

Pimentel v De Freight LLC

2020 NY Slip Op 32003(U)

June 24, 2020

Supreme Court, New York County

Docket Number: 161075/2017

Judge: Arlene P. Bluth

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH

PART IAS MOTION 14

Justice

-----X

INDEX NO. 161075/2017

FRANCISCO PIMENTEL,

MOTION DATE N/A

Plaintiff,

MOTION SEQ. NO. 002

- v -

DE FREIGHT LLC, NAMOR REALTY COMPANY L.L.C.,
ARCHSTONE BUILDERS LLC,

DECISION + ORDER ON MOTION

Defendant.

-----X

NAMOR REALTY COMPANY L.L.C.

Third-Party
Index No. 595883/2018

Plaintiff,

-against-

TRANSEL ELEVATOR, ELECTRIC INC. D/B/A T.E.I. GROUP

Defendant.

-----X

DE FREIGHT LLC

Second Third-Party
Index No. 595289/2020

Plaintiff,

-against-

ED TRUCK SERVICE, INC.

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 155, 156

were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE/JURY

The motion by defendant Namor Realty Company, L.L.C. ("Namor") to strike the note of issue is granted in part and denied in part.

Background

In this Labor Law case, defendant Namor seeks to strike the note of issue (“NOI”) on the ground that discovery has not been completed. Namor points out that the NOI was filed on January 23, 2020 despite the fact that substantial discovery was still outstanding. It points to a discovery order dated January 21, 2020 in which third party defendant (“TEI”) was supposed to serve a supplemental response to a demand from Namor and a deposition of a TEI witness was to take place on January 23, 2020 (NYSCEF Doc. No. 104). Counsel for Namor claims she discovered that the NOI was filed while returning from the TEI deposition on January 23, 2020.

Namor claims that at this deposition, the TEI witness was unable to identify a contract and it later noticed a deposition for the TEI signatory to the contract. Moreover, discovery demands were generated as a result of the deposition, which remain outstanding. Namor also seeks outstanding discovery from defendant De Freight LLC (“De Freight”)

De Freight submitted an affirmation in partial support and acknowledges that De Freight still owes outstanding discovery and only objects to the motion to the extent Namor sought preclusion against De Freight.

In opposition, plaintiff contends that outstanding discovery between defendant and third-party defendants should not indefinitely delay his case. Plaintiff argues that the NOI was specifically discussed in calls with the Court and argues that there is ample time for the parties to complete discovery before summary judgment motions are due.

TEI also offers opposition in which it claims that its delays in responding to outstanding demands are neither willful nor contumacious. It also claims that Namor has not stated a sufficient ground to compel a further deposition of a TEI witness.

In reply, Namor contends that it entered into a contract with TEI (plaintiff's employer) for services at the work site. Namor notes that TEI has not served any discovery in response to the instant motion.

Discussion

As an initial matter, the Court strikes the NOI because discovery was not completed when it was filed. The Court recognizes that the final conference order issued before plaintiff filed the NOI did not contain a future date and directed plaintiff to file an NOI on or before January 25, 2020. However, that conference order directed TEI to supplement a response by February 21, 2020, called for a deposition to be held on January 23, 2020 and appears to order TEI to provide text messages between TEI employees within 30 days (NYSCEF Doc. No. 104).

The fact is that there were multiple outstanding discovery issues when the NOI was filed and the most recent discovery order contemplated discovery taking place after the NOI deadline. That compels the Court to strike it. While this Court might be inclined to overlook one or even two minor remaining discovery items, it cannot simply ignore the outstanding issues here, which included a deposition that took place on the day the NOI was filed. After all, an NOI certifies that all discovery is completed and that is not the case here pursuant to the conference order itself. This is not a situation where, on the eve of the end of discovery, a defendant claims that it suddenly wants discovery it never requested in prior discovery orders. Rather, defendant wants discovery, in part, from a deposition that took place (and was ordered to take place) on the day plaintiff decided to file the NOI. That is a reasonable basis upon which to strike the NOI.

The Court grants the remaining relief except that the Court denies the branch of the motion that requires TEI to produce a witness with knowledge of the contract between Namor and TEI at this time. Namor failed to meet its prima facie burden; it claimed that TEI's witness

(Jason Brown) was not familiar with the contract but did not offer a citation in the deposition transcript to support that claim (NYSCEF Doc. No. 86, ¶ 27). The failure to offer a pincite in the deposition does not adequately provide TEI the chance to oppose that contention or the Court with the opportunity to assess that claim. Instead, the Court and TEI are left with a 140-page deposition transcript.

However, TEI must provide the requested written demands from Namor. TEI's opposition to this branch of Namor's motion stresses that TEI was neither willful nor contumacious in failing to respond and points out that the demands at issue were served on February 5, 2020. The Court finds that TEI was neither willful nor contumacious but must respond to the demands listed in paragraph 15 of Namor's reply except for the demand to produce of another witness (NYSCEF Doc. No. 156, ¶ 15). Moreover, TEI did not substantively object to any of the requested discovery outside of the demand for an EBT of another TEI witness.

De Freight admits it is still working on discovery demands (NYSCEF Doc. No. 116, ¶ 4) and the Court finds that it must respond within 60 days. The Court denies Namor's request, to the extent it made any, for preclusion with respect to De Freight.

Accordingly, it is hereby

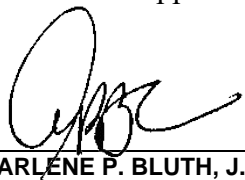
ORDERED that the motion by defendant Namor Realty Company, L.L.C. is granted to the extent that the note of issue is stricken and defendants De Freight LLC and third-party defendant Transel Elevator, Electric Inc. d/b/a T.E.I. Group are directed to respond to outstanding discovery demands within 60 days and denied to the extent Namor sought a further deposition of a TEI witness; and it is further

ORDERED that, within 15 days from the entry of this order, movant shall serve a copy of this order with notice of entry on all parties and upon the Clerk of the General Clerk’s Office (60 Centre Street, Room 119), via e-filing ONLY, who is hereby directed to strike the case from the trial calendar and make all required notations thereof in the records of the court; and it is further

ORDERED that service upon the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh).

Conference September 15, 2020 at 10 a.m. The parties are directed to check the docket and this part’s rules regarding whether the conference will be held virtually. They are also encouraged to e-file a conference order, signed by all parties, for the Court’s approval.

06/24/2020
DATE


ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE