New York Schs. Ins. Reciprocal v Milburn Sales Co., Inc.
2015 NY Slip Op 31777(U)
September 17, 2015
Supreme Court, Suffolk County
Docket Number: 2848/2011
Judge: James C. Hudson

Short Form Order

COPY

Supreme Court of the County of Suffolk
State of New York - Part XL

PRESENT:
HON. JAMES HUDSON
Acting Justice of the Supreme Court

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NEW YORK SCHOOLS INSURANCE RECIPROCAL, a/s/o WEST BABYLON UNION FREE SCHOOL DISTRICT,

Plaintiff,

- against -

MILBURN SALES CO., INC., d/b/a MILBURN CARPET ONE FLOORS & HOME, d/b/a MILBURN FLOORING MILLS,

Defendants.

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x----------x

MILBURN SALES CO., INC., d/b/a MILBURN CARPET ONE FLOORS & HOME d/b/a MILBURN FLOORING MILLS,

Third-Party Plaintiffs,

- against -

STALCO CONSTRUCTION, INC., KEM CONSTRUCTION CORPORATION and COOPER POWER AND LIGHTING CORP.,

Third-Party Defendants.

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Upon the following papers numbered 1 to 70 read on these motions to Preclude, to Strike/Compel, and for Summary Judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1-7, 8-23, 24-40,44-56; Notice of ~~Cross Motion and supporting papers 0~~; Answering Affidavits and supporting papers 41-43, 57-68 ; Replying Affidavits and supporting papers 69-70; ~~Other 0 ; (and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are hereby consolidated for the purposes of this determination; and it is further

ORDERED that the unopposed motion (#005) by the third party defendant Stalco Construction Inc. for an order pursuant to CPLR 3124 and CPLR 3126 precluding the defendant/third-party plaintiff from presenting evidence at trial for failing to provide responses to its demands for discovery is denied; and it is further

ORDERED that the motion (#006) (incorrectly designated a cross motion) by the defendant/third party plaintiff for an order pursuant to CPLR 3124 compelling three nonparty witnesses to respond to subpoenas ad testificandum and to appear for depositions on a date certain is denied; and it is further

ORDERED that the motion (#007) by the plaintiff for an order pursuant to CPLR 3124 and CPLR 3126 striking the defendant/third-party plaintiff's answer or compelling the defendant/third-party plaintiff to produce responses to its demands for discovery is denied as academic; and it is further

ORDERED that the motion by the third-party defendant Cooper Power and Lighting Corp. for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims against it, and pursuant to CPLR 3126 for sanctions, is granted to the extent that Cooper Power and Lighting Corp. is awarded summary judgment dismissing the complaint and all cross claims against it, and is otherwise denied.

This is an action to recover damages sustained by the plaintiff, as insurer and subrogee of the West Babylon Union Free School District (School District), after it was obligated to pay its insured's claim arising from a fire at the South Bay Elementary School (the school) located within said school district. The fire, which occurred on February 18, 2010, started while the defendant Milburn Sales Co., Inc., doing business as Milburn Carpet One Floors & Home, doing business as Milburn Flooring Mills (Milburn) was working to refinish the gymnasium floor in the school. The plaintiff alleges that the fire was caused by Milburn's negligence in placing "refinishing residue and products" in plastic bags in the hallway of the school which spontaneously combusted, and in failing to dispose of said residue and products in the manner consistent with the product's guidelines. The plaintiff's claim for negligence against Milburn is based, in part, on the findings of the Town of Babylon Fire Marshal's

Office, which concluded that the fire was the result of Milburn's "[careless] discarding of materials known to spontaneously [combust]."

The plaintiff commenced this action by the filing of a summons and complaint on January 25, 2011. Issue was joined by Milburn's service of an answer dated April 4, 2011. On April 27, 2011, Milburn filed a third-party summons and complaint against the third-party defendants Stalco Construction Inc. (Stalco), Kem Construction Corp. (Kem), and Cooper Power and Lighting Corp. (Cooper). It is undisputed that prior to Milburn's work at the school, and at approximately the same time, the school was in the process of completing the renovation of its library. It is undisputed that Stalco was acting as the general contractor for said renovation, that Kem was hired as the mechanical and plumbing contractor, and that Cooper was hired to complete the electrical work for that project. In its third-party complaint, Milburn makes the same allegation against each third-party defendant that "[i]f the plaintiff sustained any of the damages" set forth in the complaint, "such damages were caused wholly and solely by reason of the negligence ... and all breaches of duty ... and/or warranty and/or contract" by said party.

Stalco now moves (#005) for an order precluding Milburn from offering any evidence at the trial of this action as to those items requested in its demands for discovery dated October 5, 2012. In his affirmation in support of the motion, counsel for Stalco avers that no responses have been received from Milburn, and that a letter reminding Milburn that responses had not been received was mailed on or about March 5, 2013.

Summary denial of the motion is mandated as Stalco has failed to provide a sufficient affirmation of a good faith effort to resolve the issues raised by the motion (*see* Uniform Rules for Trial Cts. [22 NYCRR 202.7 [a]). Such an affirmation "shall indicate the time, place and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held" (Uniform Rules for Trial Cts [22 NYCRR 202.7 [c]). Here, Stalco's affirmations merely provided that there was a letter sent to Milburn's attorney. It does not appear that there was any effort made on that, or any other, occasion to resolve the parties' discovery dispute, but only to advise the parties that the disclosure was outstanding. "The burden is on the party seeking sanctions based on disclosure issues to comply with Uniform Rules for Trial Cts [22 NYCRR] § 202.7 [a][2] and [c]. If the moving defendants did not confer with the opposing parties counsel, they should have set forth their reasons for not doing so in the affirmation. The court should not be left to wonder whether any consultation with opposing parties counsel occurred, or be compelled to assume the reasons why no consultation occurred" (***Hutchinson v Langer***, 25 Misc 3d 1235[A], 2009 NY Slip Op 52427U [Sup Ct, Kings County 2009]). The submitted affirmations are deficient (*see* ***Tine v Courtview Owners***

Corp., 40 AD3d 966, 838 NYS2d 92 [2d Dept 2007]; ***Cestaro v Chin***, 20 AD3d 500, 799 NYS2d 143 [2d Dept 2005]; ***Barnes v NYNEX, Inc.***, 274 AD2d 368, 711 NYS2d 893 [2d Dept 2000]).

Milburn now moves (#006) for an order pursuant to CPLR 3124 compelling three nonparty witnesses to respond to the subpoenas *ad testificandum* previously served upon them and to appear for depositions on a date certain. The instant motion is denied as procedurally defective. In the affirmation of good faith submitted herein, counsel for Milburn avers that said nonparty witnesses "were all employees of Russo Consultants who were retained by [the plaintiff] to investigate the fire which is the subject of this action." Counsel further states that, prior to the "date for the depositions," counsel for the plaintiff "contacted the undersigned and informed he would not produce any of the three witnesses."

The instant motion was made on notice to the parties. However, notice was not served on Russo Consultants or the subject nonparty witnesses. A motion against a party to an action to compel the production of a witness cannot succeed unless that party has control over the individual that the movant seeks to question (*see e.g.* ***Hann v Black***, 96 AD3d 1503, 946 NYS2d 722 [4th Dept 2012]; ***Schneider v Melmarkets Inc.***, 289 AD2d 470, 735 NYS2d 601 [2d Dept 2001]). More importantly, a subpoena *ad testificandum* is served pursuant to CPLR Article 23 not CPLR Article 31, and the proper procedure to enforce the penalties applicable to disobedience of a judicial subpoenas are set forth in said article (CPLR 2308[a]). Accordingly, Milburn's motion to compel is denied.

The plaintiff now moves (#007) for an order striking Milburn's answer or compelling Milburn to produce copies of its primary and excess insurance policies. In opposition to the motion Milburn provides a copy of its response to the plaintiff's discovery notices seeking the items with an affidavit of service dated March 11, 2014. Accordingly, the plaintiff's motion is denied as academic.

Cooper now moves (#008) for summary judgment dismissing the third-party complaint and all cross claims against it, and for sanctions against Milburn for "frivolous action" in refusing to stipulate to discontinue this action against Cooper. In support of its motion, Cooper submits, among other things, the pleadings, a copy of the Town of Babylon Fire Marshal's report dated April 30, 2010 (the Initiation Report), and the transcripts of the depositions of three employees of the School District, the vice- president and four employees of Milburn, and one of its employees. It is undisputed that Milburn was hired by the School District and commenced its work to refinish the gymnasium floor at the school during the one-week mid-winter break in February 2010 (the break), that the custodial staff at the school does not work during the break other than to open the school for contractors to do their work,

and that the school is equipped with a burglar alarm system and a fire alarm system. The four Milburn employees testified that they discarded certain materials used in the refinishing of the gymnasium floor in a garbage pail inside the school upon the completion of their work on February 18, 2010, the day of the fire, and that the materials included, among other things, empty cans of oil-based paints.

Peter Jahn (Jahn) was deposed on May 19, 2014 and testified that he is employed as a mechanic electrician by Cooper, that he was at the school on February 12, 2010 and February 16, 2010, and that he was "running communication cables," that is, television lines, on both days. He stated that said work is not considered electrical work as said cables do not use any electrical voltage, that he had not hooked up the cables to any power source by February 16th, and that the only tool he used those days was a set of pliers. He indicated that no solvents or chemicals were used, and that he generated no garbage from his work. He identified the Cooper "ledger card" showing the dates that he worked at the school to be as he had testified, and that Cooper was not performing any work on the day of this incident, February 18, 2010.

Cooper, having established its prima facie entitlement to summary judgment dismissing the third-party complaint and all cross claims against it, it is incumbent upon Milburn as the nonmoving party to produce evidence in admissible form sufficient to require a trial of the material issues of fact (***Roth Vandenburg Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi Vandenburg Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill Vondenburg Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

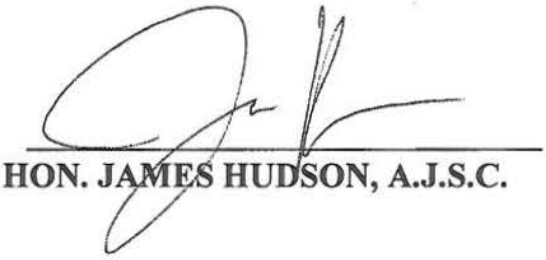
Cooper's motion is unopposed by the plaintiff, Stalco and Kem. In opposition to the motion, Milburn submits the report issued to the plaintiff by Russo Consultants, the Initiation Report, and the depositions of the four Milburn workers, Graziano and Castiglione. In his affirmation in opposition to the motion, counsel for Milburn contends that there are issues of fact whether his client was the cause of this fire, and that Graziano, the School District plant facilities administrator, testified that the punch list for the library renovation included some "touch-up" painting. Here, Milburn has failed to raise an issue of fact whether Cooper was hired to do any painting at the school or whether any of its work activities could have caused, or contributed to the cause, of this fire.

It is determined that the branch of Cooper's motion which seeks sanctions is without merit. CPLR 3126 provides for penalties for failure to comply with an order for disclosure, and is not relevant herein. Even considering this branch of the motion to be a motion seeking sanctions against Milburn counsel pursuant to 22 NYCRR 130-1.1, based on the record

herein, the court finds the failure to provide a stipulation of discontinuance itself to be non-frivolous. Accordingly, Cooper's motion is granted to the extent that it is awarded summary judgment dismissing the third-party complaint and all cross claims against it.

The Court directs that the causes of action as to which summary judgment was granted are hereby severed and that the remaining causes of action shall continue (*see* CPLR 3212 [e] [1]).

DATED: SEPTEMBER 17, 2015
RIVERHEAD, NY



HON. JAMES HUDSON, A.J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION