

Saudi v 1500 Prop. Partners, LLC
2025 NY Slip Op 35372(U)
January 9, 2025
Supreme Court, Suffolk County
Docket Number: Index No. 610657/2022
Judge: James F. Quinn
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INDEX No. 610657/2022

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 41 - SUFFOLK COUNTY

PRESENT:

Hon. JAMES F. QUINN
Acting Justice of the Supreme Court

MOT. DATE 11/01/2024 (#002) and
11/05/2024 (#002)
MOT. ADJ. DATE 11/26/2024
Mot. Seq. #002-MD; #003-MD

-----X
EDUARDO SAUDI,
Plaintiff,
- against -
1500 PROPERTY PARTNERS, LLC,
RICHWOOD HOMES, INC., M&R STONY
BROOK, INC., and NELIN CONSTRUCTION
CORP.,
Defendants.

DECISION AND ORDER

GALLAGHER, P.C.
Attorneys for Plaintiff
260 Madison Avenue, 17th Floor
New York, New York 10016

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NELIN CONSTRUCTION CORP.,
Third-Party Plaintiff,

LEWIS BRISBOIS BISGAARD & SMITH, LLF
Attorneys for Defendant
1500 Property Partners, LLC
77 Water Street, 2100
New York, New York 10005

- against -

CLEAR IMAGE STOREFRONTS AND
GLASS, INC.,
Third-Party Defendant.

CULLEN AND DYKMAN, LLP
Attorneys for Defendant and Third-Party Plaintiff
Nelin Construction Corp.
1 Battery Park Plaza, 34th Floor
New York, New York 10004

-----X
1500 PROPERTY PARTNERS, LLC,
Second Third-Party Plaintiff,

BARRY McTIERNAN & MOORE LLC
Attorneys for Third-Party Defendant
Clear Image Storefronts & Glass, Inc.
One Battery Park Plaza, 35th Floor
New York, New York 10004

-against-

CLEAR IMAGE STOREFRONTS AND
GLASS, INC.,
Second Third-Party Defendant.

Richwood Homes, Inc., M&R Stony Brook Inc.
and Nelin Construction Corp. were discontinued
by Stipulation filed January 19, 2023.

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Upon the E-File document list numbered 85-118 and 121-122 and read on motion by Third -Party Defendant Clear Image Storefronts and Glass, Inc. (#002) (“Clear Image”) for an order pursuant to CPLR §3103(a) granting a protective order and pursuant to CPLR §3116(a) striking Plaintiff’s errata sheet and

for an order striking two audio recordings and by Plaintiff Eduardo Saudi (#003) for an order pursuant to CPLR §3103(a) granting a protective order, it is hereby

ORDERED, the application (#002) by Third -Party Defendant Clear Image Storefronts and Glass, Inc. for an order pursuant to CPLR §3103(a) granting a protective order is **denied**; and it is further

ORDERED, the application (#002) by Third -Party Defendant Clear Image Storefronts and Glass, Inc. for an order pursuant to CPLR §3116(a) striking Plaintiff's errata sheet is **denied**; and it is further

ORDERED, the application (#002) by Third -Party Defendant Clear Image Storefronts and Glass, Inc. for an order striking two audio recordings is **denied**; and it is further

ORDERED, the application (#003) by Plaintiff Eduardo Saudi for an order pursuant to CPLR §3103(a) granting a protective order is **denied**.

This is an action to recover damages for personal injuries allegedly sustained by Plaintiff when he fell from a scaffold that allegedly collapsed on February 2, 2022. The action was commenced by the filing of a summons and complaint on June 6, 2022 and by the filing of a supplemental summons and amended complaint on September 1, 2022. Issue was joined on October 14, 2022 by the filing of an answer to the amended complaint by Defendants 1500 Property Partners, LLC ("1500 Property"), Richwood Homes, Inc., M&R Stony Brook Inc. and Nelin Construction Corp.. A Third-Party summons and complaint was filed on January 9, 2023 by Nelin Construction Corp.. Issue was joined by the filing of an answer and counter-claims on March 1, 2023 by Third-Party Defendant Clear Image Storefronts and Glass, Inc.. A Stipulation of Discontinuance was filed on January 19, 2023 discontinuing the action as against Defendants Richwood Homes, Inc. and M&R Stony Brook, Inc.. A Second Third-Party summons and complaint was filed by 1500 Property Partners, LLC on March 6, 2023. Issue was joined by the filing of an answer and counter-claims by Third and Second Party Defendant Clear Image Storefronts and Glass, Inc. on March 30, 2023. A Reply to counter-claims was filed by Defendant/Third-Party Plaintiff Nelin Construction Corp. on March 21, 2023. A Partial Stipulation of Discontinuance was filed on September 6, 2024 discontinuing all common law and contribution claims only as against Clear Image Storefronts and Glass, Inc..

Third -Party Defendant Clear Image Storefronts and Glass, Inc. seeks an order from the court vacating Defendant/Third-Party Plaintiff Nelin Construction Corp.'s ("Nelin") Notice of Deposition for Clear Image employee Donald Barter dated September 27, 2024. Plaintiff seeks an order from the court precluding a further deposition of the Plaintiff by Nelin as demanded in a Notice to Take Deposition dated September 27, 2024 or in the alternative only permit interrogatories. Other than noting the CPLR section counsel for Plaintiff provides no legal or caselaw authority to support its position. Both requests surround the issue of two audio recordings recorded by Plaintiff as between himself and Donald Barter on February 14, 2022 and August 16, 2024. Plaintiff consents to Clear Image's application to not permit a further deposition of Clear Image owner Donald Barter. 1500 Property Partners, LLC did not submit any papers.

CPLR §3101(a) directs that there shall be “full disclosure of all matter material and necessary in the prosecution or defense of an action” (*Kooper v Kooper*, 74 AD3d 6, 10, 901 NYS2d 312 [2d Dept. 2010]). The Court of Appeals has stated the words “material and necessary” are to be interpreted 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” (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406, 288 NYS2d 449 [1968]). “The test is one of usefulness and reason” (*Yoshida v Chin*, 111 AD3d 704, 705, 974 NYS2d 580 [2d Dept. 2013]). “If there is any possibility that the information is sought in good faith for possible use as evidence-in-chief or in rebuttal or for cross-examination, it should be considered ‘evidence material in the prosecution or defense’” (*Allen v Crowell-Collier Publ. Co., Id.*, at 407, 288 NYS2d 449, quoting CPLR 3101). Further, CPLR §3124 provides that a party seeking disclosure may move to compel compliance or a response “if a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order.” In this regard, “it is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims” (*Vyas v Campbell*, 4 AD3d 417, 771 NYS2d 375 [2d Dept. 2004] citing *Crazytown Furniture, Inc. v Brooklyn Union Gas Co.*, 150 AD2d 420, 541 NYS2d 30 [2d Dept. 1989]). However, the principle of “full disclosure does not give a party the right to uncontrolled and unfettered disclosure” (*Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531, 531, 845 NYS2d 124 [2d Dept. 2007]) and a court has discretion to limit disclosure and issue a protective order “to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts” (CPLR §3103(a); *Nimkoff v Central Park Plaza Assoc., LLC*, 123 AD3d 679, 680–681, 997 NYS2d 698 [2d Dept. 2014]; *Diaz v City of New York*, 117 AD3d 777, 985 NYS2d 695 [2d Dept. 2014]; *County of Suffolk v Long Is. Power Auth.*, 100 AD3d 944, 946, 954 NYS2d 619 [2d Dept. 2012]; *Conte v County of Nassau*, 87 AD3d 558, 559, 929 NYS2d 741 [2d Dept 2011]; *Accent Collections, Inc. v Cappelli Enters., Inc.*, 84 AD3d 1283, 924 NYS2d 545 [2d Dept 2011]). The burden is on the moving party to establish the need for a protective order (*Koump v Smith*, 25 NY2d 297 [1969]; *Bombard v Amica Mut. Ins. Co.*, 11 AD3d 647, 783 NYS2d 85 [2d Dept 2004]) by making a “factual showing of unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice” (*Cascardo v Cascardo*, 136 AD3d 729, 729, 24 NYS3d 742 [2d Dept. 2016]; *State of New York v General Elec. Co.*, 215 AD2d 928, 626 NYS2d 861 [2d Dept. 1995]). “If the disclosure sought is of relevant material and does not come under any of the immunities...of CPLR 3101, it will be a rare case in which CPLR 3103 is applied to deny disclosure altogether” (*Willis v Cassia*, 255 AD2d 800, 680 NYS2d 313 [3d Dept. 1998]). A motion for a protective order should not be granted when supported “solely by an attorney’s affirmation containing only conclusory allegations of hardship” (*Boylin v Eagle Tel.*, 130 AD2d 538, 538 [2d Dept. 1987]). “The supervision of disclosure and the setting of reasonable terms and conditions therefore rests within the sound discretion of the trial court and, absent an improvident exercise of that discretion, its determination will not be disturbed” (*Mattocks v White Motor Corp.*, 258 A.D.2d 628, 629, 685 N.Y.S.2d 764 [2d Dept. 1999]). “This discretion is to be exercised with the competing interests of the parties and the truth-finding goal of the discovery process in mind” (*Cascardo v Cascardo*, 136 AD3d 729, 730, 24 NYS3d 742 [2d Dept. 2016]).

Here, both Third -Party Defendant Clear Image Storefronts and Glass, Inc. and Plaintiff Eduardo Saudi submitted attorney affirmations in support of their applications and have failed to provide an affidavit in support of their respective motions seeking a protective order (*see Boylin v Eagle Telephonics*, 130 AD2d 538, 538, 515 NYS2d 273 [2d Dept. 1987])(attorney affirmation insufficient on a motion pursuant to CPLR §3103(a)); *see also Gonzalo v Fragomeni*, 221 AD3d 586, 199 NYS3d 559 [2d Dept 2023]; *Thomas v Alleyne*, 302 AD2d 36, 752 NYS2d 362 [2d Dept. 2002]). As such, Third -Party Defendant Clear Image Storefronts and Glass, Inc. and Plaintiff Eduardo Saudi have not met their burden to warrant the requested relief pursuant to CPLR §3103(a) (*see, e.g., Ural v Encompass Ins. Co. of Am.*, 158 AD3d 845, 73 NYS3d 91 [2d Dept. 2018]; *Ligoure v City of New York*, 128 AD3d 1027, 9 NYS3d 678 [2d Dept. 2015]; *Yoshida v Chin*, 111 AD3d 704, 706, 974 NYS2d 580, 582 [2d Dept. 2013]; *Boylin v Eagle Telephonics*, *supra*).

Clear Image is seeking an order pursuant to CPLR §3116(a) striking Plaintiff's errata sheet arguing it is untimely and references events that occurred after Plaintiff's deposition. Plaintiff's deposition was taken on July 24, 2024. The second recording occurred on August 16, 2024. Clear Image states that they received both the February 14, 2022 and August 16, 2024 recordings on or about September 7, 2024. Plaintiff alleges that it wasn't until after he spoke with Donald Barter in August 2024 that he remembered he had an earlier recording between himself and Donald Barter. Clear Image argues that Clear Image's discovery responses indicated Plaintiff was not in possession of any recordings, yet he was. Clear Image alleges that Plaintiff speaking with Donald Barter after his deposition was an attempt to intimidate a witness and knew Mr. Barter was represented by counsel and therefore should have not spoken to him. Plaintiff opposes the application and argues that the return of Plaintiff's deposition transcript was timely served upon 1500 Property and courtesy copies e-mailed to all other parties and that the errata sheet does not contain any admissions or changes in Plaintiff's deposition testimony. Plaintiff provides no caselaw or legal authority to support its position. Nelin opposes the application and argues there is no prohibition against parties speaking with each other and that Donald Barter could not have been questioned at his deposition about the recordings as the recordings had not yet been turned over to counsel. Clear Image is also seeking an order striking the two recordings of February 14, 2022 and the August 16, 2024, however, does not provide any caselaw or legal authority to support that position. Plaintiff does not address the application to strike the recordings.

"CPLR 3116(a) provides that a witness may make "changes in form or substance" to his or her deposition testimony as long as such changes are accompanied by "a statement of the reasons given by the witness for making them." A correction will be rejected where the proffered reason for the change is inadequate (*see Ashford v Tannenhauser*, 108 AD3d 735, 736 [2013]; *Shell v Kone El. Co.*, 90 AD3d 890, 891 [2011]; *Kelley v Empire Roller Skating Rink, Inc.*, 34 AD3d 533, 534 [2006]). Further, material or critical changes to testimony through the use of an errata sheet is also prohibited (*see Horn v 197 5th Ave. Corp.*, 123 AD3d 768, 770 [2014])" (*Torres v Board of Educ. Of City of N.Y.*, 137 AD3d 1256, 29 NYS3d 396 [2d Dept 2016]).

Here, Nelin is seeking to have a further deposition of the owner of Clear Image, Donald Barter, and the Plaintiff Eduardo Saudi as it relates to the two recordings of February 14, 2022 and the August 16, 2024 as they were provided to counsel after the depositions of Plaintiff and Donald Barter were completed. Plaintiff’s counsel argues that upon learning that his client had the recordings they were immediately turned over. CPLR §3101(a) directs that there shall be “full disclosure of all matter material and necessary in the prosecution or defense of an action” (*Kooper v Kooper, supra*).

In the interest of judicial economy and the efficient utilization of everyone’s resources the Court finds that as discovery is an ongoing obligation and this action has not yet been certified ready for trial they will not be stricken. Further, the Court finds the allegation that the errata sheet was nineteen (19) days late and therefore should be stricken is not equitable in this case. The Court finds Plaintiff’s reference to a conversation that took place after his deposition does not substantively change, alter or effect his deposition testimony. The Court finds the reference part of the explanation regarding the recall of an earlier recorded conversation and production of the subject recordings.

Accordingly, it is hereby

ORDERED, Nelin Construction Corp. shall be permitted to take the further deposition of the Plaintiff Eduardo Saudi only as it relates to the recordings of February 14, 2022 and the August 16, 2024; and it is further


ORDERED, Nelin Construction Corp. shall be permitted to take the further deposition of Donald Barter, the owner of Clear Image Storefronts and Glass, Inc., only as it relates to the recordings of February 14, 2022 and the August 16, 2024; and it is further

ORDERED, all parties are directed to restrict their questions only as to the matters directly related to the instant action contained in the recordings of February 14, 2022 and the August 16, 2024, any discussions regarding other individuals and/or their personal matters are completely off limits and counsel are prohibited from questioning or addressing those matters in any way; and it is further

ORDERED, that counsel shall appear **IN PERSON** for a Compliance Conference on **January 21, 2025 at 9:30am**, as scheduled.

The foregoing constitutes the *Decision and Order* of this Court.

Dated: January 9, 2025
Riverhead, New York


HON. JAMES F. QUINN, A.J.S.C.

_____ FINAL DISPOSITION XX NON-FINAL DISPOSITION