

**Michael Anthony Contr. Corp v Queens N.Y. Realty
LLC**

2020 NY Slip Op 35793(U)

February 25, 2020

Supreme Court, Nassau County

Docket Number: Index No. 604986/14

Judge: Jerome C. Murphy

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

**HON. JEROME C. MURPHY,
Justice.**

MICHAEL ANTHONY CONTRACTING CORP.,

Plaintiff,

- against -

**QUEENS N.Y. REALTY LLC, MIDRE CONTRACTING
CORP., ACTION STORE FRONTS INC., ROMAN IRON
WORKS INC., MAX HOROWITZ & SON INC.,
PRIME LIGHT ELECTRICAL CONSTRUCTION
MAINTENANCE INC., and SURETEC INSURANCE
COMPANY,**

Defendants

**QUEENS N.Y. REALTY LLC, on behalf of itself and as
subrogee of all other persons similarly situated as trust
fund beneficiaries of Lien Law Trusts of third-party
defendant Michael Anthony Contracting Corp., and
Benjamin Mason, M.D.,**

Third-Party Plaintiffs,

- against -

**MICHAEL ANTHONY CONTRACTING CORP.,
MICHAEL PERNA, HYMAN HAYES ASSOCIATES,
LLC, MYLES HYMAN, M/E ENGINEERING, P.C.,
F. JOSEPH STRAUB, P.E., HIG SERVICES, INC.,
LONG ISLAND CONCRETE INC., HART ROOFING
& WATERPROOFING, INC., ACTION STORE
FRONTS INC, ROMAN IRON WORKS, INC.,
MAX HOROWITZ & SON INC., and
JOHN DOES #1-10, inclusive, as those persons**

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Sequence Nos.: 014

DECISION AND ORDER

and entities having an interest in the trust funds received, or to be received by Michael Anthony Contracting Corp., for the improvement of the property located at 105-12 101st Avenue, Queens County, New York (a/k/a Block 9423, Lot 6 on the Land and Tax Map of Queens County, New York),

Third-Party Defendants.

The following papers were read on this motion:

Sequence No. 014:

Notice of Motion, Affirmation and Exhibits.....1

PRELIMINARY STATEMENT

Defendants, Queens NY Realty LLC and Third-Party Plaintiff, Benjamin Mason, M.D., bring forth this application for an Order pursuant to CPLR §3108 directing the issuance of a commission to enable Defendants/Third-Party Plaintiffs, Queens NY Realty, LLC and Dr. Benjamin Mason to demand documents and take the deposition of Mr. Denis Serna, an out-of-state non-party residing in Connecticut and for such other and further relief as this Court deems just and proper. No opposition and reply have been submitted.

BACKGROUND

The underlying action involves a claim by Michael Anthony Contracting Corp. for payment in connection with the construction of an eye surgical facility known as Mason Eye Surgery Center, located at 105-12 101st Avenue, Queens, New York the "Project"). Mr. Denis Serna, a resident of Greenwich, CT, was identified in the Second Amended Third-party Complaint as a third-party defendant. He was named in the Tenth, and Eleventh Causes of Action in the Third-party Complaint (NYSEF Document No. 67).

A Third Amended Third-party Complaint, filed on October 18, 2017 (Document No. 151) did not include him as a third-party defendant. He was, however, a named defendant in the Queens County Action of *Dr. Benjamin Mason v. Tyndall Industries, LLC, Nina Wallace and Dennis Serna*, Index No. 712179/2017. It appears that the action against Tyndall Industries

remains open, but the actions against the individual defendants were dismissed (NYSEFS Doc. No. 30).

According to the Second Amended Third-party Complaint, and the Affirmation in Support of the Motion, Mr. Serna was the Owners Representative in connection with the Project. The position of defendants and third-party plaintiffs was, among others, was that multiple change orders were undertaken by plaintiff, without the consent of Queens N.Y. Realty, LLC ("QNYR") or Mr. Serna, its representative. Third-party defendants Hyman Hayes Associates, LLC ("HHA") and Herman Hyman claim that they relied on Mr. Serna, as the Owners Representative, to agree to the percentage of work done to justify payments, and they also assert that Mr. Serna signed off on the modifications that Michael Anthony Contracting Corp. ("MACC") submitted.

DISCUSSION

CPLR § 3108 provides as follows:

A deposition may be taken on written questions when the examining party and the deponent so stipulate or when the testimony is to be taken without the state. A commission or letters rogatory may be issued where necessary or convenient for the taking of a deposition outside of the state.

The statute does not preclude parties from conducting an oral deposition outside the state, even if an adverse party opposes it (*Kelleher v. Mazzaro*, 175 A.D.2d 352 [3rd Dept. 1991]). QNYR and Dr. Mason have established that the testimony of Mr. Serna is material and necessary to fundamental issues in the action.

Mr. Serna is a resident of Connecticut, and is not subject to a New York subpoena (Judiciary Law § 2-b[1]; *In re Oxycontin*, 76 A.D.3d 1019, 1021 [2d Dept. 2010], quoting *Wiseman v. American Motors Sales Corp.*, 103 A.D.2d 230, 234 [2d Dept. 1984]). Moreover, Connecticut has apparently not adopted the provisions of the Uniform Interstate Depositions and Discovery Act as has New York (CPLR § 3119), thereby limiting the options available for obtaining the deposition of Mr. Serna.

It appears that the moving parties have sought to obtain the voluntary appearance of Mr. Serna for a deposition in New York, but his consent was conditioned on concessions in the

Queens County action, to which QNYR and Dr. Mason did not agree.

Given that the Appellate Division Order of February 13, 2020 only stayed the trial of this matter and given that there is no opposition to this motion, the motion by QNYR and Dr. Mason is granted, but this discovery must be completed before any date that this Court reschedules the trial for, and it is therefor

ORDERED, that Nathan Zezula, Esq., an attorney duly admitted to practice in the states of New York and Connecticut, is hereby commissioned to take the oral deposition of Denis Serna, a non-party resident of Greenwich, Connecticut, as a witness in the above-entitled action now pending in Supreme Court, Nassau County among the above-named parties, such deposition to take place in Connecticut, or at a mutually convenient and agreed upon location in New York, and it is further

ORDERED, that Nathan Zezula, Esq. is further authorized and empowered, to take the deposition of Denis Serna and to inspect and copy documents in his possession, custody or control, at a location to be determined pursuant to the rules and laws of Connecticut, or at another mutually convenient and agreed upon location in New York, and it is further

ORDERED, that Nathan Zezula, Esq. is authorized to have the witness sworn by a competent person appointed by you for that purpose, and for him to answer questions posed by counsel with respect to the above-referenced action, and it is further

ORDERED, that requested documents are subject to disclosure in this action before this Court, and that, subject to the laws of the State of New York, the testimony and documents may be used in the pending action.

To the extent that requested relief has not been granted, it is expressly denied.

This constitutes the Decision and Order of the Court.

Dated: February 25, 2020
Mineola, New York

ENTER:


HON. JEROME C. MURPHY
J.S.C.

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ENTERED
FEB 26 2020
NASSAU COUNTY
COUNTY CLERK'S OFFICE