

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

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IN RE 91ST STREET CRANE COLLAPSE LITIGATION:

Index No. 771000/2010E
Date: 4/8/2011

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THIS DOCUMENT RELATES TO: ALL CASES

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CASE MANAGEMENT ORDER NO. 12

PAUL G. FEINMAN, J.:

I. Date and Time Change for May Compliance Conference:

Upon consultation with the parties at the compliance conference held April 7, 2011, CMO #7 is modified only to the extent that the next compliance conference is adjourned from Thursday, May 5, 2011 to **Thursday, May 12, 2011**, in Part 12, 60 Centre Street, courtroom 212, New York, NY 10007 at **10:00 a.m.**

II. Greater NY Mutual Insurance Company Request for Leave to Amend:

Greater New York Mutual Insurance Company seeks leave to serve a supplemental summons and amended complaint to add J.F. Lomma, Inc. as a defendant in its action (Index No. 100419/2009). At the compliance conference held April 7, 2011, leave was granted to serve a supplemental summons and amended complaint and counsel for the New York Crane defendants agreed to accept service on behalf of J.F. Lomma, Inc.

III. Wrongful Death Plaintiffs Discovery Demands to NY Crane Defendants:

By letters dated March 22, 2011 (Doc. 753), and March 31, 2011 (Doc. 766), as well as at the most recent compliance conference on April 7, 2011, Group 1 Wrongful Death Plaintiffs argued that the NY Crane defendants have failed to fully comply with several outstanding discovery demands. These demands, called "Group 1 Plaintiffs' CPLR Demands to the Lomma

Defendants,” were served against New York Crane & Equipment Corp., James F. Lomma, Lomma Trucking & Rigging, J.F. Lomma Inc., TES Inc., J F Lomma Trucking & Rigging, and JF Lomma Rigging and Specialized Services on July 9, 2010 (Doc. 200). The NY Crane defendants objected to numerous demands causing both parties to seek guidance from the court. Therefore, plaintiffs’ demands against the NY Crane defendants were discussed in great detail at a compliance conference on August 20, 2010. At this conference, the parties were able to reach an agreement on most of plaintiffs’ demands. Thereafter, the NY Crane defendants issued amended responses on September 24, 2010 (*see* Doc. 469). However, plaintiffs now claim several of NY Crane’s responses are incomplete, inadequate or otherwise need to be updated.

1. Revised Demand #2 - Business Addresses:

In this demand, plaintiffs seek several items of information including a “list of each business address/location for New York Crane & Equipment Corp., Lomma Trucking & Rigging, J.F. Lomma Inc., TES Inc., J F Lomma Trucking & Rigging, JF Lomma Rigging and Specialized Services during the period of 2000 to the present” (Doc. 469 at 3). The NY Crane defendants’ amended response provided one¹ physical address each for New York Crane & Equipment Corp., “JF Lomma, Inc.” and “TES” for the requested period. As to the remaining entities, for each NY Crane claims “[n]o such entity is known to exist” (*id.* at 3-4).

Plaintiffs contend NY Crane’s responses omit several business locations that are referred to in documents produced by NY Crane. For example, they point to a National Interstate insurance company policy produced by the NY Crane defendants as Kodiak 00002972 (*see* Index

¹ One address is provided for New York Crane & Equipment Corp. for the period of 2000-2007, and another for July 2007 to the present (Doc. 469 at 3).

No. 117294/2008, Doc. 613-2), which includes a list of ten properties to be covered under this policy issued to "J F Lomma Inc....DBA: JFL Leasing Inc." At the conference held April 7, 2011, NY Crane claimed its responses were adequate in that they had already provided an address for each entity's "office."

Plaintiffs' revised demand #2's request for "each business address/location" cannot be construed as being limited solely to each entity's corporate headquarters. A proper response would include the address of any location where the NY Crane defendants have conducted regular business-related activities, including storage yards, maintenance facilities and inspection sites. However, the response should be limited to those business activities related to "crane operations" (*see* Doc. 481 at 113).

In addition, plaintiffs' revised demand #2 also seeks a "list of the telephone number(s)[,] web sites(s) and e-mail addresses for each of the above Lomma defendants at the listed office address(es)" (Doc. 469). At the August 2010 conference, the NY Crane defendants did not specifically object to providing this information for certain entities, but its amended responses provided only web sites, but no phone numbers or e-mail addresses.

A web site address, in some ways, is analogous to a physical address. Typically, a company may have one main web site that is used to conduct business or advertise its products or services to potential customers. An e-mail address is quite different. Even a relatively small company does not have a single e-mail address used for all electronic correspondence. Instead, individual employees have their own individual e-mail addresses. The same applies for telephone numbers. Thus, to the extent the NY Crane defendants have a general e-mail address or telephone number, such would be of little assistance to plaintiffs. To the extent plaintiffs are

asking for the e-mails and telephone numbers of each individual NY Crane employee, such demand would be overly broad and unduly burdensome. Accordingly, NY Crane defendants need not supplement its response to demand #2 with e-mail addresses and telephone numbers. However, it must amend its prior responses to include any previously omitted location where any NY Crane defendant conducted "crane operations" during the relevant time period. This amended response shall be served on plaintiffs by no later than Friday, April 29, 2011.

2. Revised Demand #3 - Employee List:

Demand #3 calls for the NY Crane defendants to provide a list of names and job titles for employees of each of the various NY Crane defendants. At the August 20, 2010, compliance conference, plaintiffs agreed to limit the scope of this demand to those locations engaged in NY Crane's "crane operations" (*see* Doc. 481 at 110). According to plaintiffs, the list provided by NY Crane defendants in its amended response is incomplete. For example, the list does not include Robert Hoffman, one of the individual deponents produced by NY Crane for its deposition. Plaintiffs further claim that NY Crane's amended response is deficient in that no distinction is made between current and former employees. Thus, plaintiffs argue that the response to this demand should be supplemented to include this information, and, if a particular individual is no longer employed by defendants, NY Crane should provide that person's last known address. This information was not specifically requested in demand #3. NY Crane argues that it is currently in the process of producing payroll records which should provide the additional information plaintiffs seek. They argue it would be unduly burdensome to require them to identify individually each former employee along with their last-known address, where such employees possess no information relevant to this action.

The NY Crane defendants should supplement its amended responses to include any of its employees engaged in "crane operations" that were omitted from its prior response to demand #3. Under CPLR 3101 (h), once informed of any deficiencies in its discovery responses, NY Crane had a duty to supplement its responses to correct any errors or omissions. However, while demand #3 currently seeks employee information for the period of 2000 to the present (*see* Doc. 469 at 4), it should be limited to those employees engaged in crane operations from the period from 2000 to May 31, 2009. Employees that were hired more than a year after the crane collapse would be unlikely to possess any relevant knowledge as to the claims or defenses at issue in this action, such that the burden imposed by this particular request would be undue.

Although the parties agreed to limit demand #3 to those individuals involved in "crane operations," the meaning of the that phrase was not resolved at the August 20, 2010 conference (*see* Doc. 481 at 116). It is not clear from the record whether this definition issue was ever subsequently determined. In any case, limiting the scope of plaintiffs' demands to "crane operations," is simply another way of stating the general rule of CPLR 3101 that the scope of discovery includes all matters that are material and relevant to the prosecution of the causes of action or defenses at issue in the action. Here, this would include individuals possessing any information relating to the possible causes of the crane collapse and/or its maintenance and repair. Thus, while the nine individuals listed as being employed by New York Crane & Equipment, the admitted owner of the crane, would be involved in "crane operations," individuals employed by J.F. Lomma, Inc. or TES, Inc. may not necessarily have been. The NY Crane defendants, in determining whether employees of these entities were engaged in activities related to "crane operations," should construe that phrase liberally. Documents that have been

produced thus far by NY Crane, as well those that have reviewed by the court *in camera* but not yet produced, clearly demonstrate certain employees of JF Lomma, Inc. and TES, Inc. were involved in activities that would be considered "crane operations." Furthermore, NY Crane's response should include individuals who may possess knowledge which could lead to the discovery of material and necessary information, such as employees responsible for record-keeping and information technology.

Given that the NY Crane defendants are producing payroll documents, the employment status and last known address, where applicable, of particular employees should not be unduly burdensome to locate, considering the fact that the NY Crane defendants, according to their prior response to demand #3, are relatively small companies. Thus, any burden that may be imposed on defendants is outweighed by the value that this discovery will have to plaintiffs by allowing them to take appropriate steps, within the confines of the CPLR and this court's orders, towards deposing those individuals with the most knowledge in a timely manner.

In summary, the NY Crane defendants' response should be amended to include any individual employed by any of the NY Crane defendants from 2000 to May 31, 2009, that had previously been omitted. Furthermore, for each employee involved in "crane operations," including those who managed records or information technology employed by those involved in "crane operations," during the relevant time period, the NY Crane defendants shall disclose whether such person is currently employed by one of the NY Crane entities. If the person is no longer an employee, NY Crane defendants must provide that individual's last known address. The NY Crane defendants must complete their amended responses to demand #3 by Friday, May 13, 2011.

3. Revised Demand #15 - Insurance Broker Discovery:

Demand #15 of plaintiffs' discovery demands to NY Crane defendants seeks the name and present address for each and every insurance broker or agency used by each NY Crane defendant from 2000 to the present. To the extent this demand has not yet explicitly been stricken by the court, its impropriety should have been clear from prior decisions and orders addressing plaintiffs' demands for insurance-related discovery (*see* CMO #7, Doc. 579; *see also* *Leo v City of New York*, index No. 117294/2008, Mot. Seq. No. 042, Doc. 730). NY Crane previously provided a list of all insurance policies that may be used to satisfy all or a portion of any judgment entered in this action (*see* Docs. 563-5 and 613-2). As such, the NY Crane defendants have satisfied their obligations under CPLR 3101 (f).

4. Tibor Varganyi's Acer Laptop:

By letter dated April 12, 2011, the court received additional documents pulled from the DVDs containing files from Tibor Varganyi's Acer laptop. These additional files consisted of those the court was unable to open during its initial *in camera* review, and were provided pursuant to the court's decision and order, dated April 1, 2011 (Doc. 771). Having reviewed these additional files, the court has determined that they need not be produced, as they are not material and necessary to prosecuting any claim or defenses in this action, nor likely to lead to any discoverable information.

5. Tibor Varganyi's Sceptre Laptop:

Various issues related to the production of files from Tibor Varganyi's Sceptre laptop are referred to a special subcommittee consisting of counsel for the NY Crane defendants and the Group 1 Wrongful Death Plaintiffs. After conducting a conference with the court's Assistant

Law Clerk, D. Allen Zachary, Esq., the members of this subcommittee voluntarily agreed upon Friday, April 22, 2011, at 2:15 p.m. as the time to meet, notwithstanding that it is a religious holiday (Good Friday). Matters that will be addressed include the application of search terms to focus review and production efforts on relevant files, the form in which any production should be made, and costs.

In addition, the court has conducted a preliminary, albeit sporadic, *in camera* review to obtain a general assessment of the contents of this hard drive. A small percentage of the files were selected at random, opened, and the court reviewed the contents. During this very limited review, however, the court came across several relevant and non-privileged files, which may or may not have been previously produced. A selection of these files have been printed and scanned to PDF files and are attached to this order.

The preliminary *in camera* review has convinced the court that some of the files on the Sceptre hard drive should be quickly reviewed and produced by the NY Crane defendants even prior to the subcommittee's meeting on April 22. Specifically, the NY Crane defendants should produce all PDF files contained on the hard drive that are material and necessary and not privileged. The PDFs should be provided to plaintiffs in their original native form, in a manner that does not compromise or degrade the files' metadata. Many of these files are duplicates, but a significant portion appear responsive to plaintiffs' outstanding document demands. Any burden incurred by NY Crane will be outweighed by the benefit of making available these materials to plaintiffs prior to the NY Crane defendants' next deposition. Accordingly, this preliminary production, consisting solely of PDF files from the Sceptre laptop, shall be turned over to counsel for wrongful death plaintiffs by no later than April 21, 2011, at 5:30 p.m.

IV. EBT Scheduling Order:

At the last compliance conference, held April 7, 2011, the parties discussed the schedule for the remaining depositions in this action. Several parties suggested that any further scheduling order take into consideration the fact that depositions of defendants' designated individuals frequently, if not always, require several days for completion. Thus, as a result, the dates provided in CMO #4 and #6 quickly became inaccurate. Other parties raised particular scheduling issues which the court has also taken into consideration. Accordingly, the deposition schedule previously set in CMOs #4 and #6 shall be amended as follows, subject to future modifications that this court may deem fit:

Track 1

April 18:	No deposition scheduled (Passover/Easter)
April 20:	No deposition scheduled (Passover/Easter)
April 25:	No deposition scheduled (Passover/Easter)
April 27:	NY Crane Defendants - Ron Ledder (day 1)
May 2:	New York City Educational Construction Fund - Jaime Smarr (day 2)
May 4:	NY Crane Defendants - Ron Ledder (day 2)
May 9:	Michael Carbone (non-party) (fourth and final date)
May 11:	TES, Inc. - Tom Guzzi (day 1)
May 16:	TES, Inc. - Tom Guzzi (day 2)
May 18:	Brady Marine Repair Co. - Person #1 (day 1)
May 23:	Brady Marine Repair Co. - Person #1 (day 2)
May 25:	Brady Marine Repair Co. - Person #2 (day 1)
May 30:	No depositions scheduled (Memorial Day)
June 1:	Brady Marine Repair Co. - Person #2 (day 2)
June 6:	Testwell, Inc. (day 1)
June 8:	Testwell, Inc. (day 2)
June 13:	Branch Radiographic Laboratories, Inc. (day 1)
June 15:	Branch Radiographic Laboratories, Inc. (day 2)
June 20:	Sorbara Construction Corp. (day 1)
June 22:	Sorbara Construction Corp. (day 2)
June 27:	1765 First Associates, LLC (day 1)
June 29:	1765 First Associates, LLC (day 2)
July 4:	No deposition scheduled (Independence Day)

July 6: Leon D. DeMatteis Construction Corp. (day 1)
 July 11: Leon D. DeMatteis Construction Corp. (day 2)
 July 13: Mattone Group Construction Co. Ltd., Mattone Group Ltd., and Mattone Group LLC (day 1)
 July 18: Mattone Group Construction Co. Ltd., Mattone Group Ltd., and Mattone Group LLC (day 2)
 July 20: Howard I. Shapiro & Associates Consulting Engineers, P.C. (day 1)
 July 25: Howard I. Shapiro & Associates Consulting Engineers, P.C. (day 2)
 July 27: New York Rigging Corp. (day 1)
 August 1: New York Rigging Corp. (day 2)
 August 3: Lucius Pitkin, Inc. (day 1)
 August 8: Lucius Pitkin, Inc. (day 2)
 August 10: McLaren Engineering Group and M.G., McLaren, P.C. (day 1)
 August 15: McLaren Engineering Group and M.G., McLaren, P.C. (day 2)

As was the case under CMOs #4 and #6, if the deposition of an entity is not completed within the time allotted for it, that deposition will continue on the next consecutive date allotted for a deposition within the same track. Each subsequent deposition within that track will similarly adjust to the next consecutive date in that track. The parties are free to alter this deposition schedule so long as all parties execute a stipulation clearly detailing any such changes and provided that the court is furnished with a copy of such stipulation at least one week in advance of any such amendments. Attached to the stipulation should be a complete revised schedule reflecting the changes.

The revised schedule above does not include nonparty depositions. Furthermore, the deposition of defendant James Lomma does not appear because it has been stayed pending resolution of his related criminal action. Finally, this order does not address the depositions scheduled in Track 2, which were set for completion by March 4, 2011, under CMO #6.

This constitutes the order of the court.

Dated:

April 15, 2011
New York, New York

Lawrence J. Fenner

J.S.C.