

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Nº 13-CV-3006 (JFB)(ARL)

JOSEPH A. FERRARA, SR., FRANK H. FINKEL, MARC HERBST, DENISE RICHARDSON,
THOMAS F. CORBETT, THOMAS GESUALDI, LOUIS BISIGNANO, ANTHONY D'AQUILA,
MICHAEL O'TOOLE, AND BENEDETTO UMBRA, AS TRUSTEES AND FIDUCIARIES OF
THE LOCAL 282 PENSION TRUST FUND,

Plaintiffs,

VERSUS

SMITHTOWN TRUCKING CO., INC., SMITHTOWN CONCRETE PRODUCTS, CORP., AND
SMITHTOWN REALTY CORP.

Defendants.

MEMORANDUM AND ORDER

October 30, 2015

JOSEPH F. BIANCO, District Judge:

The Trustees (“plaintiffs” or “Trustees”) of the Local 282 Pension Trust Fund (the “Fund”) bring this action for withdrawal liability against defendants Smithtown Trucking Co., Inc. (“Smithtown Trucking”), Smithtown Concrete Products, Corp. (“Smithtown Concrete”), and Smithtown Realty Corp. (“Smithtown Realty”) (collectively, “defendants”) pursuant to Sections 502, 515, 4212, and 4301 of the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. §§ 1001 *et seq.* Defendants presently appeal Magistrate Judge Lindsay’s April 23, 2015 Order denying defendants’ motion to compel the depositions of plaintiff Trustees Thomas Gesualdi (“Gesualdi”) and Joseph Ferrara (“Ferrera”), and permitting defendants to instead serve the plaintiffs with a contention

interrogatory. Defendants argue that depositions of Gesualdi and Ferrara are necessary because each has relevant knowledge about allegations that defendants are jointly and severally liable for Smithtown Trucking’s withdrawal liability based on their alleged single entity, alter ego, single employer, and/or joint employer relationship. For the following reasons, the Court affirms Magistrate Judge Lindsay’s April 23, 2015 ruling in its entirety.

I. BACKGROUND

Smithtown Trucking is a party to a series of collective bargaining agreements with the Building Material Teamsters Local 282 (“Local 282”), which required Smithtown Trucking to make contributions to the Fund. (Amended Complaint (“Am. Compl.”) ¶ 9.) In March 2011, Smithtown Trucking

permanently ceased to have an obligation to contribute, thereby withdrawing from the Fund within the meaning of Section 4203(a) of ERISA, 29 U.S.C. § 1383(a). (*Id.* ¶ 10.) On March 3, 2015, Smithtown Trucking agreed to a Consent Judgment to be entered in favor of the Trustees and against it in the amount of \$1,017,975.13 plus interest. (“The Consent Judgment,” Docket No. 44.) The Consent Judgment was approved by this Court on March 4, 2015, and provides that its terms “shall apply to any person or entity in the same manner that it applies to Smithtown Trucking to the extent such entity is found to be liable under any theory of law for Smithtown Trucking’s withdrawal liability (“Jointly Liable Entity”).” (*Id.*) Smithtown Concrete and Smithtown Realty agreed to this provision and agreed that “[t]o the extent either is not found to be a Jointly Liable Entity, such entity shall in no way be bound or otherwise affected by this Judgment whatsoever.” (*Id.*)

Plaintiffs seek to impose withdrawal liability on Smithtown Concrete and Smithtown Realty in addition to Smithtown Trucking on the theory that the three companies are members of a single control group (*see* Am. Compl. ¶ 82); or are a single entity that share an alter ego, single employer, and/or joint employer relationship with each other, such that the corporate veil should be pierced among them (*id.* ¶ 84). (*See also* Am. Compl. at Prayer for Relief ¶ 1.)

On March 20, 2015, defendants filed a motion to compel the depositions of plaintiffs Gesualdi and Ferrera. Defendants argue that based on Smithtown Trucking’s “personal experiences” with Gesualdi, “[d]efendants are quite certain that [he] is very knowledgeable” about the interrelationship of defendants because he serves as President of Local 282, was Local 282’s “lead negotiator” in collective bargaining negotiations with Smithtown Trucking, and

is familiar with the operation of Smithtown Concrete. (Letter Motion to Take Depositions, Docket No. 45.) Defendants also point to a declaration Gesualdi provided to Magistrate Judge Brown in an unrelated ERISA action about benefit fund contributions in relation to the scope of work performed by an alleged alter ego, single employer, and/or joint employer relationship in which Gesualdi stated that he is familiar with industry collective bargaining agreements and their provisions, as well as the type of work performed in the construction and trucking industry. (*See id.* ¶ 13.) Defendants argue that they should be permitted to depose Ferrera because he has been a Trustee of the Fund for over twenty years, operates a ready mix concrete business that employs drivers covered by a Local 282 collective bargaining agreement, and is generally familiar with the construction and trucking industry, as well as signatory employers who perform work within the industry. (*Id.* ¶ 14.)

On March 31, 2015, plaintiffs opposed defendants’ motion to compel, arguing that there is no basis for the depositions. Plaintiffs contend the depositions would waste time and harass witnesses because the only remaining dispute in the case relates to the defendants’ interrelationship and operation, and Gesualdi and Ferrera’s knowledge regarding the disputed facts is solely from defendants or third parties.

In an order issued on April 23, 2015, Magistrate Judge Lindsay denied defendants’ motion to compel, but permitted defendants to serve plaintiffs with a contention interrogatory requiring them to identify the specific statements and documents that support their allegation that Smithtown Concrete and Smithtown Realty are jointly and severally liable for the withdrawal liability of Smithtown Trucking. Magistrate Judge Lindsay reasoned, “plaintiffs’ contend

that Trustees Ferrera and Gesualdi have no first hand knowledge of the defendants' interrelationship and operations other than what was provided to them by counsel, but neither Trustee has provided an affidavit attesting to that fact. Nonetheless, the plaintiffs have indicated that they relied solely on statements made by Neil Spevack, the principal of all three defendants, documents produced by the defendants during the litigation, searches of public records and interviews with two former employees of the defendants."

On April 27, 2015, defendants appealed Magistrate Judge Lindsay's Order and reiterated the arguments made in their motion to compel. Plaintiffs responded on June 8, 2015, and attached plaintiffs' response to the contention interrogatory ordered by Magistrate Judge Lindsay.

II. STANDARD OF REVIEW

This Court may reverse a magistrate judge's order on a nondispositive pre-trial matter only if the order is "clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a); *see Thomas E. Hoar, Inc. v. Sara Lee Corp.*, 900 F.2d 522, 525 (2d Cir. 1990) ("A magistrate . . . may issue orders regarding nondispositive pretrial matters. The district court reviews such orders under the 'clearly erroneous or contrary to law' standard."). "An order is 'clearly erroneous' only when the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Weiss v. La Suisse*, 161 F. Supp. 2d 305, 321 (S.D.N.Y. 2001) (internal citation and quotation marks omitted). "An order is 'contrary to law' when it fails to apply or misapplies relevant statutes, case law or rules of procedure." *Id.* "Discovery matters generally are considered 'nondispositive' of the litigation." *Id.* (citing

Thomas E. Hoar, 900 F.2d 525). Accordingly, this Court reviews Magistrate Judge Lindsay's April 23, 2015 order under the "clearly erroneous or contrary to law" standard.

III. DISCUSSION

The Court finds that Magistrate Judge Lindsay did not err in denying defendants' motion to compel.

The Court concludes that there is no basis to disturb Magistrate Judge Lindsay's Order permitting service of a contention interrogatory instead of requiring plaintiffs Gesualdi and Ferrera to appear for depositions. Defendants do not provide support for their assertion that Gesualdi and Ferrera had personal knowledge regarding the defendants' interrelationship and operation; instead, defendants make only conclusory assertions about Gesualdi and Ferrera's general knowledge of the relevant industries and familiarity with collective bargaining agreements. It was not clearly erroneous for Magistrate Judge Lindsay to conclude that the facts defendants point to regarding Gesualdi and Ferrera's experiences (*i.e.* Gesualdi's position as President of Local 282, his participation in efforts to end a strike at Smithtown Trucking, his familiarity with the operation of Smithtown Concrete, and his declaration in an unrelated case as well as Ferrera's experience as a Trustee of the Fund, operation of a ready mix concrete business that employs drivers covered by a Local 282 collective bargaining agreement, and general familiarity with the construction and trucking industry and signatory employers who perform work within the industry) do not amount to personal knowledge about the interrelationship among these specific defendants.

Additionally, plaintiffs submitted an extensive and extremely detailed contention interrogatory response identifying specific statements and documents from defendants and third parties that support their allegation that Smithtown Concrete and Smithtown Realty were jointly and severally liable for the withdrawal liability of Smithtown Trucking.

On appeal, defendants have provided no basis to disturb Magistrate Judge Lindsay's conclusion that depositions of Gesualdi and Ferrera are not warranted.¹ Accordingly, the Court affirms Magistrate Judge Lindsay's April 23, 2015 ruling.

IV. CONCLUSION

For the foregoing reasons, the Court affirms Magistrate Judge Lindsay's April 23, 2015 ruling.

SO ORDERED.

JOSEPH F. BIANCO
United States District Judge

Dated: October 30, 2015
Central Islip, NY

Plaintiffs are represented by Joseph J. Vitale, Zachary N. Leeds, and Tzvi N. Mackson of Cohen, Weiss and Simon LLP, 330 West 42nd Street, New York, NY 10036. Defendants are represented by Richard B. Ziskin and Suzanne Harmon Ziskin of The Ziskin Law Firm, LLP, 6268 Jericho Turnpike, Suite 12A, Commack, NY 11725.

¹ This Court would reach the same conclusion even under a *de novo* standard of review.