

Ochoa v 3475 Third Ave. Hous. Dev. Fund Corp.

2023 NY Slip Op 34983(U)

February 2, 2023

Supreme Court, Bronx County

Docket Number: Index No. 31545/2019E

Judge: Lucindo Suarez

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This opinion is uncorrected and not selected for official publication.

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Mtn. Seq. # 10

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 19

JULIO OCHOA,

Index No.: 31545/2019E

Plaintiff,

- against -

DECISION and ORDER

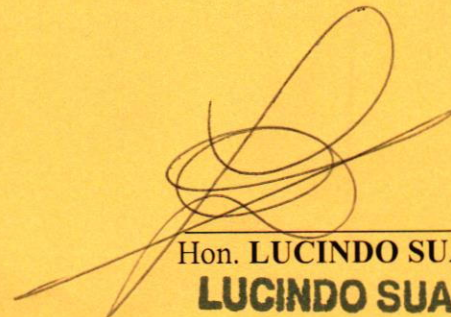
3475 THIRD AVENUE HOUSING DEVELOPMENT
FUND CORPORATON, DA HAI CONSTRUCTION INC.,
ALEGRIA OPERATING LLC., ALEGRIA HEALTH &
WELLNES, ALEGRIA OPERATION LLC d/b/a
ALEGRIA HEALTH & WELLNESS, SC PRIME
ENERGY LTD., PILLAR PROPERTY MANAGEMENT
LLC., 3475 THIRD AVENUE OWNER REALTY LLC.,
3475 THIRD AVENUE MM LLC. and 3475 THIRD
AVENUE REALTY LLC.

Defendants.

	<u>PAPERS NUMBERED</u>
Defendants 3475 Third Avenue Notice of Motion, Affirmation in Support, Exhibits, Memorandum of Law, (Motion Seq. # 10)	NYSCEF doc. No. 273-280
Plaintiff's Affirmation in Opposition, Exhibit (Motion Seq. # 10)	NYSCEF doc. No. 283-303
Defendants Affirmation in Reply, Exhibit (Motion Seq. # 10)	NYSCEF doc. No. 307-308

Upon the enumerated papers, motion sequence 10 is decided in accordance with the annexed decision and order.

Dated: 2/2/2023



Hon. LUCINDO SUAREZ, J.S.C.
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Defendants.

HON. JUSTICE LUCINDO SUAREZ

This discovery dispute arises out of an accident that occurred on September 26, 2019 at 3475 Third Avenue, Bronx, New York during the construction of a medical center. Plaintiff Julio Ochoa, an employee of Arian Contracting Inc., was seriously injured when the ladder that he was working on slid out from underneath him, causing him to fall to the ground.

On or about October 2, 2019, Plaintiff commenced this action, and subsequently amended the complaint on three occasions. (NYS ECF Doc.No.34,46,158).

On October 9, 2020, Defendant 3475 HDFC and Pillar answered Plaintiff's Second Amended Complaint (NYS ECF Doc.No.175).

On December 21, 2020, Plaintiff filed a Notice to Admit, requiring admissions related to Defendant Pillar. (NYS ECF Doc.No.106)

On December 22, 2020, Defendant Pillar responded (NYS ECF Doc.No.108)

On September 17, 2021, Plaintiff filed its Third Amended Verified compliant containing 293 paragraphs. (NYS ECF Doc.No.158)

On October 21, 2021, Plaintiff moved this court for an order (i) striking the answer of Defendants 3475 HDFC and PILLAR, and which resulted in an order dated March 17, 2022. (NYS ECF Doc. No.228)

On June 23, 2022, Plaintiff filed a second Notice to Admit ((NYS ECF Doc.No.263). Based on this record, all indications are none of the parties' depositions are complete.

A notice to admit is designed to elicit admissions on matters which the requesting party 'reasonably believes there can be no substantial dispute' (CPLR 3123 [a]) (*National Union Fire Ins. Co. of Pittsburgh, Pa. v Allen*, 232 AD2d 80, 85 [1st Dept 1997]). "[A] notice to admit may not be utilized to request admission of material issues or ultimate or conclusory facts," or "facts within the unique knowledge of other parties" (*Taylor v Blair*, 116 AD2d 204, 206 [1st Dept 1986]). Rather, it is "only properly used to eliminate from trial matters which are easily provable and about which there can be no controversy" (*Samsung Am. v Yugoslav-*

Korean Consulting & Trading Co., 199 AD2d 48, 49 [1st Dept 1993]). Further, because a notice to admit "is not intended as simply another means for achieving discovery," it may not be used to obtain information in lieu of other disclosure devices (see *Hodes v City of New York*, 165 AD2d 168, 170 [1st Dept 1991]). *Fetahu v New Jersey Tr. Corp.*, 167 AD3d 514, 515 (1st Dept 2018). Although a "notice to admit can be used to probe a party's understanding of his own duties under law . . . it is inappropriate as a vehicle for asking a party to interpret the law or someone else's compliance therewith." *Villa v NY City Hous. Auth.*, 107 AD2d 619, 620 (1st Dept 1985). Further, the decision whether to issue a protective order against a notice to admit lies within the discretion of the court. See *Hawthorne Group, LLC v RRE Ventures*, 7 AD3d 320, 324 (1st Dept 2004).

CPLR 3103 (a) provides, inter alia, that

"[t]he court may at any time on its own initiative, or on motion of any party or of any person from whom or about whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts."

* * *

According to Defendants who opposed the current application, Plaintiff's request admissions related to matters that fall within three categories: (i) those that have already been responded to in prior pleadings; (ii) those that do not related to matters which Plaintiff can reasonably believe there is no dispute; and/or (iii) those

that could be obtained through other disclosure devices. (See NYS ECF Doc.No.274 (page 3)).

Plaintiff's Notice to Admit, dated June 21, 2022, contain a total of 34 admission requested. "[W]hile a few proper requests may be interspersed in the [n]otice to [a]dmit . . . it is not [this Court's] obligation to prune [the notice to admit]" Kimmel v Paul, Weiss, Rifkind, Wharton & Garrison, 214 AD2 453, 453-454 (1st Dept 1995) (citations omitted).

Accordingly, this court finds, items 1 through 8 of the notice to admit are proper and call for the ownership and management of the premises where the incident occurred. Villa v. NYCHA, 107 A.D.2d 620 (1st Dept. 1985).¹

Likewise, Items 9 through 11 of the notice to admit are proper and call for the identity of the general and construction managers of the premises where the incident occurred.

Items 12 through 14 of the notice to admit are proper and call for the existence of a construction contracts, if any.

With regards to Items 15 through 22, those items are withdrawn (See, NYS ECF No. Doc. 283 at paragraph 32).

¹ "My office has been trying to obtain the contracts that relate to this project as well as the name of the general contractor/construction manager since December 2020 and defendants ... continue to disregard all order issued by this court". (See, NYS ECF No. Doc. 283 at paragraph 27)

Finally, as noted, a notice to admit should not be used in lieu of a discovery device. *See Hodes v City of New York*, 165 AD2d 168, 170 (1st Dept 1991); however if the purpose of a notice to admit is to obtain factual admissions about which the demanding party reasonably believes there can be no substantial dispute (CPLR 3123 [a]; *National Union Fire Ins. Co. of Pittsburgh, Pa. v Allen*, 232 AD2d at 85), then Items 23 through 34 are clearly proper and call for the identity of which company performed work at the subject site, or the existence of written construction contracts, if any.

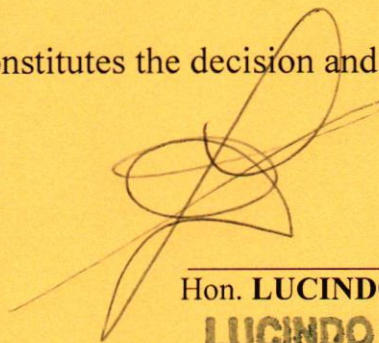
Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion for a protective order is granted, as indicated herein; and it is further

ORDERED that defendants are required to respond to Items 1 through 8, 9 through 11, 12 through 14 and Items 23 through 34 of the notice to admit within twenty (20) days from the date of service of this order with notice of entry.

ORDERED that this constitutes the decision and order of the court.

Dated: 2/2/2023



Hon. LUCINDO SUAREZ, J.S.C.
LUCINDO SUAREZ, J.S.C.