

Winkler v Halmar Intl.
2020 NY Slip Op 32455(U)
July 27, 2020
Supreme Court, New York County
Docket Number: 150694/2014
Judge: Margaret A. Chan
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARGARET A. CHAN PART IAS MOTION 33EFM

Justice

-----X

WINKLER, DOREEN ELLEN

Plaintiff,

- v -

HALMAR INTERNATIONAL

Defendant.

-----X

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION

Plaintiff,

-against-

PRECISION CONCRETE PUMPING, INC.

Defendant.

-----X

HAKS GROUP, INC., HAKS ENGINEERS, ARCHITECTS AND LAND SURVEYORS, P.C.

Plaintiff,

-against-

JA UNDERGROUND PROFESSIONAL CORPORATION D/B/A JACOBS ASSOCIATES

Defendant.

-----X

INDEX NO. 150694/2014
MOTION DATE
MOTION SEQ. NO. 011

DECISION + ORDER ON MOTION

Third-Party Index No. 595096/2015

Second Third-Party Index No. 595523/2015

The following e-filed documents, listed by NYSCEF document number (Motion 011) 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519

were read on this motion to/for PRECLUDE/COMPEL.

In this Labor Law matter, defendant JA Underground Professional Corporation d/b/a Jacobs Associates (JA) moves by Order to Show Cause (OSC) to: (1) preclude defendant Halmar International, LLC (Halmar) from calling non-party

William Loftus as a witness at time of trial pursuant to CPLR 3126; or, in the alternative (2) compel Loftus to comply with the subpoena duces tecum and ad testificandum dated January 7, 2020 that was previously served at Loftus' residence on January 11, 2020 pursuant to CPLR § 2308(b). The OSC is unopposed. The court conducted a telephonic hearing on the OSC on July 24, 2020 and non-party Loftus did not appear. The Decision and Order is as follows:

BACKGROUND

JA has sought to depose Loftus for more than 2 years, including when Loftus remained under the control of defendant Halmar International, LLC ("Halmar"). Indeed, in a January 30, 2018 e-mail exchange between counsels, JA specifically requested to depose Loftus, to which Halmar's counsel responded, "I will produce Loftus without the need of a formal demand," indicating that Loftus was Halmar's employee and within Halmar's control as of January 30, 2018 (NYSCEF # 496).

JA continued to seek the Loftus' deposition. Indeed, per this court's June 6, 2018 so-ordered compliance conference stipulation, Loftus was marked as Halmar's witness and was scheduled to be deposed on October 2, 2018 (NYSCEF # 497). However, that deposition did not occur. Thus, at the October 17, 2018 compliance conference, this court against so-ordered Loftus's deposition for November 2, 2018 (NYSCEF # 498). Again, Loftus did not appear.

In February 2019, JA again sought Loftus's testimony, and it was at this time that it learned from Halmar that Loftus was no longer in their employ (NYSCEF # 499). This court was appraised of this fact at the February 13, 2019 compliance conference and ordered Halmar to provide Loftus' last known address to enable JA to obtain his deposition via subpoena (NYSCEF # 500). Halmar provided Loftus' last known address to JA on March 25, 2019 (NYSCEF # 501).

JA issued its first subpoena to Loftus on April 16, 2019 for a deposition to be held on June 5, 2019 (NYSCEF # 502). The subpoena was served on his wife Jennifer Loftus at their Long Beach home on April 22, 2019 (NYSCEF # 503). However, Loftus did not contact JA, and the June 5, 2019 deposition was adjourned.

This court again addressed Loftus' deposition at a November 13, 2019 compliance conference (NYSCEF # 505). JA again served a subpoena duces tecum and ad testificandum on Loftus at his home on December 11, 2019 for a scheduled January 7, 2020 deposition in New York County (NYSCEF ## 506-507). Loftus did not appear at the January 7, 2020 deposition. However, at the deposition, Halmar raised an objection that the proper venue for the deposition was in fact Loftus's home county of Nassau.

Thus, in an abundance of caution, JA served a third subpoena on Loftus at his home on January 11, 2020 with a scheduled February 7, 2020 deposition date (NYSCEF ## 508-509). Loftus again did not appear for the deposition.

DISCUSSION

JA's motion is granted. At the July 24, 2020 hearing, the parties agreed that Loftus should be judicially compelled to comply with JA's deposition demand. If Loftus fails to appear for another scheduled deposition, then Halmar will be precluded from bringing him as a witness in this matter.

CPLR § 2308(b) governs disobedience of non-judicial subpoenas and reads as follows:

if a person fails to comply with a subpoena which is not returnable in a court, the issuer or the person on whose behalf the subpoena was issued may move in the supreme court to compel compliance. If the court finds that the subpoena was authorized, it shall order compliance and may impose costs not exceeding fifty dollars. A subpoenaed person shall also be liable to the person on whose behalf the subpoena was issued for a penalty not exceeding fifty dollars and damages sustained by reason of the failure to comply (CPLR § 2308[b]).

While this court cannot hold Loftus in contempt as his disobedience is of a non-judicial subpoena, this court can order his compliance and attendance at a deposition (*see Dias v Consol. Edison Co. of New York, Inc.*, 116 AD2d 453, 454 [1st Dept 1986]). As such, Loftus must attend a deposition to be held on August 7, 2020. His failure to attend may result in sanctions being imposed against him.

However, in the event that Loftus does not appear at the August 7, 2020 deposition, Halmar will be precluded from bringing him as a witness at time of trial. CPLR 3126 reads in pertinent part as follows:

If any party, or a person who at the time a deposition is taken or an examination or inspection is made is an... employee or agent of a party or otherwise under a party's control, [and] refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them... an order prohibiting the disobedient party... from using certain witnesses (CPLR 3126).

Halmar failed to comply with multiple so-ordered stipulations to produce Loftus prior to the termination of his employment with Halmar. Halmar's

“numerous and unexplained failures to comply with longstanding and still outstanding discovery obligations justify the inference that [its] noncompliance with discovery has been willful and contumacious” (*Sanchez v City of New York*, 266 AD2d 127, 127 [1st Dept 1999]). As such, if Loftus fails to appear for the August 7, 2020 deposition, Halmar will be precluded from bringing him as a witness at the time of trial.

Accordingly, it is ORDERED that the branch of JA’s motion to compel William Loftus to comply with the January 7, 2020 subpoena duces tecum and ad testificandum pursuant to CPLR § 2308(b) is granted; it is further


ORDERED that William Loftus shall appear for an examination before trial to be held on August 7, 2020. If Mr. Loftus fails to appear, he may be held in contempt of court and subject to sanctions. JA shall select the venue for Mr. Loftus’ deposition and shall notify Mr. Loftus of the location with a notice to accompany its service of this Decision and Order upon Mr. Loftus. The deposition shall be held both in-person and virtually to accommodate the health concerns of the parties; it is further

ORDERED that the branch of JA’s motion to preclude Halmar from producing William Loftus at time of trial pursuant to CPLR 3126 is conditionally granted. In the event Mr. Loftus appears for the aforementioned deposition, he will be permitted to be at witness at trial. However, in the event Mr. Loftus fails to appear for the judicially compelled deposition, Halmar will be precluded from bringing Mr. Loftus as a witness; it is further

ORDERED that JA shall serve a copy of this order with notice of entry upon all parties and the clerk of the court within two (2) days of this Order; and it is further

ORDERED that JA shall serve a copy of this order with notice of entry upon William Loftus via FedEx 2 Day Delivery within two (2) days of this Order and shall file proof of service within three (3) days of said service.

This constitutes the Decision and Order of the court.

<u>7/27/2020</u> DATE	 MARGARET A. CHAN, J.S.C.			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	REFERENCE
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT