

Bernal v Zada West LLC.

2011 NY Slip Op 33496(U)

December 27, 2011

Sup Ct, NY County

Docket Number: 116757/2008

Judge: Paul G. Feinman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: HON. PAUL G. FEINMAN PART 12

Justice

Ricardo Nicolas Bernal

- v -

Zada West

INDEX NO. 116757/08
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/Petition — Affidavits — Exhibits _____
Answering Affidavits — Exhibits (Memo) _____
Notice of Cross-Motion — Affidavits — Exhibits _____
Replying Affidavits (Reply Memo) _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ORDERED that this motion/petition *is denied*
in accordance with the annexed decision.

FILED

JAN 03 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/27/11

[Signature]

J.S.C.

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MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

-----X
RICARDO NICOLAS BERNAL,
Plaintiff,

against

ZADA WEST LLC and ZADA REALTY LLC,
Defendants.

-----X
ZADA WEST LLC and ZADA REALTY LLC,
Third-Party Plaintiffs,

against

PPR CONSTRUCTION and PETER RUKAJ,
Third-Party Defendants.

Index Number 116757/2008

Mot. Seq. No. 001

DECISION AND ORDER

T.P. Index Number 590627/2011

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FILED

JAN 03 2012

Papers considered in review of this motion to strike:

Papers	Document No.
Notice of Motion, Affirmation, Affidavit, Exhibits	1
Affirmation in Opposition, Exhibit	2
Reply Affirmation, Exhibits	3

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PAUL G. FEINMAN, J.:

Plaintiff Ricardo Bernal moves for an order striking defendants' answer for failure to comply with discovery, or in the alternative for a further deposition of defendant Zada West LLC. By interim order dated September 14, 2011, the court resolved another branch of the motion concerning extending the note of issue by directing the parties to file the note of issue before October 31, 2011. The court also ordered sealed the portion of the September 14, 2011 oral argument addressing the deposition issue conducted *in camera*, pursuant to 22 NYCRR

216.1. Here follows the decision concerning the remaining branch of the motion.

This is a personal injury action. According to the verified complaint, defendants Zada West and Zada Realty, the owners and managers of certain premises on West 47th Street, New York, New York, caused to be hired a construction company in about October 2007 to perform work on the premises, and plaintiff was an employee of the construction company (Mot. Ex. A [Ver. Compl. ¶¶ 1-31]). Plaintiff was injured while at work on October 22, 2007 (Ver. Compl. ¶¶ 34-35). He commenced an action by filing a summons and verified complaint on December 16, 2008. The complaint alleges causes of action sounding under Labor Law §§ 200 and 241 (6), and common law negligence. Issue was joined and defendants have commenced a third-party action against the construction company. The parties have been engaged in discovery.

According to plaintiff, during the deposition of Daniel Rahimzada, who was testifying on behalf of Zada West, he refused to respond to "proper and relevant questions" and pleaded a Fifth Amendment privilege against self-incrimination (Mot. Kelner Aff. ¶ 6). Specifically, he refused to answer one particular question.

Q: Was he [plaintiff's employer Peter Rukaj] paid the entire sum of \$60,000 as per the contract?

A: No.

Q: Do you know how much Mr. Rukaj was paid?

A: I believe \$30,000.

Q: Is there a reason why he was paid less than the total amount?

A: I choose not to answer that. I take the Fifth on that.

(Mot. Ex. E, EBT, Oct. 15, 2010, p. 31:2-11).

Plaintiff argues that defendant's refusal to answer such a question was unwarranted and

prevented him from conducting a complete deposition (Mot. Kelner Aff. ¶¶ 14-15). He claims that there has been no showing that defendant's answer to the question asked would incriminate him or reflect his involvement in an activity for which he can be criminally prosecuted (*id.* ¶ 24). He moves for an order directing a further deposition of Rahimzada to obtain an answer to the question posed and to any follow-up questions which may grow out of the answer.

Defendants oppose the motion. They argue that the question is irrelevant to the claim of strict liability under Labor Law § 241 (6) (Steinberg Aff. in Opp. ¶¶ 17-30). They also argue that plaintiff's argument that Rahimzada, has no right to invoke his constitutional privilege is meritless. Defendants rely on cases such as *Kastegar v United States*, 406 US 441, 444-445 (1972), and *State v Carey Resources, Inc.*, 97 AD2d 508, 509 (2d Dept 1983), which hold that the pendency of a criminal proceeding or investigation is not a prerequisite for the invocation of the privilege against self incrimination (Steinberg Aff. ¶¶ 31-39).

Pursuant to the Fifth Amendment, "No person...shall be compelled in any criminal case to be a witness against himself" (US Const. Fifth Amend.). Furthermore, such Fifth Amendment protection allows an individual to refuse to answer official questions in "any proceeding, civil or criminal, formal or informal, where the answers might incriminate him [or her] in future criminal proceedings" (*Access Capital, Inc. v DeCicco*, 302 AD2d 48, 51 [1st Dept 2002]).

To help resolve plaintiff's motion, the court conducted part of the oral argument *in camera* and *ex parte* with counsel for defendant on September 14, 2011. This portion of the argument was transcribed and then sealed after a finding made pursuant to 22 NYCRR 216.1. After careful consideration of the arguments made *in camera* and *ex parte* and considering the arguments presented herein, the court determines that pursuant to the Fifth Amendment protection against self-incrimination, Rahimzada has good cause to refuse to answer the specific

question from the deposition, and that such an answer would reveal privileged information. The court is cognizant of plaintiff's argument that the privilege is a personal one and may not be invoked by an entity such a corporation (Kelner Reply Aff. ¶¶ 14-18). Plaintiff cites *United States v White*, which holds that individuals acting as representatives of a collective group, "cannot be said to be exercising their personal rights and duties nor be entitled to their purely personal privileges" (322 US 694, 699 [1944]). Rather, *White* explains, the individuals "assume the rights, duties, and privileges of the artificial entity or association of which they are agents or officers . . . [and in] their official capacity . . . they have no privilege against self-incrimination." Plaintiff cites several New York cases, including *Stuart v Tomasino*, 148 AD2d 370 (1st Dept. 1989) (no Fifth amendment privilege on behalf of corporation), also standing for the proposition that the privilege is an individual one rather than belonging to an entity.


Notwithstanding, the court is persuaded based on the sealed record, that even though Rahimzada appeared on behalf of Zada West, that he is entitled to invoke the Fifth amendment privilege in this context. If forced to answer, the court is satisfied he could realistically expose himself to personal criminal liability. Therefore, plaintiff's motion to strike defendants' answer is denied, and his motion in the alternative seeking a further deposition of Zada West is denied.

It is

ORDERED that plaintiff's motion is denied in its entirety.

This constitutes the decision and order of the court.

Dated: December 27, 2011
New York, New York



J.S.C.

FILED

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