Robles v 635 Owner LLC
2020 NY Slip Op 33541(U)
October 22, 2020
Supreme Court, New York County
Docket Number: 162049/2015
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46
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ANGEL ROBLES, Index No. 162049/2015

Plaintiff

- against - DECISION AND ORDER

635 OWNER LLC and W5 GROUP LLC,

Defendants

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LUCY BILLINGS, J.S.C.:

Defendant W5 Group LLC, the general contractor on the construction site owned by co-defendant 635 Owner LLC where plaintiff claims he was injured, has moved for a protective order against 635 Owner's requests for admissions that W5 Group has not answered in 635 Owner's Notice to Admit served on W5 Group October 24, 2019. C.P.L.R. § 3103(a).

I. THE IRRELEVANT AND IMPERMISSIBLE REQUSTS FOR ADMISSIONS

According to 635 Owner's own description, most of the requests for admissions to which W5 Group objects concern issues that the court now has determined: whether W5 Group, an entity that owned W5 Group, or an entity that W5 Group owned employed plaintiff, which the court determined W5 Group failed to show, and the parties' rights and obligations under their contract. As

long as W5 Group has failed to show that it was plaintiff's employer and the court has denied W5 Group's motion to add any defense based on such a status, the ownership of non-party affiliated entities, any agreements between them and W5 Group, and their work at the construction site are irrelevant. Liberty Petroleum Realty, LLC v. Gulf Oil, L.P., 164 A.D.3d 401, 405 (1st Dep't 2018); Curran v. New York City Tr. Auth., 161 A.D.3d 649, 649 (1st Dep't 2018); DeLeonardis v. Hara, 136 A.D.3d 558, 558 (1st Dep't 2016); Zohar v. Hair Club for Men, 200 A.D.2d 453, 453-54 (1st Dep't 1994).

As to the request to admit that W5 Group owes 635 Owner indemnification under their contract, the court has answered that question affirmatively. Other requests concerning the parties' rights and obligations under their contract seek to determine legal conclusions dictated by the contract's terms, which are the court's province, and not based on W5 Group's interpretation of the contract, which no party has shown to be ambiguous. As there is no ambiguity in the contract's terms, W5 Group's admission regarding parties' rights or obligations under those terms is meaningless. The plain terms, which are not reasonably susceptible of more than one interpretation, dictate those rights and obligations. Universal Am. Corp. v. National Union Fire Ins.

Co. of Pittsburgh, PA, 25 N.Y.3d 675, 680 (2015); Beardslee v. Inflection Energy, LLC, 25 N.Y.3d 150, 157 (2015); Gilbane Bldg. Co./TDX Constr. Corp. v. St. Paul Fire & Mar. Ins. Co., 143 A.D.3d 146, 156 (1st Dep't 2016); Bank of N.Y. Mellon v. WMC Mtge., LLC, 136 A.D.3d 1, 6 (1st Dep't 2015).

The request to admit that 635 Owner retained no right under the contract to direct W5 Group's operations is irrelevant in any event. The only possibly relevant issue, if liability is to be apportioned, or indemnification is to be reduced, is whether 635 Owner did direct W5 Group's operations, did so negligently, and in so doing contributed to plaintiff's injury. See Pellot v. Tivat Realty LLC, 173 A.D.3d 498, 498-99 (1st Dep't 2019); Curran v. New York City Tr. Auth., 161 A.D.3d at 649; Matter of Souza, 80 A.D.3d 446, 446 (1st Dep't 2011); Wolin v. St. Vincent's Hosp. & Med. Ctr. of N.Y., 304 A.D.2d 348, 349 (1st Dep't 2003). The court already determined, however, that 635 Owner did not supervise or control plaintiff's work when he was injured and maintained no control over the use of the ladder from which he fell.

Nor is it W5 Group's province to confirm whether its project manager James Costello's deposition testimony was truthful as 635 Owner requests. See Nuccio v. Chou, 183 A.D.2d 511, 514 (1st

Dep't 1992); Clarke v. New York Tr. Auth., 174 A.D.2d 268, 276 (1st Dep't 1992); Sanchez v. Manhattan & Bronx Surface Tr. Operating Auth., 170 A.D.2d 402, 405 (1st Dep't 1991). 635 Owner acknowledges that the purpose of a notice to admit is to remove uncontested issues that otherwise would unnecessarily consume time being proved at trial and not to compel admission of material issues. Hawthorne Group v. RRE Ventures, 7 A.D.3d 320, 324 (1st Dep't 2004); Wolin v. St. Vincent's Hosp. & Med. Ctr. of N.Y., 304 A.D.2d at 349; Meadowbrook-Richman, Inc. v. Cicchiello, 273 A.D.2d 6, 6 (1st Dep't 2000). If Costello's deposition testimony is admitted at the trial, the testimony surely will bear on material issues, and the jury will determine that testimony's truth. W5 Group's admission that his deposition testimony was truthful will not eliminate the need for his testimony at trial. If Costello testifies at the trial, again the testimony surely will bear on material issues, and the jury will determine his trial testimony's truth.

II. COMPLIANCE WITH 22 N.Y.C.R.R. § 202.7

635 Owner protests that W5 Group failed to recount any effort to resolve their dispute over the Notice to Admit before serving this motion. 22 N.Y.C.R.R. § 202.7(a) and (c). W5 Group did recount, however, that it offered to produce its witness

James Marrone to provide the information sought by the Notice to Admit, but 635 Owner refused that offer. Tokayer v. Kosher Sports Inc., 178 A.D.3d 641, 641 (1st Dep't 2019). See Caserta v. Triborough Bridge & Tunnel Auth., 180 A.D.3d 532, 533 (1st Dep't 2020). Since 635 Owner seeks to justify its requests for admissions on the grounds that W5 Group did not produce Marrone as its witness, but produced Costello, who lacked knowledge of the parties' contract and the relationships and agreements among W5 Group and affiliates, W5 Group's offer was a reasonable, potentially viable resolution.

After 635 Owner contended that W5 Group had made no effort to resolve their dispute, W5 Group further explains that it negotiated an extension of time to respond more fully to the Notice to Admit, but 635 Owner refused to extend W5 Group's time to move for a protective order. Thus, to protect against its failures to respond being considered admissions, C.P.L.R. § 3123(a), W5 Group was constrained to serve its motion. Rodriguez v. Nevei Bais, Inc., 158 A.D.3d 597, 598 (1st Dep't 2018); Suarez v. Shapiro Family Realty Asoc., LLC, 149 A.D.3d 526, 527 (1st Dep't 2017); Cuprill v. Citywide Towing & Auto Repair Servs., 149 A.D.3d 442, 443 (1st Dep't 2017). See Hernandez v. City of New York, 95 A.D.3d 793, 794 (1st Dep't 2012); New Image Constr.,

Inc. v. TDR Enters. Inc., 74 A.D.3d 680, 681 (1st Dep't 2010). W5 Group further recounts that it then reached out repeatedly by telephone and email to resolve the dispute, but was unsuccessful, demonstrating the futility of such efforts. Suarez v. Shapiro Family Realty Asoc., LLC, 149 A.D.3d at 527; Loeb v. Assara N.Y. I L.P., 118 A.D.3d 457, 458 (1st Dept 2014); Scaba v. Scaba, 99 A.D.3d 610, 611 (1st Dep't 2012); Baulieu v. Ardsley Assoc. L.P., 84 A.D.3d 666, 666 (1st Dep't 2011).

III. VERIFICATION OF W5 GROUP'S RESPONSES

Finally, 635 Owner also complains that Costello's verification on W5 Group's behalf of the responses that W5 Group has provided is deficient because (1) Costello is not a member of W5 Group, (2) his verification is dated before the responses themselves, and (3) he verifies them as "true to deponent's own knowledge, except as the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes them to be true." Aff. of Kevin T. Fitzpatrick Ex. J, at 38. Contrary to 635 Owner's contention, this verification is sworn before a Notary Public.

635 Owner cites no authority for its first proposition. Based on the explanation by W5 Group's attorney that he simply dated, signed, and served its responses after Costello reviewed

them, the date of Costello's verification is inconsequential. The substance of his verification complies with C.P.L.R. § 3021, which requires that a "verification must be to the effect that the pleading is true to the knowledge of the deponent, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true."

In any event, 635 Owner does not cross-move or separately move for any relief based on the claimed deficiencies. Therefore the court grants no relief on these grounds.

IV. CONCLUSION

Given the plethora of irrelevant information sought by 635 Owner's 72 requests for admissions in its Notice to Admit, the court's function is not to pare down the requests for admissions to the few that remain relevant. Blau v. Blau, 3 A.D.3d 167, 171 (1st Dep't 2004); Pascual v. Rusic Woods Homeowners Assn., Inc., 173 A.D.3d 757, 758 (2d Dep't 2019); Stepping Stones Assoc., L.P. v. Scialdone, 148 A.D.3d 855, 856 (2d Dep't 2017); Berkowitz v. 29 Woodmere Blvd. Owners', Inc. 135 A.D.3d 798, 799 (2d Dep't 2016). Therefore the court grants W5 Group's motion for a protective order allowing W5 Group to refrain from further responding to 635 Owner's Notice to Admit served October 24, 2019, and prohibiting 635 Owner from considering any failure to

respond as an admission. C.P.L.R. § 3103(a); Hawthorne Group v.RRE Ventures, 7 A.D.3d at 324; Wolin v. St. Vincent's Hosp. & Med. Ctr. of N.Y., 304 A.D.2d at 349; Meadowbrook-Richman, Inc. V. Cicchiello, 273 A.D.2d at 6. See C.P.L.R. § 3123(a). This protective order is without prejudice to another timely notice to admit served by 635 Owner on W5 Group that seeks relevant, permissible information and to which W5 Group shall be obligated to respond. C.P.L.R. § 3123(a). To the extent that James Marrone's deposition is still potentially relevant, 635 Owner may move to conduct his deposition pursuant to 22 N.Y.C.R.R. § 202.21(d). Since the court is requiring a new notice to admit, if any, to which W5 Group will respond anew, the court need not determine whether W5 Group has waived any privileged claimed in those responses. See Beach v. Shanely, 62 N.Y.2d 241, 248 (1984); Liberty Petroleum Realty, LLC v. Gulf Oil, L.P., 164 A.D.3d at 407; K.S. v. City of New York, 56 A.D.3d 527, 528 (2d Dep't 2008).

DATED: October 22, 2020

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