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

PRESENT: SHEILA ABDUS-SALAAM PART 13

Justice

Sheehan

- v -

Pantelidis

INDEX NO. 112355-00

MOTION DATE 3/30/01

MOTION SEQ. NO. 02

MOTION CAL. NO. 158

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: [x] Yes [ ] No

Upon the foregoing papers, it is ordered that this motion and cross-motion are decided in accordance with the accompanying memorandum decision.

TION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE

Dated: SEPTEMBER 10, 2001

J.S.C.

Check one: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION

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

. X

JOSEPH SHEEHAN and ROSA M. SHEEHAN, Index No. 112555/00

Plaintiffs,

-against- IAS PART 13

GEORGE PANTELIDIS, DECISION

Defendant.

. . . . . -X

GEORGE PANTELIDIS,

Third-party Plaintiff,

-against-

JOE L. MASONRY CONSTRUCTION INC., CREATIVE LIVING ENCLOSURE, INC., d/b/a CRYSTAL CO., ARISTA IRON WORKS, INC. SOCRATES RESTORATION, INC., VERRAZANO FLOORING CO., INC., MASCON RESTORATION, INC., S&J IRON WORKS, INC., WILLIAM F. SAVINO and WILLIAM F. SAVINO ARCHITECTS, JEMCO ELECTRICAL CONTRACTORS, INC., ELVERA SERVICE, INC., SPACE AIR CONDITIONING CORP., and JOSEPH, I. KREISEL, d/b/a ABC CHIMNEY & FIREPLACE COMPANY,

Third-party Defendants.

- X

SHEILA ABDUS-SALAAM, J.:

Motion sequence nos. 002,003,004,005 and 006 are consolidated for disposition, and are disposed of in the following memorandum decision.

In motion sequence no. 002, defendant challenges the propriety and adequacy

of the amount of the bond posted as an undertaking by plaintiffs pursuant to this court's January 22, 2001 order, which was entered on January 31, 2001 (the "Order"). Defendant also excepts to the sufficiency of the surety, pursuant to CPLR 2506, based upon plaintiffs' failure to attach a certificate of qualification with the undertaking filed on February 8, 2001. Plaintiffs oppose the motion and cross-move, pursuant to CPLR 2507 and 2508 to justify the undertaking.

In motion sequence no. 003, defendant moves for reargument and renewal of the Order. Plaintiffs oppose the motion and cross-move for sanctions pursuant to 22 NYCRR §§130-1.1 and 130-1.2.

In motion sequence no. 004, defendant moves to compel certain disclosure from plaintiffs, namely: a full and sufficient bill of particulars, pursuant to CPLR 3042(c); complete medical reports, authorizations and other information, pursuant to CPLR 3121 and 22NYCRR §202.17; and an inspection of plaintiffs' building pursuant to CPLR 3120.

In motion sequence no. 005, defendant moves, pursuant to CPLR 3103, for a protective order vacating notices of depositions and subpoenas duces tecum served by plaintiffs on seven non-party witnesses or, in the alternative, staying the depositions.

In motion sequence no. 006, plaintiffs move to punish defendant for contempt for violating the Order.

Plaintiffs are the owners and residents of the townhouse located at 114 East 73rd Street in Manhattan. Defendant owns, and along with his family and tenants, resides in the adjoining townhouse at 116 East 73rd Street. The buildings share a common or party wall. Plaintiffs brought this action alleging that in or about September 1998, defendant's renovation of his building caused extensive damage to plaintiffs' property. Defendant, on the other hand, claims that plaintiffs caused their own damage by failing to seal up or remove their diningroom fireplace as ordered by then Justice Baer over a decade ago.

Four of the five motions consolidated here for disposition arise from the Order granting plaintiffs preliminary injunctive relief limited to certain minimally intrusive testing (as opposed to the more invasive tests plaintiffs also sought) of defendant's property in

an attempt to assess the extent of any safety risks to plaintiffs' premises that may have been caused by defendant's renovation work. That Order permits plaintiffs to conduct smoke and boiler tests, to lower a video camera into the chimneys and flues of the party wall to inspect the integrity of the joints, and requires defendant to make available to plaintiffs for interviews the contractors who performed work on defendant's property that allegedly has caused damage to plaintiffs' property and endangered the health and safety of plaintiffs and other members of their household. These tests and the interviews were to be conducted within 60 days of the Order, or by March 23, 2001. As a condition of this preliminary injunction, plaintiffs were required to post a $10,000 undertaking.

As noted, the Order was entered on January 31,2001. That same day, defendant filed a third-party action naming twelve contractors and professionals involved in the renovation/alteration work on his building. On February 8, 2001, plaintiffs filed the undertaking with the court. Approximately a week later, defendant excepted to the undertaking but waited until March 9, 2001 to bring a motion attacking the bond. That motion, along with defendant's motions for reargument, to compel disclosure and for a protective order, was made returnable in the Motion Submission Part on March 23, 2001, the deadline for complying with the Order. In addition, defendant sought a stay of the Order from the Appellate Division. The application was denied on March 22,2001.

The tests provided for in the Order were finally conducted on April 26, 2001. At oral argument on plaintiffs' motion for contempt, brought on by order to show cause and made returnable April 27, 2001, plaintiffs' attorney reported that defendant's new heating system flunked the smoke test. Smoke and dangerous carbon monoxide were coming from defendant's flues into plaintiffs' townhouse. I issued a ruling from the bench directing defendant to shut down his heating system pending a hearing on the tests results. On May 2, 2001, the scheduled hearing date, defendant's counsel indicated that the heating plant had already been shut down in connection with the smoke test and that it had not been fired up again. Defendant's counsel also stated that after the tests the building superintendent had disconnected the fireplace and

chimney flues, and that licensed plumbers had replaced the gas-fired hot water heaters with electric ones.

These subsequent events render academic defendant's motion contesting the sufficiency and adequacy of plaintiffs' bond (to the extent that it has not already been withdrawn by defendant),[1] and plaintiffs' cross-motion to justify the undertaking. Even if they had not, however, the motion should be denied. Contrary to defendant's arguments that the bond should have been an indemnity bond, and that the bond amount should have been $3 million to protect defendant, his family and tenants from unspecified damage that may be caused by the tests, the $10,000 injunction bond posted by plaintiffs complied with the requirements of the CPLR and proved more than adequate for the purpose. The tests, once defendant allowed them to be conducted, went off without a hitch, demonstrating that defendant's concerns about the undertaking were at best unfounded and at worst an attempt to delay his compliance with the order.

The performance of the tests also renders academic most of defendant's motion to reargue. That motion is based on several meritless technical objections to the Order, such as it fails to provide for (a) reciprocal videotaping of plaintiffs' flues or smoke and boiler testing of plaintiffs' townhouse; and (b) notice to defendant of the manner of the inspection and testing or any notice whatsoever to defendant's tenants. It also repeats defendant's arguments concerning the insufficiency of the bond, made in the separate motion dealt with above.

The portion of the motion to reargue not mooted by the testing which occurred on April 26th is the contractor interviews. Under the Order, defendant was to make available to plaintiffs for interviews the contractors who performed the renovation work. To that end, on February 16, 2001, plaintiffs' counsel wrote a letter to defendant's counsel requesting, among other things, that the sub-contractors who performed work on the party wall and the fireplace and boiler flues be produced at plaintiffs' counsel offices, and that defendant's counsel suggest dates for the interviews. By then, as

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[1] In his reply defendant withdrew his exception to the bond based upon the lack of certification of the surety.

noted, defendant had impleaded these contractors into this action. This impleader is also one of defendant's grounds for renewal.

In their cross-motion for sanctions, plaintiffs argue that defendant made the contractors third parties so that he could argue that he no longer controls them and thereby avoid making them available as required by the Order. At the April 27th oral argument, defendant claimed that he believed by impleading the contractors, he was complying with the Order to make them available to plaintiffs. However, he also admitted that he belatedly wrote letters to the contractors seeking their cooperation and had not done this before bringing the third-party action.

Although defendant may have had ulterior motives in bringing the third-party action, I am persuaded by the argument made in his motion papers that because an interview of a non-party is not a statutorily authorized disclosure device, the court may not direct a non-party to submit to an interview. Even though defendant supports this argument with a single case Cwick v. City of Rochester, 54 AD2d 1078, in which the Fourth Department reversed the motion court's order granting the interview of a doctor based upon the doctor's opinion letter in a wrongful death action, and even though the facts of this case are different than in Cwick, the legal proposition is indistinguishable and I have found no case in this or any other department which holds that an interview -- as opposed to a deposition -- is an appropriate disclosure device. (Perhaps plaintiffs themselves realized this as they also served subpoenas on the subcontractors they sought to interview.) I am also persuaded that this informal mechanism does not adequately safeguard either the contractors who may not wish to be interviewed (as is apparently the case here) or defendant who may be subjected to sanctions (such as are now being sought by plaintiffs) for his failure to make them available. Additionally, it has never been shown that these contractors are under defendant's control. Accordingly, defendant's motion to reargue is granted to the extent that it seeks to vacate that provision of the Order which requires defendant to make his contractors available to plaintiffs for interviews, and upon reargument, that provision of the Order is hereby vacated.

That branch of the motion which seeks renewal, on the ground that plaintiffs are

pursuing an administrative appeal of the Department of Buildings' permit relating to the two-story glass and aluminum greenhouse where defendant's patio was, however, is denied. Plaintiffs' pursuit of their administrative remedies has nothing to do with the Order.

Plaintiffs' cross-motion for sanctions is also denied. At first blush, the cross-motion seems to make a persuasive case that defendant and his counsel have attempted to obstruct plaintiffs from performing the inspections and tests required under the Order by imposing conditions to defendant's compliance such as a higher undertaking, reciprocal inspections and lengthy notice requirements. Plaintiffs accuse defendant of bringing "baseless" motions timed to further his strategy of "abusive, vexatious and dilatory litigation tactics." Indeed, I indicated at the oral argument, that I would consider sanctions against defendant and his counsel. However, upon reflection I do not believe sanctions are warranted. While I appreciate plaintiffs' frustration with defendant's seeming unwillingness to comply with the Order and take no pleasure in reading or hearing repetitious arguments, I cannot agree that defendant's and his counsel's conduct was "undertaken primarily to delay or prolong the resolution of the litigation, [and] to harass [and] maliciously injure" plaintiffs NYCRR §§ 130-1.1 and 130-1.2.

None of defendant's motions was untimely. As plaintiffs point out, all four of the motions were made returnable the same date, March 23, 2001, which also happened to be the deadline for compliance with the order. Neither that fact nor the fact that defendant thought it necessary to bring several motions or seek a stay (albeit unsuccessfully) is sufficient to warrant sanctions. Nor are all the motions "baseless". The motion to reargue, as it turns out, is in part successful and, as discussed below, so is the motion to compel disclosure. Under these circumstances, defendant should not be sanctioned. Accordingly, plaintiffs' cross-motion for sanctions is denied.

For the same reasons, defendant's vigorous pursuit of his right to challenge the Order (and to seek redress for his discovery grievances), rather than simply acquiesce in its directives, does not warrant a finding of contempt. Plaintiffs' motion is therefore denied.

Turning now to the discovery motions, in his motion to compel disclosure, defendant seeks a) a bill of particulars, b) medical authorizations and c) an inspection of plaintiffs' townhouse. Defendant also alleges that plaintiffs have failed to appear for depositions.

Although plaintiffs provided a bill of particulars shortly after the motion was made, defendant claims that it is insufficient because several items were either answered inadequately or not answered at all, and other items were improperly objected to, as plaintiffs waited more than three months to provide the bill which was first demanded in November, 2000. Defendant's claims are valid. Plaintiffs must provide a full and complete bill of particulars within 20 days of service of a copy of this order with notice of entry.

However, defendant is not entitled to medical authorizations and medical reports from plaintiffs. These items are only required where a party's mental or physical condition is "in controversy" (CPLR 3121[a]) or where "recovery is sought for personal injuries, disability or death" (Uniform Court Rules §202.17). Plaintiffs' complaint seeks injunctive and monetary relief for property damage only. Plaintiffs are not claiming to have suffered any physical injuries or sought medical treatment, despite an isolated statement in the November 13, 2000 affidavit in support of their motion for injunctive relief that defendant's renovation work caused them serious health problems. That statement alone does not place plaintiffs' physical condition in controversy. Defendant's reliance on that statement for privileged medical information is misplaced. Accordingly, defendant's request for plaintiffs' medical information is denied.

Defendant's request for a further inspection of plaintiffs' property is also denied. Defendant had an opportunity to inspect plaintiffs' townhouse during the summer of 2000. His failure to conduct a full inspection or to have his counsel (contrary to his arguments, he was represented by counsel at the time) present, does not entitle him to another inspection, especially given the undisputed results of the smoke tests that show this problem, at least, is coming from defendant's side of the wall.

Defendant may take plaintiffs' depositions but there is no need based on this record to compel them, as defendant apparently has not actually proposed any dates

for plaintiffs to be deposed. They should be scheduled along with the depositions of the third-party contractors/professionals and Mrs. Pantelides,. There is no need for a protective order as to these witnesses and the stay of disclosure is therefore vacated.

However, the injunction against defendant's use of his heating plant I imposed from the bench on May 2, 2001, shall remain in place pending submission of proposals from the parties for a long-term solution to the danger posed by the smoke-emitting flues.

Finally, in mid-June 2001, I was assigned to a medical malpractice part. My general part inventory was reassigned to Justice Tompkins although any open motions submitted as of June 14,2001 had to be decided by me. During the June 22,2001 calendar - - the first after the reassignment, - - I announced this change to the attorneys appearing for arguments on matters on that calendar. Plaintiffs' counsel was present that day on another matter and heard the announcement. I have received letters from plaintiffs' counsel and counsel for one of the third-parties on this case requesting that I keep the case. I have also received letters from defendant's counsel objecting to these requests. Because I have also received similar letters in other cases where the parties disagree on my keeping the case, it would be inappropriate for me to interfere with the orderly reassignment of cases. Once I have decided all motions fully submitted by the June 14th cut-off date, as here, I advise counsel (in case they do not already know) that the matter has been reassigned to Justice Tompkins.

Accordingly, it is

ORDERED that defendant's motion to reargue and renew is granted only to the extent of vacating that portion of the January 31, 2001 order which required defendant to make available to plaintiffs for interviews defendant's sub-contractors, and the motion is otherwise denied; and it is further

ORDERED that defendant's motion to compel disclosure is granted only to the extent that plaintiffs shall provide a fully responsive bill of particulars consistent with this opinion within 20 days of service of a copy of this order with notice of entry, and the motion is otherwise denied; and it is further

ORDERED that defendant's motion contesting the sufficiency of plaintiffs' bond;

defendant's motion for a protective order; plaintiffs' cross-motions to justify the undertaking and for sanctions; and plaintiffs' motion for contempt are all denied.

This constitutes the decision and order of the court.

ENTER:

Dated: September 10, 2001

J. S. C.