

**Hornick v Pal Gen. Constr. Corp.**

2018 NY Slip Op 33243(U)

December 17, 2018

Supreme Court, New York County

Docket Number: 153091/2014

Judge: David Benjamin Cohen

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID BENJAMIN COHEN PART IAS MOTION 58EFM

Justice

-----X

PETER HORNICK,
Plaintiff,

- v -

PAL GENERAL CONSTRUCTION CORP.,
Defendant.

INDEX NO. 153091/2014
MOTION DATE 08/14/2018
MOTION SEQ. NO. 002

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78

were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE/JURY DEMAND/FROM TRIAL CALENDAR

Upon the foregoing documents:

In this action to recover monetary losses for property damage, defendant/third-party plaintiff PAL General Construction Corporation (PAL or defendant) moves, pursuant Uniform Rule Section 202.21 (e), to vacate the note of issue (NOI) and certificate of readiness and strike this matter from the trial calendar due to the existence of significant outstanding discovery. In the alternative, PAL moves, pursuant to CPLR 2004 and 3212(a), to request additional time to complete outstanding discovery and extend the time to interpose a motion for summary judgment. The motion is opposed by plaintiff.

I. Background and Procedural History

Plaintiff is the proprietary lessee of a cooperative apartment in the building located at 177 West 83rd Street, New York, New York, which is on the top floor of the building. PAL undertook to do certain work in connection with repairs to the building, which allegedly resulted in the collapse of plaintiff's ceiling and caused asbestos to fall into the apartment.

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The summons and complaint in this instant matter were filed on April 1, 2014. PAL's pre-answer motion to dismiss, pursuant to CPLR 3211(a)(1), (4), (5) and (10), was denied by Hon. Donna M. Mills on October 1, 2014 (NYSCEF Doc. No. 18) and defendant served an answer on November 3, 2014. A third-party summons and complaint was filed on December 9, 2015 and the corresponding answer was filed on January 25, 2016.

Previously, a separate but related action was filed by plaintiff against PAL and other defendants in New York county under index No. 106753/11. On July 25, 2012, Justice Madden denied plaintiff's cross-motion for a default judgment against PAL without prejudice to renewal on papers in compliance with CPLR 3215.

As related in Justice Donna M. Mills's decision and order dated October 7, 2014, rather than renewing his motion papers, "plaintiff filed this new lawsuit [index No. 153091/14] against the defendant with a different date of loss arising out of the same incident" (NYSCEF Doc. No. 18 at 2).

A stipulation dated April 27, 2018 discontinuing the third-party action with prejudice was filed with the court (NYSCEF Doc. No. 48).

A preliminary conference order was issued on November 14, 2014 (NYSCEF Doc. No. 21) followed by numerous compliance conferences and status conference orders between March 13, 2015 through and including July 11, 2018 signed, respectively, by Justices Donna M. Mills, Justice Michael L. Katz and this court (NYSCEF Doc. Nos. 23-25, 31, 32, 33, 34, 36-38, 44, 47, and 50). The parties were first directed to file the NOI as early as July 7, 2015 (NYSCEF Doc. No. 23) and more recently on March 28, 2018, the court ordered the NOI to be filed on or before

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July 25, 2018 (NYSCEF Doc. No. 47) and affirmed same again on July 11, 2018 (NYSCEF Doc. No. 50).

The NOI was filed on July 26, 2018 by plaintiff's attorney (NYSCEF Doc. No. 53). Defendant's instant motion was filed on August 14, 2018.

## II. Motion to Vacate the Note of Issue

Defendant argues that discovery is far from being complete as plaintiff's further deposition, outstanding discovery responses and defense expert inspections remain outstanding. Defendant further argues that plaintiff filed the NOI within a week and a half of filing his Amended Verified Response to Demand for Bill of Particulars (Amended BOP) and that defendant did not have the opportunity to question plaintiff regarding the alleged further damages or to obtain documentation pertaining to same. In the event the court denies defendant's motion, it requests, in the alternative, that the time for dispositive motions be extended 60 days.

Plaintiff argues in opposition that the NOI was filed, pursuant to the court's July 11, 2018 order and that the only discovery outstanding was a site inspection, which was scheduled for May 24, 2018 according to the court's March 28, 2018 order. However, defendant never scheduled the inspection. While defendant was given leave to conduct the site inspection on or before July 25, 2018, pursuant to the court's July 11, 2018 order, no inspection was scheduled or performed, nor was an extension of time for an inspection requested.

Plaintiff further argues that the Amended BOP merely incorporated those damages testified to in the deposition held on January 29, 2018, culminating in a 100-page transcript.

In reply, defendant argues that plaintiff amended his Verified Response to the Demand for Verified Bill of Particulars (BOP) on July 12, 2018 to assert supplemental damages representing \$500,000 more than in his original BOP, the day after the court's July 11, 2018 compliance conference, therefore entitling defendant to obtain further documentation in connection with the Amended BOP. Defendant also points out that it reserved its right to hold the inspection in the event it could not be held prior to the filing of the NOI as set forth in the court's July 11, 2018 order. Finally, defendant argues that the outstanding discovery is material and necessary to the defense of its case.

According to the Uniform Civil Rules for the Supreme Court and the County Court:

“(e) Vacating note of issue. Within 20 days after service of a note of issue and certificate of readiness, any party to the action or special proceeding may move to vacate the note of issue, upon affidavit showing in what respects the case is not ready for trial, and the court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some material respect”

(22 NYCRR 202.21[e]).

As set forth in the record, plaintiff first served a BOP on April 8, 2015 (NYSCEF Doc. No. 63), and subsequently filed an Amended BOP on July 12, 2018 (NYSCEF Doc. No. 64).

On or about July 27, 2018, defendant served a Notice to Take Deposition Upon Oral Examination on plaintiff based on the claims for damages within the Amended BOP dated July 12, 2018 (NYSCEF Doc. No. 67). On or about August 9, 2018, defendant served a Notice for Discovery and Inspection (NYSCEF Doc. No. 66) and Demand for Remediation Information and Documentation (NYSCEF Doc. No. 68).

The court takes note of defendant's May 23, 2018 correspondence advising plaintiff that, due to a miscommunication, one of its expert is no longer available to proceed with the previously scheduled May 24, 2018 site inspection and requesting that plaintiff's counsel cooperate to

reschedule an inspection at a mutually agreed upon date and time (NYSCEF Doc. No. 65). Defendant specifically states therein that it has not waived the site inspection (*id.*).

A July 11, 2018 compliance conference order directed the parties to hold a site inspection of the premises on or before July 25, 2018 (NYSCEF Doc. No. 50). The order further specified that defendant reserves the right to hold an inspection in the event the inspection cannot be held prior to the filing of the NOI on or before July 25, 2018 in accordance with the previous order (*id.*).

The note of issue should be vacated where a party moves within the time prescribed, pursuant to 22 NYCRR 202.21[e], and demonstrates that the certificate of readiness contains erroneous facts, including an incorrect statement that discovery has been completed or waived (*Pua v Lam*, 155 AD3d 487, 487 [1<sup>st</sup> Dept 2017]; *Matos v City of New York*, 154 AD3d 532, 533 [1<sup>st</sup> Dept 2017]; *Ortiz v Arias*, 285 AD2d 390, 390 [1<sup>st</sup> Dept 2001]; *Cromer v Yellen*, 268 AD2d 381, 381 [1<sup>st</sup> Dept 2000]).

Here, defendant pointed out that plaintiff served an Amended BOP, which reflects an additional approximately \$500,000 in damages, the day after this court issued its last compliance conference order. Contrary to what is averred in the certificate of readiness, discovery is still outstanding in that plaintiff has yet to respond to defendant's Notice to Take Deposition Upon Oral Examination, Notice for Discovery and Inspection and Demand for Remediation Information and Documentation. Furthermore, plaintiff's allegations that defendant waived the inspection are belied by the record (*Vargas v Villa Josefa Realty Corp.*, 28 AD3d 389, 391 [1<sup>st</sup> Dept 2006]; *see also Cromer*, 268 AD2d at 381).

In light of the foregoing, the recital in the certificate of readiness that discovery is complete or waived is incorrect thus necessitating the granting of defendant's motion to vacate the NOI (*Munoz v 147 Corp.*, 309 AD2d 647, 648 [1<sup>st</sup> Dept 2003]; *Ortiz v Arias*, 285 AD2d at 390).

Based on the above, that branch of defendant's motion seeking, in the alternative, an extension of time to file a summary judgment motion is rendered moot.

**III. Conclusion**

Accordingly, it is

ORDERED that the motion is granted and the note of issue is vacated and the case is stricken from the trial calendar; and it is further ordered

ORDERED that all further discovery in this matter shall be completed within 60 days from the date hereof; and it is further

ORDERED that the parties shall appear for a conference in Room 574, 111 Centre Street, on February 20, 2019 at 9:30 a.m. with a copy of this order; and it is further

ORDERED that, within 15 days from the entry of this order, movant shall serve a copy of this order with notice of entry on all parties and upon the Clerk of the Trial Support Office (Room 158), who is hereby directed to strike the case from the trial calendar and make all required notations thereof in the records of the court; and it is further

ORDERED that, within 15 days from completion of discovery as hereinabove directed, the plaintiff shall cause the action to be placed upon the trial calendar by the filing of a new note of issue and statement of readiness and payment of the fee therefor.

12/17/2018  
DATE

  
DAVID BENJAMIN COHEN, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE