

Chiriguaya v Arthur Ransome Houses, LP

2011 NY Slip Op 33132(U)

December 5, 2011

Supreme Court, New York County

Docket Number: 114241/07

Judge: J. York

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT 2B York

PART 2

Justice

Index Number : 114241/2007

CHIRIGUAYA, JOHNNY

VS.

ARTHUR RANSOME HOUSES, LP

SEQUENCE NUMBER : 010

STRIKE

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

FILED

DEC 05 2011

NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

~~WITH ACCOMPANYING MEMORANDUM DECIDED IN ACCORDANCE~~

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECIDED IN ACCORDANCE**

Dated: 11/30/11

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

-----X
JOHNNY CHIRIGUAYA and MARIUXI CHIRIGUYA,

Plaintiffs,

-against-

Index No.: 114241/07

ARTHUR RANSOME HOUSES, LP and ABYSSINIAN
DEVELOPMENT CORP., SIGMA CONTRACTING
CORP., and GIANT TAPING & PLASTERING, INC.,

Defendants.

-----X
GIANT TAPING & PLASTERING INC.,

Third-Party Plaintiff,

Index No.: 590206/10

-against-

ENVIRO & DEMO MASTERS INC. and FAICAN T.
CONSTRUCTION INC.,

FILED

Third-Party Defendants.

DEC 05 2011

-----X

YORK, J.:

NEW YORK
COUNTY CLERK'S OFFICE

Motion sequence numbers 010 and 011 are consolidated for disposition. In motion sequence 010, third-party defendant Faican T. Construction (Faican), moves, pursuant to CPLR 3126, to dismiss the third-party complaint filed by third-party plaintiff Giant Taping & Plastering, Inc. (Giant), due to Giant's failure to provide responses to discovery. Third-party defendant Enviro & Demo Masters, Inc. (Enviro), cross-moves to dismiss the third-party complaint and incorporates the arguments presented by Faican. In motion sequence 011, Giant cross-moves, for an order directing that all parties in the third-party action appear for depositions within 30 days.

Plaintiff Johnny Chiriguaya alleges that on May 22, 2007, while he was working as a police officer, he suffered personal injuries after he slipped and fell on steps leading to a basement at 141 West 117th Street, Manhattan, New York. On May 18, 2010, this court issued an order which dismissed this action, because plaintiff failed to timely file a note of issue. However, plaintiff moved by order to show cause to vacate the dismissal, and on September 13, 2010, the court vacated the May 18, 2010 order and set forth a discovery schedule. Anthony J. Pagliuca, Esq., counsel for Faican, maintains that during a telephone conference with the court which took place on October 13, 2010, Mark C. Sternick, Esq., counsel for Giant, agreed to an accelerated discovery schedule due to the age of the case.

On October 20, 2010, a status conference was held. At the conference, discovery disputes were discussed and the parties were directed by the court to make appropriate motions, by order to show cause, addressing the timeliness of the third-party action and outstanding discovery responses. Faican moved to dismiss and/or sever the third-party action, and on December 1, 2010, this court severed the third-party action.

Faican now moves to strike the third-party complaint, because of Giant's failure to provide discovery. Mr. Pagliuca argues that since December 1, 2010, he has had several conversations via phone and e-mail with Mr. Sternick, in which he demanded that outstanding discovery be provided. Although Mr. Sternick maintained that he would be providing the outstanding discovery on March 7, 2011, Mr. Pagliuca did not receive adequate responses and has still not received all of the documents which were previously requested. Mr. Pagliuca contends that, due to Giant's failure to respond to the discovery demands, the third-party action should be dismissed.

Enviro cross-moves to dismiss the third-party complaint and incorporates the arguments of Faican. Enviro contends that Giant has failed to provide it with requested discovery including copies of prior pleadings and discovery responses, color copies of exhibits to depositions, plaintiff's medical records, IME reports, contracts, insurance certificates, drawings, payroll records, invoices, records of payment, lien waivers, copies of photographs of the accident location, and records referenced in a response provided by Giant.

Giant cross-moves for an order compelling all parties to appear for a deposition within thirty days. The affirmation of Mr. Sternick which is dated April 27, 2010, states that he provided all of the requested documents with the exception of those relating to its subcontractors and deposition transcripts. However, in his further reply affirmation dated May 30, 2011, Mr. Sternick states that certain discovery has not been provided and that, by May 31, 2011, third-party defendants will have all of the documents which they requested.

CPLR 3126 authorizes sanctions against a party who "refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed" The court notes that the exchange of discovery in this matter has been greatly delayed by Giant's inability to provide discovery in a timely manner. Mr. Sternick explains that while this motion was pending, he was in the process of serving the third-party defendants with all of the outstanding discovery responses. Therefore, to the extent that the documentary discovery which Mr. Sternick acknowledges in his May 30, 2011 reply affirmation has not been provided, the requested documents must be provided within fourteen days of entry of this order. If such discovery is not provided within fourteen days, Giant's behavior will be deemed willful

and contumacious and the third-party complaint will be stricken. If such documents have already been provided, third-party depositions which were previously not ordered by the court, must take place by January 20, 2012. The note of issue must be filed on or before January 31, 2012. There will be no adjournments of these dates without prior court approval.

Accordingly, it is hereby

ORDERED that third-party defendant Faican T. Construction's motion to dismiss the third-party complaint of Giant Taping & Plastering, Inc., and the cross motion of Enviro & Demo Masters, Inc.'s to dismiss the third-party complaint, is conditionally granted if Giant fails to provide the ordered discovery; and it is further

ORDERED that the cross motion of Giant is denied and that the documentary discovery which Mr. Sternick acknowledges is owed in his May 30, 2011 reply affirmation, must be provided within fourteen days of entry of this order, or the third-party complaint will be stricken. Specifically, Giant is to produce all medical records and the IME report of plaintiff, all deposition transcripts with copies of the exhibits, all relevant contracts and insurance certificates, photographs of the accident location, construction drawings, lien waivers, records of billing and payment for work performed, payroll records which identify all workers, their job at the site and the time which they spent at the site, prior pleadings, and discovery responses. All third-party depositions must be conducted by January 20, 2012, and the note of issue must be filed on or before January 31, 2012.

Dated: 12/30/11

FILED
DEC 30 2011
NEW YORK
COUNTY CLERK'S OFFICE

ENTER:

[Signature]
U.S.C.