

Mollema v Citigroup Inc.
2020 NY Slip Op 33971(U)
December 2, 2020
Supreme Court, New York County
Docket Number: 157126/2015
Judge: Barbara Jaffe
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE

PART

IAS MOTION 12

Justice

-----X

WILLIAM MOLLEMA,

INDEX NO. 157126/2015

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 007

- v -

CITIGROUP INC., CITIGROUP FINANCIAL
PRODUCTS INC., SL GREEN REALTY CORP.,
TISHMAN CONSTRUCTION CORPORATION,

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 007) 90-99, 101-106, 108
were read on this motion to _____ dismiss _____.

Third-party defendant Hallen Welding Service Inc. moves pursuant to CPLR 3126 and
3124 for an order dismissing the third-party complaint, or in the alternative, compelling third-
party plaintiffs to produce a witness for an examination before trial. Third-party plaintiffs
oppose.

By summons and complaint, plaintiff commenced this action alleging that while
employed by Hallen, he was injured while working on a construction project. (NYSCEF 93). By
third-party summons and complaint, third-party plaintiffs advance claims against Hallen for
indemnification, contribution, and breach of contract for failure to procure insurance. (NYSCEF
95).

At his deposition, the safety director of third-party plaintiff Tishman Construction
Corporation testified, as pertinent here, that he had no knowledge as to the contracts by which
Tishman had agreed to work on the construction project. He identified another Tishman

employee as someone with knowledge of the contracts and denied having knowledge as to whether Hallen had participated in the owner-controlled insurance program (OCIP). (NYSCEF 97).

By so-ordered stipulation dated April 29, 2020, the parties agreed that Hallen must move for an order compelling the deposition of a witness with knowledge of the contract and OCIP or the deposition would be waived. (NYSCEF 95).

Hallen contends that the contractual relationship between the parties, the procedure for considering and adding OCIP members, and its effective dates and requirements are pertinent to this litigation and that absent the safety director's knowledge of the contracts and OCIP, and given the failure of third-party plaintiffs to produce an additional witness with relevant knowledge, the third-party complaint should be stricken. In the alternative, it seeks an order compelling the deposition of the person identified by Tishman's safety director, or someone with sufficient knowledge of the contracts and OCIP. (NYSCEF 91).

In opposition, third-party plaintiffs deny that Tishman's witness lacked sufficient knowledge of the relevant facts, as the third-party action only concerns entitlement to indemnification, contribution, and breach of contract. Thus, whether Hallen is obligated to indemnify them is determined solely by their contract, a copy of which Hallen produced in response to a discovery demand (NYSCEF 104). They also maintain that it is undisputed that Hallen was not enrolled in the OCIP, that their contract was in effect at the time of plaintiff's accident, and that Hallen served an insurance disclosure reflecting that it was covered under its own general liability policy (NYSCEF 105). Further information about the OCIP is immaterial, they assert, and state that if Hallen seeks confirmation on coverage, it should have commenced a separate declaratory judgment action. (NYSCEF 103).

In reply, Hallen argues that as third-party plaintiffs advance a cause of action for breach of contract for failure to procure insurance, the negotiation of the pertinent contract and enrollment in the OCIP are relevant, and as Tishman's safety director could not authenticate the contract, an additional witness is necessary to do so. It denies that the contract is authenticated because it was exchanged during discovery, and contends that Tishman fails to authenticate the contract. Moreover, having not yet been deposed, a dispute remains as to whether it was enrolled in the OCIP, and it claims that despite providing the insurance coverage providing a defense, it does not concede entitlement to coverage under the OCIP. It contends that the OCIP was part of the negotiations of the contract and "part of the inducement" of it to perform the work, and that third-party plaintiffs' cause of action for breach of contract concerns whether Tishman acted in good faith in negotiating the contract and whether it was required to obtain an insurance policy at all. (NYSCEF 108).

Pursuant to CPLR 3101(a), "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action ..." What is "material and necessary" is generally left to the court's sound discretion and may include "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity." (*Andon ex rel. Andon v 302-304 Mott St. Assocs.*, 94 NY2d 740, 746 [2000], quoting *Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 406 [1968]). A party may seek an order compelling compliance or a response to any request, notice, interrogatory, demand, question, or order under CPLR article 31. (CPLR 3124).

When seeking to compel the deposition of an additional witness from a corporate defendant, the plaintiff must make a "detailed showing" of the necessity to take the additional deposition, by demonstrating that the previously deposed witness had insufficient knowledge of

the relevant issues and that there is a substantial likelihood that the additional witness possesses information material and necessary to the prosecution of the case. (*Best Payphones, Inc. v Guzov Ofsink, LLC*, 135 AD3d 585 [1st Dept 2016]).

To the extent Hallen seeks testimony as to the OCIP, it fails to demonstrate how such testimony is relevant to the third-party claims asserted against it. Hallen does not claim to be covered by the OCIP, and moreover, whether Hallen is covered by it has no bearing on whether it is obligated to indemnify third-party plaintiffs. While Hallen claims that the OCIP was part of the negotiation of the contract, such negotiations are irrelevant as to whether Hallen was required to procure its own insurance, which is determined based on the language of the contract.

While Hallen claims that additional testimony is needed to authenticate the contract, neither it nor third-party plaintiffs dispute the contract's authenticity. Notably, third-party plaintiffs concede that the contract, which Hallen produced in discovery, is authentic.

Accordingly, it is hereby

ORDERED, that third-party defendant's motion is denied in its entirety.

<u>12/2/2020</u>		20201202135830B1AFFE43E3C6EF9B2B4223AA4240F533CD6C32	
DATE		 BARBARA JAFFE, J.S.C.	
CHECK ONE:	☐ CASE DISPOSED	☒ NON-FINAL DISPOSITION	
	☐ GRANTED ☒ DENIED	☐ GRANTED IN PART	☐ OTHER
APPLICATION:	☐ SETTLE ORDER	☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN	☐ FIDUCIARY APPOINTMENT	☐ REFERENCE