

Asian v Flintlock Constr. Servs. LLC

2023 NY Slip Op 34257(U)

December 8, 2023

Supreme Court, New York County

Docket Number: Index No. 150767/2018

Judge: Eric Schumacher

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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. ERIC SCHUMACHER PART 23M

Justice

-----X

INDEX NO. 150767/2018

SAUL ASIAN,

MOTION DATE 01/20/2023

Plaintiff,

MOTION SEQ. NO. 005

- v -

FLINTLOCK CONSTRUCTION SERVICES LLC et al.,

**DECISION + ORDER ON
MOTION**

Defendants.

(and a third-party action)

-----X

NYSCEF doc nos. 246-260, 262, 278-279, 281, 283, 285, and 288-292 were read on this motion to preclude.

Motion by plaintiff Saul Asian for an order: (1) pursuant to CPLR 3123 deeming the allegations contained in plaintiff's November 21, 2022 notice to admit admitted; and (2) pursuant to CPLR 3124 compelling defendants to produce the discovery demanded in plaintiff's December 12, 2022 notice for discovery and inspection denied.

BACKGROUND

Plaintiff commenced this action on January 24, 2018, by filing the summons and complaint (NYSCEF doc no. 1). As is relevant here, plaintiff alleges that, while working on a construction project, he was caused to suffer serious and permanent injuries due to the negligence of multiple defendants, including defendant Flintlock Construction Services, LLC (hereinafter Flintlock) (*id.* ¶ 58-60). Defendant Flintlock was the general contractor at the subject construction project (*id.* ¶ 23). On June 10, 2019, defendant Flintlock commenced a third-party action against plaintiff's employer, third-party defendant Sky Materials Corp. (hereinafter Sky Materials), by filing the third-party summons and complaint (NYSCEF doc no. 36).

On September 30, 2021, plaintiff filed the note of issue (NYSCEF doc no. 132). The note of issue was accompanied by a certificate of trial readiness, which stated that "[d]iscovery proceedings now known to be necessary are completed" and that "[t]here are no outstanding requests for discovery" (*id.* at 3).

On July 26, 2022, a conference order from the prior court was filed. As is relevant here, part of the order stated that "[d]iscovery is ongoing and is permitted to occur post the note of issue filing" (NYSCEF doc no. 161).

On November 21, 2022, as is relevant here, plaintiff filed two notices to admit. The first notice to admit was addressed to defendant Flintlock and other defendants and sought verification of paystubs between non-party Sky Structures Corp. and plaintiff (NYSCEF doc no. 193). The second notice to admit was addressed to third-party defendant Sky Materials and

sought admissions regarding paystubs, payroll information, and that third-party defendant Sky Materials was doing business as Sky Structures Corp. (NYSCEF doc no. 194). On December 6, 2022, plaintiff filed a letter to the court withdrawing the first notice to admit addressed to defendant Flintlock and other defendants (NYSCEF doc no. 195). Plaintiff stated that the second notice to admit addressed to third-party defendant Sky Materials remained in full effect (id.).

On December 12, 2022, third-party defendant Sky Materials filed its response to plaintiff's notice to admit (NYSCEF doc no. 256). Defendant Flintlock did not file a response to plaintiff's notice to admit. On December 30, 2022, plaintiff filed a notice of rejection of third-party defendant Sky Materials' response to plaintiff's notice to admit (NYSCEF doc no. 243).

On December 12, 2022, plaintiff served a notice for discovery and inspection demanding inspection of surveillance video footage allegedly depicting plaintiff and information relating to the video footage (NYSCEF doc no. 200). On December 19, 2022, defendant Flintlock served a response to plaintiff's notice of discovery and inspection (NYSCEF doc no. 257).

On January 13, 2023, plaintiff emailed the prior court pursuant to the prior court's part rules seeking leave to file this current motion (NYSCEF doc no. 252). There is no indication in the record that the prior court ever granted such leave.

Nonetheless, on January 20, 2023, plaintiff filed this motion. In support of the motion plaintiff submitted an affirmation of plaintiff's counsel. Both defendant Flintlock and third-party defendant Sky Materials filed opposition to the motion. At the time the motion was filed, third-party defendant Sky Materials had not yet responded to plaintiff's notice for discovery and inspection. Third-party defendant Sky Materials served plaintiff with its response to the notice for discovery and inspection on January 23, 2023 (NYSCEF doc no. 290).

DISCUSSION

As a preliminary matter the court finds that post-note of issue discovery motions are presumptively improper. A party may not obtain further discovery after the filing of the note of issue and certificate of readiness absent a showing of special, unusual, or extraordinary circumstances (see Uniform Rules for Trial Cts [22 NYCRR] § 202.21[d]; Pannone v Silberstein, 40 AD3d 327, 328 [1st Dept 2007]; Nikqi v Dedona Contr. Corp., 117 AD3d 620, 620 [1st Dept 2014]; Grant v Wainer, 179 AD2d 364, 364-65 [1st Dept 1992]).

Here, to the extent that the prior court required leave for post-note of issue discovery motions, there is no indication in the record that such leave was obtained. In any event, the note of issue has long been filed and the certificate of readiness states that discovery is complete and that there are no outstanding discovery requests.

As such, the motion is denied on movant's failure to obtain leave to file a discovery motion post-note of issue. The movant merely demonstrated that the request for leave was made, not that leave was granted.

Even if the note of issue had not been filed or plaintiff had obtained leave, any issues regarding responses to plaintiff's notice to admit are moot based on the papers.

The court notes that the only remedies prescribed by CPLR 3123 as to motion practice concern applications for protective orders and sanctions. Nothing in CPLR 3123 operates as forming a remedy for a party to obtain, in effect, a declaratory judgment that something has been deemed admitted. Notices to admit are self-regulating; failure to adequately respond results in admission of the requested matters.

Here, plaintiff moved in effect for the court to deem that third-party defendant Sky Materials admitted the requested matters in the notice to admit. As CPLR 3123 does not authorize the court to issue a declaratory judgment that something has been deemed admitted, the court cannot grant this branch of plaintiff's motion. Sky Materials' unsworn response will speak for itself at trial.

As to defendant Flintlock, the notice to admit concerning defendant Flintlock was withdrawn. Defendant Flintlock is not addressed in the operative notice to admit. Defendant Flintlock pointed this out in its opposition papers, which plaintiff does not dispute.

Any issues regarding responses to plaintiff's notice for discovery and inspection are also moot based on the papers. As stated in plaintiff's moving papers and defendant Flintlock's opposition, defendant Flintlock served a response to the notice for discovery and inspection on December 19, 2022 (NYSCEF doc nos. 253, 257). Plaintiff served its response to the notice for discovery and inspection on January 23, 2023 (NYSCEF doc no. 290).

As such, even if the note of issue had not been filed or plaintiff had obtained leave, which plaintiff did not, any issues regarding responses to plaintiff's notice to admit and notice for discovery and inspection are moot.

As to any further discovery matters in this case, the court finds that the period of ongoing discovery granted in the prior court's July 26, 2022 order must end. While that order set forth that discovery would continue despite the filing of the note of issue, it did not indicate what, if any, unusual or unanticipated circumstances precipitated the authorization of further discovery. This court will not permit further open-ended discovery that is not otherwise permitted by statute or court rule. The note of issue was filed over two years ago, and discovery must end. As such, this court will vacate so much of the order as permitted ongoing discovery with no criteria or end date and will require any application for further court-authorized discovery not otherwise agreed on by the parties or permitted without permission from the court by statute or court rule be sought by the appropriate application.

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CONCLUSION

Accordingly, it is

ORDERED that the motion is denied; and it is further

ORDERED that the prior court's July 26, 2022 order (NYSCEF doc no. 161) is vacated; and it is further

ORDERED that, within five days of entry, defendant Flintlock Construction Services LLC and third-party defendant Sky Materials Corp. shall each serve a copy of this order with notice of entry on plaintiff.

The foregoing constitutes the decision and order of the court.

12/8/2023
DATE


ERIC SCHUMACHER, J.S.C.

CHECK ONE:

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|--------------------------|----------------------------|-------------------------------------|-----------------------|------------------------------------|
| <input type="checkbox"/> | CASE DISPOSED | <input checked="" type="checkbox"/> | NON-FINAL DISPOSITION | |
| <input type="checkbox"/> | GRANTED | <input checked="" type="checkbox"/> | DENIED | <input type="checkbox"/> OTHER |
| <input type="checkbox"/> | SETTLE ORDER | <input type="checkbox"/> | GRANTED IN PART | |
| <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> | SUBMIT ORDER | <input type="checkbox"/> REFERENCE |
| | | <input type="checkbox"/> | FIDUCIARY APPOINTMENT | |

APPLICATION:

CHECK IF APPROPRIATE: