

Hettich v 125 E. 50th St. Co. LLC
2016 NY Slip Op 31013(U)
May 25, 2016
Supreme Court, New York County
Docket Number: 116525/07
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 2

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BRIAN HETTICH,

Plaintiff,

-against-

DECISION/ORDER

Index No. 116525/07
Mot. Seq. No. 15

125 EAST 50th STREET CO. LLC, DENIHAN
OWNERSHIP COMPANY, LLC, DHG
MANAGEMENT COMPANY, LLC, and
BENJAMIN RESTAURANT, LLC,

Defendants.

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125 EAST 50th STREET CO., LLC, DENIHAN
OWNERSHIP COMPANY, LLC,

Third-Party Plaintiffs,

-against-

Index No. 590301/09

NOUVEAU ELEVATOR INDUSTRIES, INC.

Third-Party Defendant.

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HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF
THIS MOTION.

PAPERS

NUMBERED

ORDER TO SHOW CAUSE, AFF. IN SUPP. AND EXHIBITS ANNEXED.....	1, 2 (Exs. A-K)
SALOTTO AFF. IN OPP. AND EXHIBIT ANNEXED.....	3 (Ex.)
BIGELOW AFF. IN OPP. AND EXHIBITS ANNEXED.....	4 (Exs. A-D)
REPLY AFF. IN SUPP.....	5

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

Defendants move for an order, pursuant to CPLR 3126 (1), compelling third-party defendant Nouveau Elevator Industries, Inc. to comply with their notice for discovery and inspection or, in the alternative, precluding Nouveau from offering into evidence at trial any documents which have not been produced by it; and (2) compelling plaintiff to provide a response to defendants' notice for discovery and inspection for updated authorizations or, in the alternative, precluding plaintiff from offering into evidence at trial any documents which have not been produced by him.¹ Plaintiff and Nouveau submit written opposition. Following oral argument and a review of the papers and relevant statutes and case law, the motion is **denied in part on the merits and denied in part as moot.**

Factual and Procedural Background:

This action stems from a work related incident in which plaintiff, an elevator mechanic, was allegedly injured in October 2007 while helping to replace the controller of a dumbwaiter at the Benjamin Hotel, an establishment owned and operated by defendants. (Ex. B to Aff. in Supp.) In April 2009, defendants impleaded Nouveau, alleging, among other things, contractual indemnification. (Ex. C to Aff. in Supp.) In July 2011, plaintiff filed the first note of issue and certificate of readiness. (Ex. D to Aff. in Supp.) In August 2011, Nouveau moved to vacate the note of issue and certificate of readiness (motion sequence number 10), which motion was granted by this Court (Feinman, J.) in an order entered January 17, 2012.² Thereafter, defendants moved for

¹ While the motion initially sought relief against plaintiff for failure to comply with discovery demands, defendants concede in their reply papers that, since plaintiff has complied with the demands, the branch of the motion directed at him is moot.

² This Court may take judicial notice of undisputed court records and files. *See Matter of Moynihah v New York City Health & Hosps. Corp.*, 120 AD3d 1029, 1041 n 1 (1st Dept 2014).

summary judgment dismissing the complaint (motion sequence number 11), which motion was granted by this Court (Feinman, J.), in an order entered October 1, 2012. (Ex. E to Aff. in Supp.) Plaintiff appealed and, in April 2014, the Appellate Division, First Department modified the order by denying defendants' motion. 116 AD3d 525, 525 (1st Dept 2014).

Thereafter, there was a status conference held on October 8, 2014, which culminated in an order of this Court (York, J.) directing, among other things, that there be further depositions of Mark Tighe and Don Speranza limited to the issue of a modification agreement related to Nouveau's insurance policy scheduled for November 3, 2014. (Ex. H to Aff. in Supp.) The order set a November 21, 2014 deadline for filing the note of issue. (*Id.*) On November 21, 2014, plaintiff filed another note of issue and certificate of readiness. (Ex. G to Aff. in Supp.) No party has moved to vacate that second note of issue and certificate of readiness.

On March 20, 2015, defendants served a demand for discovery, inspection and photocopying on Nouveau requesting:

- (1) The names (and last known addresses if no longer employed) of Nouveau's 'Admins' working for the company in 2005;
- (2) The identity of Nouveau's insurance broker in 2005, including its account representative/agent;
- (3) The identity of the Admin at Nouveau who transmitted a copy of the Modification Agreement (Exhibit 'D' and/or 'D1', marked during Mark Tighe's deposition in this action) to Nouveau's insurance company and/or broker for approval;
- (4) The person at Nouveau's insurance company and/or broker to whom a copy of [said] Modification Agreement . . . was sent for approval;
- (5) Any and all correspondence (letters, facsimile, electronic, etc.) generated in connection with the transmission of a copy of the Modification Agreement to Nouveau's insurance company and/or broker for approval;
- (6) Any and all correspondence (letters, facsimile, electronic, etc.) generated in connection with the transmission of a copy of the Modification Agreement from Nouveau's insurance company and/or broker back to Nouveau;
- (7) True and complete copies of all policies of insurance providing Nouveau with coverage for the subject claim including all declarations pages and endorsements;
- (8) True and complete copies of all certificates of insurance reflecting all policies of insurance providing Nouveau with coverage for this claim;
- (9) True and complete

copies of all files related to Nouveau's active contracts/agreements with [defendant Denihan Ownership Company, LLC] in effect during the time period of 2002 to 2008; (10) True and complete copies of all electronic file documents related to Nouveau's active contracts/agreements with Denihan in effect during the time period of 2002 to 2008; (11) True and complete copies of all job folders, work tickets, invoices, bills, etc. related to work performed by Nouveau on the dumbwaiter at the Benjamin Hotel during the time period of 2002 to 2008; (12) A true and complete copy of job folder related to job #66786.

(Ex. I to Aff. in Supp.) On April 16, 2015, Nouveau served a response to the demand, objecting to all of the items on the ground that, among other things, the demands were improperly made following the filing of the note of issue and certificate of readiness without a showing of the requisite unusual or unanticipated circumstances. (Ex. J to Aff. in Supp.) In January 2016, over one year after the filing of the second note of issue, defendants brought the instant motion, by order to show cause, seeking to compel Nouveau to comply with their March 20, 2015 discovery demand.

Positions of the Parties:

Defendants assert that they are entitled to the discovery requested and refer to Nouveau's objection as a "blanket objection based solely upon the fact that the demand was served post-note of issue" – "a flawed timeliness argument." Defendants support their moving papers with no citation to legal authority. Nouveau contends in response that defendants' demands have been improperly served after the filing of the note of issue without moving for permission to engage in additional discovery or a showing of unusual or unanticipated circumstances. Additionally, Nouveau contends that any factual issues concerning the modification agreement for which defendants now seek discovery have been known by them since 2009. Defendants assert in reply that they are entitled to the discovery requested and that the timing of the November 2014 depositions, alone, constituted an "unusual circumstance that justifies the minimal delay in seeking post-[n]ote of [i]ssue discovery"

Conclusions of Law:

Where a party seeks to engage in post-note of issue discovery, it may either move to vacate the note of issue within 20 days of its service on the ground that the case was not ready for trial or move to request permission to engage in such discovery, which motion must be supported by a showing of “unusual or unanticipated circumstances” that “require additional pretrial proceedings to prevent substantial prejudice.” 22 NYCRR 202.21 (d); *see* 22 NYCRR 202.21 (e); *Singh v Finneran*, 100 AD3d 735, 736 (2d Dept 2012); *Madison v Sama*, 92 AD3d 607, 607 (1st Dept 2012); *Med Part v Kingsbridge Hgts. Care Ctr., Inc.*, 22 AD3d 260, 261 (1st Dept 2005). Here, defendants failed to move for permission to engage in post-note of issue discovery, as they are required to do pursuant to 22 NYCRR 202.21. That procedural irregularity, alone, warrants this Court’s denial of the instant motion. *See Singh v Finneran*, 100 AD3d at 735.

Even construing this motion as a properly made motion to request permission to engage in discovery, however, this Court finds that it is not adequately supported by the requisite showing of unusual or unanticipated circumstances. Defendants waited four months after the note of issue was filed to attempt to engage in discovery related to issues they claim came to light as a result of the depositions taken on November 4, 2014. Even if this Court were to credit defendants’ assertion that they had no knowledge of the issues related to the modification agreement before November 4, 2014, they have provided no excuse whatsoever for failing to make their demands before the second note of issue was filed, for failing to move to vacate the note of issue within 20 days after its filing on the ground that they were owed discovery or in any way demonstrating that there are unusual or unanticipated circumstances warranting permission to engage in additional discovery. *Compare Wiebusch v Bethany Mem. Reform Church*, 51 AD3d 577, 577-578 (1st Dept 2008) (holding that the

illness of plaintiff's prior attorney constituted unusual or unanticipated circumstances). Indeed, as noted above, defendants waited until January 2016, over one year after the filing of the second note of issue, to bring the instant motion. Defendants have failed to set forth, and this Court is unable to discern, any reason for defendants' untimely and procedurally irregular demands apart from "a lack of diligence." *Nikqi v Dedona Contr. Corp.*, 117 AD3d 620, 620 (1st Dept 2014); *Colon v Yen Ru Jin*, 45 AD3d 359, 359-360 (1st Dept 2007).

Therefore, in accordance with the foregoing, it is hereby:


ORDERED that the branch of the motion seeking to compel third-party defendant Nouveau Elevator Industries, Inc. to comply with their notice for discovery and inspection or, in the alternative, precluding Nouveau from offering into evidence at trial any documents which have not been produced by it is denied; and it is further,

ORDERED that the branch of the motion seeking to compel plaintiff to provide a response to defendants' notice for discovery and inspection for updated authorizations or, in the alternative, precluding plaintiff from offering into evidence at trial any documents which have not been produced by him is denied as moot; and it is further,

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

DATED: May 25, 2016

ENTER:



Hon. Kathryn E. Freed, J.S.C.

**HON. KATHRYN FREED
JUSTICE OF SUPREME COURT**