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| <b>Lopez v BOP NE LLC</b>  |
| 2022 NY Slip Op 33470(U)   |
| October 13, 2022   |
| Supreme Court, New York County   |
| Docket Number: Index No. 157418/2018   |
| 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

-----X

RAFAEL LOPEZ,

Plaintiff,

- v -

BOP NE LLC, TISHMAN CONSTRUCTION CORPORATION
OF NEW YORK, BOP NE TOWER LESSEE LLC

Defendant.

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INDEX NO. 157418/2018

MOTION DATE 10/12/2022

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 87, 88, 89, 90

were read on this motion to/for MOTION TO COMPEL

BACKGROUND

Plaintiff commenced this action seeking damages for an alleged injury on June 6, 2018, when he tripped on debris while working on the 47th floor at the Manhattan West Project, North East Tower construction site, located at 401 Ninth Avenue New York, New York, in the course of his employment with Navillus Tile Inc. Plaintiff alleges that the defendants were negligent and violated Sections 200, 240 and 241(6) of the Labor Law.

PENDING MOTION

Defendants move for an order pursuant to CPLR §§ 2308(b), 3101(a) and 3111 compelling Felipe Lopez, 160 East 4th Street, Apartment #3D, Mount Vernon, New York 10550 and Jose Lopez, 14 Alpha Place, New Rochelle, New York 10805 to comply with the defendants' non-party deposition subpoenas requiring them to appear for deposition in this matter; holding non-party Felipe Lopez and Jose Lopez in contempt for refusing to comply with a previously

served subpoena requiring him to appear for deposition; or in the alternative, pursuant to CPLR §§ 3126, precluding plaintiff from offering any form of evidence of said nonparties in any admissible form including statement, affidavit, interrogatories, or testimony.

The motion was opposed by plaintiff, and the nonparties have failed to appear or otherwise submit opposition.

The motion is granted to the extent set forth below.

### DISCUSSION

On May 4, 2022, defendants served a subpoena to conduct the non-party depositions of Mr. Felipe Lopez and Mr. Jose Lopez - the plaintiff's co-workers and brothers at the time of the accident and perspective witnesses. Both brothers failed to appear for the depositions, which was scheduled for June 1 and June 3, 2022. Neither has since contacted defendants to reschedule the depositions.

According to plaintiff's deposition testimony his brother Felipe Lopez was working nearby him at the time of accident. He testified that following the accident, he informed Felipe Lopez that he could no longer lift materials at the job site and asked for assistance. When he left the site, he was driven home in his car by Felipe Lopez. Plaintiff also testified that his brother, Jose Lopez, had been working at the site that day and left in the same car. Notably, plaintiff testified that during that time he was experiencing severe right shoulder pain.

Since the discovery sought from Felipe Lopez and Jose Lopez is material and relevant to the defense of the plaintiff's liability claim, the non-party witnesses should be ordered comply with the subpoenas. CPLR § 3101(a); *James v. American Tobacco Company*, 15 A.D.3d 182, 789 N.Y.S.2d 40 (1<sup>st</sup> Dep't 2005).

CPLR § 2308(b) provides in pertinent part:

Unless otherwise provided, 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 court may issue a warrant directing a sheriff to bring the witness before the person or body requiring his appearance.

Plaintiff counsel in his opposition argues that the subpoena served upon these witnesses was facially defective in that the defense failed to serve a so-ordered subpoena and failed to submit proof that authorized travel expenses and witness fees were paid.

Plaintiff's assertion that the non-party subpoenas must be so-ordered is incorrect. The CPLR does not require that a non-party subpoena be so-ordered. As for plaintiff's argument that defendants failed to submit proof that authorized traveling expenses and witness fees were paid or tendered in advance, in violation of CPLR 2303, defendants have provided an affidavit of service, which shows that both Felipe Lopez and Jose Lopez were paid the authorized witness fee and/or traveling expenses in the amount of \$18.00 each, and that they were properly served in full compliance with CPLR §2103.

Finally, while plaintiff argues that an order of preclusion is not appropriate, the Court notes that both non-party witnesses are the brothers of the plaintiff. They all reside in the same area and Felipe Lopez resides in the same apartment building as the plaintiff. On the date of accident, the brothers all drove to work together in the plaintiff's vehicle; they were all part of the same Nautilus work crew; after the incident, it was Felipe Lopez who completed the plaintiff's assigned task. Additionally, after the accident, the plaintiff and his brothers all drove home in the same vehicle. Thus, while Felipe Lopez and Jose Lopez are non-party witnesses, their close relationship with the plaintiff makes them interested parties in this litigation, and it is reasonable to assume that plaintiff exhibits some degree of control over these witnesses.

WHEREFORE it is hereby:

ORDERED that the motion of plaintiff is granted to the extent of directing Felipe Lopez and Jose Lopez to appear for a deposition within 60 days from the date of this decision and order; and it is further

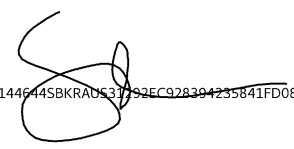
ORDERED that in the event either fails to appear plaintiff shall be precluded from offering any form of evidence of said nonparties in any admissible form including statement, affidavit, interrogatories, or testimony; and it is further

ORDERED that, within 20 days from entry of this order, defendants 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 on the non-party witnesses; 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](http://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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|---------------------------|--------------------------|----------------------------|--------------------------|--------|-------------------------------------|-----------------------|
| <u>10/13/2022</u><br>DATE |                          |                            |                          |        | <u>SABRINA KRAUS, J.S.C.</u>        |                       |
| CHECK ONE:                | <input type="checkbox"/> | CASE DISPOSED              | <input type="checkbox"/> | DENIED | <input checked="" type="checkbox"/> | NON-FINAL DISPOSITION |
|                           | <input type="checkbox"/> | GRANTED                    |                          |        | <input checked="" 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             |