

Sullivan v Lehigh Cement Co.

2014 NY Slip Op 30256(U)

January 27, 2014

Supreme Court, New York County

Docket Number: 103161/10

Judge: Louis B. York

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

LOUIS B. YORK

J.S.C.

PRESENT: _____
Justice

PART _____

Index Number : 103161/2010
SULLIVAN, THOMAS
vs.
LEHIGH CEMENT CO.
SEQUENCE NUMBER : 004
EXTEND TIME

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

FILED

JAN 30 2014

NEW YORK
COUNTY CLERKS OFFICE

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 1/27/14

_____, J.S.C.

LOUIS B. YORK
NON-FINAL DISPOSITION
J.S.C.

- 1. CHECK ONE: CASE DISPOSED
- 2. CHECK AS 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: PART 2

-----X
THOMAS SULLIVAN and DEIRDRE SULLIVAN,

Plaintiffs,

-against-

Index No.: 103161/10

LEHIGH CEMENT COMPANY, LEHIGH PORTLAND
CEMENT COMPANY and BROOKLYN NAVY YARD
DEVELOPMENT CORPORATION, THE CITY OF
NEW YORK,

Defendants.

FILED

JAN 30 2014

**NEW YORK
COUNTY CLERKS OFFICE**

-----X
YORK, J.:

Defendants Lehigh Cement Company, LLC s/h/a Lehigh Cement Company and Lehigh Portland Cement Company (defendants) move, pursuant to CPLR 3126, for an order precluding plaintiffs Thomas Sullivan (plaintiff) and Deirdre Sullivan, from offering any evidence at the time of trial or in opposition to dispositive motions on the issue of liability, which counsel for plaintiffs allegedly obstructed from being disclosed. Defendants contend that the discovery process was impeded because plaintiffs' counsel instructed plaintiff not to answer 63 questions at his second deposition. Defendants alternatively move, pursuant to CPLR 3124, to compel plaintiff to answer those questions which his attorney blocked him from answering. Defendants also move, pursuant to CPLR 3126, to strike plaintiffs' complaint and/or bill of particulars for obstructing the deposition.

Plaintiffs cross-move, pursuant to CPLR 3103, for a protective order denying defendants' request for a further deposition of plaintiff.

FACTUAL ALLEGATIONS

On March 9, 2010, plaintiffs commenced this action to seek damages for personal injuries which plaintiff allegedly sustained after he slipped and fell off of a crane deck while working at the Brooklyn Navy Yard in Brooklyn, New York. Plaintiffs served a bill of particulars on August 30, 2010, which set forth the alleged injuries, as well as theories of liability. On January 6, 2012, plaintiffs served a supplemental bill of particulars on defendants.

On June 6, 2012, the parties appeared for a preliminary conference at which dates were set forth for the exchange of discovery and for the depositions of all parties. Plaintiff's deposition was initially scheduled for September 19, 2012, and was eventually held on October 1, 2012. On October 3, 2012, plaintiffs served defendants with a second supplemental bill of particulars. Defendants argue that the supplemental bill of particulars made significant additions to the claims of negligence which were set forth in the original bill of particulars, including additional theories of negligence based upon the alleged existence of snow and ice at the location of the subject accident. Defendants maintain that the bill of particulars which was dated August 30, 2012, included 58 allegations of negligence, while the supplemental bill of particulars dated October 3, 2012, included 74 allegations of negligence.

Defendants' counsel contends that he wrote to plaintiffs' counsel seeking a supplemental bill of particulars setting forth any claims related to alleged violations of the New York State Industrial Code, however, plaintiffs' counsel did not respond to such request. Defendants' counsel maintains that, following an inspection of the crane on which plaintiff was injured, he advised plaintiffs' counsel that he sought to ask plaintiff additional questions concerning the crane, which plaintiff had not discussed at his first deposition.

On December 12, 2012, the parties appeared for a compliance conference before this court at which a second deposition of plaintiff was scheduled. Following the conference, plaintiffs' counsel served another supplemental bill of particulars alleging violations of the Industrial Code, which plaintiffs had not identified in the previous bills of particulars. On January 8, 2013, plaintiff attended the second deposition at which defendants' counsel reopened questioning on liability. Defendants maintain that plaintiffs' counsel blocked plaintiff from answering questions, despite the crane inspection following the first deposition, and despite plaintiffs serving two supplemental bills of particulars following the first deposition. Defendants allege that plaintiffs' counsel directed plaintiff not to answer at least 63 questions during the deposition, and failed to set forth specific reasoning to justify obstructing plaintiff from answering the questions.

Plaintiffs' counsel maintains that, based upon an agreement made at the conclusion of plaintiff's initial deposition, questions regarding liability were deemed closed. Plaintiffs' counsel contends that the purpose of the supplemental deposition of plaintiff was for questions related to damages, and that defendants improperly sought legal and factual conclusions.

DISCUSSION

The Uniform Rules for the Conduct of Depositions addresses the appropriate conduct of attorneys at depositions. Specifically, section 221.1 (a) provides:

“[n]o objections shall be made at a deposition except those which, pursuant to subdivision (b), (c) or (d) of Rule 3115 of the Civil Practice Law and Rules, would be waived if not interposed, and except in compliance with subdivision (e) of such rule. All objections made at a deposition shall be noted by the officer before whom the deposition is taken, and the answer shall be given and the deposition shall proceed subject to the objections and to the right of a person to apply for appropriate relief pursuant to article 31 of the CPLR.”

(Uniform Rules for Trial Cts [22 NYCRR] § 221.1 [a]).

Section 221.2 of the Uniform Rules for the Conduct of Depositions provides:

“[a] deponent shall answer all questions at a deposition, except (a) to preserve a privilege or right of confidentiality, (b) to enforce a limitation set forth in an order of a court, or (c) when the question is plainly improper and would, if answered, cause significant prejudice to any person. An attorney shall not direct a deponent not to answer except as provided in CPLR Rule 3115 or this subdivision. Any refusal to answer or direction not to answer shall be accompanied by a succinct and clear statement of the basis therefor. If the deponent does not answer a question, the examining party shall have the right to complete the remainder of the deposition.”

(Uniform Rules for Trial Cts [22 NYCRR] § 221.2).

CPLR 3115 (b), (c), and (d) provides:

“(b) Errors which might be obviated if made known promptly. Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of persons, and errors of any kind which might be obviated or removed if objection were promptly presented, are waived unless reasonable objection thereto is made at the taking of the deposition.

(c) Disqualification of person taking deposition. Objection to the taking of a deposition because of disqualification of the person by whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(d) Competency of witnesses or admissibility of testimony. Objections to the competency of a witness or to the admissibility of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if objection had been made at that time.”

Here, plaintiffs’ counsel’s objections, and his directions to plaintiff not to answer questions, fail to comply with the Uniform Rules for the Conduct of Depositions. Following his objections, plaintiffs’ counsel did not state that he was preserving a privilege or right of confidentiality, that he was enforcing a limitation set forth in an order of the court, or that the

questions would cause significant prejudice. Furthermore, defendants were provided with two supplemental bills of particulars following the initial deposition of plaintiff about which he should have been able to question plaintiff. Also, at the status conference which was held on December 12, 2012, both parties agreed to a “further EBT of plaintiff Thomas Sullivan to be held on December 20, 2012.” The status conference order does not limit in any way the type of questions which could be asked to plaintiff.

Therefore, this court orders that another deposition of plaintiff is to take place within 45 days of service of notice of entry of this order. Before the deposition of plaintiff takes place, both parties are to review the prior deposition transcripts, the three bills of particulars, and the Uniform Rules for the Conduct of Depositions. As discovery has yet to be completed, this court will extend the discovery end date to February 21, 2014, and the note of issue is to be filed on or before February 28, 2014. There will be no adjournments of these dates without prior court approval.

While defendants contend that plaintiffs’ counsel’s failure to comply with the deposition rules constitutes willful and contumacious conduct, the court does not find that such conduct constituted bad faith and declines to preclude or strike plaintiff’s supplemental bills of particulars or complaint. *See Scher v Paramount Pictures Corp.*, 102 AD3d 471, 471 (1st Dept 2013) (holding that there was not a clear showing that defendants’ failure to comply with the discovery orders was willful, contumacious or in bad faith).

CONCLUSION and ORDER

Accordingly, it is

ORDERED that the part of defendants Lehigh Cement Company, LLC s/h/a Lehigh

