

Garcia v 250 N. 10th St. LLC.
2018 NY Slip Op 32756(U)
October 15, 2018
Supreme Court, Queens County
Docket Number: 872/13
Judge: Allan B. Weiss
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, ALLAN B. WEISS IAS PART 2
Justice

CROGWLIN ORLY GARCIA,

Plaintiff,

-against-

250 NORTH 10TH STREET LLC., LCOR, INC.,
RYDER CONSTRUCTION INC., ROCKLEDGE
SCAFFOLD CORP., and TECTONIC INDUSTRIES,
CORP.,

Defendants.

Index No.: 872/13

Motion Date: 6/13/18

Motion Seq. No.: 18 & 21

RYDER CONSTRUCTION COMPANY, INC.,

Third-Party Plaintiff,

-against-

BARONE STEEL FABRICATORS, INC., BARONE
STEEL, INC., and TECTONIC INDUSTRIES,
CORP.,

Third-Party Defendants.

250 NORTH 10TH STREET LLC and LCOR, INC.,

Second Third-Party Plaintiffs,

-against-

BARONE STEEL INC.,
Second Third-Party Defendant.

250 NORTH 10TH STREET LLC and LCOR, INC.,

Third Third-Party Plaintiffs,

-against-

CONSTRUCTION REALTY SAFETY GROUP, INC.
Third Third-Party Defendant.

250 NORTH 10TH STREET LLC., LCOR, INC., RYDER
CONSTRUCTION INC.,

Fourth Third-Party Plaintiffs,

-against-

CONSTRUCTION REALTY SAFETY GROUP, INC.,

Fourth Third-Party Defendant.

Motions Seq. #18 and #21 are combined for disposition.

The following papers numbered 1 to 37 read on the motion Seq.#18 by plaintiff for an Order restoring this action to the trial calendar; and motion Seq.#21 by plaintiff for an Order severing the plaintiff's action from all third-party actions and cross-motion by defendant/third-party plaintiff Ryder Construction Company, Inc.(Ryder) for an Order pursuant to CPLR 3126 striking the answer of the third-party defendants, Barone Steel Fabricators Inc.(Fabricators) and Barone Steel Inc.(Steel), for failure to produce Ralph Barone for a deposition and precluding these third-party defendants from testifying at the trial of the action.

	<u>PAPERS NUMBERED</u>
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Upon the foregoing papers it is ordered that these motions and cross-motion are determined as follows.

This action to recover for personal injuries plaintiff allegedly sustained when he fell from a scaffold at a construction site as the result of the defendants' alleged violation of various provisions of the Labor Law was commenced on January 15, 2013.

In October, 2014 the plaintiff, defendant Tectonic Industries, Corp.(Tectonic), Ryder, Steel and Fabricators by a joint motion, and plaintiff moved for summary judgment. The plaintiff was granted summary judgment on his claim based upon violations of Labor Law 240(1) as against the owner and Ryder by Order dated July 15, 2015. Ryder's and Steel and Fabricators motions were denied. Tectonic's motion to dismiss the complaint and all cross-claims and third-party claims were dismissed.

On May 5, 2014 the plaintiff filed his Note of Issue. On April 28, 2015 the parties appeared in the Trial Scheduling Part(TSP) and the Note of Issue was vacated due to the existence of substantial outstanding discovery.

The plaintiff now moves (mot. Seq.#18) for an order restoring the action to the trial calendar asserting that all discovery is complete.

Ryder opposes the motion on the grounds that discovery is not complete. Ryder's new counsel, who was substituted on November 1, 2017, maintains that on February 22 and 23, 2018 it served a notice to take the deposition of Ralph Barone of Steel and Fabricators; a Notice to Adit and a Notice of Non-party deposition of Joseph Ferrigno from Admiral Insurance Brokerage Corp.

It appears that as a result of Ryder's opposition, plaintiff brought a new motion Seq. #21 to sever the third-party actions for indemnification. Plaintiff argues that severance is warranted since he was granted summary judgment in his favor and against the owner of the property and Ryder, the general contractor on his Labor Law §240(1) claim over three years ago leaving only the issue of damages outstanding. He claims that any further delay in resolving plaintiff's claims is severely prejudicial to plaintiff who has been rendered totally disabled. Plaintiff also contends that the action has been pending for more than five years and Ryder has demanded no discovery in the last 2 1/2 years despite the denial three years ago of Ryder's motion for summary judgment on its indemnification claim against Steel and Fabricators.

Ryder and all other parties oppose severance. In addition Ryder cross-moves¹ to strike Steel's and Fabricator's answer for failure to produce Ralph Barone for a deposition. Ryder asserts that a deposition of Ralph Barone the vice-president of Steel and Fabricators is necessary on matters of insurance coverage.

Steel and Fabricators objected to Ryder's Notice and oppose the instant motion.

A corporate entity has the right to designate the employee who will be deposed (see O'Brien v Village of Babylon, 153 AD3d 547[2017]; Conte v County of Nassau, 87 AD3d 559, 560 [2011]). A party "seeking additional depositions has the burden of demonstrating '(1) that the representatives already deposed had insufficient knowledge, or were otherwise inadequate, and (2) there is a substantial likelihood that the persons sought for depositions possess information which is material and necessary to the prosecution of the case'" (Gomez v State of New York, 106 AD3d 870, 872 [2013], quoting Zollner v City of New York, 204 AD2d 626, 627 [1994]; see Conte v County of Nassau, supra at 560).

On December 9, 2015 Nick Barone, President, founder and sole shareholder of Fabricators appeared for a deposition on behalf of Steel and Fabricators. All parties, including Ryder, had an opportunity to ask questions. Nick Barone answered all questions asked. Ryder has failed to demonstrate that Nick Barone had insufficient knowledge regarding the issues in the main action or third-party actions or was otherwise inadequate, and that there was a substantial likelihood that Ralph Barone possesses information which is material and necessary to the prosecution of the case which Nick Barone did not possess.

Although CPLR 3101 (a) provides for full disclosure of all evidence material and necessary to the prosecution or defense of an action, unlimited disclosure is not required, and supervision of disclosure is generally left to the trial court's broad discretion (see Allen v Crowell-Collier Publ. Co., 21 NY2d 403, 406 [1968]; Gilman & Ciocia, Inc. v. Walsh, 45 AD3d 531, 531 [2007]). Ryder had more than five years to complete discovery. Any further delay of the resolution of the action due to Ryder's inaction is not justified.

¹Ryder's motion is improperly brought as a cross-motion since it seeks relief as against a non-movant (see CPLR 2215; Mango v. Long Is. Jewish-Hillside Med. Center, 123 A.D.2d 843, 844 [1986] .

Accordingly, Ryder's motion to strike Steel's and Fabricator's answer for its alleged wilful failure to produce Ralph Barone for a deposition is denied.

It is noted that the issues regarding the Notice to Admit served on Steel and Fabricators raised in motions Seq. #19 and #20 were decided by Order dated October 11, 2018 and Joseph Ferrigno was already deposed. Thus, it appears that no further discovery alleged by Ryder to be outstanding remains outstanding.

Accordingly, the plaintiff's motion (Seq.#21) to sever the third-party actions is denied.

The plaintiff's motion to restore the action to the trial calendar is granted.

Plaintiff shall file a new note of issue on or before October 26, 2018.

All parties shall appear in the Trial Scheduling Part, courtroom 25 on December 7, 2018 at 9:30 a.m. for a pre-trial conference.

A copy of this Order is being mailed to the attorneys for the parties.

Dated: October 15, 2018
D# 58

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J.S.C.