

Ortiz-Rubio v Oceangate L.P.

2022 NY Slip Op 32833(U)

August 22, 2022

Supreme Court, New York County

Docket Number: Index No. 153389/2020

Judge: David Benjamin Cohen

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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. DAVID B. COHEN

PART 58

Justice

-----X

INDEX NO. 153389/2020

LUIS KEVIN ORTIZ-RUBIO,

Plaintiff,

MOTION SEQ. NO. 002

- v -

OCEANGATE L.P., STARRETT OCEANGATE LLC, SATO
CONSTRUCTION CO., INC., ROCK GROUP NY CORP.,
FLAG WATERPROOFING AND RESTORATION, LLC.,

Defendants.

**DECISION + ORDER ON
MOTION**

-----X

SATO CONSTRUCTION CO., INC. and FLAG
WATERPROOFING AND RESTORATION, LLC,

TP Plaintiffs,

Third-Party
Index No. 595641/2020

-against-

STONE CITY ENTERPRISES INC.,

TP Defendant.

-----X

SATO CONSTRUCTION CO., INC. and FLAG
WATERPROOFING AND RESTORATION, LLC,

Second TP Plaintiffs,

Second Third-Party
Index No. 595351/2022

-against-

MAGA CONTRACTING CORP.,

Second TP Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 61, 62, 63, 64, 65,
66, 67, 68, 69, 70, 71

were read on this motion to/for ORDER OF PROTECTION.

In this Labor Law action, defendant/third-party plaintiff/second third-party plaintiff Sato Construction Co., Inc. d/b/a Flag Waterproofing and Restoration Company i/s/h/a Sato Construction Co., Inc. and Flag Waterproofing and Restoration, LLC (“Sato”) moves, pursuant to CPLR 3103, for a protective order striking a notice to admit served on it by plaintiff Luis Kevin Ortiz-Rubio or, in the alternative, for an order, pursuant to CPLR 3123, extending its time to respond to the notice to admit. Plaintiff opposes the motion. After consideration of the parties’ contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises from an incident on December 18, 2019 in which plaintiff was injured while working at a construction site at 2955 West 29th Street in Brooklyn. On May 27, 2020, plaintiff commenced the captioned action by filing a summons and complaint against Sato and the other defendants named in the caption. Doc. 1. Sato joined issue by its answer filed August 11, 2020. Doc. 8. In the said answer, which was verified by Sato’s attorney, Sato denied, upon information and belief, that it was the general contractor at the site. Doc. 8.

On or about May 20, 2022, plaintiff served a notice to admit on Sato. Doc. 59. The notice to admit asked said defendants to deny or admit the following:

On or about December 18, 2019, Defendant SATO CONSTRUCTION CO., INC. DBA FLAG WATER PROOFING AND RESTORATION COMPANY I/S/H/A SATO CONSTRUCTION CO., INC. was the general contractor at the premises located at 2955 West 29th Street in the County of Kings, City and State of New York.

Doc. 59.

On May 23, 2022, counsel for Sato wrote to plaintiff’s counsel asserting that the notice to admit was improper and requesting that it be withdrawn. Doc. 60. Since the notice to admit was

not withdrawn, counsel for Sato filed the instant motion seeking a protective order pursuant to CPLR 3103 or, in the alternative, for an extension of time to respond to the notice to admit pursuant to CPLR 3123. Doc. 61. In support of the motion, counsel for Sato asserts that the notice to admit is improper since it seeks information regarding ultimate issues of fact and because Sato has already denied in its answer that it was the general contractor at the site. Doc. 62. Further, counsel argues that the information sought by the notice to admit can be obtained by deposing Sato. Doc. 62.

In opposition, counsel for plaintiff argues that Sato must respond to the notice to admit since it does not seek information regarding ultimate issues of fact. Doc. 70. Counsel further asserts that, although Sato maintains that the information sought can be obtained at a deposition, Sato still has not been deposed and, since the statute of limitations is going to expire in December 2022, it is important that he learn the identity of the general contractor as soon as possible. Doc. 70.

In reply, counsel for Sato reiterates his arguments that the notice to admit is improper because it seeks information regarding an ultimate issue of fact as well as an issue already addressed in its answer. Doc. 71. He further asserts that Sato has been ready and willing to appear for deposition. Doc. 71.

LEGAL CONCLUSIONS

"A notice to admit is designed to elicit admissions on matters which the requesting party 'reasonably believes there can be no substantial dispute' (CPLR 3123 [a])" (*National Union Fire Ins. Co. of Pittsburgh, Pa. v Allen*, 232 AD2d 80, 85 [1st Dept 1997]). "[A] notice to admit may not be utilized to request admission of material issues or ultimate or conclusory facts," or "facts within the unique knowledge of other parties" (*Taylor v Blair*, 116 AD2d 204, 206 [1st Dept 1986]). Rather, it is "only properly used to eliminate from trial matters which are easily provable and about which there can be no controversy" (*Samsung Am. v Yugoslav-Korean Consulting & Trading Co.*, 199 AD2d 48, 49 [1st Dept 1993]). Further, because a notice to admit "is not intended as simply another means for achieving

discovery," it may not be used to obtain information in lieu of other disclosure devices (*see Hodes v City of New York*, 165 AD2d 168, 170 [1st Dept 1991]).

(*Fetahu v New Jersey Tr. Corp.*, 167 AD3d 514, 515 [1st Dept 2018]).

CPLR 3103 (a) provides, inter alia, that "[t]he court may at any time on its own initiative, or on motion of any party or of any person from whom or about whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts." The determination of whether to issue a protective order against a notice to admit is a matter of discretion for the court. (*See Hawthorne Group, LLC v RRE Ventures*, 7 AD3d 320, 324 [1st Dept 2004]).

This Court, in its discretion, finds that plaintiff's notice to admit properly seeks to "probe [Sato's] understanding of [its] own duties under law" at the site and is not "a vehicle for asking [Sato] to interpret the law or someone else's compliance therewith." (*Villa v NY City Hous. Auth.*, 107 AD2d 619, 620 [1st Dept 1985]).

CPLR 3123 (a) provides, inter alia, that:

[e]ach of the matters of which an admission is requested shall be deemed admitted unless within twenty days after service thereof or within such further time as the court may allow, *the party* to whom the request is directed serves upon the party requesting the admission a sworn statement either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why [it] cannot truthfully either admit or deny those matters."

(*emphasis added*).

Although Sato correctly contends that it has already denied in its answer that it was the general contractor, and that a notice to admit cannot be used to seek admissions regarding matters already addressed in responsive pleadings (*see Villa*, 107 AD2d at 620), it ignores the fact that the denial in its answer was not only made upon information and belief and, thus, was not an outright

denial, but also that its answer was verified by its attorney, and not by a member or principal of the party, Sato, as required by the statute.

Finally, this Court notes that, in seeking a protective order, Sato cites no case law specifically holding that a notice seeking an admission that an entity was a general contractor on a construction site is improper. Although this Court has located no appellate authority in this regard, it notes that, in the case of *Walston v City of New York*, 2020 NY Misc LEXIS 5710, 2020 Slip Op 32985(U) (Sup Ct New York County 2020 [Freed, J.]), this Court held that it was proper to seek an admission from a defendant regarding whether it was a general contractor.

Accordingly, it is hereby:

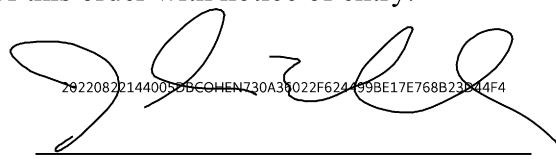
ORDERED that the branch of the motion by defendant/third-party plaintiff/second third-party plaintiff Sato Construction Co., Inc. d/b/a Flag Waterproofing and Restoration Company i/s/h/a Sato Construction Co., Inc. and Flag Waterproofing and Restoration, LLC seeking a protective order pursuant to CPLR 3103 is denied; and it is further

ORDERED that the branch of the motion by defendant/third-party plaintiff/second third-party plaintiff Sato Construction Co., Inc. d/b/a Flag Waterproofing and Restoration Company i/s/h/a Sato Construction Co., Inc. and Flag Waterproofing and Restoration, LLC seeking to extend its time to respond to plaintiff's notice to admit dated May 20, 2022 is granted; and it is further

ORDERED that plaintiff shall serve this order, with notice of entry, within 10 days after this order is filed on NYSCEF; and it is further

ORDERED that defendant/third-party plaintiff/second third-party plaintiff Sato Construction Co., Inc. d/b/a Flag Waterproofing and Restoration Company i/s/h/a Sato

Construction Co., Inc. and Flag Waterproofing and Restoration, LLC is to serve a response to plaintiff's notice to admit within 10 days after service of this order with notice of entry.



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8/22/2022
DATE

HON. DAVID B. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE