

MacMenamin v 95th & Third LLC

2023 NY Slip Op 30787(U)

March 17, 2023

Supreme Court, New York County

Docket Number: Index No. 155551/2018

Judge: Louis L. Nock

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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. LOUIS L. NOCK PART 38M

Justice

-----X

PATRICK MACMENAMIN,

Plaintiff,

- v -

95TH AND THIRD LLC and GILBANE BUILDING
COMPANY,

Defendants.

-----X

95TH AND THIRD LLC and GILBANE BUILDING COMPANY,

Third-Party Plaintiffs,

-against-

TRANSEL ELEVATOR & ELECTRIC INC. and BSIS, INC.,

Third-Party Defendants.

-----X

TRANSEL ELEVATOR & ELECTRIC INC.,

Second Third-Party Plaintiff,

-against-

TRADE OFF LLC,

Second Third-Party Defendant.

-----X

INDEX NO. 15551/2018

MOTION DATE 08/25/2022,
10/03/2022,
10/03/2022

MOTION SEQ. NO. 002 003 004

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595721/2018

Second Third-Party
Index No. 595840/2021

The following e-filed documents, listed by NYSCEF document numbers (Motion 002) 69, 70, 71, 72, 73, 74, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, and 86

were read on this motion for DISCOVERY.

The following e-filed documents, listed by NYSCEF document numbers (Motion 003) 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 109, and 111

were read on this motion to VACATE NOTE OF ISSUE.

The following e-filed documents, listed by NYSCEF document numbers (Motion 004) 102, 103, 104, 105, 106, 107, 108, 110, and 112

were read on this motion to

VACATE NOTE OF ISSUE.

Upon the foregoing documents, the motion of third-party defendant BSIS, Inc. (“BSIS”), for a protective order (Mot. Seq. No. 002); the motion of defendants/third-party plaintiffs 95th and Third LLC (“Owner”) and Gilbane Building Company (“Gilbane,” and with Owner the “Defendants/Third-Party Plaintiffs”) and of second third-party defendant Trade Off LLC (“Trade Off”) to vacate the note of issue (Mot. Seq. No. 003); and the motion of third-party defendant/second third-party plaintiff Transel Elevator & Electric Inc. (“TEI”) to vacate the note of issue (Mot. Seq. No. 004), are all consolidated for disposition in accordance with the following memorandum decision.

Background

The action concerns an alleged construction accident in which plaintiff, a construction worker, sustained injuries at a worksite located at 95th Street and 3rd Avenue (“the premises”) (complaint, NYSCEF Doc. No. 1). Defendants/Third Party Plaintiffs were the general contractors and owners of the worksite (*id.*). Defendants/Third Party Plaintiffs impleaded TEI and BSIS. Plaintiff was employed by BSIS at the time of the alleged accident, and Defendants/Third Party Plaintiffs contracted with BSIS for labor and services (complaint, NYSCEF Doc. No. 1 ¶¶ 7, 34, 36). BSIS entered into a subcontract with TEI to perform specific elevator work at premises (third party complaint, NYSCEF Doc. No. 12 ¶ 22; Peele EBT tr, NYSCEF Doc. No. 73 at 14). Following the deposition of BSIS’s president Christopher Peele, Defendants/Third Party Plaintiffs made a post EBT discovery demand of BSIS (NYSCEF Doc. No. 72), and BSIS now moves for a protective order in relation to the demand. Shortly after the

motion was filed, on September 13, 2022, plaintiff filed the note of issue (NYSCEF Doc. No. 75).

Underlying the present action is a separate action seeking a declaratory judgment for entitlement to insurance brought by Defendants/Third-Party Plaintiffs (*Gilbane Building Company, et al. v W.R. Berkley Corporation, et al.*, index No. 650317/2019) after Defendants/Third Party Plaintiffs tendered defense and indemnification to BSIS was denied by BSIS and its carriers, despite contractual clauses to maintain insurance (“declaratory judgment action”) (opposition, NYSCEF Doc. No. 76 ¶¶ 6, 7).

BSIS’ Motion for a Protective Order (Seq. 002)

BSIS moves for a protective order pursuant to CPLR 3103(a) with respect to a post-deposition notice of discovery and inspection dated July 18, 2022, of Defendants/Third-Party Plaintiffs, 95th and 3rd LLC and Gilbane Residential Construction (incorrectly sued herein as Gilbane Building Company) (“Defendants/Third Party Plaintiffs”). The court may issue a protective order “to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts” (CPLR 3103[a]). CPLR 3101(a) provides that “there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action.” “It is incumbent on the party seeking discovery to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims” (*Crazytown Furniture v Brooklyn Union Gas Co.*, 150 AD2d 420, 421 [2d Dept 1989]). “[U]nlimited disclosure is not required, and supervision of disclosure is generally left to the trial court’s broad discretion” (*Palermo Mason Const., Inc. v Aark Holding Corp.*, 300 AD2d 460, 461 [2d Dept 2002]).

The first demand seeks entrance drawings “or any related documents” that TEI provided BSIS in connection with the Purchase Order from TEI to BSIS (post-EBT demand, NYSCEF Doc. No. 72, ¶ 1). Similarly, the third demand seeks all “documents and/or communications” pertaining to BSIS's requests to TEI for entrance drawings prior to BSIS providing TEI with the quote/estimate for its services” (*id.*, ¶ 3). BSIS argues that since this is a trip and fall case, entrance drawings and purchase orders are irrelevant; Defendants/Third-Party Plaintiffs argue that this is basic discovery needed to understand the work being performed on the day of the accident and is necessary in the third-party and declaratory judgment actions. The court agrees with Defendants/Third-Party Plaintiffs and finds that these demands are “reasonably calculated to lead to the discovery of information bearing on the claims” (*Crazytown Furniture*, 150 AD2d at 421).

The second, fourth, and fifth demands seek “any and all email and other correspondences” between TEI and BSIS with respect to the purchase order for the subject project, between BSIS and its insurance broker pertaining to BSIS's certificate of insurance, and between BSIS's insurance broker and other parties pertaining to BSIS's certificate of insurance, respectively (post-EBT demand, NYSCEF Doc. No. 72 ¶¶ 2, 4, 5). BSIS argues that these demands are overly broad and unduly burdensome. While the papers do not make clear whether such production would be burdensome for BSIS, the purchase order and certificate of insurance have already been produced, and any email correspondences related thereto are not reasonably calculated to lead to the discovery of material information. Moreover, that the documents sought may be relevant to the related declaratory judgment action is not indicative that that they are material and necessary herein (*cf. Arena v Shaw*, 179 AD3d 415, 416 [1st Dept 2020])

[compelling production of documents from a New Jersey action because they were also relevant to the claims alleged in the New York action]).

The sixth, seventh, eighth, and ninth demands seek all communications between TEI and BSIS pertaining to TEI's requests to BSIS to unload materials at the subject jobsite during the month of May 2017, all daily logs, payroll records, and/or any and all other documents/materials identifying the BSIS workers onsite on May 15, 2017, all documentation as to which floors BSIS employees were assigned to work or unload materials on during May of 2017, and all names and titles for each and every BSIS employee who was paid by BSIS on May 15, 2017 (post-EBT demand, NYSCEF Doc. No. 72 ¶¶ 6-9). BSIS argues that Peele, the owner and president of BSIS, testified that BSIS was not installing anything on the day of the accident and was only making a delivery (Peele EBT tr, NYSCEF Doc. No. 73 at 72). Defendants/Third Party Plaintiffs point out, however, that Peele testified he was unsure of the stage of BSIS's work on the premises and assumed BSIS was making a delivery (*id.* at 58). Further, they claim that the documents demanded are relevant to TEI's potential liability for common law indemnification and contribution if the documents sought demonstrate that TEI controlled or directed BSIS' work. Information as to which BSIS employees worked on the day of the underlying argument and where in the building they were working is relevant to the issues in this case, especially considering Peele's uncertain testimony as to what work BSIS was doing at the jobsite the day of the accident, and whether TEI was directing or controlling BSIS' work. That BSIS may itself not be liable for common law indemnification or contribution pursuant to Worker's Compensation Law § 11, as it argues, does not render all the documents sought irrelevant to the other issues of fact in this case. Accordingly, the court finds that demands six through nine are relevant to the claims at hand, especially considering the questions of fact as to what duties BSIS

was performing at the time of the accident, and whether TEI directed or controlled BSIS' work on the day of the accident.

Finally, the tenth demand seeks the last known address and phone number of former BSIS employee Heather Smosky (NYSCEF Doc. No. 72 ¶ 10). Defendants/Third Party Plaintiffs state that Smosky would have been the person at BSIS who would have been sent the purchase order from TEI pertaining to BSIS's work on the Premises and Peele, who has been previously deposed, has no direct knowledge about the communications concerning TEI's retention of BSIS for work at the premises (NYSCEF Doc. No. 76 ¶ 15). The court finds this information relevant to Defendants/Third Party Plaintiffs' defense, and BSIS offers no meaningful opposition to releasing Smosky's last known contact information.

Defendants/Third-Party Plaintiffs and Trade Off's Motion and TEI's Motion to Vacate the Note of Issue (Seqs. 003, 004)

All parties save BSIS move to vacate plaintiff's note of issue filed on September 13, 2022 (NYSCEF Doc. No. 75). Pursuant to 22 NYCRR 202.21(e), "[w]ithin 20 days after service of a note of issue and certificate of readiness, any party to the action [] may move to vacate the note of issue, upon affidavit showing in what respects the case is not ready for trial, and the court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some material respect."

As set forth above, the court will grant the motion for a protective order only in part, which will necessitate ordering BSIS to respond to the Defendants/Third-Party Plaintiffs post-EDT demand, one of the grounds listed in the notice of motion for vacating the note of issue. TEI must also respond to said demand, and makes no opposition to such relief. Further, all movants ask for additional time to make dispositive motions, and subsequent to this motion

being fully submitted the court entered an order extending the time to make dispositive motions to March 13, 2013 (order, NYSCEF Doc. No. 115). Subsequently, all parties save TEI have moved for summary judgment, which motions are pending in the Motion Submissions Part (notice of motion, NYSCEF Doc. Nos. 116, 130, 160). Finally, TEI noticed the deposition of nonparty Richard Hall for September 30, 2022 (notice of deposition, NYSCEF Doc. No. 97), but Hall failed to appear (Campbell affirmation, NYSCEF Doc. No. 109, ¶ 7).

Substantial discovery remains outstanding, and such is grounds for vacating the note of issue (*Cromer v Yellen*, 268 AD2d 381 [1st Dept 2000]). However, it is also within the court's discretion to maintain the note of issue while setting a date certain by which all outstanding discovery shall be completed (*Rampersant v Nationwide Mut. Fire Ins. Co.*, 71 AD3d 972, 973 [2d Dept 2010]; *Torres v New York City Tr. Auth.*, 192 AD2d 400, 400 [1st Dept 1993]). Here, plaintiff's case was filed in 2018, and has now been pending for approximately five years. Further, none of the outstanding discovery can be attributed to plaintiff's acts or omissions, and all of it is essentially part of the third-party actions. Under the circumstances, rather than put plaintiff to the burden of refiling the note of issue after the completion of discovery in which he is not involved, the court declines to vacate the note of issue but will instead provide a date certain by which all the above-mentioned outstanding discovery must be completed.

Accordingly, it is hereby

ORDERED that the motion for a protective order of third-party defendant BSIS, Inc. (Mot. Seq. No. 002), is granted in part; and it is further

ORDERED that defendant shall produce to Defendants/Third-Party Plaintiffs on or before April 21, 2023, documents and information responsive to demands nos. 1, 3, and 6-10 of the post-EBT demands served on BSIS, Inc. (NYSCEF Doc. No. 72); and it is further

ORDERED that the motion of Defendants/Third-Party Plaintiffs and Trade Off (Mot. Seq. No. 003), and the motion of Third-Party Defendant TEI (Mot. Seq. No. 004) to vacate the note of issue and strike the case from the trial calendar is denied; but that Third-Party Defendant TEI shall be permitted to take a deposition of nonparty Richard Hall, provided that the deposition is completed within 30 days from the date of filing hereof; and it is further

ORDERED that TEI shall respond to the post-EBT demand of Defendants/Third-Party Plaintiffs (NYSCEF Doc. No. 96) on or before April 21, 2023.

This constitutes the decision and order of the court.



<u>3/17/2023</u>			<u>LOUIS L. NOCK, J.S.C.</u>	
DATE				
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE