

**Diaz v 2 Broadway Ground Lease Trust**

2023 NY Slip Op 33651(U)

October 17, 2023

Supreme Court, New York County

Docket Number: Index No. 162756/2014

Judge: Denise M. Dominguez

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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. DENISE M DOMINGUEZ PART 21

Justice

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INDEX NO. 162756/2014

CARLOS DIAZ,

MOTION SEQ. NO. 004

Plaintiff,

- v -

2 BROADWAY GROUND LEASE TRUST, 2 BROADWAY LLC, METROPOLITAN TRANSPORTATION AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY, TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY, ABM JANITORIAL SERVICE-NORTHEAST, INC., SLADE INDUSTRIES, INC., SLADE ELEVATOR,

DECISION + ORDER ON MOTION

Defendants.

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2 BROADWAY GROUND LEASE TRUST, 2 BROADWAY LLC, METROPOLITAN TRANSPORTATION AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY, TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY

Third-Party
Index No. 595043/2016

Third-Party Plaintiffs,

-against-

ABM JANITORIAL SERVICES - NORTHEAST, INC., SLADE INDUSTRIES, INC., SLADE ELEVATOR

Third-Party Defendants.

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ABM JANITORIAL SERVICES - NORTHEAST, INC.

Second Third-Party
Index No. 595049/2017

Second Third-Party Plaintiff,

-against-

GILBERT INTERNATIONAL INC

Third-Party Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 225, 226, 227, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242

were read on this motion to/for STAY

Upon the foregoing documents Defendant/Third-Party Defendant SLADE ELEVATOR's ("SLADE") motion to stay the trial in this matter is granted.

This personal injury matter concerns a January 3, 2014 incident, where it is alleged that the Plaintiff, CARLOS DIAZ, who was employed as an elevator operator at 2 Broadway, New York, New York, was injured when the doors of freight elevator No. 27 suddenly closed on him, catching the right side of his body as he was attempting to reenter the freight elevator on the 32nd floor.

SLADE moves by Order to Show Cause to direct the Plaintiff to appear for a new orthopedic Independent Medical Examination ("IME") because the Defendants' expert, Dr. Herbert Sherry, who previously conducted the Plaintiff's orthopedic IME on March 3, 2017, passed away in June of 2023, and would therefore be unavailable to testify at trial. SLADE argues that it is entitled to new IME pursuant to CPLR §3121(a) as Dr. Sherry can no longer testify at trial as to the prior IME. As the trial of this action is set to start on October 23, 2023, SLADE also seeks a short stay of the trial in this matter to allow time by which to have the IME completed.

In support of the motion, SLADE submits that Dr. Sherry was expected to testify as to his IME of the Plaintiff on behalf of the Defendants (NYSCEF Doc. 218, 219, 220, 228). In anticipation of this testimony, following the last Pre-Trial Conference (on September 7, 2023) the Defendants sought to secure Dr. Sherry's trial availability. SLADE, through its attorney affirmation and representation to this Court, reached out to Dr. Sherry's office, but, could not reach Dr. Sherry. Eventually SLADE was informed that Dr. Sherry had recently passed away. SLADE submits the obituary of Dr. Sherry and has affirmed to this Court that counsel eventually spoke to Dr. Sherry's widow, who confirmed the recent date of Dr. Sherry's passing.

In opposition, the Plaintiff questions whether there is sufficient evidence of Dr. Sherry's passing. This is unavailing in light of the evidence submitted.

It is clear that an IME is a material and necessary aspect of discovery that the Defendants rely upon to support their defense in this personal injury action. Here, it is clear that the Defendants had intended to rely upon Dr. Sherry's testimony at the time of trial; Dr. Sherry was duly designated as an expert, that the Plaintiff underwent the IME in March of 2017 and the Defendants noticed Dr. Sherry as an expert for the upcoming trial. It is also clear that due to Dr. Sherry's passing, he cannot appear to testify as to his examination of the Plaintiff and the findings contained within his April 3, 2017 report.

Additionally, it is clear that SLADE immediately sought the within relief upon being notified of Dr. Sherry's passing and immediately sought to identify a potential new orthopedic expert who could accommodate scheduling an IME quickly. The parties have advised the Court

that while the instant motion was pending, a new orthopedic expert was designated by the Defendants, Dr. Jerry Lubliner. The Plaintiff has also been sent a proposed IME date of November 15, 2023.

Therefore, the motion to direct the Plaintiff to appear for a new orthopedic IME is granted and the trial of this matter shall be stayed in order to permit time for the new IME to be held.

In light of the representation of Plaintiff's counsel, as the Plaintiff currently resides in Florida, he would need to travel to New York for the IME. Therefore, the Court recognizes that confirming the Plaintiff's availability for November 15, 2023 may not be possible in light of travel arrangements. Therefore, if not already done, the Plaintiff is directed to immediately confirm whether the November 15, 2023 IME date with Dr. Lubliner is amenable to the Plaintiff's schedule. If the Plaintiff cannot attend the previously designated November 15, 2023 date, if not already done, the Plaintiff must inform the Defendants by October 23, 2023. If an alternative date is needed for the IME, the parties are directed to coordinate a mutually convenient date. However, the IME shall be scheduled no later than December 15, 2023 and the IME report shall be exchanged within 20 days of conducting the IME.

As to the issue of the outstanding trial authorizations, at the recent conference, the parties acknowledged that the trial authorizations had just recently been exchanged. Therefore, to the extent that it has not already been done, the Plaintiff is directed to serve the Defendants with duly executed trial authorizations by October 31, 2023. The Defendants are directed to process the authorizations upon receipt and to notify Plaintiff immediately if any authorization is rejected by any of the facilities/entities/providers so that the parties can resolve any issues concerning the trial authorizations while the trial is stayed.

Accordingly, it is hereby

ORDERED that Defendant/Third-Party Defendant SLADE ELEVATOR's motion to conduct a new orthopedic IME is granted, the IME same shall be conducted by December 15, 2023 and the report exchanged within 20 days of the IME being conducted; and it is further

ORDERED that the trial in this matter, set to begin October 23, 2023, shall be stayed until January 19, 2024, or until the next available date thereafter as determined by Part 40; and it is further

ORDERED that no adjournments of the above are permitted without Court approval; and it is further

ORDERED that the movant shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119), who are directed to mark the court’s records to reflect the above; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website ; and it is further

ORDERED that the parties are to notify Part 40 of the within Order as soon as practicable, even if Order with Notice of Entry has not yet been served upon the Clerk.

10/17/2023

DATE

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

HON. DENISE M. DOMINGUEZ J.S.C.