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| Metromotion Prods. Inc. v Good Light Studio, Inc. |
| 2022 NY Slip Op 33362(U) |
| October 7, 2022 |
| Supreme Court, New York County |
| Docket Number: Index No. 150804/2018 |
| Judge: Sabrina Kraus |
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SABRINA KRAUS PART 57TR

Justice

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METROMOTION PRODUCTIONS, INC., A NEW YORK BUSINESS CORPORATION, DAYLIGHT STUDIO, L.L.C, A NEW YORK LIMITED LIABILITY COMPANY, AND INDIVIDUAL AND AS ASSIGNEE OF FIREMANS FUND INSURANCE COMPANY,

Plaintiff,

- v -

GOOD LIGHT STUDIO, INC., A NEW YORK BUSINESS CORPORATION, GOOD LIGHT STUDIO 2, LLC, A NEW YORK LIMITED LIABILITY COMPANY, JAMES GALLOWAY, STUDIO WITH A VIEW, INC., A NEW YORK BUSINESS CORPORATION, ROBERT F. STUART & CO. INC., 450 WEST 31ST OWNERS CORP., A NEW YORK BUSINESS CORPORATION,

Defendants.

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INDEX NO. 150804/2018
MOTION DATE 10/7/2022
MOTION SEQ. NO. 011

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 011) 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258

were read on this motion to/for Quash subpoenas for post note depositions.

BACKGROUND

Plaintiffs allegedly sustained property damage and loss of business as a result of water damage on February 1, 2015. Subsequently, plaintiffs filed and settled a claim with Fireman's Fund Insurance Company, their first party insurer. The settlement included an assignment of its rights, interest and claims against third party defendants to plaintiffs in the amount of \$762,527.70. This assignment plus additional damages, including alleged substantial loss of business and income are the basis of this action.

PENDING MOTION

Plaintiff moves by order to show cause for an order striking the subpoenas served by Robert F. Stuart & Co., Inc. and 450 West 31st Owners Corp. (Defendants) for the depositions of non-parties Shari La Sala and Taylor Hingston as impermissible post note of issue discovery; and deeming the subpoenas as null and void for failure to comply with 22 NYCRR 202.21(d).

On October 7, 2022, the court heard oral argument and reserved decision.

For the reasons stated below the motion is denied.

PROCEDURAL HISTORY

This action was commenced by the filing of summons and complaint on January 25, 2018. Issue was joined on May 18, 2018.

Plaintiffs, in their original Bill of Particulars which was served upon defense counsel in 2018, lists a business interruption/lost profit claim of \$362,877.29.

The deposition of Marc Chanti was taken on March 27, 2019. During that deposition, Mr. Chanti identified Shari La Sala as vice president of plaintiff. Shortly after the deposition was taken, on May 28, 2019, plaintiffs produced the handwritten notes made by Shari LaSala and identified them as such.

On July 25, 2019, a note of issue with jury demand was filed in this case. On August 14, 2019, Defendants James Galloway and Studio With A View, Inc., Good Light Studio, Inc. and Good Light Studio 2, LLC moved to vacate plaintiffs' note of issue stating that various discovery was not complete.

On October 4, 2019, plaintiffs agreed to voluntarily withdraw the note of issue and the case was taken off the trial calendar. Further discovery and depositions were conducted.

In February of 2020, plaintiffs amended their Bill of Particulars to allege a business interruption/lost profit claim of over \$5,000,000.00. At a status conference held on February 13, 2020, plaintiff was directed to appear for a deposition which would be limited to issues arising from its Amended Bill of Particulars. The deposition was to take place on or before March 31, 2020, but did not take place as scheduled due to the pandemic.

On December 30, 2020, plaintiffs produced emails including many from Taylor Hingston who was identified in those emails as plaintiffs' manager.

On June 15, 2021, a second note of issue with jury demand was filed in this case.

Upon receipt of the Note of Issue on June 15, 2021, Defendants emailed plaintiffs' counsel and asserted that Defendants were entitled to an additional deposition due to the fact that plaintiffs amended their Bill of Particulars. Defendants agreed to allow the Note of Issue to stand as long as plaintiffs produced an individual to testify regarding the lost income alleged in the amended Bill of Particulars. Plaintiffs agreed to produce such a witness.

On May 6, 2022, plaintiffs produced Alfina Chanti (AC) for deposition. AC was the widow of Marc Chanti, the owner of Metromotion, who had passed away in June 2019, prior to the amendment of the Bill of Particulars. AC was not an employee of Metromotion at the time of the incident and Defendants allege she had no knowledge of the business interruption claim.

Additionally, Defendants argue there is evidence to suggest that plaintiffs were conducting business during the period in which they allege they were shutdown and that the testimony of Taylor Hingston and Shari LaSala is necessary to explore this issue. Neither of these individuals is employed by Metromotion at this time.

DISCUSSION

Discovery sought after the filing of a note of issue and certificate of readiness may only be sought under two procedural circumstances set forth in 22 NYCRR 202.21. One method of obtaining post-note discovery is to vacate the note of issue within 20 days of its service pursuant to 22 NYCRR 202.21(e), by showing that discovery is incomplete, and the matter is not ready for trial. The second method, beyond that 20 days, requires that the movant, pursuant to 22 NYCRR 202.21(d), meet a more stringent standard and demonstrate “unusual or unanticipated circumstances and substantial prejudice” absent the additional discovery (*Audiovox Corp. v. Benyamini*, 265 A.D.2d 135,138; see *Schroeder v. IESI N.Y. Corp.*, 24 A.D.3d 180, 181; *Aviles v. 938 SCY Ltd.*, 283 A.D.2d 935, 936).

However, in this case counsel agreed not to move to vacate the second note of issue based on the promise that a witness would be produced who had knowledge of the facts behind the amended Bill of Particulars which substantially increased the amount of damages sought for lost business and the time period over which said damages were sought. Based on the foregoing, it would be unfair to deprive Defendants of the opportunity to depose the two nonparty witnesses when the witness produced by plaintiff lacked knowledge of these issues.

This is provided that the depositions of the nonparty witnesses can be accomplished expeditiously before this action is scheduled for trial.

WHEREFORE it is hereby:

ORDERED that the motion to quash the nonparty subpoenas is denied; and it is further

ORDERED that Defendants may proceed with the depositions of the two nonparty witnesses as long as same can be accomplished within 90 days of the date of this order; and it is further

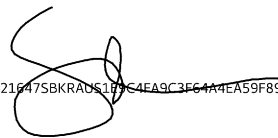
ORDERED that the parties appear for a virtual status conference on February 7th, 2023, at 11 am; and it is further

ORDERED that, within 20 days from entry of this order, movant shall serve a copy of this order with notice of entry on the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk 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

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.



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10/7/2022

DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: