

Seog Yoon v L&L Holding Co.

2023 NY Slip Op 31681(U)

May 17, 2023

Supreme Court, New York County

Docket Number: Index No. 151107/2021

Judge: Sabrina Kraus

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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. SABRINA KRAUS PART **57TR**

Justice

-----X

SEOG YOON, BETH YOON,

Plaintiff,

- v -

L&L HOLDING COMPANY, LLC, 425 PARK OWNER
LLC, TISHMAN CONSTRUCTION CORPORATION, 425
PARK AVENUE GROUND LESSEE, L.P., PANORMOS,
LLC, SHACHI CHAUDHARY, OWEN STEEL COMPANY,
INC,

Defendant.

-----X

L&L HOLDING COMPANY, LLC, 425 PARK OWNER LLC,
TISHMAN CONSTRUCTION CORPORATION

Plaintiff,

-against-

PANORMOS LLC, SHACHI CHAUDHARY

Defendant.

-----X

INDEX NO. 151107/2021

MOTION DATE 03/20/23

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595766/2021

The following e-filed documents, listed by NYSCEF document number (Motion 002) 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113

were read on this motion to/for STRIKE PLEADINGS

BACKGROUND

In this labor law 240(1), 241(6) and 200 action, Plaintiff, Seog Yoon, an ironworker, seeks to recover damages for personal injuries sustained while working at 425 Park Avenue, New York, New York, on October 10, 2020. Plaintiff alleges that while lawfully upon the aforesaid premises as an employee of A.J. McNulty (AJM), he was caused to sustain serious and severe injuries when he was struck by a vehicle owned and operated by third-party Defendants.

THE PENDING MOTION

On March 21, 2023, Plaintiff moved pursuant to CPLR §3126 for an order striking the answer of Defendants, L&L Holding Company, LLC, 425 Park Owner LLC, 425 Park Avenue Ground Lessee, L.P., and Tishman Construction Corporation; or in the alternative pursuant to CPLR §3126 for an order precluding Defendants from introducing any evidence at trial, or pursuant to CPLR §3124 compelling the Defendants, to provide all outstanding discovery and complete depositions by a date certain or face the striking of their answer.

Defendants filed opposition on March 15, 2023, and Plaintiff filed reply on March 20, 2023. On March 21, 2023, the court reserved decision.

DISCUSSION

CPLR § 3101 provides for full disclosure of all matter material and necessary in the prosecution or defense of an action (*Palmatier v Mr. Heater Corp.*, 156 AD3d 1167, 1168, [2017]). “The words, ‘material and necessary’, are to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial” (*Galasso v Cobbleskill Stone Prods., Inc.* 169 AD3d 1344 [2019]). On this motion Plaintiff bears the burden of proving that the discovery request is reasonably calculated to yield material and necessary information (see *Catlyn & Derzee, Inv. V Amedore Land Devs., LLC*, 166 AD3d 1137, 1141 [2018]). “Supreme Court is vested with broad discretion in controlling discovery and disclosure, and generally its determinations will not be disturbed in the absence of clear abuse of discretion” (*Gold v Mountain Lake Pub., Telecom.*, 124 AD3d 1050, 1051).

CPLR §3124 provides, in part, that if a party fails to respond or comply with any demand or court order, the party seeking the discovery may move to compel compliance. CPLR §3126

further provides, that if a party willfully fails to disclose information which the court finds ought to have been disclosed, the court may strike the pleading and/or prohibit the party from offering the discovery at trial.

On or about May 18, 2021, Plaintiffs served Defendants a Notice for Discovery and Inspection. On August 4, 2021, the court issued a preliminary conference order, directing the exchange of discovery. On November 3, 2021, the court issued a compliance conference order directing Defendants to respond to Plaintiff's May 18, 2021, demand for Discovery and Inspection, within 30 days.

On February 9, 2022, a compliance conference was held, wherein the Court again ordered Defendants to respond to Plaintiff's D&I dated May 18, 2021, within 30 days.

On or about April 4, 2022, Defendants served initial responses to Plaintiff's May 18, 2021, demands.

On or about April 19, 2022, Plaintiffs served Defendants a Supplemental Notice for Discovery and Inspection, as well as a good faith letter, setting forth the discovery that remained outstanding from Defendants. Plaintiff requested Defendants to produce a *Jackson* Affidavit in regard to discovery they claimed did not exist and/or was not in their possession.

On or about May 18, 2022, a status conference was held, and the Court ordered Defendants to respond to Plaintiff's supplemental Notice of Discovery and Inspection as well as the good faith letter dated April 19, 2022, within 30 days.

On or about September 21, 2022, another status conference was held, and Defendants were again ordered to respond to Plaintiff's supplemental Notice of Discovery and Inspection and good faith letter dated April 19, 2022, within 30 days and provide responses or a *Jackson* affidavit from a person with knowledge.

On or about October 21, 2022, and November 4, 2022, Defendants produced some additional discovery and served formal response to Plaintiff's supplemental Notice for Discovery and Inspection and the good faith letter.

Plaintiff served another good faith letter on Defendants, in response to the November 2022 production, setting forth the discovery that remained outstanding and requesting *Jackson* Affidavits for items Defendants claim did not exist and/or were not in their possession.

On or about November 15, 2022, a status conference was held, and the Court ordered Defendants to respond to Plaintiffs' good faith letter dated November 15, 2022, within 45 days and provide responses or a *Jackson* Affidavit from a person with knowledge.

On or about January 12, 2023, Defendants, served a response to Plaintiff's good faith letter dated November 15, 2022, and the status conference order also dated November 15, 2022.

On or about January 19, 2023, Defendants served a supplemental response to Plaintiff's supplemental Notice for Discovery & Inspection dated April 19, 2022, together with two *Jackson* Affidavits.

On or about January 27, 2023, Plaintiff served upon Defendants another good faith letter, in response to the supplemental responses, setting forth the discovery that continued to remain outstanding from them and rejected the Affidavits provided by Tishman and L&L, stating they failed to comply with *Jackson*, and demanded additional affidavits wherein a person with knowledge details the search conducted, indicate where the records were likely to be kept, the efforts made to preserve them, whether the records were routinely destroyed and whether a search had been conducted in every location where the records were likely to be found.

Plaintiff asserts that the following discovery is remains outstanding from Defendants:

1. Copies of toolbox and/or safety meeting minutes for toolbox meetings

conducted by A.J. McNulty and kept in the normal course of business of each Defendant for 90 days up to and including the date of the accident and for the meeting held immediately after the accident at the subject jobsite.

2. Copies of the excess insurance policy, umbrella policy, and additional insurance coverage above the primary policy, applicable to the October 10, 2020, accident.

3. Copies of toolbox and/or safety meeting minutes for toolbox meetings conducted by each Defendant for 90 days up to and including the date of the accident and for the meeting held immediately after the accident at the subject jobsite.

4. Foreman meeting minutes conducted by Tishman Construction Corporation for the foreman meeting conducted immediately after the accident.

5. Copies of all meeting minutes for job meetings, progress meetings, architectural meetings, owner meeting or other such work progress meetings for thirty (30) days prior to and including the date of the accident and the date after the accident for each defendant.

6. Inspection reports, memorandum, correspondence, or writings generated by or provided to the defendants based upon jobsite safety deficiencies, unsafe conditions, hazards, warnings or complaints provided to each defendant prior to the date of accident.

7. Copies of all statements taken of the Plaintiff by each Defendant regarding his October 10, 2020, accident.

8. Copies of all schedules prepared by each Defendant for three (3) months up to and including the date of the accident at the jobsite.

9. A copy of all site safety manager logs from October 10, 2020, the day of the accident.

10. A copy of the DOB certificate of correction, task hazard analysis plan, renewed procedure and drawing and toolbox talk that were all attached to the DOB appointment request form submitted by Tishman, in response to the partial stop work order asserted after this accident.

11. Copies of all meeting minutes for job meetings, progress meetings, architectural meetings, owner meeting or other such work progress meetings conducted by A.J. McNulty and kept in the normal business of each Defendant for thirty (30) days prior to and including the date of the accident and the date after the accident for each defendant.

12. Copies of all safety manuals, plans and/or programs prepared by, or utilized by, followed by and/or enforced by Defendants 425 Park Owner, LLC and/or L&L Holding Company, LLC in full force and effect at the jobsite in question on the date of the accident for each defendant.

13. A copy of all daily logs and/or reports created by A.J. McNulty for three months up to and including the date of the accident and for the day immediately after the accident, maintained in the ordinary course of business of each Defendant.

14. A copy of all safety logs and/or reports created by A.J. McNulty for three months up to and including the date of the accident and for the day immediately

after the accident, maintained in the ordinary course of business of each Defendant.

15. Copies of all legally mandated OSHA logs for 6 months up to and including the week of the accident for the accident site, to include the OSHA log completed for Plaintiff's injury.

16. Copies of all videos of the happening of Plaintiff's accident that occurred on October 10, 2020.

17. Copies of all photographs taken of Plaintiff's accident and/or the accident scene on October 10, 2020.

18. Copies of all tapes depicting Plaintiff's accident and the subsequent scene on October 10, 2020.

19. Names and addresses of all witnesses regarding Plaintiff's October 10, 2020, accident.

20. Copies of all photographs taken by AMS Safety, and provided to Defendants, of the jobsite, including the date of loss and Plaintiff's accident scene for 30 days up to and including the date of the accident.

In opposition, Defendants argue that they have responded to every one of Plaintiff's demands and good faith letters and have also responded to every Court Order addressing Plaintiff's demands and good faith letters. In doing so, Defendants assert they have disclosed more than 1,000 pages of discoverable materials, and provided *Jackson* Affidavits confirming, under penalty of perjury, that there are no other responsive documents in their possession.

In support, however, Defendants submit only two email exchanges dated October 21, 2022 and November 11, 2022, and accident and safety reports with photographs. Defendant, although they argue that they have provided sufficient *Jackson* Affidavits, fail to attach copies of the same.

However, Plaintiff provides copies of Defendants responses as well as the two *Jackson* Affidavits, in support of their motion.

A review of the discovery responses establishes that Defendants have not sufficiently complied with Plaintiff's discovery requests. The court finds, however, that the failure to sufficiently respond to the discovery requests has not risen to the level of willful failure.

For instance, Plaintiff's request numbered 1, which requests "copies of toolbox and/or safety meeting minutes for toolbox meetings conducted by A.J. McNulty and kept in the normal course of business of each Defendant for 90 days up to and including the date of the accident and for the meeting held immediately after the accident at the subject jobsite, has not been provided." Plaintiff acknowledges that Defendant has provided the Toolbox Talks for October 12, 2020, the day after the accident, however, Defendants also offer a purported *Jackson* Affidavit from Jeannette Marrero, Insurance Claims Specialist and Litigation Paralegal employed by Defendant Tishman Construction Corporation of New York, in which indicates she

"...conducted a diligent search for safety, toolbox, and work progress meeting minutes; inspection reports, memorandum, correspondence or other writings related to any jobsite safety deficiencies, alleged unsafe conditions, hazards, warnings or complaints generated prior to the date of toss; statements taken of Plaintiff; work schedules; daily logs; site safety logs; accident reports; OSHA logs; videos; photographs; tapes; and witness information, pertaining to Plaintiff's accident and the alleged conditions giving rise to same, for the time period requested by Plaintiff's Counsel is not in possession of any such records other than those which have already been disclosed"

At the onset, the affidavit does not comply with the requirements set forth in *Jackson v. City of New York*, (185 A.D.2d at 770, 586 N.Y.S.2d 952), which requires, "a showing as to where the subject records were likely to be kept, what efforts, if any, were made to preserve them, whether such records were routinely destroyed, or whether a search had been conducted in every location where the records were likely to be found."

The affidavit also fails to offer an explanation as to why there is a Tool Box Talk report for October 12, 2020, but not for any other day. Similarly, the affidavit of from Kevin Hoey, the Executive Vice President for L&L Holding Company LLC also fails to indicate "where the subject records were likely to be kept, what efforts, if any, were made to preserve them, whether

such records were routinely destroyed, or whether a search had been conducted in every location where the records were likely to be found,” as required by *Jackson*, supra.

Defendants also claim they provided the excess insurance policy, but their January 12, 2023, response simply states, “at the time of Plaintiff’s accident, TISHMAN maintained an excess insurance policy with XL Insurance America Inc., under policy number US00090380LI19A, with limits of \$5,000,000 per occurrence and in the aggregate.” There is no indication a copy of the policy was ever exchanged.

Although it seems as if much of what Plaintiff is seeking are in fact documents maintained by a non-party AJM, Plaintiff’s employer, and although Defendant Tishman maintains that AJM was not a subcontractor and that there was no contractual relationship between the two, Defendant Tishman is in possession of some documentation of AJM’s. For instance, the Accident Report attached as exhibit E to Defendants opposition. Defendant must provide either all documents from AJM in their possession, or a proper affidavit indicating why some documents are in their possession and others are not and otherwise conform with the requirements under *Jackson*.

Defendants submit a sufficient response to Plaintiff’s request enumerated as item 20 above, i.e., copies of all photographs taken by AMS Safety, and provided to Defendants, of the jobsite, including the date of loss and Plaintiff’s accident scene for 30 days up to and including the date of the accident, as exhibit F to their opposition.

For each of the items enumerated above, 1 through 19, Defendants are compelled to respond to Plaintiff with the documents that are requested, i.e., a copy of the excess insurance policy, or a proper *Jackson* Affidavit with sufficient details and explanation as to where, how and when, the search was conducted and why the documents cannot be provided.

Wherefor, it is hereby

ORDERED Plaintiff's motion is granted to the extent that Defendants are compelled to provide the outstanding discovery as discussed above, with 45 days; and it is further

ORDERED the parties are directed to appear for a virtual status conference on July 13, 2023, at 11 am, via MS TEAMS; 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 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).

This constitutes the decision and order of the court.

5/17/2023

DATE



SABRINA KRAUS, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: