

Hufnagel v 10 CHF, LLC

2024 NY Slip Op 31298(U)

April 12, 2024

Supreme Court, New York County

Docket Number: Index No. 152873/2020

Judge: Leslie A. Stroth

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

PRESENT: HON. LESLIE A. STROTH PART 12M

Justice

-----X

JOHN HUFNAGEL,

Plaintiff,

- v -

10 CHF, LLC, JOHN HUMMEL BUILDERS, LLC, JOHN
HUMMER CUSTOM BUILDERS, INC.,

Defendant.

-----X

JOHN HUMMEL BUILDERS, LLC, JOHN HUMMER CUSTOM
BUILDERS, INC.

Plaintiff,

-against-

RADIANT DRYWALL & INSULATION CORP.

Defendant.

-----X

10 CHF, LLC

Plaintiff,

-against-

RADIANT DRYWALL & INSULATION CORP.

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 106, 113

were read on this motion to/for DISCOVERY.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 79, 80, 81, 82, 83, 84, 105, 107, 108, 109, 110, 111, 112

were read on this motion to/for DISCOVERY.

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595697/2020

Second Third-Party
Index No. 595954/2020

This action for personal injury arises from a March 9, 2020, incident in which plaintiff John Hufnagal (plaintiff) was working on a construction project at a building located at 10 Cove Farm Hollow Road, East Hampton, New York (subject premises). Defendant/third party plaintiff John Hummel Builders, LLC and John Hummel Custom Builders, Inc. (the Hummel defendants) serves as general contractor at the subject premises, which is owned by defendant/second third party plaintiff 10 CHF LLC (CHF). The Hummel defendants and CHF have impleaded third party defendant/second third party defendant Radiant Drywall & Insulation Corp. (Radiant), plaintiff's employer.

In Motion Sequence 2 the Hummel defendants and CHF request that this Court compel Radiant to produce John Bunai, pursuant to CPLR 3124, for an examination before trial, which Radiant opposes, and upon which plaintiff takes no position.

In Motion Sequence 3, plaintiff requests that, pursuant to CPLR 3126, this Court preclude the Hummel defendants from offering future testimony of Ralph Betner, striking the Hummel defendant's answer for failure to produce Ralph Betner for examination before trial, a conditional order precluding the Hummel defendants from offering any testimony or evidence from Ralph Betner unless he is produced for examination before trial and precluding the examination before trial of Nuno Nogueira by defendants or third party defendants. The Hummel defendants and CHF oppose this motion, and Radiant takes no position.

I. Background

The Hummel defendants entered into several subcontracts with Radiant to perform work over various periods of time, including one which specifies the work to be performed at the subject premises. *See* NYSCEF doc. no. 87. There is some dispute as to the extent of contractual indemnification between Radiant and the Hummel defendants. *Id.*

John Bunai is the owner/principal of Radiant, and Bunai signed the subcontracting agreements on behalf of Radiant. *See* NYSCEF doc. no. 87.

On February 6, 2023, the Hummel defendants served a notice to take oral deposition of Bunai upon Radiant. *See* NYSCEF doc. no. 101. Radiant did not file any opposition. *See* NYSCEF doc. no. 87.

In his complaint, plaintiff alleges that he was performing sheetrock work at the subject premises when the scaffolding on which he was standing collapsed, causing him to sustain injuries to his back, head, and ankle. *See* NYSCEF doc. no. 88.

During the course of discovery, Radiant provided the Hummel defendants with its “Employer’s Injury Report”, which lists Bunai as the investigator of the incident. *See* NYSCEF doc. no. 95.

Bunai did not speak with his employees Rowe or plaintiff regarding the accident immediately following it. *See* NYSCEF doc. no. 106.

The Hummel defendants employed John Holohan as the project manager in charge of the work at the subject premises (*See* NYSCEF doc. no. 83), and Ralph Betner as a site supervisor at the subject premises. *See* NYSCEF doc. no. 112.

Plaintiff alleges that Betner was the foreman of the project and was on site at the subject premises when the accident occurred. *See NYSCEF doc. no. 80.*

Radiant employee Anthony Rowe testified at deposition that he spoke with Betner regarding removing the barricades to the elevator shaft, that he observed Betner to have a 20-minute discussion with plaintiff before the accident, and that Betner himself removed said barricades. *See* NYSCEF doc. no. 82.

The Hummel defendants allege that Betner was on site but deny the alleged conversations with Rowe or plaintiff on the date of the accident. *See* NYSCEF doc. no. 112.

During discovery, CHF provided plaintiff with a statement from non-party witness Nuno Noguera (Noguera), who was an employee of another, unnamed subcontractor at the subject premises on the date of the accident. *See* NYSCEF doc. no. 23. In that statement, Noguera alleges that plaintiff was the one who removed the security plywood from the elevator shaft, and not any employee of the Hummel defendants. *Id.*

Plaintiff has made two attempts to subpoena Noguera for an examination before trial, and in both instances Noguera failed to appear. *See* NYSCEF doc. no. 84.

II. Analysis

A. The Hummel Defendants' and CHF's Motion to Compel Radiant to Produce Bunai

It is well established that the Court may grant a motion compelling production of an additional witness when the moving party has established that “the knowledge of the proffered official is insufficient to produce testimonial and documentary evidence ‘material and necessary’ to the prosecution of the action...” *Colicchio v City of New York*, 181 AD2d 528, 529 (1st dept 1992).

The Hummel defendants argue that they have met this burden regarding their claims for contractual indemnity over Radiant and Radiant's counterclaims for contractual indemnity over the Hummel defendants. *See* NYSCEF doc. no. 87. The previously produced witness for Radiant, Anthony Rowe, testified in his deposition that it was not a part of his duties at Radiant to review their contracts, and that he had never seen any contracts between Radiant and the Hummel defendants. *See* NYSCEF doc. no. 98. The Hummel defendants further argue that Bunai's

testimony is necessary to the action as an individual who performed an investigation into the incident for Radiant, but whose sources for that investigation are not clear. *See* NYSCEF doc. no. 87.

Radiant counters that any information which could be provided by Bunai is already available to the Hummel defendants in the form of their Response to the Notice to Admit the contracts and agreements filed by the Hummel defendants, in which Bunai stipulated that the documents were true and accurate copies of the contracts and agreements. *See* NYSCEF doc. no. 100. Radiant further argues that the investigation report in which Bunai is listed as investigator was prepared by Radiant's office manager, Phyllis Goetz, and since plaintiff has served a notice to take Goetz' deposition, Bunai is not a necessary party to depose. *See* NYSCEF doc. no. 106.

This Court finds that the proper test to determine if an additional witness from Radiant should be deposed is based not on evidentiary items such as a notice to admit, but rather on the information found in the testimony of Radiant's first witness Rowe. Rowe testified that they knew no information whatsoever regarding Radiant's contracts, including those with the Hummel defendants (*See* NYSCEF doc. no. 98), and therefore could not provide any relevant information regarding the Hummel defendants' claims for contractual indemnity, nor for Radiant's counterclaims for breach of contract and contractual indemnity. Accordingly, the Hummel defendants' motion to compel Radiant to produce John Bunai for deposition is granted to the extent that Radiant must produce John Bunai for deposition within 30 days of the date of this Order.

B. Hufnagal's Motion Pursuant to CPLR 3126 to Preclude Future Testimony of Ralph Betner, to Strike the Hummel Defendant's Answer, Granting Conditional Preclusion of Ralph Betner's Future Testimony, and Preventing any party from deposing Nuno Nogueira or From Using any Statements made by Nogueira in Support of Motions Practice or Trial

i. Deposition and Future Testimony of Ralph Betner and the Hummel Defendant's Answer

It is well established that the court may preclude testimony and/or strike a party's pleadings for "willful, contumacious, or bad faith conduct" *Marquez v 171 Tenants Corporation*, 161 AD3d 646 (1st Dept 2018).

Plaintiff argues that the Hummel Defendants' continuous failure to make Ralph Betner available for examination before trial, despite written demand for his testimony, and follow up communications both in and out of court, for the same, constitutes willful and contumacious behavior sufficient to dismiss the Hummel defendants' answer, or, in the alternative, to preclude any testimony from Betner in support of future motions practice or trial. The Hummel defendants counter that, as there has never been a court order directing them to produce Betner, plaintiff has failed to meet his burden to prove willful and contumacious behavior.

This Court finds that plaintiff has not met his burden to show that the Hummel defendants acted willfully and contumaciously. Accordingly, plaintiff's motion to preclude all future testimony of Ralph Betner, to strike the Hummel Defendants' answer, and to grant conditional preclusion of Ralph Betner's future testimony is denied.

Plaintiff also argues that he is entitled to depose Betner as an additional witness who can offer information material and necessary to the prosecution of the case, and which cannot be

obtained from the first deposed witness of the Hummel defendants, Rowe. This Court has previously reviewed the applicable law for when an additional witness may be deposed as a source of necessary and material information, the analysis remains the same. Here, plaintiff argues that given Holoham's testimony that Betner was responsible for coordinating with subcontractors and given Rowe's testimony that he and plaintiff had each spoken to Betner regarding the work which led to plaintiff's accident. Plaintiff also points to Rowe's testimony that Betner himself removed the barricades to the subject elevator shaft, they have met their burden in establishing that he is a source of material and necessary information.

This Court finds that plaintiff has provided sufficient evidence that Betner is in possession of material and necessary information to the prosecution of this action that Holoham could not provide regarding his interactions and communications with Radiant and with plaintiff. The Hummel defendants point to Betner's affidavit that he does not recall speaking with Hufnagal on the date of the accident, however, plaintiff has not had an opportunity to confront and question Betner regarding this disputed fact. Accordingly, plaintiff's motion is granted only to the extent that Ralph Betner must be produced for deposition within 30 days of this Order.

ii. Deposition and Future Testimony of Nuno Noguera

Plaintiff argues that, given Noguera's identification as a person who has material knowledge about this incident, and given Noguera's failure to comply with two judicial subpoenas to appear for an examination before trial, that the Hummel defendants should be precluded from offering Noguera's statement in support of any future motions practice or trial. The Hummel defendants counter that since the subpoena was not returnable in court, plaintiff's proper remedy would be a motion under CPLR 2308 (b), and not preclusion of future testimony. Accordingly, plaintiff's motion for a protective order precluding defendants from taking future deposition of Noguera or

from using any written recorded statements made by Noguera in support of future motions practice or trial is denied.

III. Conclusion

Accordingly, it is hereby

ORDERED that the Hummel defendants' motion to compel Radiant to produce John Bunai for deposition is granted to the extent that Radiant must produce John Bunai for deposition within 30 days of the date of this Order; and it is further

ORDERED that plaintiff's motion to preclude all future testimony of Ralph Betner, to strike the Hummel Defendants' answer, and to grant conditional preclusion of Ralph Betner's future testimony is denied; and it is further

ORDERED that plaintiff's motion is granted only to the extent that Ralph Betner must be produced for deposition within 30 days of this Order; and it is further

ORDERED that plaintiff's motion for a protective order precluding defendants from taking future deposition of Noguera or from using any written recorded statements made by Noguera in support of future motions practice or trial is denied.

The foregoing constitutes the Order and Decision of the Court.

4/12/2024
DATE 
LESLIE A. STROTH, J.S.C.

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