

NGL Contr. Ltd v Plaza Toyota
2019 NY Slip Op 33107(U)
October 16, 2019
Supreme Court, New York County
Docket Number: 652039/2017
Judge: John J. Kelley
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY PART IAS MOTION 56EFM

Justice

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NGL CONTRACTING LTD,

Plaintiff,

- v -

PLAZA TOYOTA, and JOHN A. ROSATTI,

Defendants.

-----X

INDEX NO. 652039/2017

MOTION DATE 07/02/2019

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43

were read on this motion to/for

VACATE/STRIKE - NOTE OF ISSUE/JURY

In this action to recover damages for breach of a construction contract and on a personal guarantee, the defendants move to vacate the note of issue and compel further discovery or, in the alternative, to impose sanctions upon the plaintiff for failure to make discovery. The plaintiff opposes the motion. The motion is granted to the extent that the note of issue is vacated, and the plaintiff is directed to provide particular responses to the defendant's demand for discovery and inspection, submit to a deposition, and file a new note of issue in accordance with the compliance conference order dated October 15, 2019. The motion is otherwise denied.

The plaintiff and defendant Plaza Toyota entered into a contract, pursuant to which the plaintiff agreed to undertake construction work at that defendant's car dealership. The defendant, John A. Rosatti, allegedly guaranteed Plaza Toyota's performance under the agreement. The plaintiff contends that it completed the work, and demanded approximately \$235,000 under the terms of the contract, but that the defendants have refused to pay it.

On November 20, 2018, the defendants served a demand for documents setting forth 18 specific requests. According to the defendants, on May 14, 2019, the plaintiff produced several

documents, but did not expressly provide a written response to the demand articulating which documents were responsive to which requests.

In a preliminary conference order dated March 26, 2019, the court directed the parties to conduct depositions on or before July 17, 2019, and fixed the discovery cutoff deadline for September 30, 2019. The parties thereafter scheduled the plaintiff's deposition for late May. The defendants nonetheless refused to proceed with that deposition in the absence of what they deemed to be a proper response to their document request. Rather than rescheduling the deposition, the plaintiff filed a note of issue on June 18, 2019. On July 2, 2019, the defendants moved to vacate the note of issue, and either compel outstanding discovery or dismiss the complaint, on the grounds that the plaintiff failed to comply with discovery orders, failed to respond to the defendants' demand for discovery and inspection, and failed to identify what documents that were produced were responsive to which particular demand. In opposition, the plaintiff simply averred that it timely provided the requested documents and that, inasmuch as the defendants cancelled the plaintiff's deposition, they had waived the right to conduct it.

The court may vacate a note of issue where, as here, it appears that a material fact set forth therein, i.e., the representation that discovery is complete, is incorrect (see 22 NYCRR 202.21[e]; *Rivers v Birnbaum*, 102 AD3d 26 [2d Dept 2012]; *Gomes v Valentine Realty LLC*, 32 AD3d 699 [1st Dept 2006]; *Herbert v Sivaco Wire Corp.*, 1 AD3d 144 [1st Dept 2003]). CPLR 3101 provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." "The words 'material and necessary' as used in CPLR 3101(a) are 'to be interpreted liberally to require disclosure . . . of any facts bearing on the controversy' (*Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 406 [1968])" (*Matter of Steam Pipe Explosion at 41st St. & Lexington Ave.*, 127 AD3d 554, 555 [1st Dept 2015]).

Pursuant to CPLR 3122(c), “[w]henver a person is required . . . to produce documents for inspection, that person shall produce them as they are kept in the regular course of business or shall organize and label them to correspond to the categories in the request.” Since the plaintiff did not produce documents in this fashion, it was not in compliance with its discovery obligations at the time it filed the note of issue, and must now organize and label the relevant documents in accordance with the statute (*see H.P.S. Mgt. Co., Inc. v St. Paul Surplus Lines Ins. Co.*, 127 AD3d 1018 [2d Dept 2015]). Moreover, a party cannot unilaterally deem its adversary to have waived the right to conduct a deposition where, as here, the parties had three more months before the discovery deadline passed, and the party is on notice that there remained several disputed discovery issues.

“such assumption that defendant[s] waived [their] right to disclosure was erroneous, unilateral, premature and in contravention of the directions of the Preliminary Conference Order. Pursuant to the provisions of the Order, the Court has the authority to determine whether defendant waived disclosure and whether all discovery is complete” (*Dragutescu v New York City Transit Auth.*, 2007 NY Misc LEXIS 4462, *5 [Sup Ct, Queens County, Jun. 7, 2007]).

Accordingly, it is

ORDERED that the defendants’ motion is granted to the extent that the note of issue filed on June 18, 2018 is vacated and stricken and the parties shall conduct additional discovery in accordance with the Compliance Conference Order of this court dated October 15, 2019, and the motion is otherwise denied; and it is further,

ORDERED that the defendants shall serve a copy of this order with notice of entry upon the Trial Support Clerk, who shall mark the court’s calendar records accordingly; and it is further,

ORDERED that the plaintiff’s deadline for filing a new note of issue is extended to March 2, 2020 (*see* General Construction Law § 25-a).

This constitutes the Decision and Order of the court.

10/16/2019
DATE



JOHN J. KELLEY, J.S.C.
HON. JOHN J. KELLEY
J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: