Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15
Justice

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ANTONIOS PAPADIMITRIOU,

Plaintiff(s),

- and -

MARRIOTT INTERNATIONAL, INC. d/b/a MOXY NOMAD, FLINTLOCK CONSTRUCTION SERVICES, LLC, D&D ELECTRICAL CONSTRUCTION COMPANY INC. and LSG 105 WEST 28TH LLC,

Defendant(s).

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Index No.:716042/18

Motion Date:10/6/20

Motion Cal. No.: 29

Motion Seq. No: 01

The following papers numbered 1 - 9 read on this motion by defendants LSG 105 West 28th LLC and Flintlock Construction Services, LLC, pursuant to CPLR § 3126, for an order dismissing the complaint, or, in the alternative, pursuant to 22 NYCRR § 202.21 (b), for an order vacating the note of issue and compelling plaintiff to provide certain outstanding discovery.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits-Service	1 - 4
Affirmation in Opposition-Exhibits-Service	5 - 7
Reply Affirmation-Service	8 - 9

Upon the foregoing papers it is **ORDERED** that the motion is decided as follows:

In this Labor Law action, plaintiff alleges that on or about June 8 2018, he was injured while on the premises located at 105 West 28th Street in the County, City and State of New York. Issue was joined by defendants LSG 105 West 28th LLC and Flintlock Construction Services, LLC (hereafter, "the moving defendants") on or about January 24, 2019, at which time they also served their combined demands, including a demand for a verified bill of particulars ("BP").[1] On or about March 5, 2019, plaintiff served a BP in response to the moving defendants' demand.

According to the moving defendants, plaintiff's BP failed to both identify the exact location on the premises where the incident occurred, and specify the defect or condition that allegedly caused his accident. By letter dated March 20, 2019, the moving defendants demanded a supplemental BP addressing these purported defects. Pursuant to the April 3, 2019 preliminary conference order, plaintiff was ordered to provide a supplemental BP by May 2, 2019. Plaintiff served the supplemental BP, which, the moving defendants maintain, was still deficient. Pursuant to the October 9, 2019 compliance conference order, all of the parties were ordered to respond to all outstanding demands within 30 days.

According to the moving defendants, although they sent good faith letters in November of 2019 and January of 2020, plaintiff has not served another supplemental BP curing the defects. Party depositions have not been held, and plaintiff filed a note of issue and certificate of readiness on June 4, 2020.

The moving defendants now move to strike the complaint due to plaintiff's failure to provide the requested information. Pursuant to CPLR § 3126 (3), the court may strike the pleadings of a party who "refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed." The Second Department instructs that:

> "the striking of a party's pleading is a drastic remedy which is warranted only where there has been a clear showing that the failure to comply with discovery is willful and contumacious. Willful and contumacious conduct can be inferred from a party's repeated failure to respond to demands or to comply with discovery orders without a reasonable excuse" (*Henry v Datso*n, 140 AD3d 1120, 1122 [2d Dept 2016]).

The record does not indicate that plaintiff has engaged in the sort of willful and contumacious conduct required to strike the complaint. It is noted that plaintiff timely served a supplemental BP in accordance with the preliminary conference order, and the compliance conference order, in contrast, did not specifically direct plaintiff to serve another supplemental BP, but instead

[1] Although issue was joined by the other defendants, they have not submitted papers in response to the instant motion.

directed all parties to respond to all prior demands to the extent that this had not already been done. The record, thus, does not show that plaintiff willfully defied a discovery order. Plaintiff's refusal to provide more specific information in response to the moving defendants' demands, does not, in and of itself, rise to the level of sanctionable conduct under CPLR §3126, particularly in the absence of a court order directing him to do otherwise.

The moving defendants have made a sufficient showing that they are entitled to the specific information which plaintiff failed to provide in his BP and supplemental BP. It is well-settled that "[t]he purpose of a bill of particulars is to amplify the pleadings, limit the proof, and prevent surprise at trial" (*Jones v LeFrance Leasing LP*, 61 AD3d 824, 825 [2d Dept 2009]). Therefore, a party defending against a personal injury claim is "entitled to particulars regarding the manner in which it allegedly was negligent and the alleged defect [at issue], as well as specification with respect to the plaintiffs' claims concerning the creation of the allegedly dangerous condition" (*id* [citations omitted]). In addition, since "aggravation of a preexisting injury or condition is an element of damages which must be affirmatively pleaded and proven" (*Rodgers v NY City Tr. Auth.*, 70 AD3d 917, 920 [2d Dept 2010]), a defendant is entitled to particulars concerning those preexisting injuries claimed to have been aggravated by the subject incident.

Here, the moving defendants have demanded that plaintiff specify the defect or condition that allegedly caused his accident, and identify the exact location on the premises where the accident occurred. In his BP, plaintiff generally referred to a dangerous or unsafe condition on the subject premises, but he did not actually say what the condition was. In addition, plaintiff stated that incident occurred in staircase "A," on the second floor, but he provided no further specificity. Plaintiff's supplemental BP does not correct these deficiencies, leaving the moving defendants in the dark as to whether the alleged condition was transient, structural, or otherwise of a permanent or semi-permanent nature. On this showing, the moving defendants cannot reasonably be expected to discern how the condition was created, much less plaintiff's theory as to how they were negligent. Plaintiff's failure to specify the accident location also leaves the moving defendants to guess as to where the unidentified hazard was on the second floor, *e.g.*, on the landing, or a particular step, or some other adjacent location. Similarly, merely stating that the accident aggravated an unspecified preexisting left knee injury does little to particularize the nature of said injury, and how it was aggravated, particularly where it has been claimed that plaintiff suffered multiple injuries to this region of the body. Such sparse information offered by plaintiff in his BP and

supplemental BP does not comport with the core purposes underlying this disclosure device (*see Jones, supra*).

The moving defendants also move to vacate the note of issue. The court "may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect …" (22 NYCRR § 202.21 [e]). Where a plaintiff's certificate of readiness incorrectly states that discovery proceedings known to be necessary were completed and that there had been a reasonable opportunity to complete them, this constitutes misstatements of material fact, which renders the filing of the note of issue a nullity, thus, warranting its vacatur (*see Greco v Wellington Leasing LP*, 144 AD3d 981, 981-982 [2d Dept 2016]; *Young v Destaso Funding, LLC*, 92 AD3d 778, 778-779 [2d Dept 2012]).

Plaintiff's certificate of readiness indicated that all discovery was complete and the case was ready for trial. It is evident, however, that these were misstatements of material fact, since plaintiff's counsel submitted with the note of issue an affirmation indicating that neither party depositions, nor a medical examination, had been held, and other discovery demands were outstanding. On this record, due to the paucity of discovery completed, the note of issue must be vacated.

For the foregoing reasons, the above-referenced motion is granted to the extent that it is

ORDERED that plaintiff's note of issue and certificate of readiness, filed on June 4, 2020, are vacated; and it is further

ORDERED that, within 15 days of the entry of this order, the moving defendants shall serve all parties with the order, with notice of entry, and file proof of same; and it is further

ORDERED that, within 30 days of the service of this order with notice of entry, plaintiffs shall serve the moving defendants with a supplemental bill of particulars specifically identifying the defect or dangerous condition alleged to have caused the accident, including its precise location, and identifying the specific injury alleged to have been aggravated or exacerbated as a result of the accident; and it is further

ORDERED that plaintiff's deposition shall be completed by April 16, 2021, the defendants' depositions shall be completed by May 7, 2021, and that the depositions may be held virtually; and it is further

ORDERED that physical examinations of the plaintiff shall be noticed and conducted in accordance with paragraph "4" of the April 3, 2019 preliminary conference order; and it is further

ORDERED that plaintiffs shall serve and file a note of issue and certificate of readiness by September 10, 2021.

Plaintiff's compliance with such is subject to dismissal by the court of the complaint.

The foregoing shall constitute the decision and order of this court.

Dated: January 21, 2021

JANICE A. TAYLOR, J.S.C.

FILED
1/21/2021
11:58 AM
COUNTY CLERK
QUEENS COUNTY

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