

Marion v Tappan Zee Constructors, LLC
2020 NY Slip Op 34593(U)
January 29, 2020
Supreme Court, Ulster County
Docket Number: Index No. 16-2180
Judge: Christopher E. Cahill
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**STATE OF NEW YORK
SUPREME COURT COUNTY OF ULSTER**

TIMOTHY MARION,

Plaintiff,

-against-

**Decision & Order
Index No. 16-2180**

**TAPPAN ZEE CONSTRUCTORS, LLC, FLUOR
ENTERPRISES, INC., AMERICAN BRIDGE
COMPANY, TRAYLOR BROS. , INC. AND
GRANITE CONSTRUCTION NORTHEAST, INC.,**

Defendants.

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**Nina Postupack
Ulster County Clerk**

Supreme Court, Ulster County
Motion Return Date: September 9, 2019
RJ1 No.: 55-16-01707

Present: Christopher E. Cahill, JSC

Appearances: STEVEN M. MELLEY, PLLC
Attorneys for Plaintiff
24 Closs Drive
Rhinebeck, New York 12572
By: Steven M. Melley, Esq.

FLACKER, GARLICK & ASSOCIATES, LLP
Attorneys for Defendants
45 Broadway
New York, New York 10006
By: Robert N. Dengler, Esq.

Cahill, J.:

Defendants, with the exception of defendant Tappan Zee Constructors, LLP ("TZC"),
move to dismiss the complaint for failure to state a cause of action pursuant to CPLR §

Supreme Ct

3211(a)(7). The plaintiff opposes the motion and cross-moves for an order denying the motion to dismiss as premature as no discovery has been held. The plaintiff also seeks to strike the defendants' answers or compel the defendants to comply with his discovery demands. The defendants oppose the cross-motion.

Defendant TZC entered into a contract with the NYS Thruway Authority to design and build a new Tappan Zee Bridge to span the Hudson River from Westchester County, New York to Rockland County, New York. On March 20, 2013, the plaintiff was hired as a boat captain by TZC and was required to operate a vessel on the Hudson River for the bridge project. On September 17, 2013, the plaintiff claims that he was injured while navigating rough waters on the river. He commenced this action on August 15, 2016, alleging that the vessel was not suited to navigate the waters of the Hudson River. He also contends he is totally disabled as a result of these work-related injuries. Specifically, he has alleged causes of action pursuant to the Jones Act (46 USC § 30104), general maritime law and state law. Besides TZC, the plaintiff has named the other four corporate entities as defendants as they were members of TZC's limited liability company.

The plaintiff alleges that the defendants have continuously refused to comply with his discovery demands, and that his demands were either denied, ignored or unresponsive. The plaintiff also maintains that the defendants have wilfully stalled the discovery process for several years. Although discovery with TZC has been ongoing, the plaintiff states that the moving defendants "have engaged in zero disclosure," as the four defendants have not produced any records or documents, although demanded, and have failed to produce a single person with any knowledge to submit to an examination before trial. Finally, the plaintiff asserts that the

defendants are not immune from liability as members of TZC's limited liability company as the defendants argue.

Defendants oppose plaintiff's cross-motion and maintain that he fails to state a cause of action under maritime law or state law. The defendants allege they have complied with the discovery demands of the plaintiff in relation to TZC, and that they are immune from liability as a limited liability company for acts taken on behalf of the company. The defendants' opposition papers, however, are silent in regard to plaintiff's allegation that they failed to comply with his discovery demands over several years.

As to the law applicable to defendants' motions, it is well established that the pleadings shall be liberally construed, the facts alleged accepted as true, and every possible favorable inference given to plaintiff (Leon v. Martinez, 84 NY2d 83 [1994]). A motion to dismiss pursuant to CPLR § 3211 (a) (7) will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law (AG Capital Funding Partners L.P. v. State St. Bank and Trust Co., 5 NY3d 582 [2005]). The Court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory (Clarke v. Laidlaw Transit, Inc., 125 AD3d 920 [2nd Dept. 2015]). In addition, New York courts adhere to the policy of favoring the resolution of actions on the merits rather than by dismissal (Henry v. Datson, 140 AD3d 1120 [2nd Dept. 2016]).

In support of this dismissal motion, defendants argue that as a matter of law, under Limited Liability Law Sections 609 and 610, they cannot be sued because the plaintiff's claim of liability is based "solely" on their status as members of Tappan Zee Constructors, LLC. As

plaintiff argues, however, and as the complaint alleges, each defendant and “its agents, servants, employees and/or contractors under its control”, did negligently “modify, alter and/or replaced all or a part of the captain’s chair/seat, but not the structure for the seat (nor remedy its lack of suspension)...”. The only way this claim can be evaluated is by having the member defendants comply with plaintiff’s discovery demands. Plaintiff emphasizes that the information sought by discovery is within the exclusive knowledge of the defendants, and that the plaintiff will be prejudiced if this action is dismissed without discovery.

A trial court must use its sound discretion in resolving discovery disputes (Mot Ardon v. 302-304 St. Assocs., 94 NY2d 740 [2000]). Pursuant to CPLR § 3124, it is well established that disclosure provisions are to be liberally construed and a trial court is afforded broad discretion in managing disclosure (McMahon v. Manners, 158 AD3d 616 [2nd Dept. 2018]). CPLR § 3101(a) requires full disclosure of all evidence material and necessary for the prosecution or defense of an action, regardless of the burden of proof (Forman v. Henkin, 30 NY3d 656 [2018]). CPLR § 3126 authorizes the court to fashion an appropriate remedy for non-disclosure, the nature and degree of which is a matter committed to the court’s sound discretion and will not be disturbed absent a clear abuse of the court’s discretion (Those Certain Underwriters at Lloyds, London v. Occidental Gems, Inc., 11 NY3d 843 [2008]). Discretion in compelling compliance and imposing penalties for noncompliance in discovery matters is soundly vested in the trial court (Sugar Foods De Mexico v. Scientific Scents, LLC, 88 AD3d 1194 [3rd Dept. 2011]).

In addition, CPLR § 3211(d) permits a party opposing a dismissal motion to obtain further discovery when it appears that facts supporting the position of the opposing party exist but cannot be stated (Brielmeier v. Leal, 145 AD3d 753 [2nd Dept. 2016]). Supreme Court is

afforded discretion when presented with a request for further disclosure pursuant to CPLR § 3211(d), and appellate review is guided by whether the court abused its discretion (Stubbs v. Ellis Hosp., 68 AD3d 1617 [3rd Dept. 2009]). A motion to dismiss is properly denied as premature when the nonmoving party has not been given a reasonable time and opportunity to conduct disclosure relative to pertinent evidence that is within the exclusive knowledge of the movant (Greener v. Town of Hurley, 140 AD3d 1285 [3rd Dept. 2016]).

While discovery with Tappan Zee Constructors, LLC has been conducted and depositions have been held, the Court finds the defendants' motion to dismiss is premature as discovery has not been completed with the remaining defendants and no depositions have been conducted in regard to these defendants (Wesolowski v. St. Francis Hosp., 108 AD3d 525 [2nd Dept. 2013]). Even assuming that the movant made a *prima facie* showing of its entitlement to dismissal as a matter of law, the court can exercise its discretion in denying the motion as premature, with leave to renew following discovery (see, CPLR §3211(d); Botros v. Flamm, 77 AD3d 602 [2nd Dept. 2010]). Since relevant discovery has not been completed, defendants' motion to dismiss is denied, but may be renewed once discovery has been concluded. (Herrera v. Gargiso, 140 AD3d 1122 [2nd Dept. 2016]). Defendants are directed to comply with plaintiff's outstanding discovery demands within 30 days of the date of service of a copy of this decision and order upon them, together with notice of entry, and to attend an EBT within 60 days thereafter.

The parties' request for costs and attorney fees are denied as the parties are responsible for their own expenses as "incidents of litigation." (In re Hyde, 15 NY3d 179 [2010]). It is hereby

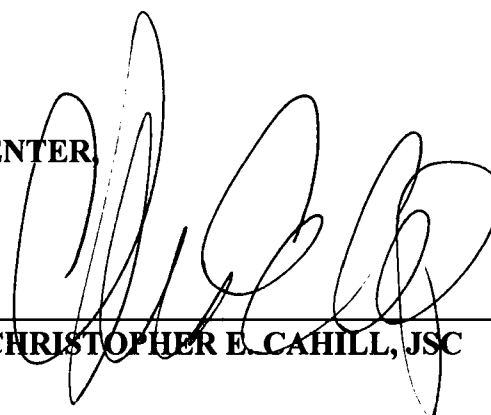
ORDERED that plaintiff's motion to compel discovery is granted to the extent set forth

herein, and the defendants' motion to dismiss the complaint is denied subject to renewal after discovery is completed.

This shall constitute the Decision and Order of the Court. The original Decision and Order and all other papers are being delivered to the Supreme Court Clerk for transmission to the Ulster County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR § 2220. Counsel is not relieved from the applicable provisions of that rule regarding notice of entry.

SO ORDERED.

Dated: Kingston, New York
January 29, 2020

ENTER

CHRISTOPHER E. CAHILL, JSC

PAPERS CONSIDERED:

1. Notice of Motion dated August 12, 2019; Affirmation of Robert M. Dengler, Esq. dated August 12, 2019 with exhibits 1-5; Memorandum of Law dated August 12, 2019;
2. Notice of Cross-motion dated August 29, 2019; Affirmation of Steven M. Melley, Esq. dated August 29, 2019 with exhibits A-J;
3. Memorandum of Law dated September 25, 2019.

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Nina Postupack
Ulster County Clerk