

Connor v Core Four Constr.

2020 NY Slip Op 34030(U)

December 4, 2020

Supreme Court, New York County

Docket Number: 159558/2015

Judge: Robert R. Reed

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ROBERT R. REED PART 43

Justice

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GREG CONNOR,

Plaintiff,

- v -

CORE FOUR CONSTRUCTION, 205 WEST 39TH ST
COMPANY, 205 WEST 39TH ST CORPORATION, 205
WEST 39TH ST, LLC NO1, 205 WEST 39TH ST, LLC NO2,
205 WEST 39TH ST, LLC NO3, 205 WEST 39TH ST, LLC
NO4, 205 WEST 39TH ST, LLC NO5, 205 WEST 39TH ST,
LLC NO6, 205 WEST 39TH ST, LLC NO7, CALVIN KLEIN,
INC., PVH CORP., 205 WEST 39TH STREET COMPANY,
L.P.,

Defendant.

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CORE FOUR CONSTRUCTION, CALVIN KLEIN, INC., PVH
CORP., 205 WEST 39TH STREET COMPANY, L.P., 205
WEST 39TH STREET COMPANY, 205 WEST 39TH STREET
CORPORATION, 205 WEST 39TH STREET, LLC NO.1, 205
WEST 39TH STREET, LLC NO.2, 205 WEST 39TH STREET,
LLC NO.3, 205 WEST 39TH STREET, LLC NO.4, 205 WEST
39TH STREET, LLC NO.5, 205 WEST 39TH STREET, LLC
NO.6, 205 WEST 39TH STREET, LLC NO.7

Plaintiff,

-against-

TF NUGENT, LL FLOOR DESIGNS

Defendant.

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INDEX NO. 159558/2015
MOTION DATE 12/18/2020
MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595147/2016

The following e-filed documents, listed by NYSCEF document number (Motion 003) 111, 112, 113, 114,
115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 152, 180
were read on this motion to STRIKE CASE FROM CALENDAR

ROBERT R. REED, J.

Upon the foregoing documents, it is ordered that this motion to vacate the note of issue and certificate of readiness, to extend the time for the parties to file dispositive motions, and to direct all parties to complete outstanding discovery, is granted in part and denied in part.

Defendants/third-party plaintiffs Core Four Construction, Calvin Klein, Inc., PVH Corp., 205 West 39th Street Company, L.P., 205 West 39th Street Corporation., 205 West 39th Street, LLC No. 1, 205 West 39th Street, LLC No. 2, 205 West 39th Street, LLC No. 3, 205 West 39th Street, LLC No. 4, 205 West 39th Street, LLC No. 5, 205 West 39th Street, LLC No. 6, and 205 West 39th Street, LLC No. 7 argue that the note of issue should be vacated because certain discovery remains outstanding. Defendants/third-party plaintiffs assert that they supplemented their March 27, 2020 discovery responses to all parties, and urge that the note of issue and certificate of readiness be vacated so that all parties have the opportunity to appropriately review those responses. Defendants/third-party plaintiffs also assert that plaintiff's responses to discovery demands served by third-party defendant LLC Floor Designs remain outstanding. Plaintiff opposes, arguing that, to the extent there is outstanding discovery, it relates only to demands between the separate camps of defendants.

A court may vacate a note of issue where 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 Bimbaum*, 102 AD3d 26 [2nd Dept 2012]; *Gomes v Valentine Realty LLC*, 32 AD3d 699 [1st Dept 2006]; *Herbert v Sivaco Wire Corp.*, 1 AD3d 144 [1st Dept 2003]). Further, 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)" (*Matter of Steam Pipe Explosion at 41st Street and Lexington Avenue*, 127 AD3d 554, 555).

Defendants/third-party plaintiffs assert in their moving papers that plaintiff has failed to respond to a June 11, 2020 notice of discovery and inspection sent by defendant/third-party defendant LL Floor Designs. Defendants/third-party plaintiffs attach as an exhibit to their moving papers a copy of the notice of discovery and inspection sent by third-party defendant LL Floor Designs which was directed to plaintiff. Defendants/third-party plaintiffs are entitled to receive a copy of plaintiff's response to such discovery demands in the normal course of litigation, and, thus, they can fairly assert from non-receipt that there has been no response by plaintiff. In his opposition, plaintiff fails to directly refute the assertion that he has failed to respond to the third-party defendant's discovery demands, and fails, moreover, to provide a copy of a response to said discovery demands to demonstrate compliance. Instead, plaintiff asserts that the outstanding discovery issues that remain are between the two separate camps of defendants. Of course, whether outstanding discovery is to be provided by plaintiff or by certain defendants, the fact remains that, apparently, there is outstanding discovery. Therefore, plaintiff's filing of the note of issue representing that all discovery is complete contained a materially incorrect statement.

Defendants/third-party plaintiffs' request for extension of time to file its summary judgment motion is denied as moot. Defendants/third-party plaintiffs have already filed their summary judgment motion which is currently pending before the court.

Accordingly, it is

ORDERED that the portion of the motion of defendants/third-party plaintiffs Core Four Construction, Calvin Klein, Inc., PVH Corp., 205 West 39th Street Company, L.P., 205 West 39th

Street Corporation., 205 West 39th Street , LLC No. 1, 205 West 39th Street, LLC No. 2, 205 West 39th Street, LLC No. 3, 205 West 39th Street, LLC No. 4, 205 West 39th Street, LLC No. 5, 205 West 39th Street, LLC No. 6 and 205 West 39th Street, LLC No. 7 that seeks to vacate the note of issue and certificate of readiness is granted, and therefore the note of issue is hereby vacated and the case stricken from the trial calendar; and it is further

ORDERED that all further discovery in this matter shall be completed within 60 days from service of a copy of this order with notice of entry; and it is further

ORDERED that plaintiff shall comply with all outstanding written discovery obligations within 21 days; and it is further

ORDERED that the portion of the motion seeking to extend the time for the parties to file dispositive motions is denied; and it is further


ORDERED that, within 20 days from entry of this order, movant shall serve a copy of this order with notice of entry on all parties and upon the Clerk of the Trial Support Office (60 Centre Street, Room 158M), who is hereby directed to strike the case from the trial calendar and make all required notations thereof in the records of the court; and it is further

ORDERED that upon completion of discovery as hereinabove directed, plaintiff shall cause the action to be placed upon the trial calendar by the filing of a new note of issue and certificate of readiness (for which a fee shall be imposed), to which shall be attached a copy of this order [the plaintiff shall move to reinstate the note of issue as provided in Uniform Rule 202.21 (f)]; and it is further

ORDERED that such service upon the Clerk of the Trial Support Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

This constitutes the Decision and Order of the court.

12/4/2020
DATE


ROBERT R. REED, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER				
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	REFERENCE