
VIPA RESTORATION, INC.,

Defendants.

x-----x
GIANQUINTO MASONRY, INC.,

Defendant/Third Party Plaintiff,

-against-

HST ROOFING, INC.,

Third-Party Defendant.

x-----x

INDEX NO.:014704/2011

MOT. SEQ. NO.:006-MG

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Upon the following documents numbered 1 to 34, read on this; Notice of Motion/ Order to Show Cause and supporting papers for Other Reliefs; Notice of Motion and supporting papers 1-20; Answering Affidavits and supporting papers 21-24; Replying Affidavits and supporting papers 25-34; ~~Other 0~~; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED, that the motion (seq. no.:006) of Defendant/Third Party Plaintiff Gianquinto Masonry, Inc. ("Plaintiff") requesting an order pursuant to CPLR §§3101, 3106, 3111, 3120, 3122, 3124 and 3126 directing that an adverse inference charge be given at trial against the Third-Party Defendant HST Roofing, Inc. ("Defendant") with respect to its records and witnesses of the underlying incident due to spoliation and/or willful non-compliance with discovery demands and obligations; and/or requiring Defendant to provide the demanded records and produce a witness for deposition by a date certain or face a penalty such as an adverse inference; and/or requiring Defendant to provide the demanded records and produce a witness for deposition by a date certain or produce an Affidavit from a person with personal knowledge about the non-existence of such records or witnesses by a date certain or face the penalty of an adverse inference charge; is granted in its entirety.

Case History

This is a Commercial action of long standing. The central allegation is that improper construction during 2002-2005 during the building of Sachem East High School in Farmingville, New York ("High School") is the proximate and actual cause of water damage being sustained by that school building. The current Third-Party action naming HST Roofing as Defendant was commenced on or about May 2nd, 2018. Previously, HST Roofing, Inc. was named as a defendant in a related action alleging improper construction of that High School. During 2006, Aurora Contractors, Inc., the general contractor on that 2002-2005 High School construction project filed suit for non-payment under Index Number:021012/2006. A related Fourth-Party action naming HST Roofing, Inc. as a Defendant, was filed on January 13th, 2010 under Index Number.:300057/2010. HST Roofing, Inc. at both the time of that filing and the time of this Decision is a listed New York State Corporation which address is 3 Yeoman Drive, East Northport, NY 11731. HST Roofing, Inc., Third-Party Defendant in the instant case, has been on notice of the lawsuit alleging improper construction of the High School since at least 2010. Defendant was the roofing subcontractor on the construction project which built the High School. On May 3rd, 2011, Sachem Central School District ("Sachem"), on its own and as assignee of Aurora Contractors, Inc., filed the instant case under Index Number.:014704/2011. In the instant action, Sachem alleges improper construction is the proximate and actual cause of water damage to that School building. The instant Third-Party action names HST Roofing, Inc. as a Defendant. On or about May 2nd, 2018, Third-Party Plaintiff Gianquinto Masonry, Inc. commenced the Instant Third-Party action against Third-Party Defendant HST Roofing, Inc.. On April 8th, 2019, Plaintiff Gianquinto Masonry, Inc. filed its motion (seq. no.:006) for relief against Defendant HST Roofing, Inc..

Defendant's Motion for an Adverse Inference Charge (Seq No.:001)

Central to the relief sought by Plaintiff in its instant motion (seq. no.:006) is Plaintiff's allegations that Defendant has willfully and contumaciously failed to comply with discovery demands to produce business records pursuant to an October 1st, 2018 Notice for Discovery & Inspection. Plaintiff further alleges that Defendant has refused to provide any records relative to the subcontracting work which HST Roofing, Inc. performed on the High School construction during 2002-2005. Plaintiff alleges Defendant has refused to provide the address and contact information of Harvey Sultan, President of HST Roofing, Inc. and has further refused to provide a list of Defendant's employees who worked on the High School construction project. Plaintiff requests relief in the form of an adverse inference charge at trial due to Defendant's alleged non-compliance.

Defendant responded to Plaintiff's discovery demands on January 23rd, 2019 and February 11th, 2019 (copies submitted as Exhibit "L" attached to Plaintiff's motion (seq. no.:001). Same responses simultaneously assert that Plaintiff's demands are "...vague and ambitious..." and "...overbroad..." and "...unduly burdensome..." while asserting that none of the requested business records exist/ever existed/or have been destroyed.

On January 23rd, 2019, Defendant's Counsel, informed Plaintiff's Counsel by letter of the following:

"Through our investigation we learned that Mr. Sultan closed the business in 2004 and has no records from the business or information surrounding this job. The last known address we had for Mr. Sultan, which I cannot verify as correct, is 2324 Shoma Lane, Unit 88, Royal Palm Beach, Florida 33414. The last contact information I had, which I advised you was no longer in service was the phone number (631) 544-4216." (January 23rd, 2019 attorney correspondence from Edward Fogarty, Jr., Esq., Defendant's Counsel, to Michael P. Kelly, Esq., Plaintiff's Counsel, attached as Exhibit "M" to Plaintiff's motion (seq 001).

On February 14th, 2019 a pre-motion conference was held pursuant to Part XLVI Commercial Claims Rules. Subsequent to that conference, Plaintiff's instant motion (seq. no.:001) was filed. Defendant's Counsel, in support of his Affirmation in Opposition, attached an original May 8th, 2019 Affidavit ("Sultan Affidavit", "Affidavit"), purportedly of Harvey Sultan, President of HST Roofing (attached as Exhibit "B").

The Sultan Affidavit

CPLR §2309. Oaths and affirmations provides, in pertinent part:

“(b) Form. An oath or affirmation shall be administered in a form calculated to awaken the conscience and impress the mind of the person taking it in accordance with his religious or ethical beliefs; and

(c) Oaths and affirmations taken without the state. An oath or affirmation taken without the state shall be treated as if taken within the state if it is accompanied by such certificate or certificates as would be required to entitle a deed acknowledged without the state to be recorded within the state if such deed had been acknowledged before the officer who administered the oath or affirmation.” (McKinney’s CPLR §2309 [2019]).

“The obvious purpose of CPLR 2309(c) is to assure that sworn documents executed outside of New York, perhaps under different standards or procedures, are executed in a manner that meets New York’s reliability standards, as equivalent to the execution requirements for the recording of a deed. The ‘certificate’ required by CPLR 2309 (c), commonly referred to in case law as a ‘certificate of conformity,’ must contain language attesting that the oath administered in the foreign state was taken in accordance with the laws of that jurisdiction or the law of New York (*see* Real Property Law §299-a[1]).” (*Midfirst Bank v. Agho*, 121 AD3d 343, 349, 991 NYS2d 623 [2d Dept 2014]).

“A ‘certificate of conformity’ is separate and distinct from a ‘certificate of authentication,’ which attests to the oathgiver’s authority under the foreign jurisdiction to administer oaths. (*see* Patrick M. Conners, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C2309:3). In other words, a certificate of conformity speaks to the manner in which a foreign oath is taken...(see *Ford Motor Credit Co. v. Prestige Gown Cleaning Serv.*, 193 Misc2d 262, 264 [2002]; *Firstcom Broadcast Servs. v. New York Sound*, 184 Misc2d 524

[2000].)” (*Id.*).

“...a certificate of conformity is required whenever an oath is acknowledged in writing outside of New York by a non-New York notary, and the document is proffered for use in New York litigation.” (*Id.* at 350).

RPL §309-b. Uniform forms of certificates of acknowledgment or proof without this state provides, in pertinent part:

“1. The certificate of an acknowledgment, without this state, of a conveyance or other instrument with respect to real property situate in this state, by a person, may conform substantially with the following form, the blanks being properly filled:

State, District of Columbia, Territory, Possession, or Foreign Country} ss.:

On the ___ day of ___ in the year ___ before me, the undersigned, personally appeared _____, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.” (McKinney’s RPL §309-b [2019]).

“With respect to documents required to be filed that are not conveyances of an interest in real property, such documents filed by corporations must be acknowledged under Real Property Law §309, and such documents filed by persons and entities other than corporations must be acknowledged under Real Property Law §309-a...” (*N.Y. Op. Atty. Gen. (Inf.)* 1023, 2000 WL 33126674).

RPL §299-a. Acknowledgment to conform to law of New York or of place where taken; certificate of conformity provides, in pertinent part:

“1. An acknowledgment or proof made pursuant to the

provisions of section two hundred ninety-nine of this chapter may be taken in the manner prescribed either by the laws of the State of New York or by the laws of the state, District of Columbia, territory, possession, dependency, or other place where the acknowledgment or proof is taken. The acknowledgment or proof, if taken in the manner prescribed by such state, District of Columbia, territory, possession, dependency or other place, must be accompanied by a certificate to the effect that it conforms with such laws; and

2. (a) the signature to such a certificate of conformity shall be presumptively genuine, and the qualification of the person whose name is so signed as a person authorized to make such certificate shall be presumptively established by the recital thereof in the certificate.” (McKinney’s RPL §299-a [2019]).

“...for an out-of-state affidavit to be admissible it must be accompanied by a certificate of conformity (*see* Real Property Law §299-a [1]; **PRA III, LLC v. Gonzalez**, 54 AD3d 917, 864 NYS2d 140 [2d Dept 2008])” (**JP Morgan Chase Bank v. Diaz**, 56 Misc3d 1136, 1139, 57 NYS3d 358, 360 [Sup Ct Suffolk Cty 2017]). Notarial acknowledgment taken out-of-state must demonstrate that the notary confirmed the identity of the party,...in order for the document to be admissible before a court (**Goddard v. Schmoll**, 24 Misc 381, 53 NYS 402 [City Ct, N.Y.C. 1898]).

Plaintiff, in its Affirmation in Reply objects to the admissibility of the Affidavit of Mr. Sultan because it fails to contain the necessary certificate of conformity, having been executed in the State of Florida. Plaintiff asserts that the Sultan Affidavit is non-complaint with Florida law and cites to supporting Florida Statutes in support of that contention. Plaintiff asserts that the Affidavit fails to contain the necessary *jurat* as required by subsection 13, of FS 117.05 (Florida Title X, Chapter 117). Additionally, the Affidavit lacks “the venue stating the location of the notarization” pursuant to FS 117.05(4)(a). Although New York permits the filing of a certificate of conformity *nunc pro tunc*, by which Defendant could render the Affidavit admissible, the additional fact that the Affidavit is non-compliant with the requirements of Florida law renders the Affidavit inadmissible regardless of whether Defendant submits a Certificate of Conformity (*see Ameriseal of NE Florida, Inc. v. Leiffer*, 673 So2d 68, 70 [Fl. 5th Dist. Ct. Of App., 1996]; **Moccia v. Carrier Car Rental, Inc.**, 40 AD3d 504, 504-05, 837 NYS2d 67, 68 [1st Dept 2007]; **Raynor v. Raynor**, 279 AD 671, 108 NYS2d 20 [2d Dept 1951]).

In the case at bar, the Defendant has not corrected the Sultan Affidavit by filing a Certificate of Conformity. The Affidavit, formed and executed in the state of Florida, in form fails to comply with Florida law, rendering it inadmissible. The Court agrees with Plaintiff's Counsel on two (2) points raised in the Affirmation in Reply. First, affiant Mr. Sultan fails to state his residence address or even that he is a resident of the State of Florida. Second, as Mr. Sultan has been located, there would appear to be no reason why he cannot be produced for a deposition. Additionally the Court must note that all records of HST roofing, inc. have been destroyed and Mr. Sultan cannot remember the names of his employees who participated in what was arguably one of the last jobs undertaken by Defendant before "closing down" during 2004. Mr. Sultan fails to account for the continued existence of HST Roofing, Inc. as a New York State Corporation during 2019. HST Roofing, Inc. and its President, Harvey Sultan, have been aware of the ongoing litigation since at least 2010. The Court finds it troubling that in his Affidavit Mr. Sultan purports to have destroyed his HST Roofing Corporate records in or around 2011-2012 "on advice from my attorney and accountant." Additionally, we cannot credit Mr. Sultan's averment that he did not know about this ongoing litigation in which his Corporation is a named Defendant or that he was unaware of the need to preserve his corporate records to assist in his defense.

The Balance of Defendant's Discovery Responses (Mot. Seq. No.:001)

On or about October 2nd, 2018, Plaintiff served its discovery demands upon Defendant. Same demands were for, *inter alia*, the records of HST Roofing, Inc. related to or involving the High School construction and its subcontracted roofing work performed. Same included requests for names of Defendant's employees who were associated with that High School construction, witnesses, accident and incident reports, photographs of the construction, expert witness names and *curriculum vitae*, statements of Third-Party Plaintiffs, collateral source information regarding indemnification for economic loss, insurance information (copies of Plaintiff's discovery demands attached to Plaintiff's motion as Exhibit "J"). To date the only substantive information produced in response by Defendant, other than the inadmissible Affidavit purportedly of Harvey Sultan, is a copy of Defendant's Commercial General Liability Part Coverage Part Declarations (Exhibit "M"). The balance of Defendant's responses consist of general denials and claims that Plaintiff's demands are overbroad and vague and ambitious and unduly burdensome. All responses are made by Defendant's Counsel, not supported by Affidavits, and most are non-specific, general denials (Discovery Responses attached hereto as Exhibits "L" and "M"). The general discovery rule broadly mandates full disclosure of all matter material and necessary in the prosecution or defense of an action (*see McKinney's CPLR §3101, et. seq.; Kavanagh v. Ogden Allied Maintenance Corp.*, 92 NY2d 952, 683 NYS2d 156, 705 NE2d 1197 [1998]; *Allen v. Crowell-Collier Pub. Co.*, 21 NY2d 403, 288 NYS2d 449, 235 NE2d 430 [1968]; *see Town*

of Pleasant Valley v. New York State Bd. Of Real Property Services, 235 AD2d 8, 685 NYS2d 74 [2d Dept 1999]). A motion to compel response to discovery demands which are relevant, properly tailored discovery demands will be considered. A trial court providently exercised its discretion in granting a protective order where a discovery demand was palpably improper (*Ceballos v. New York City Housing Authority*, 173 AD3d 1132, —NYS3d—, 2019 WL 2608359 [2d Dept June 26, 2019]). It has also been held that a trial court abused its discretion in conditionally striking (defendant's) answer as a discovery sanction in a slip and fall case where the defendant failed to fully comply with discovery demands (*Kayantas v. Restaurant Depot, LLC*, 173 AD3d 718, —NYS3d— 2019 WL 2363660 [2d Dept June 5, 2019]).

In the case at bar, Plaintiff has filed discovery responses which are palpably insufficient and, except for the noted insurance coverage declaration page, devoid of any requested records. Moreover, the purported Affidavit of Defendant's principal fails to comport with the aforementioned statutory requirements and thus cannot be considered for the truth of its contents.

Accordingly, the relief requested by Plaintiff in the instant motion (seq. no.:001) is granted in its entirety.

The Parties and their clients are directed to appear at a Court conference to be held on **Wednesday, August 28th, 2019 at 9:30 am** at the New York State Supreme Court, One Court Street, Riverhead, New York 11901, Part XLVI.

The foregoing decision constitutes the Order of the Court.

DATED: JULY 25th, 2019
RIVERHEAD, NY



HON. JAMES HUDSON
Acting Justice of the Supreme Court