

<p>Pantelis v Skanska</p>
<p>2012 NY Slip Op 31080(U)</p>
<p>April 17, 2012</p>
<p>Supreme Court, New York County</p>
<p>Docket Number: 401598/2009</p>
<p>Judge: Michael D. Stallman</p>
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: Hon. MICHAEL D. STALLMAN
Justice

PART 21

Index Number : 401598/2009

INDEX NO. 401598/09

PANTELIS, MIKE

vs.

KOCH SKANSKA

SEQUENCE NUMBER : 004

REARGUMENT/RECONSIDERATION

MOTION DATE 3/13/12

MOTION SEQ. NO. 004

The following papers, numbered 1 to 9 were read on this motion and cross motion to reargue; cross motion for sanctions

Notice of Motion; Affirmation — Exhibits A-E	<input type="checkbox"/> No(s). <u>1-2</u>
Notice of Cross Motion—Affirmation — Exhibits A-B	<input type="checkbox"/> No(s). <u>3-4</u>
Notice of Cross Motion—Affirmation — Exhibits 1-6	<input type="checkbox"/> No(s). <u>5-6</u>
Affirmation in Opposition— Exhibits 1-2	<input type="checkbox"/> No(s). <u>7</u>
Affirmation in Opposition— Exhibits 1-2	<input type="checkbox"/> No(s). <u>8</u>
Reply Affirmation— Exhibits A-C	<input type="checkbox"/> No(s). <u>9</u>

Upon the foregoing papers, it is ordered that this motion and cross motions are decided in accordance with the annexed memorandum decision and order.

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

Dated: 4/17/12
New York, New York

FILED

APR 20 2012

NEW YORK
COUNTY CLERK'S OFFICE


HON. MICHAEL D. STALLMAN, J.S.C.

1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
2. Check if appropriate: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. Check if appropriate: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21**

-----X

MIKE PANTELIS,

Plaintiff,
- against -

Index No. 401598/09

KOCH SKANSKA and TRIBOROUGH BRIDGE
AND TUNNEL AUTHORITY,

Decision and Order

Defendants.

-----X

KOCH SKANSKA and TRIBOROUGH BRIDGE
AND TUNNEL AUTHORITY,

Third-Party Plaintiffs,

- against -

LIBERTY MAINTENANCE, INC.,

FILED

APR 20 2012

Third-Party Defendant.

-----X

NEW YORK
COUNTY CLERK'S OFFICE

HON. MICHAEL D. STALLMAN, J.:

In this action alleging, among other things, violation of Labor Law § 240 (1), defendants and third-party defendant move and cross-move, respectively, to reargue this Court's prior decision and order dated November 23, 2011, and to compel plaintiff to submit to a further post-note of issue deposition.

Plaintiff opposes the motion and cross motion and cross-moves for sanctions

against defendants.

BACKGROUND

This Labor Law § 240 action arises from a workplace accident on May 28, 2008 when plaintiff, a painter-sandblaster allegedly fell from an unsecured scaffold during work on the Triborough Bridge-Wards Island Viaduct. In a prior motion (Motion Seq. No. 002), plaintiff sought, among other things, an order precluding defendants and third-party defendant from offering any evidence, photographs, or testimony regarding the condition of plaintiff's work-site at the time of his alleged accident.

By decision and order dated November 23, 2011, the Court granted plaintiff's motion to the extent that

"[D]efendants should be precluded from introducing any photographs not disclosed (and from testifying as to the specific contents of any such non-disclosed photos). Moreover, both sides should be prepared to offer testimony about the taking and storage/retention/safeguarding of photos. Plaintiff has demonstrated entitlement to a missing documents/evidence charge; accordingly, the circumstances are properly brought to the jury's attention via competent testimony. For the same reasons, any photos (or other evidence) not disclosed, would not be admissible on a motion for summary judgment."

(Ostrover Affirm., Ex A.)

DISCUSSION

Defendants now move to reargue the Court's prior decision and order, arguing

that plaintiff should not be entitled to a missing documents/evidence charge when he had not requested such relief in his motion. Defendants also argue that they should not be penalized for not producing photographs that were not in their possession or control. According to defendants, third-party Liberty Maintenance, Inc. (Liberty) was in total charge of the containment area and photographed the interior of the containment area during the course of its work. Defendants also seek an order compelling plaintiff to appear for a further deposition with respect to six photographs produced on May 13, 2011.

Liberty cross-moves to reargue the Court's prior decision and order, in that Liberty seeks clarification that the prior decision and order does not preclude testimony on a motion for summary judgment or at trial as to any witness's observations at the work site, so long as it is based on the witness's memory and not on photographs, or memory of photographs. Liberty also seeks to compel a further deposition of plaintiff as to the six photographs, joining in defendants' arguments.

Plaintiff opposes both the motion and cross motion, and cross-moves for sanctions against defendants. Plaintiff argues that defendants' application for a further deposition of plaintiff is frivolous because, by decision and order dated July 7, 2011, Justice Wilkins denied the branch of defendants' prior motion "seeking authentication of said photographs." (Mandel Affirm., Ex 1.) Plaintiff also argues

that the application for plaintiff's further deposition is untimely because it was not sought within 20 days after service of the note of issue, citing 22 NYCRR 202.21 (e).

Reargument is granted. As stated in the prior decision and order, Joshua Bowley testified that he took photos inside and outside the containment area, and that specific accident site photos, post-accident, were supposed to be taken, and that progress photos or completed work photos, were taken at the end of every work day. However, the Court overlooked that Bowley was a Liberty employee, not an employee of defendants. The Court also incorrectly granted plaintiff both a missing documents charge and an order of preclusion, which are mutually exclusive remedies for the loss/non-disclosure of evidence. It would be unjust to preclude defendants and third-party defendant from introducing documents into evidence, and then to charge a jury that it may draw a negative inference from their non-introduction.

Therefore, upon reargument, plaintiff's motion is granted to the extent that Liberty is precluded from offering, both on summary judgment and at trial, any progress photographs, completed work photographs or accident site photographs not previously exchanged during discovery. Defendants are also precluded, both on summary judgment and at trial, from offering any progress photographs, completed work photographs or accident site photographs that they received from Liberty that were not previously exchanged during discovery.

The Court rejects Liberty's contention that preclusion should not have been granted because "there is absolutely no evidence that any photographs were taken during the day prior to plaintiff's accident, May 17, 2008, or the day of plaintiff's accident that would have actually depicted the safety line or the plaintiff's specific work area." (Demetri Affirm. ¶ 25.) This contention actually begs the question of what the progress photographs would have depicted had they been disclosed. Manolakos testified at his deposition that, in May 2008, it would take one day for a section of containment to be completed, and that photographs, which he referred to as "completed work photos" would be taken every day. (Ostrover Affirm., Ex D [Manolakos EBT], at 168-169). His deposition testimony would suggest that "completed work photos" of the containment area where plaintiff was working on the day of his accident would have been taken, because it would have taken only one day to complete work in that section of the containment area. Because such a "completed work photo" for the accident date was not produced in discovery, it cannot be known whether that photograph would have actually depicted any safety cables onto which plaintiff could have tied himself.

Reargument is also granted to clarify that Liberty is precluded from testifying, either on summary judgment or at trial, as to what the photographs themselves had depicted, i.e., the contents of the photographs. However, Liberty is not precluded,

either on a motion for summary judgment or at trial, from offering testimony from witnesses as to their observations of the worksite, so long as these observations are based on the witnesses' independent recollections, and not based on a review of any photographs not previously exchanged during discovery.

In the Court's discretion, defendants and third-party defendant's application to compel a further deposition of plaintiff is granted. Contrary to plaintiff's argument, the 20-day deadline in 22 NYCRR 202.21 (e) is the deadline for a motion to vacate the note of issue, not a deadline for a motion seeking post-note of issue discovery.

The Court is not persuaded that Justice Wilkins's prior ruling necessarily decided the issue of whether defendants should be entitled to question plaintiff as to the identity of the photographer, or as to when each photograph was taken. Several of these photographs were apparently produced by plaintiff's counsel and shown to a witness for Liberty at a deposition on May 13, 2011. Based on the deposition excerpts, this witness apparently did not testify that he took the photographs, but did testify (over objection) that the photographs show the containment area. (Mandel Affirm., Ex 3.) However, the witness was asked, "Can you tell us if it shows the containment area where Mr. Pantelis had his accident that morning or you can't tell one-way [*sic*] or the other?" The witness answered, "I can't tell." (*Id.* at 200.)

Therefore, defendants and third-party defendant are entitled to a limited deposition of plaintiff regarding plaintiff's knowledge, if any, of the name of the photographer who took each of the six photographs that plaintiff produced on May 13, 2011, the date each photograph was taken, and where each photograph was taken.

Because plaintiff has not demonstrated that Justice Wilkins's prior ruling necessarily decided the issue of a further deposition of plaintiff with respect to the six photographs exchanged in May 2011, defendants' motion was not frivolous. Therefore, plaintiff's cross motion is denied.

CONCLUSION

Accordingly, it is hereby

ORDERED that this motion to reargue and to direct a further deposition of plaintiff by defendants Skanksa Koch, Inc. f/k/a Koch Skanksa, Inc., sued herein as "Koch Skanksa" and the Triborough Bridge and Tunnel Authority is granted; and it is further

ORDERED that the cross motion to reargue and to direct a further deposition of plaintiff by third-party defendant Liberty Maintenance, Inc. is granted; and it is further

ORDERED that, upon reargument, the Court's prior decision and order is amended only to extent that the portion of the decision and order granting preclusion

and a missing documents/evidence charge is amended as follows:

Liberty is precluded from offering, both on summary judgment and at trial, any progress photographs, completed work photographs or accident site photographs not previously exchanged during discovery. Defendants are also precluded, both on summary judgment and at trial, from offering any progress photographs, completed work photographs or accident site photographs that they received from Liberty that were not previously exchanged during discovery.

and it is further

ORDERED that the Court's prior decision and order is amended to clarify that Liberty is precluded from testifying, either on summary judgment or at trial, as to what the photographs themselves had depicted, i.e., the contents of the photographs. However, Liberty is not precluded, either on a motion for summary judgment or at trial, from offering testimony from witnesses as to their observations of the work site, so long as such testimony is based on each witness's own observations and independent recollection, and not based on a review of any photographs not previously exchanged during discovery; and it is further

ORDERED that plaintiff shall appear for a further deposition on or before May 23, 2012 limited to questioning about plaintiff's knowledge of six photographs produced on May 13, 2011. The questioning shall be limited to plaintiff's knowledge, if any, of the name of the photographer who took each photograph, the date each photograph was taken, and where each photograph was taken; and it is

further

ORDERED that plaintiff's cross motion for sanctions pursuant to NYCRR 130-1.1 (a) and CPLR 3126 against defendants is denied.

Dated: April 17, 2012
New York, New York

ENTER:


JSC
HON. MICHAEL D. STALLMAN

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