

Nunez v 608-614 W. 189th St. LLC

2023 NY Slip Op 30575(U)

February 27, 2023

Supreme Court, New York County

Docket Number: Index No. 158901/2014

Judge: Debra A. James

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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. DEBRA A. JAMES

PART 59

Justice

-----X

IRIS A. NUNEZ,

Plaintiff,

- v -

608-614 WEST 189TH STREET LLC,

Defendant.

-----X

608-614 WEST 189TH STREET LLC,

First Third Party-Plaintiff,

-against-

B07 CONSTRUCTION CORP,

First Third Party-Defendant.

B07 CONSTRUCTION CORP.,

Second Third Party-Plaintiff,

-against-

C&T PLUMBING & HEATING, INC. a/k/a C&T PLUMBING & HEATING, INC., DUANE D. POLADIAN, MD, ASHRAF ALI and ASHRAF ALI, P.E., P.C.,

Second Third Party-Defendants.

INDEX NO. 158901/2014

MOTION DATE 02/22/2023

MOTION SEQ. NO. 006 007 008

DECISION + ORDER ON MOTION

First Third-Party Index No. 595125/2016

Second Third-Party Index No. 595448/2019

The following e-filed documents, listed by NYSCEF document number (Motion 006) 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 212, 213, 214

were read on this motion to/for QUASH SUBPOENA, FIX CONDITIONS

The following e-filed documents, listed by NYSCEF document number (Motion 007) 215, 216, 217, 218, 219, 220, 221, 222, 223, 228

were read on this motion to/for REARGUMENT/RECONSIDERATION

The following e-filed documents, listed by NYSCEF document number (Motion 008) 253, 254, 255, 256, 257, 258, 259

were read on this motion to/for

CONSOLIDATE/JOIN FOR TRIAL

ORDER

Upon the foregoing documents, it is

ORDERED that the motion of defendant/third party plaintiff 608-614 West 189th Street, LLC for a protective order with respect to the Judicial Subpoena Duces Tecum served upon non-party Andrew N. Bazos, MD, and to quash such subpoena (motion sequence number 006) is GRANTED, and non-party Andrew N. Bazos, MD, need not, and shall not, produce the medical files in his possession identified in the affirmation of Jorja Carr-Knecht dated December 29, 2021, submitted in support of the motion; and it is further

ORDERED that the motion of second third party defendants, C&T Plumbing & Heating Inc. s/h/a C&T Plumbing & Heating, Inc. a/k/a C&T Plumbing & Htg, Inc. and Duane D. Poladian, to reargue the Order dated November 19 2021 that denied their motion for summary judgment dismissing the second third party complaint against them (motion sequence number 007) is granted, without opposition, and upon reargument, the court rescinds and vacates the foregoing Order and hereby GRANTS the motion for summary judgment made by such second third party defendants, and the second third party complaint as against them is dismissed; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of second third party defendants C&T Plumbing & Heating Inc.

s/h/a C&T Plumbing & Heating, Inc. a/k/a C&T Plumbing & Htg, Inc. and Duane D. Poladian, dismissing all claims made against them in this action, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the remaining complaints and claims are severed and shall continue; and it is further

ORDERED that the motion of plaintiff for an order directing a joint trial of the herein action and Nunez v 608 West 189th Street, LLC v 608-614 West 189th Street, LLC, New York County, Supreme Court, Index No. 158901/2014 (motion sequence number 008) is DENIED; and it is further

ORDERED that counsel are directed to post on NYSCEF a proposed status discovery conference order detailing the outstanding discovery that has yet to completed at least two days before March 30, 2023, on which date counsel are directed to appear via Microsoft Teams, unless such appearance be waived by the court.

DECISION

As no papers have been submitted in response, the motion of second third party defendants to re-argue and upon reargument grant summary judgment dismissing all claims against them must be granted.

With respect to the Judicial Subpoena propounded by plaintiff that seeks records of the physician who examined

plaintiff on behalf of defendant 608-614 West 189th Street LLC, this court agrees that such Judicial Subpoena is improper. As argued by the opposing defendants, plaintiff is entitled to the exchange of the medical report prepared by such examining physician pursuant to CPLR 3121 and 22 NYCRR § 202.17 (c). See Hamilton v Miller, 23 NY3d 592 (2014). Drafts of such reports need not be retained and so are not discoverable. See e.g., In re City of New York, 47 Misc3d 1229(A) (Sup Ct, Rich Cty 2015), affd as mod sub nom Matter of Oakwood Beach Blueblet-State 1, 164 AD3d 1453 (2d Dept 2018). Moreover,

“the notes and records created by defendant’s examining physician [are] not discoverable because they [are] privileged as material prepared for litigation, and the plaintiff failed to demonstrate that she had a substantial need for the material, or that she was unable, without undue hardship, to obtain the substantial equivalent of the material by other means”
Katz v Camp Bnoseinu, 181 AD3d 798, 799 (2d Dept 2020). See also Giordano v New Rochelle Mun Housing Authority, 84 AD3d 729 (2d Dept 2011).

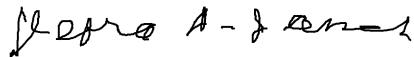
As contended by moving defendant, such subpoena is also improper as plaintiff’s remedy was to seek a court order and show special circumstances pursuant to CPLR 3101(d)(2), given that the documents plaintiff seek constitute privileged records, as material prepared for litigation. Opposing defendants are likewise correct that

“[T]he use of a judicial subpoena for the sole purpose of showing an examining physician’s history of

financial compensation indicates a defense-oriented predisposition- in other words, for the purpose of impeaching the witness's credibility is improper."

Fazio v Federal Express Corp, 272 AD2d 259, 260 (1st Dept 2000).

Finally, this court hereby vacates its verbal ruling on the record at the conclusion of extensive oral argument of motion sequence number 008, to the extent that it granted plaintiff's motion for a joint trial. Upon further deliberation, this court agrees with opposing defendants that the Order dated May 14, 2015 in Nunez v 608-614 West 189th Street, LLC, New York County, Supreme Court, Index No. 151007/2013 (Kenny, J.), which previously denied such relief (NYSCEF Document Number 238), is law of the case. See Padela v Rosen and Weidberg, 200 AD2d 722, 723 (2d Dept 1994).



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2/27/2023

DATE

DEBRA A. JAMES, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: