

Caras v George Comfort & Sons, Inc.

2020 NY Slip Op 32933(U)

September 4, 2020

Supreme Court, New York County

Docket Number: 152645/2015

Judge: Nancy M. Bannon

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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. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

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KEITH CARAS,

Plaintiff,

- v -

GEORGE COMFORT & SONS, INC., WWP OFFICE
LLC, NOMURA HOLDING AMERICA, INC., TURNER
CONSTRUCTION COMPANY,

Defendant.

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GEORGE COMFORT & SONS, INC., WWP OFFICE LLC,
NOMURA HOLDING AMERICA, INC., TURNER
CONSTRUCTION COMPANY

Plaintiff,

-against-

FOREST ELECTRIC CORP.

Defendant.

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INDEX NO. 152645/2015
MOTION DATE 08/05/2020
MOTION SEQ. NO. 012

DECISION + ORDER ON MOTION

Third-Party
Index No. 595335/2018

The following e-filed documents, listed by NYSCEF document number (Motion 012) 370, 371, 372, 373,
374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 392, 401, 402, 403, 404,
405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425,
426, 427, 428, 429

were read on this motion to/for STRIKE PLEADINGS.

This personal injury action arises out of an accident that occurred on October 22, 2012
when plaintiff Keith Caras, a journeyman steamfitter employed by a non-party subcontractor,
allegedly slipped on debris while stepping onto a one-man lift or scissor lift at a Manhattan
construction site. One of the plaintiff's claims is that the work site had insufficient lighting.
Third-party defendant Forest Electric Corp., an electrical subcontractor at the site, now moves
for a second time for sanctions against defendants/third party plaintiffs, George Comfort & Sons,

Inc., WWP Office LLC, Nomura Holding America, Inc. and Turner Construction Company, the owners, lessees of the premises and the general contractor, pursuant to CPLR 3126 and to sever the third-party action. The defendants/third-party plaintiff oppose. The motion is denied.

A Note of Issue was filed on April 24, 2018, and a third-party action was commenced two days later, impleading Forest. Numerous motions were filed before and after the filing of the Note of Issue. The Note of Issue was vacated and further discovery was directed. The court's status conference order dated October 11, 2018, notes that discovery in the third-party action remained outstanding and directed both sides to comply within 30 days. A compliance conference order dated January 10, 2019, states that the third-party plaintiffs and the third-party defendant each owed discovery and again directed compliance within 30 days. A second Note of Issue was filed on May 1, 2019.

By an order dated May 6, 2020, this court, *inter alia*, denied a motion by defendants/third-party plaintiffs which sought, pursuant to CPLR 3126, to strike the Forest's answer for failing to produce discovery, or in the alternative, for a preclusion order (MOT SEQ 008). The court also denied a motion by Forest for an order striking the third-party complaint pursuant to CPLR 3126, severing the third-party action from the main action under CPLR 603 and 1010, vacating the Note of Issue and extending the time to move for summary judgment (MOT SEQ 009). In that motion, Forest argued that the defendants/third-party plaintiffs had provided only delayed and incomplete discovery responses since impleading Forest.

By order dated August 28, 2020, the court denied a motion by the defendants/third-party plaintiffs to reargue and renew their summary judgment motion (MOT SEQ 011). In connection with the motion to reargue and renew, the defendants/third-party plaintiffs produced an additional affidavit of Lawrence Costello. This affidavit is at the center of the instant motion.

The defendants' third-party plaintiffs had produced an affidavit of Costello in support of their motion for summary judgment (MOT SEQ 010). In that affidavit, dated September 26, 2019, Costello states he was employed by Turner Construction Company and was the Project

Manager assigned to the Nomura Infrastructure Project, the plaintiff's work site. Costello avers that Turner's Master Agreement with Forest, one of its subcontractors, included only general business terms and the sub-contract work orders, which reference the Master Agreement, detail the specific scope of the work. According to these work orders, Forest was responsible for installation and maintenance of temporary light and power on the trading floors at the project including the 4th floor, where the plaintiff was working when he was injured. In his additional affidavit, dated June 5, 2020, Costello refers to his prior affidavit and again states that Forest was the electrical subcontractor responsible for installing and maintaining temporary lighting on the trading floors at the project, including the 4th floor. Costello also alleges that the indemnification provisions in the Master Agreement required Forest to indemnify and provide insurance for Turner and the property owners for all claims arising from its work at the site.

Third-party defendant Forest did not move to reargue the prior motion which was denied by the May 6, 2020 order. But it now moves for the same relief previously denied. Forest moves (1) pursuant to CPLR 3126 to strike the third-party complaint (2) pursuant to CPLR 3126 to preclude Lawrence Costello from testifying at trial and precluding defendants/third-party plaintiffs from offering evidence at trial relevant to the electrical subcontractor responsible for temporary light and power in the area of the plaintiff's accident and (3) for severance of the third-party action pursuant to CPLR 603 and 1010. Forest argues that the defendant's/third-party plaintiffs refused to identify or produce Lawrence Costello but then submitted Costello's self-serving affidavit, which demonstrates that he is a key witness that should be deposed.

The defendants/third-party plaintiffs oppose this motion. They argue that Costello was not a "surprise witness" as his name and job title were disclosed in prior discovery. They observe that Darrell Fullerton, the Project Safety Manager employed by Turner, was first deposed on January 24, 2017, and testified that Forest was responsible for providing temporary lighting at the site and that he had conversations with Forest about the lighting. Fullerton was deposed a second time, on June 14, 2019, by counsel for Forest. Defendants/third-party

plaintiffs point out that, when Fullerton identified Costello at this deposition as a member of the project team, counsel for Forest followed up with only one question, asking if Costello was employed by Turner, to which the witness answered in the affirmative. Forest then did not serve a deposition notice for Costello until September 27, 2019, four months after the Note of Issue was filed. The defendants/third-party plaintiffs further argue that Forest’s own discovery productions demonstrate that Forest knew of Costello previously and that Forest performed the relevant work. This production includes work orders and work authorizations where the work was approved by “L. Costello.” The defendants/third-party plaintiffs also maintain that Costello’s second affidavit is substantially the same as the first, adding only indemnification information which Forest, as a party to the agreement, always had, and is thus not a basis for imposing sanctions pursuant to CPLR 3126. They note that Forest has not moved for a further deposition or demonstrated that Fullerton’s testimony was inadequate.

The motion must be denied as Forest has not demonstrated entitlement to the relief sought. As correctly argued by the defendants/third-party plaintiffs, the court has already denied the relief sought in the order dated May 6, 2020, which was not the subject of a motion to reargue, and, contrary to Forest’s contention, the recently submitted affidavit of Lawrence Costello, does not provide any additional basis for granting such relief.

Accordingly, it is

ORDERED that the motion of third-party defendant Forest Electric Corp. is denied.

This constitutes the Decision and Order of the court.

9/4/2020
DATE


NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

CHECK ONE:

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