

Burgos v GTL Constr., LLC.

2023 NY Slip Op 34236(U)

December 6, 2023

Supreme Court, New York County

Docket Number: Index No. 154328/2017

Judge: David B. Cohen

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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. DAVID B. COHEN

PART 58

Justice

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INDEX NO. 154328/2017

ARMANDO BURGOS,

MOTION SEQ. NO. 006

Plaintiff,

- v -

GTL CONSTRUCTION, LLC., ASHKENAZY ACQUISITION
CORP., AAC CROSS COUNTY MALL, LLC., BENCO
CONSTRUCTION INC., WESBUILT CONSTRUCTION
MANAGERS LLC, C21 CC BLUE, LLC, CENTURY 21
DEPARTMENT STORES, LLC,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 189, 190, 191, 192
were read on this motion to/for QUASH SUBPOENA, FIX CONDITIONS.

In this Labor Law action, nonparty Mt. Hawley Insurance Company (Mt. Hawley) moves,
pursuant to CPLR 2304, for an order quashing the subpoena served upon it by third-party defendant
Force Services, LLC (Force).

Factual and Procedural Background

This case arises from an incident on April 20, 2017, in which plaintiff was allegedly injured
after he fell from an elevated platform while working at a construction site located at 750 Central
Park Avenue in Yonkers (NYSCEF Doc No. 1). He commenced this action against defendants
alleging violations of Labor Law §§ 200, 240(1), and 241(6) (Doc No. 1, 60). Prior to answering,
defendant GTL Construction, LLC commenced a third-party action against Force and third-party
defendant Wesbuilt Construction Managers, LLC (Wesbuilt), asserting claims of indemnification
(Doc No. 5). Force subsequently joined issue in the third-party action by its answer dated January
19, 2018, asserting a counterclaim against GTL, defendant Ashkenazy Acquisition Corp.

(Ashkenazy), and defendant AAC Cross County Mall, LLC (AAC), and a cross-claim against Wesbuilt (Doc No. 35).

In June 2023, Force served a subpoena upon Mt. Hawley seeking records regarding an insurance policy Mt. Hawley issued to defendant Benco Construction Inc. (the subject policy) (Doc No. 191). The subpoena sought four items specifically:

- (1) Mt. Hawley's underwriting guidelines and policies from November 2016, when the subject policy was issued,
- (2) "all correspondence" related to the subject policy,
- (3) "the complete underwriting file" for the subject policy; and
- (4) any records related to Mt. Hawley's decision to rescind the subject policy in November 2017.

Mt. Hawley moves to quash the subpoena, which Force does not oppose (Doc No. 189-190).

Legal Analysis and Conclusions

Mt. Hawley contends that the subpoena should be quashed because it amounts to improper preaction discovery, as Force has no meritorious cause of action against Mt. Hawley. It contends further that, as a liability insurer, its files are immune from discovery by other parties in this action. According to Mt. Hawley, Force cannot obtain these materials from Benco Construction directly due to such immunity, and is using the instant subpoena to circumvent that immunity.

"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" (*Anheuser-Busch, Inc. v Abrams*, 71 NY2d 327, 331-332 [1988] [internal quotation marks, brackets, and citations omitted]), and Mt. Hawley, as the party

seeking to quash the subpoena, bears the burden of making that showing (*see e.g. Wells Fargo Bank N.A. v Andalex Aviation II, LLC*, 173 AD3d 418, 419 [1st Dept 2019] [affirming denial of motion because “movant failed to carry her prima facie burden of showing that the discovery sought was irrelevant”]).

Here, Mt. Hawley has demonstrated that the information sought by Force is utterly irrelevant. With respect to Force’s request for the entire underwriting file, it is well settled that such files are immune from discovery unless the party seeking the information can “demonstrate either that they could not otherwise obtain ‘a substantial equivalent’ of the material without undue hardship or that [the insured party] waived the privilege by relying upon the material in support of a defense” (*Veltre v Rainbow Convenience Store, Inc.*, 146 AD3d 416, 417 [1st Dept 2017], quoting *Recant v Harwood*, 222 AD2d 372, 374 [1st Dept 1995]). Force failed to demonstrate either of those conditions exist here, given that it failed to oppose this motion.

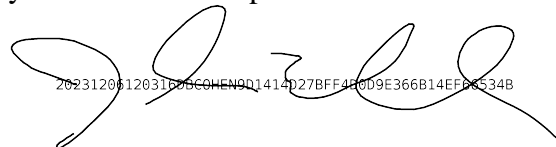
Regarding the other three requested items, i.e., Mt. Hawley’s underwriting guidelines and policies, all correspondence related to the subject policy, and all records pertaining to Mt. Hawley’s decision to rescind the subject policy, such information is irrelevant to Force, as evidenced by GTL’s third-party action. GTL’s third-party complaint only named Wesbuilt and Force as third-party defendants; Benco Construction was not named in that action. Force also never asserted any claims against Benco Construction in its answer to the third-party complaint. Between its counterclaims and cross-claims, Force only asserted claims against GTL, Ashkenazy, AAC, and Wesbuilt. Since none of those entities were in privity with Benco or Mt. Hawley as parties to the subject policy, the contents of the subject policy and information regarding its generation or rescission are irrelevant to any of Force’s claims.

Therefore, Mt. Hawley’s motion to quash the subpoena is granted (see *Lupe Dev. Partners, LLC v Pacific Flats I, LLC*, 118 AD3d 645, 645 [1st Dept 2014] [affirming motion court’s quashing of subpoena seeking information about nonparty’s assets because the assets were not relevant to plaintiff’s claims in the underlying action], *lv dismissed* 24 NY3d 998 [2014])

Mt. Hawley’s remaining contentions are either without merit or do not need to be addressed given the findings set forth above.

Accordingly, it is hereby:

ORDERED that the motion of nonparty Mt. Hawley Insurance Company to quash a subpoena returnable in this court, served upon it on June 7, 2023, is granted, the subpoena is quashed, and the subpoenaed party need not produce any documents in response.



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DAVID B. COHEN, J.S.C.

12/6/2023

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