

**Jennings v City of New York**

2020 NY Slip Op 33532(U)

September 25, 2020

Supreme Court, Richmond County

Docket Number: 150487/2017

Judge: Thomas P. Aliotta

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND: PART C2

-----X  
KENNETH JENNINGS,

HON. THOMAS P. ALIOTTA

Plaintiff,

**DECISION AND ORDER**

- against-

Index No.: 150487/2017

THE CITY OF NEW YORK, THE NEW YORK  
CITY POLICE DEPARTMENT, and  
METROPOLITAN CONSTRUCTION CORP.,

Motion No.: MS\_002

Defendants.

-----X  
METROPOLITAN CONSTRUCTION CORP.,

Third Party Plaintiff,

-against-

NBA CONTRUCTION, INC.,

Third Party Defendant

-----X

Recitation, as required by CPLR 2219(a) of the following papers numbered "1" through  
"5" were fully submitted on the 1<sup>st</sup> day of July 2020.

**Papers  
Numbered**

Defendant, Metropolitan Construction Corp.'s, Notice of Motion, Affirmation with Exhibits (NYSCEF 74 through 97).....	1, 2
Plaintiff's Affirmation in Opposition with Exhibits (NYSCEF 100 through 105).....	3
Plaintiff's Affirmation in Opposition with Exhibits (NYSCEF 108 through 115).....	4
Defendant, Metropolitan Construction Corp.'s, Reply Affirmation with Exhibits (NYSCEF 117 and 118).....	5

Upon the foregoing papers, defendant's motion pursuant to CPLR § 5015 and § 3124 is decided as follows:

This action arises out of alleged personal injuries sustained by plaintiff while he was erecting a scaffold during the course of his employment with third-party defendant, NBA CONSTRUCTION, INC., at the 120th Police Precinct building, 78 Richmond Terrace, Staten Island, New York. The following are the relevant facts germane to a determination of this motion pursuant to CPLR § 5015.

In response to the demand of defendants, THE CITY OF NEW YORK and THE NEW YORK CITY POLICE DEPARTMENT ("CITY"), for a verified bill of particulars, plaintiff alleged past lost earnings in the amount of \$68,000.00 and future lost earnings in the amount of \$5,000,000.00 as of August 28, 2017. Thereafter, a Preliminary Conference Order dated October 24, 2017 directed plaintiff to provide authorizations for his "income tax returns including W-2 and/or 1099 forms for a period of five years prior to the date of the incident to the present (2011 through 2017). Defendant, METROPOLITAN CONSTRUCTION CORP. ("Metropolitan"), appeared in this action after the Preliminary Conference was conducted. In response to Metropolitan's demand for a verified bill of particulars, plaintiff alleged past lost earnings in the amount of \$240,000.00 and continuing as of January 22, 2019, without reference to future lost earnings. Plaintiff alleged, "all other special damages/expenses to be provided, if applicable."

An authorization for the release of plaintiff's tax returns from the United States Treasury was exchanged with Metropolitan. However, on March 4, 2019, the Treasury sent a letter to Metropolitan that the authorization was rejected and an explanation of the rejection was sent to plaintiff. Plaintiff was deposed on August 28, 2019. He testified that he had 16 judgments docketed against him by the Federal government, as well as the States of New York and

Washington for not filing taxes and owed approximately \$100,000.00 in back taxes. He also testified that he worked for approximately 15 or more different entities from 2014 through the date of his accident.

Following his deposition, Metropolitan served a discovery demand dated September 11, 2019 for authorizations to obtain plaintiff's tax records from 2014 through the present from the Treasury Department and plaintiff's tax service, together with copies of all tax records in plaintiff's possession. In response, plaintiff objected to the production of tax returns. Several attempts were made by Metropolitan to resolve this dispute. On December 17, 2019, this Court issued a compliance conference order directing the following:

(4) Defendant Metropolitan to provide Plaintiff with a copy of correspondence from IRS rejecting Defendant's attempt to secure/obtain Plaintiff's IRS records/W2s via authorizations within 30 days and Plaintiff to acknowledge receipt of correspondence and provide said records within 30 days OR plaintiff to provide verification or Affidavit of non-filing of tax records within 30 days.

In response to the Order, plaintiff provided copies of his W-2 records, but not the IRS records and the affidavit of non-filing. After receiving this response, Metropolitan served a copy of the Treasury Department's letter together with a Notice to Admit. The Notice sought an admission that plaintiff did not file tax returns for the years 2014 through 2018, to which defendant received an unsworn response wherein plaintiff only admitted that he did not file tax returns in the year 2018. The remainder of the Notice was denied.

Metropolitan has now moved this Court for an order pursuant to CPLR § 5015 vacating a portion of the December 17, 2019 order permitting plaintiff to provide an affidavit in lieu of producing the records. In the alternative, Metropolitan seeks an order pursuant to CPLR § 3124 compelling plaintiff to comply with the terms of the December 17, 2019 order.

CPLR §3101(a) provides for full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof (*McMahon v. Manners*, 158 AD3d 616, 617 [2d Dept. 2018]).” The terms “material and necessary” are not to be construed as unlimited and, therefore, the Supreme Court has broad discretion with respect to the supervision of disclosure (*Id.*). In the context of tax returns, the party seeking disclosure must make a sufficiently strong showing that “the information contained in plaintiff’s tax returns is indispensable to the litigation and unavailable from other sources” (*Grossman v. Lacoff*, 168 AD2d 484, 486 [2d Dept. 1990]).

Based upon the foregoing, that branch of Metropolitan’s motion for an order pursuant to CPLR § 5015 is denied as moot as plaintiff in opposition to the motion provided an affidavit of no other income dated March 4, 2020 and copies of the records received from the Treasury Department, together with the letter of rejection.

However, Metropolitan’s motion pursuant to CPLR § 3124 is granted. In light of plaintiff’s inconsistent allegations in his verified bills of particulars, deposition testimony, and the Notice to Admit, plaintiff shall provide an updated authorization for the U.S. Treasury Department and Optima Tax to obtain tax returns for the years 2011 through 2019, the date of Metropolitan’s most recent discovery demand. Defendant, METROPOLITAN, has sustained its burden that the information demanded is not available from another source and is indispensable on the issue of plaintiff’s substantial alleged past and future loss of earnings (*McMahon v. Manners*, 158 AD3d 617).

Further, at no time has plaintiff moved to vacate the Preliminary Conference Order directing the production of tax return authorizations irrespective of the fact that plaintiff was allegedly not self-employed. While plaintiff may not have received income from multiple

sources, defendants are entitled to confirm plaintiff's total amounts earned, pension and deferred compensation information, and deductions during the years in question and whether he filed tax returns. Moreover, the authorization initially provided did not comply with the Preliminary Conference Order for tax records from 2011 through 2017, but rather permitted the release of records for the years 2015, 2016 and 2017. Therefore, plaintiff has waived his objection to providing an authorization for his tax returns. Upon plaintiff's failure to provide the authorizations to obtain copies of his tax returns for the years 2011 through 2019, such failure shall serve as the basis for sanctions pursuant to CPLR § 3126 upon a further motion.

Accordingly, it is hereby

ORDERED, that METROPOLITAN CONSTRUCTION CORP.'s motion for an order pursuant to CPLR § 5015 is denied as moot; and it is further

ORDERED, that METROPOLITAN CONSTRUCTION CORP.'s motion for an order pursuant to CPLR § 3124 is granted and plaintiff shall provide updated authorizations for the U.S. Treasury Department and Optima Tax permitting the release of his tax returns for the years 2011 through 2019 in accordance with the Preliminary Conference Order and METROPOLITAN CONSTRUCTION CORP.'s discovery demand dated September 11, 2019 within 60 days.

This constitutes the decision and order of the Court.

Dated: September 25, 2020

ENTER:



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HON. THOMAS P. ALIOTTA, J.S.C.