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

PRESENT: JUDITH J. GISCHE, J.S.C. PART 10

Justice

Cameron Plumbing, Inc., INDEX NO. 120652/03

- v - MOTION DATE

MOTION SEQ. NO. 006

City of NY MOTION CAL. NO.

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: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED

MAR 16 2009

COUNTY CLERK'S OFFICE
NEW YORK

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

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

Dated: 3/13/09

J.S.C.

JUDITH J. GISCHE, J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

Supreme Court of the State of New York
County of New York: Part 10

Canon Point South, Inc.,

Plaintiff,

Decision/Order

-against-

Index No.: 120652/03
Seq. No.: 006

The City of New York et al.,

Defendants.

Present:
Hon. Judith J. Gische, JSC

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this (these) motion(s):

PAPERS	**NUMBERED**
Motion Seq. 007 [index # 101157/2004]	
OSC, BB affirm, exhibits	1
RBG affirm in Opp., exhibits	2
Motion Seq. 006 [index # 120652/2003]	
OSC, BB affirm, exhibits	1
RBG affirm in Opp., exhibits	2

Hon. Gische, J.:

Upon the foregoing papers the decision and order of the court is as follows:

In the action bearing Index No. 101157/04, defendant The City of New York ("City") has moved by Order to Show Cause for an order to compel the deposition of non-party Richard Zottola. In the related action bearing Index No. 120652/03, the City seeks an order compelling the depositions of non-parties Basil F. Taha and Ju-Cheng Chou, as well as Richard Zottola. Plaintiffs Cannon Point North ("CPN") and Cannon Point South ("CPS") oppose the respective applications, claiming that the non-party witnesses are expert witnesses, and, therefore the City must show special

circumstances to compel such depositions.[1] Both motions are hereby considered together in this single decision and order.

Mr. Zottola is a partner at the engineering firm of Leslie E. Roberson Associates, RLLP (LERA). Basil F. Taha and Ju-Cheng Chou are both employed by the engineering firm of Lawless and Mangione ("L&M"). The City maintains that it is likely that Mr. Zottola has information regarding the physical condition and remaining useful life of the columns and lower slab at Cannon Point North and Cannon Point South from as early as 1999, until recent extensive repairs and replacements were made. The City has presented numerous exhibits, to wit, letters and reports, wherein Mr. Zottola and/or his firm makes observations and recommendations about the subject structures and their condition. For example, Leslie Roberson wrote a letter dated November 11, 1999, which indicated that LERA was acting as a "friend of the residents" of plaintiffs. In a letter dated July 4, 2002, Leslie E. Robertson, wrote to Neil Porto from Daniel Frankfurt, P.C. ("DFPC"), the New York State Department of Transportation's engineer for the FDR reconstruction project. In that letter, Mr. Robertson wrote:

> 13. We understand that a four-month 'window' has been granted to the #45 [Sutton Place South] for the repairs of their building ... two months for the north bound [lane] and two months for the south bound [lane]. May we have assurances that #25 [Sutton Place South] will have an equal opportunity to repair their own structure? And may we have the assurance for both #25 and #45 in writing?

On June 22, 1999, the New York City Department of Transportation ("NYCDOT")

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[1] Although plaintiffs have indicated in their opposition that they will designate Mr. Zottola, Mr. Taha and Mr. Chou as experts who will testify at the time of trial, plaintiffs have failed to serve a CPLR § 3101 (d) (i) disclosure. The court accepts plaintiffs' claim that these experts will testify at trial, but notes that plaintiffs must still serve a proper CPLR § 3101 (d) (i) disclosure in accordance therewith.

notified plaintiff in writing that the steel columns supporting 45 Sutton Place South over the FDR Drive had concrete encasement that was cracked and spalling. On June 25, 1999, CPS forwarded that notice to L&M. On July 30, 1999, Mr. Taha replied to NYCDOT and requested that the concrete repairs be performed by NYCDOT. The NYCDOT responded to that letter indicating that it would not do the work because the it was not permitted and/or required to work on private property. At a CPS Board of Director's meeting held on November 14, 2000, it was:

> reported that the building's engineer, [L&M] will perform an inspection, scheduled for November 14 and 15, to determine the extent of the damage to the deteriorated building concrete slab and support columns located on the FDR Drive. All existing conditions will be documented in order to establish the percentage of repairs that are necessary.

On January 26, 2001, Mr. Chou faxed to CPS a report on the physical condition of the lower slab and columns beneath CPS. As per this report, L&M was retained "to provide Architectural and Engineering Services in order to perform a physical condition inspection" of the subject structures. The objectives of this inspection was to document the condition at the time, determine the extent of deterioration to the subject structures, recommend repairs and estimate the costs of those repairs. Further, when the New York City Department of Buildings issued an Emergency Declaration and a Notice of Unsafe Building dated 6/20/02, CPS's attorney faxed this paperwork to L&M on June 24, 2002.

The City has provided several other letters from LERA and L&M wherein it is appears that these engineering firms were the plaintiff's professional engineers, were acting as a representative for the plaintiffs and conducted other physical inspections of the subject structures.

The City specifically seeks to depose these non-parties "on all relevant subjects except as to the formation of whatever specific opinion testimony that plaintiffs may declare, in a proper notice pursuant to CPLR § 3101 (d) (i), that it intends to present through those specific witnesses at the trial of this action." The City maintains that the non-parties have factual information relevant and necessary for the City's defense of claims asserted by plaintiffs and prosecution of certain counterclaims. The City claims that the non-parties access to and inspections of the subject structures for a long period of time before the City was given any access to same demonstrates a need for these non-parties' testimony.

CPS and CPN each allege for their fifth cause of action of their respective complaints, that the City issued emergency declarations in 2002, 2003 and 2005 which, in effect, constituted an unconstitutional taking of CPS's property. CPS alleges in its ninth cause of action, and CPN alleges in its seventh cause of action, that the City issued Emergency Declarations in 2003 and 2005 without providing notice and an opportunity to be heard, in violation of CPS's constitutional right to procedural due process.

CPN has also asserted a cause of action alleging that the City wrongfully demolished its lower slab and removed concrete from the columns beneath CPN, and that the City did not provide adequate notice prior to the demolition (twelfth cause of action). The City contends that the non-parties have information about whether the City allowed CPS access, either directly or through LERA and L&M, to perform inspection and repairs to the subject structures. The City also maintains that the non-parties' testimony can shed light on whether the City provided adequate notice of the

Emergency Declarations and the rate at which the subject structures were deteriorating.

The City has asserted counterclaims, to wit: damages for the costs incurred by the City for remedial work on the grounds that it was CPS' duty to maintain the subject structures and because CPS failed to do so, despite notice, CPS is liable to the City for the cost of the remedial work. The City claims that the non-parties can provide factual testimony about the condition of the subject structures and on the issue of notice.

Plaintiff opposes the instant motions because they claim that: the proposed non-party witnesses' involvement in this action has been limited to preparation for and in anticipation of litigation. Therefore, plaintiffs argue that the non-party witnesses' work products are privileged and may only obtained provided that the City can meet the heightened burden under CPLR § 3101 (d) (1) (iii).

Generally, depositions of non-party experts are not permitted absent a showing of special circumstances (CPLR 3101 [d] [2]; Flex-O-Vit USA, Inc. v. Niagara Mohawk Power Corp., 281 AD2d 980 [4th Dept 2001]). However, where testimony of the expert is sought purely with respect to his or her factual observations, and the subject of their observations is no longer available for inspection, such a deposition is proper (Coello v. Progressive Ins. Co., 6 AD3d 282 [1st Dept 2004]).

Plaintiffs also claim that the depositions should be disallowed under the work-product doctrine because the non-parties and their respective engineering firms have been advising plaintiffs "regarding technical engineering issues both throughout the current litigation and prior to the commencement of the litigation..." Material prepared for litigation is not subject to disclosure unless the party seeking disclosure has a substantial need for the report and is unable without undue hardship to obtain its

substantial equivalent by other means (CPLR § 3101 [d] [2]; Marziano v. City of Yonkers, 105 AD2d 832 [2d Dept 1984]). However, if a party prepares a document in the ordinary course of its business, it will not be protected, even if the party is aware that the document may also be useful in the event of litigation. J.R. Stevenson Corp. v. Dormitory Authority of State of N.Y., 112 AD2d 113 (1st Dept 1985). Plaintiffs general claim that the non-parties are immune to examination before trial is insufficient to establish that the work-product doctrine applies here. Moreover, based upon the facts presented, it appears that the non-parties were providing services to plaintiffs long before a dispute arose and litigation was contemplated. Therefore, the court cannot conclude that the work-product applies to any and all testimony the non-parties may give at deposition.

Given the extent of LERA and L&M's dealings with the parties to this action since as early as 1999, and their contact with the subject structures, the plaintiffs' contention that the non-parties are not fact witnesses is rejected. Plaintiffs' designation of them as experts means that they will wear two hats and may, therefore, also provide expert testimony. The requirements of CPLR § 3101 (d) (1) (iii) do not apply to these non-parties to the extent that the City seeks to depose them as identified in these motion (McCoy v. State, 52 AD3d 1212 [4 Dept. 2008]). The City is entitled to depose Mr. Zottola, Mr. Taha and Mr. Chou because these persons have information material and necessary to the City's defenses on plaintiffs' claims and prosecution of its own counterclaims, including information regarding the physical condition of the subject structures and the issue of notice. This is, of course, without prejudice to any claims of work-product privilege that plaintiffs' may interpose in response to specific questions

asked at the depositions, and the City is not entitled to answers on areas of information protected by work product.

While these are non-parties, plaintiffs do not maintain that they are not within plaintiffs' control. CPLR 3106 (b). Accordingly, the City's motion is granted.

Conclusion

In accordance herewith it is hereby:

ORDERED that the City's motion is granted in its entirety; and it is further

ORDERED that the City is entitled to depose Mr. Zottola, Mr. Taha and Mr. Chou on all relevant subjects except as to the formation of whatever specific opinion testimony that plaintiffs may decalre, in a proper notice pursuant to CPLR § 3101 (d) (I); and it is further

ORDERED that any requested relief not expressly granted herein is denied and that this shall constitute the decision and order of the court.

Dated: New York, New York
March 13, 2009

So Ordered:

HON. JUDITH J. GISCHE, J.S.C.