

**Damico v JNK-42 LLC**

2025 NY Slip Op 30795(U)

March 10, 2025

Supreme Court, New York County

Docket Number: Index No. 154323/2022

Judge: Emily Morales-Minerva

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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. EMILY MORALES-MINERVA PART 42M

Justice

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INDEX NO. 154323/2022

VINCENZO DAMICO,

MOTION DATE 12/20/2024

Plaintiff,

MOTION SEQ. NO. 001

- v -

JNK-42 LLC, ARDEON REALTY CORP., 311 WEST 42ND STREET ASSOCIATES LLC, TRITON CONSTRUCTION COMPANY, LLC

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65

were read on this motion to/for

DISCOVERY

APPEARANCES:

The Perecman Firm, P.L.L.C, New York, NY (Zahcary Salman Perecman, Esq., of counsel), for plaintiff.

EMILY MORALES-MINERVA, J.S.C.

In this labor law action, plaintiff VINCENZO DAMICO (plaintiff) moves, unopposed, by notice of motion (sequence number 001), for orders (a) compelling non-parties Paul DiMaria and Shkelzin Nigki, employees of non-party Civetta Cousins JV LLC, to appear for deposition pursuant to CPLR §§ 2308 (a)1 and

1 CPLR § 2308 (a) provides, "Failure to comply with a subpoena issued by a judge, clerk or officer of the court shall be punishable as a contempt of court. If the witness is a party the court may also strike his or her pleadings. A subpoenaed person shall also be liable to the person on whose behalf the subpoena was issued for a penalty not exceeding one hundred fifty dollars and damages sustained by reason of the failure to comply. A court may issue a warrant directing a sheriff to bring the witness into court. If a person so subpoenaed attends or is brought into court, but refuses without reasonable cause to be examined, or to answer a legal and pertinent question,

3124;<sup>2</sup> (b) compelling Civetta Cousins JV LLC to comply with plaintiff's subpoena duces tecum pursuant to CPLR §§ 2308 (a) and 3124; and (c) holding Civetta Cousins JV LLC in contempt of court pursuant to CPLR § 2308 (a).

As explained below, plaintiff's motion (seq. no. 001) is granted, in part, and is otherwise denied.

#### BACKGROUND

Plaintiff VINCENZO DAMICO (plaintiff), an employee of non-party and general contractor Civetta Cousins JV LLC (Civetta Cousins), was injured while performing construction work at a building located at 312 West 43<sup>rd</sup> Street, New York, New York (premises) (see New York State Courts Electronic Filing System [NYSCEF] Doc. No. 001, Complaint). Defendants JNK-42 LLC, ARDEON REALTY CORP., and 311 WEST 42ND STREET ASSOCIATES LLC (owners) own and maintain the premises, and defendant TRITON

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or to produce a book, paper or other thing which he or she was directed to produce by the subpoena, or to subscribe his or her deposition after it has been correctly reduced to writing, the court may forthwith issue a warrant directed to the sheriff of the county where the person is, committing him or her to jail, there to remain until he or she submits to do the act which he or she was so required to do or is discharged according to law. Such a warrant of commitment shall specify particularly the cause of the commitment and, if the witness is committed for refusing to answer a question, the question shall be inserted in the warrant.

<sup>2</sup> CPLR § 3124 provides, "If a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, except a notice to admit under section 3123, the party seeking disclosure may move to compel compliance or a response."

CONSTRUCTION COMPANY, LLC (construction manager) was hired by owners as the construction manager and primary general contractor to perform construction work at said premises (see id.).

On May 18, 2022, plaintiff commenced the instant action against defendants, seeking to recover damages. Plaintiff alleges that on or around December 15, 2021, while working in an excavation pit at the premises, a rock rolled down a pile of dirt and struck his right leg (see id.; see also NYSCEF Doc. No. 57, Incident Report).

On July 13, 2022, defendants (owners and construction manager) answered (see NYSCEF Doc. No. 12, Answer).

As part of discovery, plaintiff served deposition subpoenas upon non-parties Paul DiMaria and Shkelzin Niqki, employees of plaintiff's non-party employer, Civetta Cousins (see NYSCEF Doc. Nos. 44, 47 Judicial Subpoenas Ad Testificandum, dated June 25, 2024). Plaintiff also served a document subpoena upon his employer, Civetta Cousins (see NYSCEF Doc. No. 43, Judicial Subpoena Duces Tecum, dated June 25, 2024). Copies of said subpoenas were also served upon defendants (see NSYCEF Doc. Nos. 43, 46, 49, Affidavits of Service).

Paul DiMaria and Shkelzin Niqki failed to appear for their depositions scheduled for August 8, 2024. Despite plaintiff's extensive communications with Civetta Cousins, including on

August 8, 2024, August 23, 2024, September 12, 2024, October 16, 2024, October 24, 2024, October 29, 2024, November 4, 2024, and November 21, 2024, the depositions of Paul DiMaria and Shkelzin Nigki remain outstanding (see NYSCEF Doc. No. 54, Affirmation of Good Faith). Similarly, Civetta Cousins has failed to respond to plaintiff's document subpoena (see id.).

Consequently, plaintiff moves (motion seq. no. 001) for orders (a) compelling non-parties Paul DiMaria and Shkelzin Nigki, employees of non-party Civetta Cousins, to appear for deposition pursuant to CPLR §§ 2308 (a) and 3124; (b) compelling Civetta Cousins to comply with plaintiff's subpoena duces tecum pursuant to CPLR §§ 2308 (a) and 3124; and (c) holding Civetta Cousins in contempt of court pursuant to CPLR § 2308 (a).

Neither defendants nor Civetta Cousins appear or otherwise oppose the motion.

#### ANALYSIS

CPLR § 3101 (a) generally governs disclosure, directing that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof" (emphasis added). The "'statute embodies the policy determination that liberal discovery encourages fair and effective resolution of disputes

on the merits, minimizing the possibility for ambush and unfair surprise' " (Forman v Henkin, 30 NY3d 656, 661 [2018], quoting Spectrum Sys. Intl. Corp. v Chemical Bank, 78 NY2d 371, 376 [1991])).

CPLR § 3101 (a)(4) provides a mechanism for parties to take depositions of non-party witnesses, and the Court of Appeals has held that parties are entitled to take the deposition of a nonparty witness when that witness' testimony is "material and necessary" (Kapon v Koch, 23 NY3d 32, 38 [2014]; see also Schroder v Consol. Edison Co. of New York, Inc., 249 AD2d 69, 70 [1st Dept 1998] [holding that there shall be full disclosure of all matter material and necessary in the prosecution or defendant of an action by a non-party, upon notice stating the circumstances or reasons such disclosure is sought or required])).

Whether the non-party witness' deposition is "material and necessary [must be] interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (Forman v Henkin, 30 NY3d 656, 661 [2018], quoting Allen v Crowell-Collier Publ. Co., 21 NY2d 403, 406, [1968], citing Andon v 302-304 Mott St. Assoc., 94 NY2d 740, 746 [2000]); see

also Tutor Perini Corp. v ERY Tenant LLC, 210 AD3d 611 [1st Dept 2022]).

To depose a witness who is a non-party, the party seeking the deposition must first subpoena the witness (see CPLR § 3106 [b]).<sup>3</sup> Then, if the subpoenaed party fails to comply with the subpoena, the party seeking the deposition may move to compel compliance (see generally CPLR § 3124). However, "no motion [relating to disclosure] shall be filed with the court unless [as here] there have been served and filed with the motion papers . . . an affirmation that counsel has conferred with [] the opposing party in a good faith effort to resolve the issues raised by the motion" (Uniform Civil Rules for the Supreme Court and County Court [22 NYCRR] § 202.7; see NYSCEF Doc. No. 54, Affirmation of Good Faith).

Here, plaintiff duly served deposition subpoenas on non-party witnesses Paul DiMaria and Shkelzin Niqki (see NYSCEF Doc. Nos. 58, 59, Affidavits of Service).<sup>4</sup> Further, the subpoenas

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<sup>3</sup> CPLR § 3106 (b) provides, "Where the person to be examined is not a party or a person who at the time of taking the deposition is an officer, director, member or employee of a party, he shall be served with a subpoena. Unless the court orders otherwise, on motion with or without notice, such subpoena shall be served at least twenty days before the examination. Where a motion for a protective order against such an examination is made, the witness shall be notified by the moving party that the examination is stayed."

<sup>4</sup> The affidavits of service demonstrate that Paul DiMaria and Shkelzin Niqki were served with the subpoenas pursuant to CPLR § 308 (3), which provides that personal service upon a natural person shall be made "by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first

plainly state that the non-party witnesses, Paul DiMaria -- who is plaintiff's supervisor -- and Shkelzin Niqki -- plaintiff's colleague and witness to the incident -- are "believed to have information regarding the occurrence of December 15, 2021 [the date of plaintiff's injury]" (NYSCEF Doc. Nos. 44, 47, Judicial Subpoenas Ad Testificandum).

Plaintiff also demonstrates that the information sought is relevant, material, and necessary to the prosecution of this action (see Ledonne v Orsid Realty Corp., 83 AD3d 598 [1st Dept 2011]). Specifically, plaintiff avers that the non-party witnesses "possess critical knowledge regarding the worksite conditions, safety measures, and the accident" (see NYSCEF Doc. No. 55, Affirmation in Support, p 2, ¶ 3), which is supported by the fact that the non-party witnesses are named in the Incident Report (see NYSCEF Doc. No. 57, Civetta Cousins Investigation and Report).

Further, having not appeared on the instant motion, Civetta Cousins proffers no excuse for its failure to produce Paul DiMaria and Shkelzin Niqki for their depositions, despite plaintiff engaging in good faith efforts to schedule such (see NYSCEF Doc. No. 54, Affirmation of Good Faith). Accordingly,

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class mail to the person to be served at his or her actual place of business in an envelope bearing the legend "personal and confidential" and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served."

the court grants plaintiff's motion (seq. no. 001) to the extent that non-parties Paul DiMaria and Shkelzin Nigki must appear for deposition on or before June 5, 2025.

Likewise, plaintiff demonstrates that the disclosures sought in the document subpoena are relevant, material, and necessary to the prosecution of this action. Therefore, the court grants plaintiff's motion (seq. no. 001) to the extent that Civetta Cousins must respond to plaintiff's subpoena duces tecum and produce all documents requested on or before June 5, 2025.

The court declines to hold Civetta Cousins in contempt of court without prejudice to renewal. Let it be clear that Civetta Cousins' failure to produce Paul DiMaria and Shkelzin Nigki for their depositions and/or failure to respond to plaintiff's document subpoena on or before June 5, 2025 may result in a finding of contempt of court (see CadleRock Joint Venture, L.P. v Patterson, 199 AD3d 557 [1st Dept 2021], citing Bankers Trust Co. v Braten, 194 AD2d 378 [1st Dept 1993] [holding that non-parties could be held in contempt for their failure to appear at deposition, where standard form subpoenas served on the non-parties complied with statute]).

Accordingly, it is hereby

ORDERED that motion (sequence no. 001) of plaintiff VINCENZO DAMICO to compel non-parties Paul DiMaria and Shkelzin Nigki to appear for deposition is granted; it is further

ORDERED that non-parties Paul DiMaria and Shkelzin Nigki are directed to appear for deposition on or before June 5, 2025; it is further

ORDERED that motion (sequence no. 001) of plaintiff VINCENZO DAMICO to compel non-party Civetta Cousins JV LLC to comply with plaintiff's subpoena duces tecum is granted; it is further

ORDERED that non-party Civetta Cousins JV LLC is directed to respond to plaintiff's subpoena duces tecum and produce all documents requested on or before June 5, 2025; it is further

ORDERED that motion (sequence no. 001) of plaintiff VINCENZO DAMICO to hold non-party Civetta Cousins JV LLC in contempt of court is denied without prejudice; it is further

ORDERED that the parties shall appear for a virtual status conference on June 9, 2025 at 12:30 P.M.

03/10/2025  
DATE

*Emily Morales-Minerva*  
EMILY MORALES-MINERVA, J.S.C.

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