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: 4/16/2012

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THIS DOCUMENT RELATES TO: ALL CASES

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CASE MANAGEMENT ORDER NO. 22

PAUL G. FEINMAN, J.:

I. Next compliance conference:

The next compliance conference is scheduled for Thursday, May 3, 2012, at 2:15 p.m.

II. Non-party disclosure of DeMatteis's former employee's records

At the April 5, 2012 compliance conference, at the request of Group 1 Wrongful Death Plaintiffs' counsel, the court conducted an in camera review of the personnel file of Thomas Moran, a non-party and former employee of defendant DeMatteis, for the limited purpose of verifying the accuracy of the last known address previously provided by DeMatteis. The court reserved a ruling on plaintiffs' request for the court to direct DeMatteis to turn over a copy of the driver's license found in the personnel file.

The court finds that the driver's license is not material or relevant to any of the claims or defenses at issue in this action. The driver's license will not assist plaintiffs in serving a non-party subpoena on Thomas Moran, as the court's in camera review revealed that the post office box previously provided by DeMatteis was the most recent address found in Moran's personnel file, and the court already read into the record the address listed on the driver's license.

III. Request for certain information concerning City's productions

Group 1 Wrongful Death Plaintiffs ask the court to compel the City defendants to comply with their January 5, 2012 demand. This demand directed the City defendants to provide the Bates number and production date for each document produced by the City defendants on November 18, 2011, and December 6, 2011, of which the City defendants had previously produced in their prior document productions. The January 5 demand refers to a representation made by the City defendants' counsel at the December 8, 2011 compliance conference, stating that the "vast majority of the pages that we exchanged [on November 18, 2011, and December 6, 2011] were previously exchanged already" (Doc. 1035, Dec. 8 Transcript at 14). At that conference, the court directed the City defendants "to key the[ir] responses to [specific, previously served] demands," noting that it was insufficient to simply produce 8,000 pages without any explanation (*id.* at 17). On a similar note, the court denied plaintiffs' request for an immediate deposition of the person at each City agency who discovered the 8,000 pages in documents produced on November 18 and December 6, 2011.

After the December 8, 2011 conference, the City defendants supplemented their response to Group 1 Wrongful Death Plaintiffs' first notice for discovery and inspection by describing the general source of the various documents produced in the November 18 and December 6 production, and providing a general description of the contents of these documents, which are identified by their respective Bates numbers (Doc. 1041, City's supp. response). On January 3, 2012, plaintiffs' "reject[ed]" the City defendants' supplemental response claiming that it was not in compliance with the court's December 8 directives, which plaintiffs' claim "... specifically required said defendants to key the Bates stamp numbers of the documents produced to the demands the documents supplement" (Doc. 1043, WDPs' rejection). Two days later, plaintiffs served the January 5 discovery demand now at issue.

The substantial burden that would be imposed upon the City defendants by plaintiffs' January 5 demand outweighs any benefit that would be gained by the plaintiffs. The court has already directed the City defendants to key their November and December 2011 productions to the particular demands of which they are claimed to be responsive. Furthermore, it is clear from the arguments presented by plaintiffs' counsel at the December 8 compliance conference that they have already identified several documents of which they claim had not been produced until the City defendants' November and December 2011 productions. Also at that conference, counsel for plaintiffs advised the court that they planned to bring a motion for sanctions against the City defendants for allegedly withholding responsive documents from their prior productions until after the court had granted Michael Carbone's motion to dismiss, granted, in part, the City defendants' motion to dismiss, denied plaintiffs' prior motion to compel the depositions of Robert LiMandri and Patricia Lancaster, and after the depositions of individuals presently or formerly affiliated with the City defendants had been held. Presumably, the January 5 demand is intended to assist plaintiffs in making their motion for sanctions by shifting the burden to the City defendants to assemble the proof that could possibly support plaintiffs' contention that responsive documents have been withheld by the City defendants' in their prior productions. The January 5 demand would require the City defendants and their attorneys to gather the thousands of pages of documents produced by the City defendants in both this litigation and in the pre-action discovery proceeding since 2008, then check each document against each of the 8,000 pages produced in November and December of 2011, and then create a log identifying each document by Bates number that the City defendants had identified as not having been produced prior to November of 2011. Plaintiffs provide no support in the CPLR or in the applicable case law for imposing such a substantial burden on the City defendants. It should also

be noted that, assuming plaintiffs are able to make the initial required showing that sanctions are warranted, and the City defendants' opposition would be based, at least in part, on their contention that the documents produced in November and December of 2011 had already been produced to plaintiffs, the City defendants' will have to convince the court of the validity of their contention. This may involve assembling information similar to that sought in plaintiffs' January 5 demand. Notwithstanding, the court cannot compel the City defendants to create an otherwise non-existent document on the theory that the newly created document would constitute material and necessary evidence.

Of course, the timing and lack of explanation surrounding the City defendants' late production of 8,000 pages of documents, notwithstanding the numerous decisions and orders of this court addressing the City defendants' discovery obligations, is not a matter that may be taken lightly by the court. However, in view of the seriousness of the allegations being asserted by the plaintiffs and the severity of the sanctions they claim are warranted, the court will take no further action on these issues absent a formal motion submitted on papers. As such, plaintiffs' request to compel the City defendants to comply with their January 5 discovery demand is denied.

IV. Wrongful Death Plaintiffs' demands concerning property ownership

Group 1 Wrongful Death Plaintiffs seek to compel defendants, the City of New York, 1765 First Associates, LLC, Leon D. DeMatteis Construction Corporation, Mattone Group Construction Co. Ltd., Mattone Group Ltd., Mattone Group LLC and New York City Educational Construction Fund, together with certain entities plaintiffs describe as agents, representatives, and/or subsidiaries, to comply with plaintiffs' discovery demand served January 26, 2012 (Doc. 1090). The demand seeks the production of eleven broad categories of

documents concerning the ground lease and/or land lease, air rights, 421 (a) tax abatement and subsequent amendments related to the Azure Tower and/or the NYC DOE East Side Middle School, which were the buildings being constructed at the East 91st Street construction site at the time of the crane collapse. By letter dated February 13, 2012, plaintiffs requested an "emergency ruling" based on the Mattone defendants' and 1765 First's "refusal to turn over necessary and material documents in advance of the upcoming deposition of Mattone witness Douglas MacLaury" (Doc. 1097). The letter states that it had "recently come to light" that Mattone and DeMatteis went back to the City of New York to ask for, and were granted, reconsideration of the original land lease for the property at issue. Plaintiffs claim this development goes directly to the issue of ownership of the Azure project and the property. The letter further states that plaintiffs "immediately sent a request for documents reflecting this transfer in a notice for discovery and inspection dated January 26, 2012" (*id.*). Attached to the letter is an article from The Real Deal, dated June 30, 2011, which discusses successful efforts by Mattone and DeMatteis to convince "the city" to reconsider the terms of the land lease, and obtain additional tax benefits for the building. The court declined to take any action concerning the January 26, 2012 document demands at that time.

As an initial matter, the article cited by plaintiffs in the February 13 letter was published more than six months prior to plaintiffs' request for an "emergency ruling." Presumably, plaintiffs meant to say that the January 26 demand had been made "immediately" after *they* came across the Real Deal article, rather than when the information described therein came to light. The events described in the Real Deal article, which are the purported basis for the January 26 demand, took place at least 2 years *after* the May 30, 2008 crane collapse and, as such, have not been shown to be material and necessary to the question of ownership at the time the crane

collapsed. Further, in seeking "[e]ach and every agreement and/or document, specifically including communications of whatsoever kind and nature (including but not limited to: emails, letters, summaries, notes and/or memorandums of verbal communications," the demand, as defendants argue, is "vague, overly broad [and] unduly burdensome..." (Doc. 1101). The court finds that the requested material will not assist preparation for trial by "sharpening the issues and reducing delay and prolixity," (*Those Certain Underwriters at Lloyds, London v Occidental Gems, Inc.*, 41 AD3d 362, 365 [1st Dept 2007]; quoting *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]), and the burden that would be imposed by the unnecessarily broad requests far exceeds any hypothetical benefit that plaintiffs could conceivably gain from the production. To the extent any of the defendants have documents in their possession, custody or control that are material and necessary to the issue of ownership at the time of the crane collapse, such documents should have been produced pursuant to plaintiffs' first set of discovery demands served in 2010, as limited by the subsequent decisions and orders of this court. Moreover, nothing alleged here suggests that ownership of the land has changed since the date of the accident. Defendants, of course, have a continuing obligation to supplement their prior productions with any documents that subsequently come to their attention on the issue of ownership.

V. Inspection of ball in Lucius Pitkin Inc.'s possession

At the April 5, 2012 conference, Group 1 Wrongful Death Plaintiffs sought to compel Lucius Pitkin Inc. ("LPI") to turn over to their expert for inspection a "ball" taken from a Kodiak tower crane's turntable. Plaintiffs claim that their expert is outside of the state and that it would be an undue burden to require him to travel to New York to inspect the ball. LPI objects to the procedure proposed by plaintiffs, but has offered to make the ball available for inspection by

plaintiffs' expert in the presence of LPI's expert and/or counsel at a mutually agreeable time and place, and have, in fact, twice attempted to produce the ball for inspection.

The procedure proposed by the plaintiffs at the April 5 conference is not the same as the procedure they requested in their January 26, 2012 demand to LPI, which demanded that LPI produce the ball "... for discovery, inspection and photographing ... at a location in New York County, to be agreed by defense counsel for LPI and Wrongful Death Plaintiffs' Counsel ..." (Doc. 1089, Jan. 26 demand). Plaintiffs have not given a sufficient explanation for changing course. To the extent plaintiffs claim they would be burdened by having to fly their expert to New York to perform the inspection, this would be a burden imposed only by themselves in deciding to retain an out-of-state expert. Accordingly, plaintiffs' request is denied and the parties are directed to confer in good faith to find a mutually agreeable time and place within New York County for conducting an inspection of the ball, to be held no later than June 29, 2012.

VI. Deposition scheduling

The parties have requested various modifications to the deposition schedule previously found in CMO #21. Therefore, the schedule is now amended as follows, subject to future modifications as the court may deem fit:

April 18:	Mattone Group - Douglas MacLaury (Day #1)
April 20:	Brady Marine - Jose Ramos (Day #1)
April 23:	Brady Marine - Jose Ramos (Day #2)
April 25:	Rizzocasio (damages only)
April 30:	James Lomma (Day #1) (solely if acquitted by April 18 [*see below*])
May 2:	James Lomma (Day #2) (solely if acquitted by April 18)
May 4:	Calabro
May 11:	Doran (damages)
May 14:	Wellens and Barnes
May 16:	Ohayen (*Odermatt*)

May 18:	Nabil Saadi (*McLaren*)
May 23:	Joe & Claire Conneely
June 4:	Summer Lee & Catherie M. Pfleger
June 6:	Reto Rauschenberger
June 18:	Bridget Leino

The deposition of James Lomma shall commence on April 30, 2012, but only if a verdict is reached in his ongoing criminal trial on or before April 18, 2012, which is the date estimated by the Group 1 Wrongful Death Plaintiffs' counsel, and only if he is acquitted. If he is convicted, the court will defer scheduling Lomma's deposition until at least the next compliance conference on May 3, 2012. Plaintiffs also claim that non-party Tibor Varganyi's sentencing is scheduled for May 4, 2012. Thus, because plaintiffs expressed their preference for deposing Lomma before Varganyi, the court will also defer setting a date for his deposition until a later time, as well as non-party Maria Leo's deposition.

As mentioned by the court at the April 2012 compliance conference, even if Lomma is acquitted so that his deposition will commence April 30, 2012 and May 2, 2012, this shall not affect the scheduling of the other depositions set forth in this order.

A request has been made by the New York Crane defendants for the non-party depositions of John Hassler, Jack Harney, and Joseph Martinelli based on information they claim came to light only during the criminal trial of James Lomma. The court has insufficient information to make a determination as to the propriety of these non-party depositions at this time.

This constitutes the order of the court.

Dated: April 16, 2012
New York, New York

J.S.C.

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