

Lardiere v Site 6 DSA Owner LLC

2023 NY Slip Op 34054(U)

November 15, 2023

Supreme Court, New York County

Docket Number: Index No. 153260/2018

Judge: Arlene P. Bluth

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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. ARLENE P. BLUTH PART 14

Justice

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ROSARIO LARDIERE,

Plaintiff,

- v -

SITE 6 DSA OWNER LLC, SITE 6 COMMERCIAL LLC, TACONIC INVESTMENT PARTNERS, L&M DEVELOPMENT PARTNERS, BFC PARTNERS, L.P, DELANCEY STREET ASSOCIATES LLC, NYU LANGONE HEALTH SYSTEM, HUNTER-ROBERTS CONSTRUCTION GROUP, LLC, BFC PHASE 1 DSA LLC, THE PACE COMPANIES NEW YORK, INC., PEEPELS MECHANICAL CORP.,

Defendant.

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SITE 6 DSA OWNER LLC, TACONIC INVESTMENT PARTNERS, LLC s/h/a TACONIC INVESTMENT PARTNERS, L&M DEVELOPMENT PARTNERS, INC. s/h/a L&M DEVELOPMENT PARTNERS, DELANCEY STREET ASSOCIATES LLC, NYU LANGONE HEALTH SYSTEM and HUNTER ROBERTS CONSTRUCTION GROUP s/h/a HUNTER ROBERTS CONSTRUCTION GROUP, LLC,

Plaintiff,

-against-

GIL-BAR INDUSTRIES, THE PACE COMPANIES NEW YORK INC., PEEPELS MECHANICAL CORP

Defendant.

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SITE 6 DSA OWNER LLC, SITE 6 COMMERCIAL LLC, TACONIC INVESTMENT PARTNERS, LLC s/h/a TACONIC INVESTMENT PARTNERS, L&M DEVELOPMENT PARTNERS, INC. s/h/a L&M DEVELOPMENT PARTNERS, DELANCEY STREET ASSOCIATES LLC, NYU LANGONE HEALTH SYSTEM, HUNTER ROBERTS CONSTRUCTION GROUP s/h/a HUNTER ROBERTS CONSTRUCTION GROUP, LLC and BFC PHASE I DSA, LLC

Plaintiff,

DECISION + ORDER ON MOTION

Third-Party
Index No. 595818/2018

Second Third-Party
Index No. 595217/2020

-against-

SITE SAFETY,LLC, MECHANICAL PIPING SOLUTIONS

Defendant.

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SITE 6 DSA OWNER LLC, SITE 6 COMMERCIAL LLC, TACONIC INVESTMENT PARTNERS, LLC s/h/a TACONIC INVESTMENT PARTNERS, L&M DEVELOPMENT PARTNERS, INC. s/h/a L&M DEVELOPMENT PARTNERS, DELANCEY STREET ASSOCIATES LLC, NYU LANGONE HEALTH SYSTEM, HUNTER ROBERTS CONSTRUCTION GROUP s/h/a HUNTER ROBERTS CONSTRUCTION GROUP, LLC and BFC PHASE I DSA, LLC,

Third Third-Party
Index No. 596072/2021

Plaintiff,

-against-

COMMODORE CONSTRUCTION CORP. JACOBSON & COMPANY, INC.,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 511, 512, 515, 516, 517, 518, 519, 520

were read on this motion to/for AMEND CAPTION/PLEADINGS.

The motion by third third-party defendant Commodore Construction Corp. (“Commodore”) for a so-ordered stipulation of discontinuance is granted.

Background

In this Labor Law action, Commodore requests that the Court so-order a stipulation of discontinuance in which the third third-party plaintiffs all agreed to discontinue their claims against Commodore (see NYSCEF Doc. No. 497). It explains that after this stipulation was signed, defendant Peepels Mechanical Corp. (“Peepels”), who had not asserted any claims against Commodore, attempted to assert crossclaims against Commodore (NYSCEF Doc. No. 444).

The Court observes that the stipulation of discontinuance was dated April 10, 2023 and the crossclaims were dated April 19, 2023 although the crossclaims “pleading” was uploaded long before the stipulation of discontinuance (that is why the crossclaims’ document number is 444 and the discontinuance stipulation is 497).

Commodore argues that there were no crossclaims pending against it when the discontinuance order was signed. It also asks the Court to vacate portions of a discovery order dated September 25, 2023 that required Commodore to respond to certain discovery requests on the ground that it was already out of the case.

In opposition, Peepels points out that although the discontinuance is dated April 10, 2023, it was not uploaded until July 31, 2023 by Commodore’s present counsel and it was signed by Commodore’s prior attorneys. It points out that the purported stipulation is not signed by all counsel (it was only signed by counsel for parties with claims against Commodore) and that the instant motion is an attempt by Commodore to file an improper motion to dismiss.

In reply, Commodore claims that it is irrelevant that Commodore’s new counsel uploaded a stipulation signed by Commodore’s prior counsel.

Discussion

The Court’s discussion begins with a review of the procedural posture at issue here. The only parties that asserted claims against Commodore were the third third-party plaintiffs (SITE 6 DSA OWNER LLC, SITE 6 COMMERCIAL LLC, TACONIC INVESTMENT PARTNERS, LLC s/h/a TACONIC INVESTMENT PARTNERS, L&M DEVELOPMENT PARTNERS, INC. s/h/a L&M DEVELOPMENT PARTNERS, DELANCEY STREET ASSOCIATES LLC, NYU LANGONE HEALTH SYSTEM, HUNTER ROBERTS CONSTRUCTION GROUP s/h/a HUNTER ROBERTS CONSTRUCTION GROUP, LLC and BFC PHASE I DSA, LLC) and all

the third third-party plaintiffs agreed to discontinue their claims against Commodore in a stipulation dated April 10, 2023 (although it was uploaded on July 31, 2023). No one sufficiently disputes that this stipulation was signed on April 10, 2023. And on April 19, 2023, Peepels filed crossclaims against Commodore.

The Court observes that, procedurally, this was improper as a crossclaim is typically a pleading filed by one defendant against a co-defendant. Here, the caption shows that Peepels and Commodore were not co-defendants; the only time Commodore appears in the caption is in the third third-party complaint, a pleading in which Peepels is not involved. Therefore, Peepels should have commenced its own third-party complaint against Commodore. In this Court's view, that renders the crossclaims as a nullity.

Peepels is correct to point out that the stipulation of discontinuance was not effective as it was not signed by all parties (only a few of the many, many parties in this case signed it). CPLR 3217 provides three distinct time periods for how a discontinuance may be sought during a litigation (*Emigrant Bank v Solimano*, 209 AD3d 153, 158-59, 175 NYS3d 299 [2d Dept 2022]). Only the second time frame is applicable here.

“The second time frame for a discontinuance is the period between the responsive pleading and the point just before the case is submitted to a court or a jury for a determination of the facts of the claim. As to that broad time frame, as relevant herein, the discontinuance of an action may be effected by the filing of a written stipulation executed by the attorneys of record for all of the parties. Alternatively, between the joinder of issue and the submission of the case to a court or a jury for factual determinations, a discontinuance may be obtained, without a stipulation of the parties, by a court order upon terms and conditions that the court deems proper” (*id.* at 159 [citations omitted]).

Here, although the stipulation was not signed by all parties, it *was* signed by all the third third-party plaintiffs and Commodore. That compels the Court to grant the motion. The fact is that the only parties who filed claims against Commodore decided not to pursue those causes of action and attempted to let Commodore out of this case. While this Court finds that all of the parties' signatures were required to effectuate that stipulation of discontinuance, this Court has the power to so-order that discontinuance under CPLR 3217(b).

Peepels' attempt to file crossclaims is without merit as it was procedurally improper. And, critically, unlike a third-party complaint, Peepels did not pay the required fee or obtain an index number to pursue its claims against Commodore. It simply uploaded a document filed as a "complaint" (*see* NYSCEF Doc. No. 444). This is not a situation in which Peepels simply mislabeled its pleading; it attempted to file crossclaims against a party that was not its co-defendant.

The Court stresses that it takes no position on the substance of the potential claims asserted by Peepels against Commodore. And nothing prevents Peepels from attempting to commence another third-party action in this matter. But given the sheer number of parties in this case, the Court cannot simply overlook the procedural technicalities discussed above. In short, the Court grants the motion because the only parties who sought relief against Commodore discontinued those claims against Commodore and Peepels' attempt to assert claims was procedurally improper.


Accordingly, it is hereby

ORDERED that Commodore Construction Corp.'s motion is granted, the Court so-orders the stipulation of discontinuance in NYSCEF Doc. No. 497 and Commodore need not comply with any outstanding discovery obligations as it is no longer a part of this case; and it is further

ORDERED that movant Commodore Construction Corp. is hereby removed from the caption (in the third third-party complaint) and movant shall, within 30 days from service of a copy of this order with notice of entry upon the County Clerk and the Clerk of the General Clerk’s Office, who are directed to mark the court’s records to reflect that movant shall be removed from the caption; and it is further

ORDERED that such service upon the County Clerk 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).

See NYSCEF Doc. No. 502 concerning the next conference.

<u>11/15/2023</u> DATE	 ARLENE P. BLUTH, J.S.C.			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" 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