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: 10/13/2010

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THIS DOCUMENT RELATES TO: ALL CASES

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**CASE MANAGEMENT ORDER NO. 4**

**PAUL G. FEINMAN, J.:**

## I. Matters of General Concern

Until further notice to the contrary, compliance conferences will continue to be held at 2:15 P.M. every Thursday. After each compliance conference, the steering committee members shall confer with each other for the purpose of drafting a *single* agenda for the next conference. If, after conferring amongst each other, the steering committees cannot agree upon a single agenda, then each steering committee shall submit a proposed agenda listing the items sought to be addressed at the next conference and listing which plaintiffs, defendants, and/or groups of either plaintiffs or defendants will be attending the next conference. The agenda or proposed agendas shall be uploaded to the E-filing system no later than the Monday immediately preceding the conference. If the steering committee members cannot agree as to which parties and/or groups will be attending each conference, then all parties and groups shall attend every conference.

As has been explained in CMO 2, and the conferences on September 27, 2010 and October 7, 2010, the scope of these conferences shall be "primarily" (Doc. 442, at 4), but not exclusively, to address post-reference disputes and serve as the means to review any of J.H.O. Bradley's orders which are subject to review pursuant to CPLR 3104 (b). As the court has

repeatedly explained, an order of reference to hear and report is distinct from an order of reference to hear and determine (Doc. 442; Doc. 480, at 52-53). The former is, as a matter of law, subject to the court's confirmation, in whole or in part, or rejection, in whole or in part. In addition, CPLR 3104 provides a procedural mechanism for a party to seek review of the merits of an issue that was referred to the J.H.O. With or without the making of such a motion, that same issue would still have been subject to the court's review after the recommended ruling was reported. Thus, if the mechanism by which this court reaches the merits of such an issue happens to be rendered via a compliance conference before such a CPLR 3104 motion is decided, this court does not deem this prejudicial or a deprivation of due process.

The court is not persuaded that proceeding in this manner is tantamount to reaching the merits of a motion before the parties have been heard on the motion addressing the issue because the J.H.O.'s rulings are necessarily subject to this court's confirmation. The court is, in the first instance, *required* to reach the merits of the rulings by confirming or rejecting, in whole or in part, the J.H.O.'s report whether a CPLR 3104 motion is made or not. Despite the parties' resistance, this court is attempting to exercise the discretion afforded to it in a provident and equitable manner. If the court resolves an issue that is also the subject of a CPLR 3104 motion, then the movant may withdraw the motion mooting the issue. If the motion is not withdrawn, then the court will hear the motion in due course and afford the litigants every right to be heard that they are entitled to under the CPLR. The court will endeavor to protect every litigant's rights, which should have been clear under CMO 2, where this court stated, "If they so choose, the parties are, of course, entitled to engage in motion practice, such as to compel or for protective orders, as they deem fit. However, the compliance conferences are intended to avoid this if possible." This should also have been clear under CMO 3, where this court lifted the stays

imposed by operation of law upon the making of dispositive and/or CPLR 3104 motions and stated, "Disclosure shall proceed to the fullest extent permissible under the CPLR" (Doc. 471).

## II. Depositions

### A. Designation of Deponents

The City of New York takes exception to the wrongful death plaintiffs' designation of certain officers and/or employees of the City as deponents.[1] Generally, a corporate or municipal entity upon whom a notice of deposition has been served is entitled to designate the deponent whom that party deems to have personal knowledge of the facts (*see Rector, Church Wardens & Vestrymen of St. Bartholomew's Church in City of N.Y. v Committee to Preserve St. Bartholomew's Church*, 84 AD2d 516, 516 [1st Dept 1981]; *Necchi S.p.A. v Necchi Sewing Mach. Sales Corp.*, 23 AD2d 543, [1st Dept 1965]). However, under CPLR 3106 (b),

> "[w]here the person to be examined is not a party or a person who at the time of taking the deposition is an officer, director, member or employee of a party, he shall be served with a subpoena. Unless the court orders otherwise, on motion with or without notice, such subpoena shall be served at least twenty days before the examination."

Further, subsection (d) provides that

> "[a] party desiring to take the deposition of a particular officer, director, member or employee of a person shall include in the notice or subpoena served upon such person the identity, description or title of such individual. Such person shall produce the individual so designated unless they shall have, no later than ten days prior to the scheduled deposition, notified the requesting party that another individual would instead be produced and the identity, description or title of such individual is specified. If timely notification has been so given, such other individual shall instead be produced."

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[1] This decision and order shall not be construed as either enlarging or diminishing any party's entitlement to designate a party as a deponent. The court is only addressing the issue of designation insofar as it relates to deponents who are not named parties themselves but are employees, officers, or representatives of a named party.

The parties are free to address the extent to which these provisions, or other authority, have been complied with or violated at compliance conferences, but the court will not make prospective determinations regarding the possibility of future violations. The deposition schedule is set forth below. It is subject to modifications as the court may deem fit (*see Pearce v FJC Sec. Servs.*, 298 AD2d 242, 242 [1st Dept 2002]). The parties are reminded that they are obliged to resolve any disputes regarding the designations of deponents in good faith and the court encourages them to document such efforts (*see Goldberg v Freedman*, 33 AD2d 754, 754 [1st Dept 1969]).

**B. Schedule**

The court has considered the parties' respective positions on the scheduling as set forth in their various proposed agendas (*e.g.* Docs. 489, 490, 491, 492, 496), and as explained at the compliance conferences held on September 27, 2010 and October 7, 2010.[2] Accordingly, subject to future modifications that the court may deem fit, depositions shall be held as follows:

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| October 13, 18, and 20: | Wrongful Death Plaintiffs; |
| October 25: | Bethany Klein; |
| October 27 and November 1: | Allstate Insurance Company and/or Allstate Indemnity Company a/s/o Enchev, Gumal, Damour, Raetz, St. John, Feldman, and Langel; |
| November 3: | Simeon Alexis and Kathlyn Moore; |
| November 8: | Vincent Podlaski; |
| November 10: | Kevin Mahoney and Carolyn Ryan; |
| November 15: | State Farm Insurance Fire & Casualty a/s/o Francine Berman, Shira Gordon, Lindsey Vandoros, and Evan |

[2] The court has also considered the parties' several points regarding outstanding documents. For example, counsel for New York Crane & Equipment Corp. ("NYC&E") *et al.* objected to proceeding with the wrongful death plaintiffs' depositions in the absence of various union and income tax records. However, in the interest of fostering orderly discovery, the wrongful death plaintiffs' depositions will proceed as scheduled. After those documents are received, if the parties deem it necessary, the court will consider an appropriate application for leave to serve a notice of further deposition and/or leave to serve an additional discovery device.

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| | Epstein; |
| November 17: | Marina Harss and Marco Nistico; |
| November 22: | Ruby Akin and Oguz Akin; |
| November 29: | Rency Loures and George Loures; |
| December 6: | Phillip Schiffman and Michael Fiorentino; |
| December 8: | Terence Scroope, Travis Lull, and Linda McIntyre; |
| December 13 and 15: | Greater New York Mutual Insurance Company a/s/o First & 91 LLC; |
| January 3, 2011: | Jack Rizzocasio; |
| January 5: | Giuseppe Calabro; |
| January 10: | Daniel Oddo; |
| January 12: | Robert Graves; |
| January 19: | Christopher Doran; |
| January 24, 26, and 31: | City of New York;[3] |
| February 2: | City of New York; |
| February 2: | Michael Carbone; |
| February 7: | Patricia Lancaster; |
| February 9: | Robert Limandri; |
| February 14: | New York City Educational Fund; |
| February 16: | James Lomma; |
| February 23: | Tibor Varganyi; |
| February 28: | Jimmy Upton and Tony Quaranta; |
| March 2: | Frank Signorelli and Carl Marino; |
| March 7: | Ron Ledder and Bob Hoffman; |
| March 9: | Sal Isola; |
| March 14: | Brady Marine Repair Co.; |
| March 16: | Testwell, Inc.; |
| March 21: | Branch Radiographic Labs; |
| March 23 and 28: | Sorbara Construction Corp.; |
| March 30: | 1765 First Associates; |
| April 4 and 6: | Leon D. Dematteis Construction Corp. |
| April 11 and 13: | Mattone Group Construction Co. Ltd, Mattone Group Ltd., and Mattone Group LLC; |
| April 18 and 20: | Howard I. Shapiro & Associates Consulting Engineers, P.C.; |
| April 25: | New York Rigging Corp.; |
| April 27: | Lucius Pitkin, Inc.; |
| May 2: | McLaren Engineering Group and M.G., McLaren, P.C.; |

**C. Internet Access**

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[3] The actual deponents are to be designated as per the CPLR and/or as discussed in Point II.A, *supra*.

The parties shall make all reasonable efforts to schedule depositions at facilities that provide wireless internet access, the purpose of which is to allow the several counselors to access the litigation website and have any documents a deponent may refer to available. However, the court declines the parties' request that counselors be required to notify each other, in advance, of every document they intend to rely upon at a deposition.

**D. Interrogation of Deponents**

The parties have agreed that the interrogation of deponents shall primarily be conducted by a single lead counsel. In the event that the lead counsel has not adequately addressed a particular party's concerns, then that party shall be entitled to continue the interrogation as to the particular matters that were not addressed.

**E. Videotaping of Depositions**

Generally, if a party properly serves a notice for a videotaped deposition under CPLR 3107 and 22 NYCRR 202.15 (c), then that party is entitled to it so long as it is willing to bear the costs (*see* CPLR 3116 [d]; 22 NYCRR 202.15 [k]; *State v Bernard D.*, 61 AD3d 567, 567 [1st Dept 2009] ["[L]itigants are given the right to videotape (civil depositions under 22 NYCRR 202.15 and CPLR 3113 [b])"]; *Jones v Maples*, 257 AD2D 53, 56-57 [1st Dept 1999] ["Generally, 'CPLR 3113(b) and 22 NYCRR 202.15 freely permit a party taking a deposition to record it on videotape. There is no requirement to show special need and videotaping may be employed over the objections of a bashful or reluctant witness."] [internal quotations omitted]; *accord Roche v Udell*, 155 Misc 2d 329, 332 [Sup Ct, Nassau County 1992] ["Plaintiff has a statutory right, notwithstanding a bashful witness, to employ this methodology, at her expense, provided she complies with the procedural mandates of 22 NYCRR 202.15 (CPLR 3113[b])."]; *see also* 3 Siegel's Practice Review, *Videotape Deposition Permitted Over Party's Objection*, at

4 ["mutual agreement is not required"]).

The court encourages the parties to consent to videotaping all depositions because it would benefit all parties, as well as the court, in preserving testimony for trial. However, the court declines to compel any party to involuntarily submit to an improperly noticed videotaped deposition or to deny a party the right to videotape a deposition, without a motion to compel or for a protective order.

## III. The Confidentiality Agreement between NYC&E *et al.* and the Wrongful Death Plaintiffs

At the August 20, 2010 compliance conference, counsel for NYC&E *et al.* objected to the production of certain documents on trade secrets grounds. The court issued a number of rulings some of which required production subject to a "confidentiality agreement, which restricts [the wrongful death plaintiffs'] ability to disseminate the information such as . . . who [defendants'] customers are" and "where they are doing business" (Doc. 481, at 13, 70).

At the August 25, 2010 conference, the parties had still not executed such an agreement. The wrongful death plaintiffs and the NYC&E *et al.* defendants were provided with a copy of the New York County Lawyers' Association's model confidentiality agreement which is frequently employed by the Commercial Division of this court. NYC&E's counsel represented that he would furnish the wrongful death plaintiffs with a confidentiality agreement, with whatever modifications he deemed appropriate, by August 26, 2010 to facilitate the production of the documents which may contain trade secrets. At that same conference, the parties were advised that if they were unable to agree to specific language, they should contact the court's law clerk who would conduct a conference call to resolve the issue. No such conference call was made. At the September 27, 2010 conference, the parties were advised that they should attempt

to come to an agreement by Friday, October 1, 2010. They were also advised that they should document their good faith efforts to do so and were advised to furnish the court with those efforts on or before the October 7, 2010 conference. The wrongful death plaintiffs did provide a duly executed stipulation conforming to the model confidentiality agreement employed by the Commercial Division which was provided to the parties on August 25, 2010. The NYC&E defendants did not furnish any documentation demonstrating good faith efforts. Counsel for NYC&E explained that such efforts would have been futile because the wrongful death plaintiffs had already rejected NYC&E's proposed confidentiality agreement some time before September 27, 2010.

The court hereby directs counselors for the wrongful death plaintiffs and NYC&E defendants to furnish each other with executed stipulations conforming with the New York County Bar Association's Model Confidentiality Agreement by October 18, 2010.[4] The documents subject thereto shall be furnished no later than October 30, 2010.

This constitutes the order of the court.

Dated: 10/12/2010
New York, New York

Paul G. Feinman
J.S.C.

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[4] Available at www.nycbar.org/pdf/report/ModelConfidentiality.pdf.