Castlepoint Ins. Co. v Southside Manhattan View LLC
2016 NY Slip Op 30109(U)
January 21, 2016
Supreme Court, New York County
Docket Number: 650123/2014
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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CASTLEPOINT INSURANCE COMPANY,

Plaintiff,

Index No.
650123/2014

-against-

DECISION and ORDER

Mot. Seq. 01

SOUTHSIDE MANHATTAN VIEW LLC, FOCUS CONSTRUCTION GROUP BY B.A. INC., SALVATORE CAMPISI & SONS ELECTRICAL CONTRACTING, INC. and GIOVANNI DISIMONE,

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

This declaratory judgment action arises from an incident that occurred on August 2, 2012, in which Giovanni Disimone ("Disimone") sustained personal injuries while working on a renovation project on property located at 68-10 58th Avenue, Maspeth, New York ("Property") which is owned by defendant. Southside Manhattan View Associates, LLC ("Southside"), and is insured by CastlePoint Insurance Company ("CastlePoint"). Southside retained the co-defendant Focus Construction Group by B.A. ("Focus Construction"), Inc., Salvatore Campisi & Sons Electrical Contracting, Inc. ("Campisi Electrical") and C&N Plumbing, Inc. ("C&N Plumbing") to supervise and perform construction on the property. Disimone was employed by C&N Plumbing. Disimone sued Southside for personal injuries in an action entitled *Giovanni Disimone v. Southside Manhattan View, LLC, Focus Construction Group By B.a. Inc., and Salvatore Campisi & Sons Electrical*

Contracting, Inc., pending in the Supreme Court of the State of New York, County of Kings, under Index No. 502825/2013 ("the Underlying Action").

By letter dated October 2, 2012 and July 5, 2013, Tower disclaimed coverage to Southside based on the construction exclusion in the subject policy which excludes coverage for injuries arising out of the change, alteration or modification of a building. Tower commenced this declaratory judgment action by filing the Summons and Complaint on January 15, 2014, to confirm the propriety of its disclaimer.

On February 26, 2015, Southside joined issue by service of its Answer. On February 25, 2015, Focus, joined issue by service of its Answer. Campisi has not appeared or answered the Complaint.

On September 4, 2014, CastlePoint served a Notice for Discovery and Inspection ("Notice for Discovery") and Combined Demands (collectively, "Discovery Demands") upon Southside. CastlePoint's Notice for Discovery requested the following categories of documents:

1) "correspondence, letters, documents, memoranda, e-mails, faxes, notes, and other written or oral communications concerning the policy";

(2) "correspondence, letters, documents, memoranda, e-mails, faxes, notes, and other written or oral communications concerning the locations to be covered on the policy";

(3) "correspondence, letters, documents, memoranda, e-mails, faxes, notes, and other written or oral communications evidencing the work performed on the premises";

(4) "invoices, contracts, purchase orders or other documentation evidencing the work performed on the premises;

(5) "blueprints, permits, OSHA records and/or building department records concerning the work performed on the premises";

(6) "all documents which will be used to support the affirmative defenses listed in defendants answers to the Complaint"; and

(7) "all documents referred to in preparation for responding to this Notice for Discovery and Inspection."

On February 17, 2015, a preliminary conference was held requiring Southside to provide responses to discovery by March 18, 2015. On June 2, 2015 a discovery order was entered requiring Southside to respond to demands dated September 4, 2014 within thirty days.

Presently before the Court is a motion by CastlePoint pursuant to CPLR § 3126(3) striking Southside's Answer for willful failure to comply with the demands and notices of Plaintiff; or, alternatively, pursuant to CPLR § 3126(2) to prohibit Southside from introducing evidence at trial with respect to their primary residence. CastlePoint submits an attorney affirmation, which states that as of the date of its motion, Tower has not received responses to its Discovery Demands.

Southside opposes. Southside states that Southside has now responded to CastlePoint's Discovery Demands, and provides a copy of its responses and objections.

As to Southside's responses, CastlePoint, in its reply affirmation, states:

On August 17, 2015, Southside provided CastlePoint with numerous objections based on privilege without producing a privilege log. Moreover, Southside asserted numerous relevance objections in response to discovery demands geared toward determining the type of construction performed when Disimone suffered his injury since Southside claims the work was covered under the CastlePoint policy. Southside provided only four documents consisting of a certificate of insurance, which CastlePoint already had, the contract between Southside and Focus and an expense chart.

On August 21, 2015, CastlePoint once again wrote to Southside requesting proper responses to discovery, a privilege log and an affidavit from the principal of Southside detailing that a search was made for the records requested, information on when they were last seen and whether they were

discarded or destroyed in accordance with CPLR 3126 regarding spoliation of evidence.

CPLR §3101(a) generally provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." The Court of Appeals has held that the term "material and necessary" is to be given a liberal interpretation in favor of the disclosure of "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity," and that "[t]he test is one of usefulness and reason." (*Allen v. Cromwell-Collier Publishing Co.*, 21 N.Y.2d 403, 406 [1968]). However, a party is not required to respond to discovery demands which are "palpably improper." A demand is palpably improper if it seeks information which is irrelevant or confidential, or is overbroad and unduly burdensome. (*Gilman & Ciocia, Inc. v. Walsh*, 2007 NY Slip Op 8410, *1 [2nd Dept. 2007]).

"Compliance with disclosure requires both a timely response and one that evinces a good-faith effort to address the requests meaningfully. When the response to a discovery request is, in effect, that there are no responsive documents within the party's custody, possession, or control, that party must provide a detailed statement setting forth the past and present status of the relevant documents; where they were kept; what efforts, if any, were made to preserve them; the circumstances surrounding their disappearance or destruction; and the means and methods used to conduct a search for them. In short, the affidavit submitted must provide the court with a basis to find that the search conducted was a thorough one or that it was conducted in a good faith effort to provide the necessary records to the plaintiff' (*In re Bernfield*, 990 N.Y.S 2d 436 [N.Y. Surr. 2014]). "Bald and conclusory assertions by [respondents] that they have no documents in their possession responsive to the plaintiff's demands are clearly insufficient." (*Id.*).

Upon review the parties' submissions, the Discovery Demands, and Southside's responses to said Demands,

Wherefore it is hereby,

ORDERED that Southside shall submit a privilege log detailing those responsive documents that Southside are withholding based on attorney client privilege within ten days; and it is further

ORDERED that Southside shall submit an affidavit by an individual with knowledge detailing the means and methods that Southside used to conduct a search for the requested documents within ten days; and it is further

ORDERED that the parties are directed to appear for the scheduled compliance conference on March 1, 2016, at 9:30 AM at 71 Thomas Street, Room 205.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: JANUARY 21, 2016

JAN 2 1 2016

EILEEN A. RAKOWER, J.S.C.