

Cafisi v L&L Holding Co., LLC
2023 NY Slip Op 30298(U)
January 27, 2023
Supreme Court, New York County
Docket Number: Index No. 157075/2018
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH PART 14

Justice

-----X

SALVATORE CAFISI,

Plaintiff,

- v -

L&L HOLDING COMPANY, LLC, COMREF 380, LLC, J.T.
MAGEN & COMPANY INC., SHISEIDO AMERICA
INC., MANHATTAN MECHANICAL CONTRACTORS, INC., D
& G SHEETMETAL, INC., PAR FIRE PROTECTION, LLC,

Defendant.

-----X

J.T. MAGEN & COMPANY INC.

Plaintiff,

-against-

NATIONAL ACOUSTICS, LLC

Defendant.

-----X

MANHATTAN MECHANICAL CONTRACTORS, INC.

Plaintiff,

-against-

PAR FIRE PROTECTION, LLC, D & G SHEETMETAL, INC.

Defendant.

-----X

INDEX NO. 157075/2018
MOTION DATE N/A
MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

Third-Party
Index No. 595221/2019

Second Third-Party
Index No. 595436/2021

The following e-filed documents, listed by NYSCEF document number (Motion 004) 273, 274, 275, 276,
277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289

were read on this motion to/for STAY

Plaintiff's motion to quash the deposition subpoena for non-party Keith Lancaster is
denied.

Background

In this Labor Law action, plaintiff claims that while working at a job site, he fell from a baker scaffold that shook and tipped while he was on the 17th floor. He alleges that defendant Comref 380 LLC owned the property, defendant L&L Holding Company, LLC was the managing agent, defendant Shiseido America, Inc. was the lessee and contracted for work to be done with the general contractor (defendant J.T. Magen & Company, Inc.).

Previously, plaintiff moved to hold his foreman on the job, Keith Lancaster (who used to work for third-party defendant National Acoustics LLC) in contempt for failure to appear for a deposition. The Court declined to hold Mr. Lancaster in contempt and instead found that “no party may use any affidavits from Keith Lancaster in this case” (NYSCEF Doc. No. 275 at 3). The clear purpose was to avoid the submission of a “surprise” affidavit in connection with a summary judgment motion.

Apparently, National Acoustics has now successfully located Mr. Lancaster and wants to take his deposition. In the interim, plaintiff successfully moved for summary judgment on his Labor Law §240(1) claim.

Plaintiff details how long it took National Acoustics to produce Mr. Lancaster’s last known address and questions how Mr. Lancaster was recently located even though he apparently still lives at the same address identified by National Acoustics years ago (and where plaintiff apparently could not manage to personally serve him). Plaintiff contends that this subpoena is a clear attempt to re-open discovery on the Labor Law § 240(1) claim. He insists that Mr. Lancaster’s testimony would be irrelevant as a matter of law as he did not witness the accident. Plaintiff argues that because the Court has already granted plaintiff partial summary judgment, Mr. Lancaster’s testimony about other issues is not necessary.

In opposition, National Acoustics emphasizes that this Court's order only precluded affidavits from Mr. Lancaster and did not preclude his testimony from the entire matter. It argues that plaintiff has not met his burden for a temporary restraining order as he would suffer no irreparable harm. National Acoustics emphasizes that this is still a pre-note of issue case and relevant evidence should be a part of discovery.

Discussion

“An application to quash a subpoena should be granted only where the futility of the process to uncover anything legitimate is inevitable or obvious or where the information sought is utterly irrelevant to any proper inquiry. It is the one moving to vacate the subpoena who has the burden of establishing that the subpoena should be vacated under such circumstances” (*Matter of Kapon v Koch*, 23 NY3d 32, 38-39, 988 NYS2d 559 [2014] [internal quotations and citations omitted]).

The Court denies the motion. The fact is that, here, plaintiff wanted Mr. Lancaster's deposition so badly that he moved to hold him in contempt for failing to appear for a deposition pursuant to a subpoena. Clearly, plaintiff thought that the testimony was relevant and so important that it asked for this Court to imprison Mr. Lancaster. Plaintiff cannot now seek to preclude this witness—plaintiff's foreman on the construction site—from being deposed.

The Court recognizes plaintiff's frustrations that he has already obtained summary judgment on his Labor Law § 240(1) claim and that the case seems to be dragging along. But those are not sufficient reasons to quash this subpoena and bar the deposition of Mr. Lancaster. As the Court noted above, the purpose of the Court's finding in the contempt motion was to prevent a surprise affidavit from Mr. Lancaster in connection with a summary judgment motion. The Court's decision did not preclude Mr. Lancaster from having any involvement in this case.

Plaintiff's request at oral argument for a limiting instruction at the deposition is without merit. There is no basis to limit the deposition or preclude certain testimony. His assertion that winning partial summary judgment makes certain claims "law of the case" is well taken but that is why the CPLR provides for a motion to renew. Assuming that Mr. Lancaster has relevant information about the accident itself, defendants (including National Acoustics) will have to meet their burden to justify a demand that the Court revisit a prior decision should they decide to make such a future motion.

The Court cannot prospectively limit a party's right to make such a motion under these circumstances. Plaintiff's suspicions that something nefarious happened with respect to locating Mr. Lancaster are just that—suspicions. They do not justify quashing a subpoena for an undisputedly relevant witness. That future motions might require additional resources is, unfortunately, part of litigation. Sometimes it takes time to find witnesses, especially those like Mr. Lancaster who are no longer employed by a party defendant.

Also critical to the Court's decision is that no note of issue has been filed. Certainly, plaintiff might have a stronger claim that it is too late to depose a witness if the matter was ready for trial. But the Court sees no basis to forbid a deposition in a pre-note of issue case.

And to the extent that plaintiff seeks injunctive relief, the Court denies that request. Plaintiff did not establish he will suffer irreparable harm. That a witness might offer unflattering or unhelpful testimony (although at this point, it is unclear what Mr. Lancaster will say) is not a basis for injunctive relief.

Accordingly, it is hereby

ORDERED that plaintiff's motion to quash the subpoena of non-party Keith Lancaster is denied and all stays are hereby vacated.

Conference: May 22, 2023 per NYSCEF Doc. No. 290.

1/27/2023
DATE



ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: