

Leveron v Prana Growth Fund I, L.P.

2019 NY Slip Op 33977(U)

September 26, 2019

Supreme Court, Bronx County

Docket Number: 302203/2015

Judge: Laura G. Douglas

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
PART 11

JOSE R. LEVERON, X

Plaintiff,

-against-

PRANA GROWTH FUND I, L. P.,
PRANA FUND MANAGER, LLC,
PARK AVENUE SOUTH MANAGEMENT, LLC, and
A-AWAN CONSTRUCTION CORP.,

Defendants.

A-AWAN CONSTRUCTION CORP., X

Third-Party Plaintiff,

-against-

J & G GENERAL CONTRACTING, INC.,

Third-Party Defendant.

X

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Index No. 302023/2015

DECISION/ORDER

Present:
Hon. Laura G. Douglas
J.S.C.

Recitation, as required by Rule 2219(a) of the C.P.L.R., of the papers considered in the review of this motion to compel production of additional witness(es) for deposition and related relief:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion by Defendant A-Awan Construction Corp., Affirmation of Scott F. Morgan, Esq. dated June 21, 2019 in Support of Motion, and Exhibits (“A” through “I”).....	1
Affirmation of Pamela Wolff Cohen, Esq. dated July 9, 2019 in Opposition to Motion and Exhibits (“A” through “G”).....	2
Reply Affirmation of Scott F. Morgan, Esq. dated July 15, 2019.....	3

Upon the foregoing papers and after due deliberation, the Decision/Order on this motion is as follows:

Defendant A-Awan Construction Corp. (“A-Awan”) seeks an order compelling defendant

Park Avenue South Management, LLC (“PASM”) to produce George Guaraca (“Guaraca”) and defendant Prana Growth Fund I, L. P. and Prana Fund Manager, LLC (collectively, “Prana”) to produce Sally Collazo (“Collazo”) as additional deponents. The motion is granted solely as ordered below and is otherwise denied without prejudice.

The plaintiff seeks monetary damages from the defendants for personal injuries allegedly sustained on November 19, 2013 when he was struck by a beam while working at an exterior renovation project. A-Awan contends that questions remain whether Prana acted as both owner and general contractor for the exterior work performed at the subject premises and whether A-Awan served as a contractor or a general contractor at the work site. Specifically, A-Awan avers that the material issue regarding who inspected and controlled the site where the plaintiff had his accident was not adequately addressed by the deponents already produced by the defendants. An owner or general contractor may be held liable under Labor Law § 200 for injuries arising from the means and manner of the work only if it actually controlled or supervised the work and for injuries caused by an existing condition only if it created it or had actual or constructive notice of it (*see Cappabianca v. Skanska USA Building, Inc.*, 99 AD3d 139 [1st Dept 2012]).

Prana produced Richard Herman (“Herman”) for a deposition. Herman testified that he has no personal knowledge of the details regarding inspection and control of the subject work site. Herman did identify Collazo as the person in charge of the subject contract and the person whom oversaw the work performed by A-Awan at the site. Herman stated that the decision to undertake this work was made by Collazo or someone from PASM. He further identified Guaraca or Collazo as persons whom would ensure that the work contracted for at this site was performed. PASM produced Maurice McKenzie (“McKenzie”) for a deposition. He identified Collazo as the person who would have inspected the subject premises between August 2013 and November 2013.

A-Awan produced Ahmed Khan (“Khan”) for a deposition. He testified that A-Awan was hired to perform facade repair, pointing work, and lintel repair at the subject premises. Khan further testified that A-Awan was hired by PASM and that he dealt with Guaraca, who visited the work site, and not McKenzie. Khan denied that A-Awan hired the plaintiff’s employer, J & G General Contracting, Inc. (“J & G”), for this project. Finally, Khan was unaware whether Guaraca was responsible for safety on the project, but stated that Guaraca did appear on-site to inspect the work.

Amrik Singh (“Singh”), the president of J & G, appeared for a non-party deposition (J & G

was subsequently impleaded). J & G erected scaffolding/sidewalk shed(s) for this project. While Singh testified that A-Awan might have been the ones who hired him, he also acknowledged having signed a letter stating that J & G was not a subcontractor of and did not work under A-Awan at the subject work site.

Prana and PASM contend that it has been established that A-Awan was the general contractor on this project. They note that A-Awan's contract named A-Awan as "contractor" and provided that A-Awan was to supervise and direct the work, be solely responsible for the control of the means and methods of the work, and be responsible for any other contractors required for the work to be completed. They assert that, "at most", Prana had only a general supervisory role over this work which did not rise to the level of direction and control necessary for liability to attach. They note that Khan testified that he was "responsible for [his] work" and denied that Prana instructed him as to how to perform his work or what kind of work to do. Finally, Prana and PASM note that Singh testified that he was not directed by anyone from the building in his work, other than a building person serving as his "contact" person.

The contention by Prana and PASM that A-Awan essentially waived any further depositions by failing to raise them in conjunction with the vacatur of the plaintiff's note of issue is unavailing, since a party may serve new discovery demands after a note of issue is stricken (*see Novaro v. Jomar Real Estate Corp.*, 156 AD2d 213 [1st Dept 1989]). The argument that this motion should be denied because A-Awan did not set forth its good faith efforts to resolve this dispute is also unavailing, since the affirmations in this case suggest that attempts to resolve these issues without resorting to court intervention would have been futile (*see Suarez v. Shapiro Family Realty Associates, LLC*, 149 AD3d 526 [1st Dept 2017]).

As corporate parties, Prana and PASM had the right to produce a representative of their choosing to testify at their initial depositions (*see Nunez v. Chase Manhattan Bank*, 71 A.D.3d 967 [2nd Dept. 2010]). A-Awan must now make a detailed showing of the need to take the additional depositions of Guaraca and/or Collazo by demonstrating that Herman and/or McKenzie had insufficient information regarding relevant issues and that there is a substantial likelihood that Guaraca and/or Collazo have information material and necessary to prosecute or defend against the claims in this case (*see Best Payphones, Inc. v. Guzov Ofsink, LLC*, 135 AD3d 585 [1st Dept 2016]).

The burden of proof borne by the plaintiff on issues of control and supervision of the job site

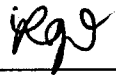
warrants inquiry into the defendants' respective roles and responsibilities at the subject location, particularly in light of Singh's statement that his company - the plaintiff's employer - was not a subcontractor of A-Awan, leaving open the question of who hired J & G. The deponents produced to date deferred to others as knowledgeable on such issues. Collazo has clearly been identified as the person in charge of the subject contract. Under these circumstances, Collazo should submit to a deposition.

Accordingly, it is hereby

ORDERED that Prana shall produce Sally Collazo for a deposition no later than 30 days following service of a copy of this Order with notice of entry.

This constitutes the Decision and Order of this Court.

Bronx, New York
September 26, 2019



HON. LAURA G. DOUGLAS
J.S.C.