

Garbett v Wappingers Cent. Sch. Dist.

2016 NY Slip Op 32895(U)

August 17, 2016

Supreme Court, Dutchess County

Docket Number: 50965/14

Judge: Maria G. Rosa

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK
DUTCHESS COUNTY

Present:

Hon. MARIA G. ROSA

Justice.

THOMAS K. GARBETT, X

Plaintiff,

DECISION AND ORDER

-against-

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WAPPINGERS CENTRAL SCHOOL DISTRICT,
Defendant.

WAPPINGERS CENTRAL SCHOOL DISTRICT, X

Third-Party Plaintiff,

-against-

SITWORKS SERVICES NY CORP.,
Third-Party Defendant.

X

The following papers were considered.

NOTICE OF MOTION
AFFIRMATION IN SUPPORT
EXHIBITS 1-12

AFFIRMATION IN OPPOSITION
EXHIBITS A&B

REPLY AFFIRMATION
EXHIBITS 13&14

SUPPLEMENTAL AFFIRMATION
EXHIBITS 15-23

SUPPLEMENTAL AFFIRMATION

Defendant/third-party plaintiff (“defendant”) previously moved to strike the answer of third-party defendant based on failures to provide discovery. In a decision and order dated May 23, 2016 this court granted the motion to the extent that it ordered third-party defendant to pay costs and fees and stated that its answer would be stricken if it did not provide discovery specified therein on or before June 13, 2016. At a conference before this court on June 6, 2016, defendant advised that the third-party defendant had failed to timely produce the discovery. The court gave the third-party defendant another opportunity to provide the discovery on or before June 23, 2016, and adjourned the matter for a compliance conference on July 26, 2016. Defendant thereafter contacted the court and indicated that the outstanding discovery was not served. The court directed defendant to submit a supplemental affirmation. That affirmation and third-party defendant’s reply thereto are now before the court.

Third-party defendant failed to appear at the compliance conference on July 26, 2016. Third-party defendant previously failed to appear at conferences held on September 9, 2015 and March 30, 2016.

Based on the foregoing, it is hereby

ORDERED that the answer of third-party defendant Siteworks Services NY Corp. is hereby stricken on default. See 22 NYCRR 202.27. Even if dismissal were not warranted pursuant to 22 NYCRR 202.27, third-party defendant’s continued failure to comply with its discovery obligations and the May 23, 2016 order of this court further require striking its answer.

The defendant moved for sanctions pursuant to CPLR §3126 based upon third-party defendant’s (“Siteworks”) failure to provide discovery. This court’s May 23, 2016 order stated that third-party defendant’s answer would be stricken if it failed to provide complete discovery responses by June 13, 2016. The court expressly stated that the response should provide the requested documents or contain an affidavit complying with the requirements of Jackson v. New York, 185 AD2d 768 for each and every document that Siteworks could not produce. The court also required Siteworks to provide an affidavit setting forth all efforts made to obtain contact information for former employees present on the job site on the date of plaintiff’s accident. By letter dated June 15, 2016, defendant advised the court that it had not received any supplemental discovery response from Siteworks. At a conference before this court on June 16, 2016, third-party defendant acknowledged failing to provide the discovery by the required date. The court then gave third-party defendant until June 23, 2016 to provide such response. Defendant has submitted a supplemental affirmation to its motion to strike stating that on June 23, 2016, Siteworks e-filed a letter and document entitled “compliance with the court’s order,” accompanied by an unsigned affidavit. In such documents, counsel stated that third-party defendant was not in possession of any information concerning the current addresses or other identifying information about employees who were on the job site on the date of plaintiff’s accident. He states that the third-party defendant searched the stored records and cannot locate the personnel files for these employees, was not in possession of any safety certificates for the employees, did not create or maintain work logs pertaining to the project and is not in possession of any documentation concerning the transmittal to its insurance carrier. Siteworks’

president submitted an affidavit stating that its records are maintained in a storage facility which he visited in an attempt to locate the “job folder” for the relevant construction project. He states he was unable to locate the file and believes it was in the plaintiff’s possession at the time of his accident. He states such file would have contained all bills, W-2s and job applications for the workers who were on the job site. The affidavit references stored records related to the two employees. Notably, Siteworks failed to disclose these records. Moreover, while the president states that his last recollection is that the records were in the plaintiff’s (his father’s) possession. His affidavit fails to state that he ever asked his father about whether he had such records or knew where they were. It is undisputed that Siteworks failed to timely comply with this court’s May 23, 2016 order requiring the supplemental production by June 13, 2016. Even after the court granted it additional time to comply, it failed to produce a signed affidavit by such date. While such deficiency was cured thereafter, the statement of counsel and the affidavit of Siteworks’ president fails to demonstrate that the most fundamental steps were taken in a good faith effort to produce the discovery defendant has sought and to which it is entitled. While third-party defendant could attribute such deficiency to incorrect deposition testimony and poor draftsmanship, the procedural history of this case reflects a prolonged and willful failure to produce basic discovery and to comply with court ordered deadlines for such production.

Based on the foregoing, it is hereby

ORDERED that defendant’s motion to strike the pleading of third-party defendant Siteworks Services NY Corp. as a sanction pursuant to CPLR §3126 is granted. It is further

ORDERED that to the extent defendant moved for an order of contempt, its motion is denied. The application is procedurally defective as it did not contain on its face the requisite notice required by Judiciary Law §756. See P&N Tiffany Properties, Inc. v. Williams, 302 AD2d 466 (2nd Dept. 2003). However, it is

ORDERED that third-party defendant shall within twenty-one (21) days of the date of this decision and order produce all files and documents containing any information, handwritten or typed, pertaining to any employees who were on the job site on the date plaintiff sustained his injury. Third-party defendant shall further act with due diligence in trying to determine whether plaintiff may be in possession of any such information, and shall forthwith share its findings with defendant.

This constitutes the decision and order of this court.

Dated: August 17, 2016
Poughkeepsie, New York

ENTER:



MARIA G. ROSA
SUPREME COURT JUSTICE

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Pursuant to CPLR Section 5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.