

Brandner v Boricua Coll. Dev. Corp.

2020 NY Slip Op 30135(U)

January 16, 2020

Supreme Court, New York County

Docket Number: 151166/2016

Judge: Robert R. Reed

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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**

PRESENT: HON. ROBERT R. REED PART 43

Justice

-----X

SUSAN BRANDNER,

Plaintiff,

- v -

BORICUA COLLEGE DEVELOPMENT CORP.,
INDIVIDUALLY AND D/B/A BORICUA COLLEGE,
BORICUA COLLEGE, THE HISPANIC SOCIETY OF
AMERICA, JAIME PATXOT, NEW YORK CITY
LANDMARKS PRESERVATION COMMISSION,

Defendant.

-----X

THE HISPANIC SOCIETY OF AMERICA

Plaintiff,

-against-

URBAN ARBORISTS, INC., NEW YORK CITY DEPARTMENT
OF PARKS & RECREATION

Defendant.

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INDEX NO. 151166/2016
MOTION DATE N/A
MOTION SEQ. NO. 005

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595076/2017

The following e-filed documents, listed by NYSCEF document number (Motion 005) 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109

were read on this motion to VACATE/STRIKE - NOTE OF ISSUE/JURY
DEMAND/FROM TRIAL CALENDAR

Upon the foregoing documents, it is ordered that this motion is granted in part and denied in part.

Third-party defendant Urban Arborists, Inc. (Urban) moves to strike plaintiff's note of issue and certificate of readiness, to compel all outstanding discovery, and to extend the time to file a motion for summary judgment. Plaintiff opposes, arguing that there is no outstanding discovery.

On or about December 29, 2016, plaintiff filed the first note of issue. On or about December 2, 2019, plaintiff filed the second note of issue and affirmed that all outstanding discovery was complete, and that plaintiff was ready for trial. Urban, however, disagrees, arguing that outstanding discovery remains. Specifically, Urban argues that plaintiff failed to fully respond to Urban's notice for discovery dated April 24, 2019. Urban also argues that plaintiff filed the second note of issue five days after third-party plaintiff's (The Hispanic Society [HSA]) deposition and before Urban received the transcript of said deposition and could serve post deposition demands upon HSA for demands made during the deposition. Urban subsequently served post deposition demands upon HSA and asserts that the requested discovery is relative to Urban's liability for subject accident.

A court may vacate a note of issue where it appears that a material fact set forth therein, i.e., the representation that discovery is complete, is incorrect (*see* 22 NYCRR 202.21(e); *Rivers v Bimbaum*, 102 AD3d 26 [2nd Dept 2012]; *Gomes v Valentine Realty LLC*, 32 AD3d 699 [1st Dept 2006]; *Herbert v Sivaco Wire Corp.*, 1 AD3d 144 [1st Dept 2003]). Further, CPLR 3101 provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." "The words 'material and necessary' as used in CPLR 3101(a) are 'to be interpreted liberally to require disclosure ... of any facts bearing on the controversy' (*Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 406 [1968])" (*Matter of Steam Pipe Explosion at 41st Street and Lexington Avenue*, 127 AD3d 554, 555 [1st Dept 2015]).

In a review of the record and all submitted papers, the record is devoid of any admissible proof -- before the within motion -- demonstrating Urban's dissatisfaction with plaintiff's discovery response. Moreover, Urban has failed to proffer any communication demonstrating its

efforts to notify plaintiff of any deficiencies and a good faith effort to resolve what it now asserts to be plaintiff's failure to fully respond to its discovery demands. In the court's view, plaintiff has substantially responded to Urban's discovery demands dated April 24, 2019. Urban asserts that the discovery sought from HSA is necessary and material and is relative to Urban's liability for the subject accident. The court cannot ignore Urban's argument of materiality and necessity regarding the post deposition demands served upon HSA to its defense in this action.

Accordingly, it is

ORDERED that the portion of third-party defendant Urban Arborists Inc.'s motion to vacate the note of issue and certificate of readiness is denied; and it is further

ORDERED that the portion of third-party defendant Urban Arborists Inc.'s motion to compel plaintiff to respond to outstanding discovery is denied; and it is further

ORDERED that, within 15 days from entry of this order, third-party plaintiff The Hispanic Society of America is directed to provide responsive documents to third-party defendant Urban Arborists Inc.'s post deposition demands dated October 24, 2019; and it is further

ORDERED that the portion of third-party defendant Urban Arborists Inc.'s motion to extend time to file a dispositive motion is granted; and it is further

ORDERED that, within 45 days from entry of this order, movant shall file all dispositive motions.

This constitutes the Decision and Order of the court.

1/16/2020
DATE


ROBERT R. REED, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE