

Benyisrael v Baumgardner House Lifting, LLC

2020 NY Slip Op 34479(U)

December 10, 2020

Supreme Court, Kings County

Docket Number: 500555/19

Judge: Lawrence S. Knipel

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 57 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 10th day of December, 2020.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

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AZARIYAH BENYISRAEL and CHAVEVAH ELVI,

Plaintiffs,

- against -

Index No. 500555/19

BAUMGARDNER HOUSE LIFTING, LLC,
SLSCO L.P., CAC BHL JOINT VENTURE, LLC
and CAPITAL CONTRACTING, PLUMBING
& HEATING CORPORATION,

Defendants.

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The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____

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Upon the foregoing papers in this labor law action, defendants Baumgardner House Lifting, LLC, SLSCO L.P., CAC BHL Joint Venture, LLC and Capital Contracting, Plumbing & Heating Corporation (collectively, defendants) move (in motion sequence [mot. seq.] three) for an order reviewing and vacating an August 19, 2020 discovery order (Discovery Order), pursuant to CPLR 3104 (d), and, upon vacating the Discovery Order: (1) directing plaintiffs to comply with the July 11, 2019 and October

25, 2019 discovery orders, defendants' April 23, 2019, August 2, 2019, June 29, 2020, June 30, 2020 discovery demands and defendants' December 20, 2019, January 10, 2020, March 13, 2020 and June 30, 2020 correspondence; (2) issuing a conditional order of preclusion to the extent that plaintiffs fail to provide substantive discovery responses; and (3) adjourning plaintiffs' deposition(s) for 90 days following receipt of the outstanding discovery.

Background

On January 9, 2019, plaintiffs commenced this action by filing a summons and a verified complaint alleging that plaintiff Azariyah Benyisrael (Benyisrael) was injured on October 31, 2017, while he was performing construction work at 160 Baden Place in Staten Island. The complaint asserts three causes of action against defendants based on their alleged violations of New York Labor Law §§ 200, 240 (1) and 241 (6).

On April 23, 2019, each of the defendants separately filed its answer to the complaint and served plaintiffs with combined discovery demands, including a demand for authorizations. On June 3, 2019, plaintiffs responded to defendants' combined discovery demands and represented that an authorization would "be provided under separate cover."

On June 3, 2019, plaintiffs served defendants with a bill of particulars, which alleges that Benyisrael sustained personal injuries in the October 2017 accident to his lumbar spine, cervical spine, head and both knees. Plaintiffs' bill of particulars also

alleges aggravation and exacerbation of preexisting knee pain. Thus, discovery revealed that Benyisrael suffered a prior knee injury before the October 2017 accident.

A July 11, 2019 preliminary conference order required plaintiffs to furnish defendants with authorizations for Benyisrael's prior knee injury. An October 25, 2019 compliance conference order also directed plaintiffs to provide authorizations for medical providers that treated Benyisrael's knee.

On July 15, 2020, defendants filed a motion to strike the complaint or, alternatively, to compel plaintiffs to produce discovery based on plaintiffs' failure to produce authorizations including those for Benyisrael's prior knee injury. Defendants' motion resulted in the August 19, 2020 Discovery Order, which, among other rulings, directed plaintiffs to provide fresh authorizations and a copy of the medical records in their possession by October 8, 2020, scheduled the parties' depositions and Benyisrael's independent medical examinations and denied defendants' motion to compel plaintiffs to produce authorizations for Benyisrael's prior knee injury.

On August 31, 2020, twelve days after the Discovery Order was issued, defendants filed the instant motion for an order, pursuant to CPLR 3104 (d), reviewing and vacating the Discovery Order on the ground that "the JHO abused his discretion in rendering the [Discovery Order]." Defense counsel asserts that "[t]he prior order should be vacated because it does not comport with the court's prior discovery orders, with Plaintiffs' own representations, or with the relief that Defendants sought in their underlying motion."

Defense counsel also asserts that “the JHO’s declination to issue an order compelling discovery with conditional preclusion language was error.” In addition, defense counsel asserts that “[t]he JHO’s order was also improper because it denied Defendants’ requests for the Form 4506 authorization and the authorization for Benyisrael’s prior knee injury, even though it was already represented by Plaintiffs that they would furnish the same” and “two prior court orders have already required Plaintiffs to exchange this discovery.” Defense counsel argues that whether defendants are entitled to such authorizations is not in dispute since plaintiffs previously represented that the authorizations would be provided.

Defendants contend that the Form 4506 authorization is relevant because Benyisrael’s tax records would reveal Benyisrael’s earning capacity. Defendants argue that they are entitled to authorizations regarding Benyisrael’s preexisting knee injury, as a matter of law, since plaintiffs’ bill of particulars alleges that the accident aggravated and exacerbated that prior knee injury. Finally, defendants argue that “[t]he JHO’s order . . . prejudices Defendants by ordering them to go forward with Plaintiffs’ depositions when it is highly likely that the medical records will not be received on time.”

Plaintiffs, in opposition, argue that defendants’ motion should be denied as untimely because it was not filed within five days after the August 19, 2020 Discovery Order, as specifically required by CPLR 3104 (d). If the court considers defendants’ untimely motion, plaintiffs assert that “all discovery set forth in paragraph b of

defendants' relief has been provided and thus their application should be deemed moot."

Defendants, in reply, contend that their motion is timely. Defense counsel argues that the Discovery Order was filed with the Kings County Clerk's office on August 25, 2020, and that the deadline within which to file a review motion under CPLR 3104 (d) was extended to August 31, 2020 since the five-day deadline fell on Sunday, August 30, 2020.

Discussion

CPLR 3104 (d), under which defendants move, provides, in pertinent part, that:

"Any party or witness may apply for review of an order made under this section by a referee. The application shall be by motion made in the court in which the action is pending *within five days after the order is made. . . .*" (emphasis added).

According to the terms of CPLR 3104 (d), that statute only enables a party or witness to seek review of an order made by a referee, rather than the court. Here, the Discovery Order was issued by this court, and not a referee, and thus CPLR 3104 (d) is inapplicable. Defendants failed to timely move to reargue the Discovery Order, pursuant to CPLR 2221 (d). CPLR 2221 (d) (1) requires that a motion for leave to reargue "shall be identified specifically as such[.]" and therefore this court cannot treat defendants' instant motion as a motion to reargue.

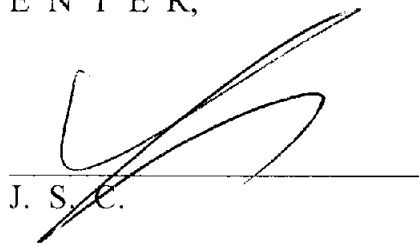
Even if CPLR 3104 (d) is applicable, defendants' motion was untimely. Contrary to defense counsel's contention, the Discovery Order was made and is dated August 19,

2020 and was subsequently entered with the Kings County Clerk's office on August 25, 2020. Thus, according to the plain language of CPLR 3104 (d), defendants were required to make a motion to review the Discovery Order no later than August 24, 2020. Defendants belatedly filed their instant motion on August 31, 2020. Consequently, defendants' motion pursuant to CPLR 3104 (d) is untimely (*see Nasir v Tait*, 128 AD3d 1033, 1033 [2015] [holding that motion to review discovery order was untimely because "CPLR 3104 (d) unequivocally provides that the five-day period runs from the date that the order was made" and not from that the date of entry]; *see also East End Labs, Inc. v Altaire Pharms., Inc*, 100 AD3d 824, 825 [2012] [same]). Accordingly, it is

ORDERED that defendants' motion (in mot. seq. three) is denied in its entirety.

This constitutes the decision and order of the court.

E N T E R,



J. S. C.

Justice Lawrence Knipel