

Paradiso v Speyer

2021 NY Slip Op 32147(U)

November 3, 2021

Supreme Court, New York County

Docket Number: Index No. 159281 /2020

Judge: Alexander M. Tisch

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ALEXANDER TISCH PART **18**

Justice

-----X

CANIO PARADISO,

Plaintiff,

- v -

TISHMAN SPEYER, THE IRVINE COMPANY LLC., 200
PARK LP.,

Defendants.

-----X

TISHMAN SPEYER, THE IRVINE COMPANY LLC., 200 PARK
LP.

Plaintiffs,

-against-

CLUNE CONSTRUCTION COMPANY, L.P.

Defendant.

-----X

INDEX NO. 159281/2020
MOTION DATE 09/08/2021
MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 596030/2020

The following e-filed documents, listed by NYSCEF document number (Motion 001) 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68

were read on this motion to/for DISCOVERY.

Upon the foregoing documents, third-party defendant Clune Construction Company, L.P. (Clune) moves to compel plaintiff to disclose a confidential severance agreement (the agreement) and for a subsequent deposition of plaintiff regarding the contents of the agreement. At parties' status conference with the Court on September 22, 2021, third-party defendant was granted leave to submit an agreement to the Court for an in-camera review. Plaintiff cross moves seeking a protective order against the disclosure of the agreement pursuant to CPLR 3103 (a), and an order compelling an inspection of the location and instrumentalities allegedly having caused plaintiff's injuries. In partial opposition to plaintiff's cross motion to compel, defendants/third-party

plaintiffs, Tishman Speyer Properties, L.P. and 200 Park, L.P. (defendants) although are not objecting to plaintiff's entitlement to an inspection, they do move this Court to limit the scope of the inspection and direct plaintiff to disclose the identity of the expert intended to conduct the inspection. Third-party defendant in opposition to plaintiff's cross motion and in reply to their own motion, reaffirms the need for production of the confidential severance agreement arguing it is material and necessary to the prosecution and defense of this action, and in conformity with defendants partial opposition papers, concurs the Court should enter an order limiting the scope of plaintiff's inspection for the premises and instrumentalities in question that allegedly caused plaintiff's injuries and the disclosure of the expert's identity.

Under CPLR 3101, parties are required to perform a full disclosure of all matter that is material and necessary in the prosecution or defense of an action. A trial court has the discretion to compel disclosure of confidential agreements (*Osowski v AMEC Const. Management, Inc.*, 69 AD3d 99, 106 [1st Dept 2009] [confidential agreement that is material and necessary to issues raised in a third-party action warrants disclosure]).

Plaintiff's argument that, merely because the agreement is confidential, it renders third-party defendant's demand for it as beyond the scope of discovery, is clearly without merit (*see, e.g., Osowski*, 69 AD3d at 106; *Mahoney v Turner Const. Co.*, 61 AD3d 101, 104 [1st Dept 2009]; *Bd. of Managers of 141 Fifth Ave. Condominium v 141 Acquisition Assoc. LLC*, 186 AD3d 1147 [1st Dept 2020]). Additionally, whether the demand is technically outside the "bounds" of what is considered to as part of his "employment record" is irrelevant. Accordingly, that branch of the cross motion for a protective order is denied.

“Disclosure of the terms of a settlement agreement by a settling party to a nonsettling party may be appropriate, despite the presence of a confidentiality clause in the agreement, where the terms of the agreement are “material and necessary” to the nonsettling party's case” (*Mahoney*, 61 AD3d at 104). The Court finds that the agreement is material and necessary to the third-party defendant's and defendants' case because it may serve as a valid release of the plaintiff's claim and constitute a bar to this action (*see generally* CPLR 3211 [a][5]). Further, the branch of the motion compelling plaintiff to appear for further deposition on this issue is also granted, as the “meaning and coverage” of a release “necessarily depend[s], as in the case of contracts generally, upon the controversy being settled and upon the purpose for which the release was actually given” (*Cahill v Regan*, 5 NY2d 292, 299 [1959]). Here plaintiff's counsel's affirmation states that the agreement “was a result of COVID 19 and plaintiff being laid off by his employer” (NYSCEF Doc No. 59 at ¶ 15). However, counsel failed to indicate he has personal knowledge about what took place when entering into the agreement and, therefore, it is hearsay and/or without any value (*see Zuckerman v City of New York*, 49 NY2d 557, 563 [1980] [an “affirmation by counsel” “who demonstrated no personal knowledge of the manner in which the accident occurred” “is without evidentiary value”]; *Utak v Commerce Bank Inc.*, 88 AD3d 522, 523 [1st Dept 2011]) and, in any event, the parties should be permitted to test that assertion.

Finally, the branch of plaintiff's cross-motion for an inspection is granted in part. No party is objecting to an inspection, however defendants and third-party defendants request that the inspection be limited in scope and/or subject to a protocol or procedure, and that plaintiff disclose the expert, both conditions of which are reasonable and are directed below.

Accordingly, it is hereby ORDERED that third-party defendant Clune's motion is granted and the agreement must be disclosed in its entirety;² and it is further

ORDERED that plaintiff must appear for further deposition within 45 days, or as otherwise directed by the Court at the next status conference and/or upon stipulation by the parties to extend the time to take the deposition; and it is further

ORDERED that the branch of plaintiff's cross-motion for a protective order is denied; and it is further

ORDERED that the branch of plaintiff's cross-motion for an inspection is granted to the extent as set forth herein; and it is further

ORDERED that plaintiff disclose the name of expert within 30 days; and it is further

ORDERED that defendants and/or third-party defendant submit a proposed scope or protocol for the inspection within 20 days; and it is further

ORDERED that plaintiff submit a counter-proposal or specific list of objections within 10 days thereafter; and it is further

ORDERED that the parties appear for virtual status conference on November 10, 2021 at 2:30 pm;³ and it is further

ORDERED that the inspection shall take place within 60 days unless as otherwise directed by the Court or stipulated by the parties; and it is further

² No party has argued that only certain portions should be disclosed or that any portion should be redacted; and the Court finds no need to redact any part of it (*cf. Bd. of Managers of 141 Fifth Ave. Condominium*, 186 AD3d 1147 [1st Dept 2020]).

³ The parties may submit the parties' submissions regarding the inspection to the Court by e-mail to dagenoss@nycourts.gov in advance of the conference if further Court assistance is needed.

ORDERED the note of issue in this matter is extended to March 31, 2022.

This constitutes the decision and order of the Court.



11/3/2021

DATE

ALEXANDER TISCH, 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