

Kerrigan v TDX Constr. Corp.

2007 NY Slip Op 33075(U)

September 12, 2007

Supreme Court, New York County

Docket Number: 0109042/2004

Judge: Shirley W. Kornreich

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

PRESENT: SHIRLEY WERNER KORNREICH
Justice

PART 54

Elizabeth Frances Kerrigan,

INDEX NO. 109042/04

- v -

MOTION DATE 8/9/07

TDX Construction Corp., et al

MOTION SEQ. NO. 7

MOTION CAL. NO. _____

The following papers, numbered 1 to 23 were read on this motion to/for Compel

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1, 2, 3, 4, 5, 8, 9, 10, 11, 12, 18
6, 13, 14, 15, 16, 19, 20, 21
7, 17, 22, 23

Cross-Motion: Yes No

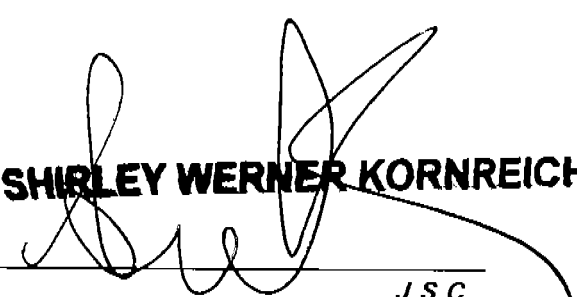
Upon the foregoing papers, It is ordered that this motion

FILED
SEP 24 2007
NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 9/12/07

HON. SHIRLEY WERNER KORNREICH

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
ELIZABETH FRANCES KERRIGAN, as Exccutrix of
the Estate of THOMAS CONNELLY, decedent,

Plaintiff,

Index No.: 109042/04

-against-

DECISION,
and ORDER

TDX CONSTRUCTION CORP., JEM ERECTORS, INC.,
BAY CRANE SERVICE, INC., BAY CRANE SERVICE
OF LONG ISLAND, INC., KOENIG IRON WORKS, INC.,
And THE TRUSTEES OF COLUMBIA UNIVERSITY IN
THE CITY OF NEW YORK

Defendants.

-----X
JEM ERECTORS, INC.,

Third-Party Plaintiff,

Third-Party Index
No.: 591138/04

-against-

ERIN ERECTORS, INC.,

Third-Party Defendant.

FILED
SEP 24 2007,
NEW YORK
COUNTY CLERK'S OFFICE

-----X
TDX CONSTRUCTION CORP., and THE TRUSTEES
OF COLUMBIA UNIVERSITY IN THE CITY OF
NEW YORK,

Fourth-Party Plaintiffs,

Fourth-Party Index
No.: 590316/05

-against-

BETON PREFABRIQUES DuLac, INC., and
ERIN ERECTORS, INC.,

Fourth-Party Defendants.

-----X

-----X
TDX CONSTRUCTION CORP., and THE TRUSTEES
OF COLUMBIA UNIVERSITY IN THE CITY OF NEW
YORK,

Fifth-Party Plaintiff,

Fifth-Party Index
No.: 590317/05

-against-

KOENIG IRON WORKS, INC., ONE BEACON INSURANCE
COMPANY, BETON PREFABRIQUES DuLac, INC.,
COMMERCE & INDUSTRY INSURANCE COMPANY
JEM ERECTORS, QBE INSURANCE CORPORATION
ERIN ERECTORS, INC., and ADMIRAL INSURANCE
COMPANY,

Fifth-Party Defendants.

-----X
TDX CONSTRUCTION CORP., and THE TRUSTEES
OF COLUMBIA UNIVERSITY IN THE CITY OF NEW
YORK,

Sixth-Party Plaintiff,

Sixth-Party Index
No.: 590170/06

-against-

ELIZABETH FRANCES KERRIGAN, as Executrix of
the Estate of THOMAS CONNELLY, dcedent

Sixth-Party Defendant.

-----X
KOENIG IRON WORKS, INC.,

Seventh-Party Plaintiff,

Seventh-Party Index
No.: 590223/06

-against-

ELIZABETH FRANCES KERRIGAN, as Executrix of
the Estate of THOMAS CONNELLY, decedent, ADMIRAL
INSURANCE COMPANY and ERIN ERECTORS, INC.,

Seventh-Party Defendants.

-----X

-----X
TDX CONSTRUCTION CORP., and THE TRUSTEES
OF COLUMBIA UNIVERSITY IN THE CITY OF NEW
YORK,

Eighth-Party Plaintiff,

Eighth-Party Index
No.: 590384/06

-against-

WESTCHESTER FIRE INSURANCE COMPANY,
FEDERAL INSURANCE COMPANY, and COMMERCE
AND INDUSTRY INSURANCE COMPANY OF CANADA

Eighth-Party Defendants.

-----X
JEM ERECTORS, INC.,

Ninth-Party Plaintiff,

Ninth-Party Index
No.: 591192/06

-against-

ERIN INTERIORS, INC.,

Ninth-Party Defendant.

-----X
KORNREICH, SHIRLEY WERNER, J.:

This action seeks damages for the wrongful death and conscious pain and suffering of decedent, Thomas Connelly, who died on July 2, 2002, from injuries sustained in a construction accident. Defendant/third-party/ninth-party plaintiff JEM Erectors, Inc. ("JEM Erectors") moves: (1) pursuant to CPLR § 3124, to direct plaintiff Elizabeth Frances Kerrigan, as executrix of decedent's estate, to comply with July 20, 2006, August 16, 2006, and December 14, 2006 notices of discovery and inspection; (2) pursuant to CPLR § 3124, to direct plaintiff to appear for a further examination before trial; and (3) pursuant to CPLR § 3126, to strike plaintiff's pleading and for judgment in favor of JEM Erectors if plaintiff does not comply with said notices for discovery and inspection. Plaintiff cross-moves: (1) pursuant to CPLR § 3124, to compel

compliance with notices of deposition served upon defendant JEM Erectors; (2) pursuant to CPLR § 3103(a), for a protective order vacating notices of deposition served on decedent's accountants; (3) to vacate or modify the court's March 1, 2007 Compliance Conference Order directing preclusion of testimony by any party who did not appear for depositions on or before April 20, 2007; and (4) pursuant to CPLR § 3103, to suppress the income tax records of Erin Erectors, Inc. Defendant/fifth-party defendant/seventh-party plaintiff Koenig Iron Works, Inc. ("Koenig") also cross moves: (1) pursuant to CPLR § 3124, to direct plaintiff to comply with Koenig's August 1, 2006, December 21, 2006, December 28, 2006, and January 8, 2007 discovery demands; (2) pursuant to CPLR § 3124, to direct plaintiff to appear for a further examination before trial; (3) pursuant to CPLR § 3124, to strike plaintiff's complaint and to grant judgment to Koenig if plaintiff does not comply with said discovery demands; (4) pursuant to CPLR § 3124, to direct all parties to comply with Koenig's December 21, 2006, December 28, 2006, January 28, 2007, and February 2, 2007 notices for discovery and inspection; (5) to transfer this action from a standard to a complex track; (6) to modify the court's March 1, 2007 Compliance Conference Order directing preclusion of testimony by any party who did not appear for depositions on or before April 20, 2007; and (7) to extend plaintiff's time to file a note of issue and certificate of readiness.

I. *Background*

A. *The Audubon III Project*

Defendant Koenig entered into an agreement with decedent Thomas Connelly ("decedent" or "Connelly") to provide construction work and labor services at the Audubon III Construction Project ("the project") at Columbia University Medical Center. Decedent then sub-contracted this work out to Erin Erectors. The project was originally contracted out by the

owner, defendant The Trustees of Columbia University in the City of New York as follows. Defendant TDX Construction Corp. ("TDX") was hired as the general contractor and construction manager with overall responsibility for job safety and the authority to stop work if any hazardous conditions were to exist. Koenig contracted with TDX to manufacture and erect structural steel on the roof of the Audubon III building. JEM Erectors provided the crane used for the project and rented it from defendant Bay Crane Service, Inc.

On July 2, 2002, Connelly was crushed against a wall by a manlift on the roof of a building located at the project. The manlift was moved to the roof by a crane located approximately 185 feet below. After the accident, Connelly was rushed to Harlem Hospital where he died approximately four hours later.

Plaintiff Elizabeth Frances Kerrigan ("plaintiff" or "Kerrigan"), decedent's widow and executrix of his estate, commenced this action for wrongful death and conscious pain and suffering of the decedent based upon defendants negligence and violations of sections 200, 240(1) and 241(6) of the Labor Law. Damages alleged included lost earnings of approximately \$24,000,000. On July 20, 2006, August 16, 2006, and December 14, 2006, JEM Erectors served notices for discovery and inspection on plaintiff. Plaintiff responded to each set of demands and submitted these responses in opposition to this motion and in support of its cross-motion. However, plaintiff objected to some of the demands arguing that they are "palpably irrelevant...privileged and not calculated to lead to admissible evidence."

The remaining requested discovery from these three demands includes: bank statements from each bank where plaintiff and decedent had personal, corporate, and business accounts; payroll records from 1999 through 2002 for Erin Erectors and Erin Interiors; authorization's for decedent's workers' compensation coverage and the workers' compensation claim that was filed

on his behalf; authorization's to obtain decedent's employment records from Erin Erectors and other companies the decedent worked for from 1996 through 2002; a copy of any checks paid by the decedent for the lease at 24-30 BQE; authorizations for plaintiff's accountant to provide Erin Erectors tax records; accounting records for Erin Erectors, Erin Interiors, and Thomas Connelly Construction from 1995 through 2006; invoices from Erin Erectors from 1995 through 2006 for work performed and materials purchased; a list of all of Erin Erectors and Erin Interiors customers from 1996 through 2006; questionnaires from the joint tax returns filed by Connelly and Kerrigan in 2001 and 2002; proof of any wire transfers between Connelly and Erin Erectors from 2000 through 2002; deposit slips from 1999 through July 2, 2002 where Connelly gave money to Erin for work performed.¹

B. Plaintiff and Decedent's Personal and Corporate Finances

Kerrigan and Connelly were married on October 23, 2000. From the time of their marriage, until Connelly's death on July 2, 2002, the couple were jointly involved in the construction business. This motion involves three construction companies: Thomas Connelly Construction, decedent's personal construction company; Erin Erectors, Inc.; and Erin Interiors, Inc. Plaintiff averred that she was the President of Erin Erectors and Erin Interiors and ran each company separate from her husband's business. According to Kerrigan, Connelly would secure contracts from various entities to his company and then subcontract out all of his work to Erin Erectors. Kerrigan avers Connelly only used Erin Erectors to perform his construction contracts. She further avers that Erin Erectors would subcontract out work to Erin Interiors only when it

¹In its motion, JEM Erectors requested the following documents which have already been provided by plaintiff: decedent's W2's from Erin Erectors and other companies the decedent worked for from 1996 through 2002; a copy of the lease for 24-30 BQE from 1999 through 2002; the 2001 and 2002 joint tax returns filed by Connelly and Kerrigan; and Erin Interiors Certificate of Incorporation.

could not handle the amount of work coming in.

Erin Erectors and Erin Interiors operated out of two locations, 515 East 72nd Street, Apartment 39C, New York, N.Y. ("Apartment 39C"), and 24-30 Brooklyn-Queens Expressway, Woodside, N.Y. ("24-30 BQE"). The certificates of incorporation for Erin Erectors and Erin Interiors list Kerrigan as the president, sole shareholder and only officer. Kerrigan avers that she was the only person with authority to enter into contracts or sign agreements on behalf of Erin Erectors or Erin Interiors and that decedent was not an authorized signatory on behalf of either corporation. She also testified that 24-30 BQE was leased to Erin Erectors. However, the leases at Apartment 39C and 24-30 BQE list Connelly as the tenant and were signed by him individually.

The discovery provided demonstrates how the couple operated their businesses and corporate finances up until Connelly's death on July 2, 2002. From January 2000 through December 2002, Connelly issued invoices from his personal business for various construction projects that he and plaintiff were working on. As previously stated, all of this work was then sub-contracted out to Erin Erectors. Plaintiff avers that decedent did not keep a ledger, logbook, or any other form of accounting to keep track of how much money he was making and that no invoices or contracts were created between Connelly and Erin Erectors. Plaintiff also avers that Erin Erectors received other sources of income outside of its work with Connelly, but she is not sure of decedent's "involvement" in these transactions.

Payments on Connelly's invoices were deposited by decedent directly into various business and personal bank accounts he jointly held with Kerrigan at Chase, HSBC, and Republic National Bank of New York ("Republic"). Kerrigan testified that all of these accounts had been joint since 1999. Checks were then issued from these accounts, and one other account

at North Fork Bank, to Erin Erectors for “payroll” and “general” expenses for the following amounts: \$1,951,000 in 2000; \$1,189,000 in 2001; and \$118,500 in 2002. Plaintiff testified that any checks made out directly to Erin Erectors, for work it had performed, were never deposited into the couples joint accounts. She averred these checks went directly into Erin Erectors business account at HSBC. Erin Erectors would use these funds to pay most of its business expenses. From February 13, 2002, through May 29, 2002, Connelly and Kerrigan also issued checks from their HSBC account to Erin Interiors for “general” and “payroll” expenses totaling \$152,000. In addition, from February 4, 2002 through June 21, 2002, Erin Erectors paid Erin Interiors \$276,000.

Plaintiff avers that she did not receive any compensation in her capacity as President of Erin Erectors and that the business did not make a profit from its creation in 1996 up until Connelly’s death on July 2, 2002. She further avers that she never received any income from decedent prior to his death. Connelly’s W2’s from 1998 through 2000 report that he was paid a total of \$105,060 in wages from Erin Erectors. Specifically, his year 2000 W2 reported that he earned \$44,386 in gross wages from Erin Erectors. Connelly and Kerrigan filed joint returns in 2001 and 2002.

II. *Conclusions of Law*

A. *JEM Erectors Motion*

Parties are entitled to the full disclosure of all material and necessary matter in an action, “regardless of the burden of proof.” *Andon v. 302-304 Mott St. Assocs.*, 94 N.Y.2d 740, 746 (2000). However, the Court may use its discretion in determining what is “material and necessary[.]” *Id.* This includes “any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. *The test is one of*

usefulness and reason[.]” *Id.* (emphasis supplied).

A formal motion to compel disclosure may be brought under CPLR 3124 if the “normal” methods of obtaining the disclosure are unsuccessful. *See* Siegel, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C3124:1, at 735. Parties may demand disclosure of evidence, or information leading to evidence, *relevant to the case* without regard to the burden of proof. *Northway Engineering, Inc. v. Felix Industries, Inc.*, 77 N.Y.2d 332, 335 (1991). The failure to comply with such requests may result in a preclusion order “preventing the nondisclosing party from using the evidence in any manner during the course of the litigation[.]” *Id.* Where a party “wilfully fails to disclose information which the court finds ought to have been disclosed[.]” the court may strike out pleadings or parts thereof or dismiss the action or any part thereof. CPLR § 3126(3).

In a wrongful death action, damages are limited to fair and just compensation for pecuniary injuries resulting from the decedent’s death to the individuals for whose benefit the action is brought. *Johnson v. Manhattan & Bronx Surface Transit Operating Authority*, 71 N.Y.2d 198, 203 (1988). The standard used to measure the value of past and future lost earnings is the decedent’s gross income at the time of death. *Johnson*, 71 N.Y.2d at 204.

Here, the financial records sought by JEM Erectors from the time of Connelly’s and Kerrigan’s marriage up until the decedent’s date of death, are relevant to determine the pecuniary value of his past and future earnings. Plaintiff argues that Connelly and Erin Erectors operated as separate entities. Connelly would contract and bid on his own jobs and then subcontract the performance of these jobs to Erin Erectors. However, the personal and business financials of Connelly and Kerrigan were completely commingled. According to plaintiff, Connelly’s income was \$1.28 million in 1999, \$1 million in 2000, \$879,000 in 2001, and \$501,000 up until his

death in 2002. Plaintiff argues these amounts were the calculation of the difference between what decedent received on his contracts and what he paid Erin Erectors for business expenses, with the exception of some "non-Erin" expenses he paid directly. Out of their joint bank accounts, Connelly and Kerrigan deposited \$1,951,000 in 2000, \$1,189,000 in 2001; and \$118,500 in 2002 directly into Erin Erectors as business expenses for the work it performed on behalf of Connelly. Plaintiff further argues that decedent was employed by Erin Erectors from 1998 through 2000, was not an owner or officer of Erin Erectors and had no authority to act on behalf of Erin Erectors or Erin Interiors.

Notwithstanding, additional discovery is material and necessary to clarify what amount of income is directly attributable to Connelly and also to determine his true role in Erin Erectors. Plaintiff testified that she received no income from Erin Erectors or from decedent up until his death on July 2, 2002. She also averred that Erin Erectors received income from sources outside of its dealings with Connelly. However, the financial information provided appears to show that all of Erin Erectors' income came via its business with Connelly and that all of its costs and expenses were paid by Connelly and Kerrigan directly through their multiple joint accounts. It appears that checks that came in from decedent's business invoices were deposited directly into Connelly and Kerrigan's joint accounts. Checks were then issued to Erin Erectors from these funds to pay for all of its "payroll" and "general" expenses. Based upon this information, every dollar used to operate Erin Erectors came from Connelly and Kerrigan's joint bank accounts. This might indicate that Connelly, Kerrigan, and Erin Erectors operated financially as one and the same. In addition, the lease for both of Erin Erectors' locations at Apartment 39C and 24-30 BQE were executed by Connelly and list him as the tenant. This contradicts plaintiff's testimony that 24-30 BQE was leased to Erin Erectors, that decedent was not an officer of Erin Erectors and

that he had no authority to act on its behalf.

Further evidence of the joint nature of these businesses comes from plaintiff's own testimony. Plaintiff avers that Connelly was not employed by Erin Erectors in 2002. However, on August 8, 2002, plaintiff filed a report with the Workers' Compensation Board entitled "Employer's Report of Work-Related Accident/Occupational Disease." This report lists First Cardinal Corporation as Erin Erectors' primary insurance carrier and states that decedent was a full time employee of Erin Erectors when the accident occurred on July 2, 2002. Kerrigan also testified that Connelly received no income from Erin Erectors in 2002. However, in 2002, decedent received \$39,000 in checks from Erin Erectors. Kerrigan avers that these checks were issued to Connelly "because he needed money in his account while he was waiting for a requisition to come through and Erin [Erectors] had money in its account and just wrote him a check to carry him over until he got a payment and then he would give the money right back when he got a requisition." Clearly, additional discovery is necessary to determine Connelly's true role and employment status with Erin Erectors.

Plaintiff also testified that Connelly did not keep any financial records for his construction business and that he subcontracted out all of his work to Erin Erectors. As a result, the only way to properly examine the value of Connelly's past and future lost earnings is to examine Erin Erectors corporate tax returns, books and records. *See Rollner v. Cannon*, 42 A.D.2d 964 (2nd Dept) (in action for wrongful death and conscious pain and suffering, business records and receipts are material and necessary for disclosure as they pertain to issue of future earnings); *Berger v. Fete Cab Corp.*, 57 A.D.2d 784 (1st Dept. 1977) (disclosure of tax returns permissible where loss of income is an element of damages and circumstances exist where alternative sources for such information are unreliable, lacking or overly burdensome).

Also, since Connelly used their joint accounts to conduct his business operations regarding deposits and subsequent payments made to Erin Erectors and did not keep any books, records, or invoices, an examination of all of Connelly and Kerrigan's bank statements is necessary to properly determine the pecuniary value of Connelly's services to plaintiff individually and in her Erin Erectors capacity. *See Maglaras v. Mt. Sinai Hosp.*, 107 A.D.2d 605 (1st Dept. 1985) (in wrongful death action, bank records of decedent and his wife, plus various employment records and income tax returns, were discoverable by defendant where the issue of pecuniary injuries suffered by decedent's beneficiaries was measured by loss of his financial contributions). Along these lines, plaintiff is subject to a further examination before trial in her capacity as President of Erin Erectors and Erin Interiors in order to properly determine the pecuniary damages she suffered.

The goal here is to determine the pecuniary loss suffered by Kerrigan as a result of Connelly's death. If Connelly had deposited checks he received from his construction business into a separate business account, had drawn up invoices to Erin Erectors for its work as a subcontractor, issued checks to Erin Erectors based upon its performance and kept business records outlining these transactions, plaintiff's arguments regarding Connelly's business relationship to Erin Erectors might be plausible. Unfortunately, this was not the case. Money to Erin Erectors came from Kerrigan's and decedent's joint personal accounts, no records detailing the nature of this relationship were kept. Therefore, plaintiff cannot claim that the financial records requested by JEM Erectors, from the time they were married in 2000 up until the decedent's date of death on July 2, 2002, are outside the purview of discovery.

However, JEM Erectors' argument that it is entitled to discovery relating to plaintiff's post-date-of-death earnings is misplaced. The law clearly states that the standard used to

measure the value of past and future lost earnings is the decedent's gross income at the time of death. *Johnson*, 71 N.Y.2d at 204. What Kerrigan and/or Erin Erectors have earned since Connelly's death on July 2, 2002 is irrelevant. JEM Erectors has not cited one case where an examination of post-date-of-death earnings was used to value the pecuniary damages suffered by a plaintiff in a wrongful death action.

B. *Plaintiff's Cross-Motion*

1. *Notice of Deposition*

Pursuant to CPLR § 3124, plaintiff moves to compel the deposition of Martin Mozitis, who was a foreman for JEM Erectors and was its supervisor on site at the project when Connelly was killed on July 2, 2002. Plaintiff argues that Mozitis' rank and presence at the job site on the day of the accident mean that he is likely to possess knowledge as to the methodology used by JEM Erectors in terms of crane operation. JEM Erectors argues that Mozitis is an elderly gentleman, in the early stages of dementia, and therefore is not physically or mentally capable of testifying. However, JEM Erectors has not produced a medical affidavit attesting to Mozitis' medical condition. Accordingly, plaintiff's motion to compel the testimony of Martin Mozitis is granted.

2. *Protective Order*

CPLR § 3103(a) gives the Court "wide discretion" to limit the use of any disclosure device when such use would cause unreasonable annoyance or embarrassment. *Jones v. Maples*, 257 A.D.2d 53, 55-56 (1st Dept. 1999); *see also* CPLR § 3103(a) (upon party's motion, Court may issue protective order "denying, limiting, conditioning or regulating the use of any disclosure device . . . to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts"). The Court must consider whether that device

sought to be used is of “particular value under the circumstances” before precluding its use, even where the potential for abuse of discovery is present. *Jones*, 257 A.D.2d at 56; *see also Arosa v. Hilton Hotels Corp.*, 178 A.D.2d 573 (2nd Dept. 1991) (court properly exercised its discretion by declining additional discovery where demands “were motivated by a desire to harass and to delay rather than by a genuine need for information”).

On March 28, 2007, JEM Erectors served notice to take the deposition of non-party witnesses Mark Johnson, CPA, of Johnson, Lauder & Savidge, LLP (“Johnson”) and Davidson, Fox & Company, LLP (“Davidson”). Davidson prepared tax returns and performed accounting services for Erin Erectors, Erin Interiors and decedent from 1997 through 2001 and Johnson provided these services from 2002 through the present. Both Davidson and Johnson are located in Binghamton, New York. Plaintiff argues that these depositions should not be conducted for two reasons. First, the notice was defective since it did not contain an address for either witness in violation of CPLR § 3107 and stated that the depositions were to take place in New York County, in violation of CPLR § 3110(2). Second, for the reasons set forth in their opposition to JEM Erectors original motion, plaintiff objects to the questioning of each accountant regarding the financial records of Erin Erectors, Erin Interiors and plaintiff.

JEM Erectors notice of deposition was defective. CPLR § 3110(2) states that the venue for a non-party deposition is the county of the witnesses residence or business. Accordingly, the proper venue for each deposition is Binghamton, New York. Further, CPLR § 3107 requires the notice of deposition to list “the name and address of each person to be examined, if known.” JEM Erectors listed the address for Johnson and Davidson on its request for business and personal income tax records of decedent dated October 13, 2006, but did not list either address on its notice of deposition. Therefore, plaintiffs notice of deposition was procedurally defective.

Despite these procedural errors, the examination of Johnson and Davidson is material and necessary to determine the pecuniary loss suffered by plaintiff. Kerrigan testified that in order for Connelly to file his tax returns his accountant had him fill out a questionnaire and turn over all of his bank statements. On their joint tax returns, Connelly and Kerrigan reported approximately \$879,000 in gross business income in 2001 and \$502,000 in 2002. Plaintiff testified that neither she as President of Erin Erectors nor Erin Erectors in its corporate capacity made any money from the time of their marriage in 2000 up until Connelly's death in 2002. This would mean that Connelly made every dollar through his construction business and his subcontracts out to Erin Erectors. As a result, testimony of the accountants who prepared these joint tax returns is vital in order to value the pecuniary loss suffered by plaintiff, i.e., how much of the income reported on these joint returns is attributable to Connelly separate from any money made by plaintiff or Erin Erectors/Erin Interiors. *See Adams v. Hilton Hotels, Inc.*, 13 A.D.3d 175 (1st Dept. 2004) (expert testimony justified where resolution of issues requires professional knowledge or skill beyond an ordinary person's training or intelligence). This will help provide all of the parties in this case with an accurate picture of the financial relationship between Connelly, Kerrigan and Erin Erectors/Erin Interiors. Accordingly, plaintiff's cross-motion for a protective order is denied and JEM Erectors is permitted to examine Davidson and Johnson concerning the financials of decedent, plaintiff, Erin Erectors and Erin Interiors for the period commencing upon their marriage in 2000 up until Connelly's death on July 2, 2002 upon service of a proper notice of deposition.

3. *Vacate or Modify March 1, 2007 Court Order*

Plaintiff also cross-moves to vacate or modify this court's March 1, 2007 Compliance Conference Order which precluded testimony from any party who was not deposed on or before

April 20, 2007. All parties have made a good faith effort to comply with the prior order and have also been awaiting this decision concerning many of the remaining discovery issues. As a result, the portion of the court's March 1, 2007 Compliance Conference Order precluding any party from testifying who was not deposed on or before April 20, 2007 is modified in accordance with this decision.

4. *Suppression of Income Tax Records*

Finally, pursuant to CPLR § 3103, plaintiff cross-moves to suppress the income tax records of Erin Erectors. During discovery, plaintiff served authorizations permitting Johnson and Davidson to release Connelly's personal and business income tax information. The accountants released to defendants Erin Erectors' tax returns. Plaintiff argues the release of these records was in error because decedent had no interest in Erin Erectors. For the reasons previously set forth, the disclosure of Erin Erectors' 2000 through 2002 corporate tax returns is material and necessary to depict the true financial relationship of Connelly, Kerrigan and Erin Erectors. In addition, these returns are necessary to appropriately value Connelly's gross income at the time of his death so that the pecuniary damages suffered by plaintiff can be accurately measured. *See Berger*, 57 A.D.2d at 784; *Fogelson v. Barst & Mukamal*, 192 A.D.2d 321 (1st Dept 1993) (to be discoverable, tax returns must contain necessary information that cannot be obtained elsewhere); *Kerman v. Friedman*, 21 A.D.3d 997 (2nd Dept 2005). Therefore, plaintiff's motion to suppress Erin Erectors' tax returns is denied.

C. *Koenig's Cross-Motion*

The portions of Koenig's cross-motion directing plaintiff to comply with Koenig's August 1, 2006, December 21, 2006, December 28, 2006 and January 8, 2007 discovery demands, directing plaintiff to appear for a further examination before trial and modifying the

courts March 1, 2007 Compliance Conference Order seek identical relief as the issues raised in JEM Erectors motion and plaintiff's cross-motion and have already been resolved.

Consequently, these sections of Koenig's cross-motion are granted for the reasons stated herein.

Koenig also argues that the complexities of this case require that the court transfer it from a standard to a complex track so that all parties have adequate time to complete discovery and properly prepare for trial. However, this action was commenced in 2004. All of the third-party actions were filed by December 2006. Every party has had ample time to complete discovery. All remaining discovery issues will be resolved in accordance with this decision. Thus, Koenig's cross-motion is denied.

Plaintiff is granted an extension in which to file its note of issue. Pursuant to the CPLR, the Court "may extend the time fixed by any . . . order for doing any act, upon such terms as may be just *and upon good cause shown*["] CPLR § 2004 (emphasis supplied). Here, good cause has been shown to extend plaintiff's time to file its note of issue. More time is necessary for the parties to examine plaintiff's outstanding financials, so plaintiff can be examined in her capacity as President of JEM Erectors and JEM Interiors and finally for Johnson and Davidson to be deposed. Accordingly, it is

ORDERED that plaintiff, Elizabeth Frances Kerrigan, is to provide all defendants with the following discovery within 30 days of the date of service of this order with notice of entry: copies of bank statements from plaintiff, decedent Thomas Connelly, Erin Erectors, Inc., and Erin Interiors, Inc., from October 23, 2000 through July 2, 2002; payroll records from Erin Erectors, Inc., and Erin Interiors, Inc., from October 23, 2000, through July 2, 2002; authorization's for decedent's workers' compensation coverage and copies of the workers' compensation claim filed on his behalf; authorization's to obtain decedent's employment records

from Erin Erectors, Inc., from 1998 through 2002; copies of any checks paid by plaintiff, decedent or Erin Erectors, Inc, for the property located at 24-30 Brooklyn-Queens Expressway, Woodside, N.Y.; authorization's for plaintiff's accountants Mark Johnson CPA, of Johnson, Lauder & Savidge, LLP and Davidson, Fox & Company to provide tax returns and accounting records for Erin Erectors, Inc., Erin Interiors, Inc., and Thomas Connelly Construction for the year 2000, 2001 and 2002; invoices for Erin Erectors, Inc., for work performed and materials purchased from October 23, 2000 through July 2, 2002; a list of all Erin Erectors, Inc., and Erin Interiors, Inc., customers from October 23, 2000 through July 2, 2002; questionnaires from the joint tax returns filed by plaintiff and decedent in 2001 and 2002; proof of any wire transfers between decedent and Erin Erectors, Inc., from October 23, 2000 to July 2, 2002 and deposit slips from October 23, 2000 through July 2, 2002 where decedent gave money to Erin Erectors, Inc., for any work performed; and it is further

ORDERED that plaintiff is to appear for a further examination before trial, in her capacity as President of Erin Erectors, Inc., and Erin Interiors Inc., within 20 days of receipt of the above discovery, at a mutually agreed to time and place; and it is further

ORDERED that plaintiff's cross-motion to compel the testimony of Martin Mozitis is granted and Mr. Mozitis is to be examined within 30 days of the date of this order unless defendant JEM Erectors produces a medical affidavit attesting that Mr. Mozitis is not physically or mentally capable of testifying within 14 days of the date of this order; and it is further

ORDERED that plaintiff's cross-motion for a protective order is denied; and it is further

ORDERED that examinations before trial of Mark Johnson, CPA of Johnson, Lauder & Savidge, 2 Court Street, Binghamton, N.Y. and Davidson Fox & Company, 53 Chenango Street, Binghamton, N.Y. are to be completed within 30 days of the receipt of the ordered documentary

discovery; and it is further

ORDERED that the portion of the courts March 1, 2007 Compliance Conference Order precluding testimony from any party who was not deposed on or before April 20, 2007 is modified in accordance with this order; and it is further

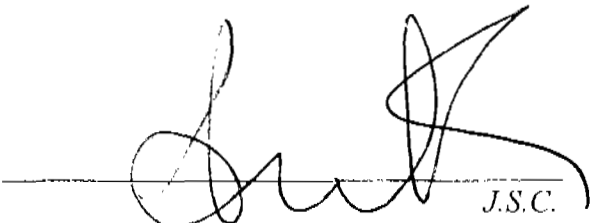
ORDERED that plaintiff's cross-motion to suppress the income tax records of Erin Erectors, Inc., is denied; and it is further

ORDERED that defendant/fifth-party defendant/seventh-party plaintiff Koenig Iron Works, Inc.'s cross-motion to transfer this action from a standard to complex track is denied; and it is further

ORDERED that defendant/fifth-party defendant/seventh-party plaintiff Koenig Iron Works, Inc.'s cross-motion to extend plaintiff's time to file a note of issue and certificate of readiness is granted and the note of issue is to be filed on or before October 31, 2007.

ENTER

DATE: September 12, 2007
New York, NY



J.S.C.

FILED
SEP 24 2007
NEW YORK
COUNTY CLERK'S OFFICE