STATE OF NEW YORK
SUPREME COURT COUNTY OF RENSSELAER

PAUL DILLON,

Plaintiff,

-against-

Index No.: 210552
RJI No.: 41-0017-2005

DE BRINO CAULKING ASSOCIATES, INC.,
DE BRINO SPECIALTY CONTRACTING, LLC,
BBL CONSTRUCTION SERVICES, LLC, and
SCHENECTADY STEEL CO., INC.,

Defendants.

SCHENECTADY STEEL CO., INC.,

Third-Party Plaintiff,

-against-

BROWNELL STEEL, INC.,

Third-Party Defendant.

All Purpose Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding

Appearances: Woolsey & Woolsey, P.C.
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DECISION/ORDER

George B. Ceresia, Jr., Justice

Plaintiff has moved for a default judgment against defendants DeBrino Caulking Associates, Inc. and DeBrino Specialty Contracting, LLC (hereinafter DeBrino) based upon said defendants' failure to comply with three orders compelling responses to a number of discovery demands. Plaintiff has separately moved to compel further discovery from DeBrino and for leave to serve an amended complaint adding an additional cause of action pursuant to Labor Law § 241-a, alleging reckless conduct and alleging various exceptions to the limitations on joint liability imposed by article 16 of the CPLR.

By decision and order dated September 25, 2007 Debrino was directed to comply with plaintiff's discovery demands dated November 2, 2006, March 20, 2007 and April 13, 2007 within 30 days. DeBrino failed to produce any documents as required, resulting in a second motion seeking sanctions as a result of the failure to comply. The Court issued a second decision and order dated May 29, 2008 conditionally striking DeBrino's answer unless it served a response to all of the plaintiff's discovery demands within 30 days. DeBrino again failed fully to comply with the discovery demands requiring a third motion to obtain the

demanded documents, records and photographs. By decision and order dated January 2, 2009 DeBrino was given yet another opportunity to comply within 15 days. The decision and order referenced the prior decisions and orders and cautioned DeBrino to follow the Courts's prior directions. DeBrino served a timely response. However, it is substantially equivalent to that rejected in the January 2, 2009 decision and order.

DeBrino opposes the motion arguing that the demanded documents are not really material and relevant, that many of the documents do not exist, can not be found or are not within the defendants' possession, custody or control. DeBrino further contends that it has complied with the demand by offering to allow the inspection of numerous photographs at DeBrino's attorney's office. The Court finds that the Debrino defendants have again failed to comply with the decision and order dated January 2, 2009. However, the requested remedy, the striking of the DeBrino defendants' answer, is extreme. This is troublesome as the deficiencies in the DeBrino responses are for the most part technical or based upon possible misunderstandings by their counsel. The responses are also based upon sound legal principles. However, they are subject to significant procedural defects. While it is also far too late to raise the claim that the items sought are not really relevant to the issues to be proven in this litigation, as such claim should have been raised in opposition to the first motion to compel compliance with the discovery demands, the claim is to some extent relevant to the sanctions to be imposed. Furthermore, while plaintiff is certainly entitled to proper, timely and unequivocal responses to discovery demands, the extreme sanction of striking the defendants' answer is not appropriate where the failure to comply with court

ordered discovery is based upon the equivalent of law office failure (see Wagner v 119 Metro, LLC, 59 AD3D 531 [2d Dept 2009]; Halikiopoulos v New York Hosp. Med. Ctr. of Queens, 284 AD2d 373 [2d Dept 2001]; Mateo v City of New York, 274 AD2d 337 [1st Dept 2000]).

DeBrino responded to numerous demands with a statement that the documents do not exist. It is noted that the prior decision and order of this Court dated May 29, 2008 expressly required the co-defendants to respond to discovery demands for items which do not exist by affidavit by a person with knowledge. While such requirement was incorporated by reference in the decision and order dated January 2, 2009 it was not expressly stated nor was defendants' attention called to such requirement. Moreover, it is certainly possible that DeBrino's attorney did not even read the portions of the prior decision applicable to co-defendants. While sanctions have been imposed for failure to provide an appropriate affidavit stating the documents do not exist, such relief appears warranted when the order expressly required such proof (see e.g. Vierya v Briggs & Stratton Corp., 166 AD2d 645 [2d Dept 1990]; see also Reddy v General Cinema Corp. of N. Y., 242 AD2d 693]2d Dept 1997]; Fuhs v Fuhs, 132 AD2d 824 [3d Dept 1987]).

While DeBrino has not offered a proper response by evidentiary proof that documents do not exist, the principle that discovery is limited to existing documents and that a party may not be compelled to create documents is well founded (see Orzech v Smith, 12 AD3d 1150 [4th Dept 2004]; Hawley v Hasgo Power Equip. Sales, 269 AD2d 804, [4th Dept 2000]). Similar principles apply to DeBrino's claims that certain documents are not within their

possession, custody or control. The discovery response dated January 29, 2009 contains only conclusory assertions that documents were given to third parties and/or could not be located or that computer records were destroyed by an electrical surge. Moreover, some of the representations are contrary to prior statements made by DeBrino's counsel.

Finally, DeBrino again contends that it has complied with the demand for photographs by offering to make the originals available for inspection at their attorney's office. It is noted that the demand for discovery expressly required service of the requested documents upon plaintiff's attorneys. The several court orders required compliance with the demand. While a showing that production of original photographs at plaintiff's attorneys' offices for inspection and copying at plaintiff's expense would be onerous might have supported an application for a protective order, DeBrino never sought such relief. As such, its offer to allow inspection at its attorney's office, which was rejected as compliance with the discovery demand in the January 2, 2009 decision and order, still does not constitute compliance with such order.

The Court concludes that the Debrino defendants' failure to comply with the decision and order dated January 2, 2009 was neither willful nor contumacious. The response constituted a good faith, but inept, attempt to comply with the order with no intent to default or to prevent or hinder discovery of material and relevant evidence. The requested remedy, the striking of the DeBrino defendants' answer, is not warranted under such circumstances

(cf. Colley v Romas, 50 AD3d 1338, 1339 [3d Dept 2008]; Rossi v Budget Rent A Car/Budget Car & Truck Rental, 49 AD3d 1088 [3d Dept 2008]).

Instead, the DeBrino defendants shall be ordered fully to comply with the discovery demands dated November 2, 2006 and March 20, 2007 within 30 days of service of the instant decision and order together with notice of entry. Defendants are cautioned to respond to or address each and every element of the demands. Defendants shall submit an affidavit of a person with knowledge of the facts if they claim that documents do not exist or are not in their possession custody or control. Such affidavits shall set forth the basis for the affiant's knowledge, their familiarity with the DeBrino defendants' record keeping practices and locations, the nature of the search conducted, the locations searched and the results. Defendants are cautioned that the affidavit of the DeBrino Comptroller submitted in opposition to the motion would not be sufficient as it fails to set forth a sufficient factual basis for her knowledge and contains considerable hearsay. If the demand seeks records for a stated period, defendants shall respond to the entire period, even if an earlier or subsequent demand seeks materials for a different period. If the demand seeks materials which are similar to ones already provided, but none exist for the time period in question, the response should explain why responsive documents do not exist. If the response states that the records have been lost by computer malfunction, the response shall set forth the current location and status of the computer, what has been done to retrieve data from the computer, and if no

attempt has been made, why not, and if any computer experts have been consulted, and if not, why not. The responses shall also explain any discrepancies between the current representations and the prior statements of availability of documents raised by the plaintiff on the instant motions.

The DeBrino defendants shall also produce original photographs for plaintiff's inspection and copying at plaintiff's expense at plaintiff's attorneys' offices. In the alternative, defendants may produce high quality copies it they so choose. If the photographs are in digital format, defendants shall produce digital media containing the photographs. Defendants are cautioned that the digital media must contain viewable images. However, defendants shall not be required to produce computer equipment or software to view the images. Strict compliance with all of the above requirements is necessary.

In addition, the DeBrino defendant's attorney shall personally pay the sum of $750.00 to plaintiff's attorneys to help defray the expenses associated with the instant motion within such 30 days. Accordingly, plaintiff's motion shall be granted to the extent indicated above.

Plaintiff has also moved to compel compliance with a discovery demand originally served upon DeBrino in 2004. Plaintiff has shown a good faith attempt to obtain compliance with the demand by showing numerous letters written to the DeBrino attorney requesting responses.

DeBrino has submitted responses to the discovery demands following service of the

motion. Plaintiff has objected to the responses to demands for the "names and addresses of all persons claimed or known by the defendant" to be a witness to the occurrence and the conditions in the area prior to and at the time of the accident on the ground that the responses are intentionally vague and meaningless[1]. Rather than providing the identities of witnesses "claimed or known," DeBrino responded by stating that it believes one or more of a list of individuals may have observed the occurrence or the conditions or may have been present. In addition, it is stated that DeBrino believes one or more of the workers on the certified payroll may have witnessed the occurrence. While such responses might be helpful in providing leads for plaintiff to locate witnesses, they are clearly not responsive to the demand. DeBrino has entirely failed to provide information with respect to the identities of witnesses which it claims or knows to be an eyewitness or to have first hand knowledge of the facts.

The discovery demand also sought insurance information with respect to both primary and excess carriers. The demand sought "the name of the insurer, the policy number, the coverage limits of said policy or agreement and the amount of said coverage limits presently available to satisfy" any judgment in this action together with a copy of the policy and the declaration page. DeBrino provided only the name of the insurer and the policy limit per

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[1]The demand also sought identities of witnesses to plaintiff's injuries. While the response submitted in opposition to the motion does not address this demand, plaintiff has not objected on such ground and it is unclear whether DeBrino has already provided such information.

occurrence. The response does not address excess insurance.

As such, defendants shall be required to serve a further response providing information with respect to the identities of witnesses who they claim or know to be an eyewitness or to have first hand knowledge of the facts, the policy number, the amount of coverage presently available to satisfy any judgment herein and a copy of the policy including the declarations page, as well as a statement with respect to excess insurance.

Plaintiff has also moved for leave to serve an amended complaint adding an additional cause of action pursuant to Labor Law § 241-a and alleging reckless conduct and various exceptions to the limitations on joint liability imposed by article 16 of the CPLR.

> """[L]eave to amend a complaint rests within the trial court's discretion and should be freely granted in the absence of prejudice or surprise resulting from the delay except in situations where the proposed amendment is wholly devoid of merit"' (Selective Ins. Co. v Northeast Fire Protection Sys., 300 AD2d 883, 883 [2002], quoting Berger v Water Commrs. of Town of Waterford, 296 AD2d 649, 649 [2002]; see CPLR 3025 [b]). In other words, while delay alone is not a sufficient ground to deny a motion to amend (see Edenwald Contr. Co. v City of New York, 60 NY2d 957, 959 [1983]; New York State Health Facilities Assn. v Axelrod, 229 AD2d 864, 866 [1996]), '[l]ateness in making a motion to amend, coupled with the absence of a satisfactory excuse for the delay and prejudice to the opposing party, justifies denial of such a motion' (Thibeault v Palma, 266 AD2d 616, 617 [1999])." (Moon v Clear Channel Communications, 307 AD2d 628, 629- 630 [3d Dept 2003]; see also Clark v MGM Textiles Indus., 18 AD3d 1006 [3d Dept 2005]; Rothberg v Reichelt, 5 AD3d 848, 849 [3d Dept 2004]).

With respect to the proposed cause of action pursuant to Labor Law § 241-a, plaintiff has failed to show that such claim has any merit. Labor Law § 241-a provides:

> Any men working in or at elevator shaftways, hatchways and stairwells of buildings

> in course of construction or demolition shall be protected by sound planking at least two inches thick laid across the opening at levels not more than two stories above and not more than one story below such men, or by other means specified in the rules of the board.

Its purpose is to protect workers from falls into shafts or areas where there is no floor for more than one story (see Sharp v Scandic Wall Ltd. Partnership, 306 AD2d 39 [1st Dept 2003]). The statute is not applicable to every hole, such as a skylight (see Angamarca v New York City Partnership Hous. Dev. Fund Co., Inc., 56 AD3d 264, 265 [1st Dept 2008]) or a hole for a ventilation shaft (see Silvers v E.W. Howell, Inc., 129 AD2d 694 [2d Dept 1987]), nor is it applicable when a worker falls only one story and lands on a solid floor (see Riley v Stickl Constr. Co., 242 AD2d 936 [4th Dept 1997]; Martucci v Tirro Constr. Corp., 192 Misc.2d 22, 26 [Sup Ct, Richmond County 2002]). Plaintiff herein fell through a hole on the second floor, landing on a solid first floor. The addition of planking on such floor would not have made any difference. Moreover, plaintiff's attempt to create an issue as to whether he fell more than one floor because the second floor in the area he was working was 11 feet above the first floor, while in other areas the floor was only eight feet above the first floor is without merit. Indeed, the Court notes that 12 NYCRR § 23-1.7 (b) (1) (iii) (a) requires two-inch planking, or material of equivalent strength installed not more than one floor or 15 feet, whichever is less, beneath the opening. Accordingly, leave to amend to add such a cause of action shall be denied.

Plaintiff also seeks to add allegations with respect to the inapplicability of the

limitations of liability imposed by CPLR article 16. CPLR § 1603 requires a party asserting that the limitations do not apply to allege and prove that an exemption applies. Such requirement has been construed to mandate that the complaint include allegations with respect to the inapplicability of article 16 (see Cole v Mandell Food Stores, 93 NY2d 34, 38 -39 [1999]). Plaintiff seeks to allege exceptions to the limitation on liability pursuant to CPLR §§ 1601 (1) and 1602 (2) (iv), (4), (7), and (8). Plaintiff concedes that the provisions of CPLR 1602 (2) (iv) do not set forth an exception to the limitations on liability which must be pleaded, but rather indicate that the limitations do not affect liability under a non-delegable duty or respondeat superior (see Rangolan v County of Nassau, 96 NY2d 42, 46-49 [2001]). Plaintiff included such subdivision in his application in an exercise of caution. The Court finds that the proposed amendment is without merit. As such, the proposed amendment to add allegations with respect to CPLR § 1602 (2) (iv) shall be denied. Plaintiff also seeks to allege an exemption pursuant to CPLR § 1602 (4), which is applicable when a plaintiff has sustained a grave injury within the meaning of Workers' Compensation Law § 11. However, a review of plaintiff's bill of particulars does not reveal any injuries which could come within such definition. As such, that exemption does not appear to be applicable. The exemption at CPLR § 1602 (7) would be applicable if leave to amend to allege reckless conduct is granted. The exemption at CPLR § 1602 (8) for liability pursuant to article 10 of the Labor Law is clearly applicable to plaintiff's causes of action pursuant to Labor Law §§

240 and 241.

It further appears that plaintiff's allegations of reckless conduct may have merit. Plaintiff alleges that defendants used a piece of particle board only 1/4 inch thick to cover a portion of the hole. Such a factual basis for a claim of reckless conduct does not appear to be entirely devoid of merit. It thus appears that the amendments should be granted unless they would cause significant prejudice to defendants.

Defendants BBL and Schenectady Steel[2] and third-party defendant Brownell Steel have raised entirely conclusory claims that the late amendments will cause prejudice. However, the CPLR article 16 issues are entirely technical in nature. There has been no showing that any discovery would be necessary, or even possible, with respect to such issues. There has also been no showing that additional discovery would be necessary with respect to the claim of reckless conduct. The parties have presumably investigated the facts and circumstances of the accident in great detail and defendants have not shown that additional issues or questions would have been asked at the depositions conducted so far. Moreover, discovery is not complete and defendants are entitled to seek additional discovery if they believe it warranted. As such, defendants BBL and Schenectady Steel and third-party defendant Brownell Steel have failed to show any prejudice caused by plaintiff's delay in

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[2]Plaintiff contends that Schenectady Steel has not submitted any opposition to the motion. While the attorney's affirmation in opposition states that the law firm only represents BBL and Brownell, the memorandum of law indicates that they represent Schenectady Steel on the motion as well.

bringing the motion.

The DeBrino defendants have also raised entirely conclusory assertions of prejudice caused by the delay. However, as with the above defendants, there is no showing that any discovery has been foreclosed or that any additional discovery is necessary. Therefore, leave to amend shall be granted with respect to reckless conduct and CPLR article 16 issues as limited above.

Accordingly it is

ORDERED that plaintiff's motion to strike the answer and for a default judgment is hereby granted only to the extent of ordering discovery and imposing sanctions as indicated above, and it is further

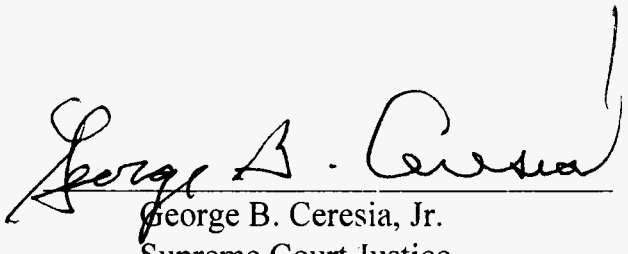
ORDERED that defendants DeBrino Caulking Associates and DeBrino Specialty Contracting are directed to serve a further response to plaintiff's discovery demands providing the names and addresses of persons who they claim or know to be an eyewitness or to have first hand knowledge of the facts, the insurance policy number, the amount of coverage presently available to satisfy any judgment herein and a copy of the policy including the declarations page and excess coverage information within 30 days of service of a copy of this decision and order together with notice of entry, and it is further

ORDERED that plaintiff's motion for leave to serve an amended complaint is hereby granted to the extent that plaintiff may serve a complaint alleging reckless conduct and

exemptions to limitations on liability pursuant to CPLR article 16 as limited herein.

This constitutes the decision and order of the Court. The original decision and order are returned to the attorney for plaintiff. A copy of this decision and order and all other papers are delivered to the Supreme Court Clerk for transmission to the County Clerk. The signing of this decision and order and delivery of a copy of the decision and order shall not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

Dated: Troy, New York
July 9, 2009



George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

Notice of Motion dated February 6, 2009;
Affidavit of John C. Woolsey, Esq. sworn to February 6, 2009 with Exhibits 1-19 annexed;
Affidavit of Paul Dillon sworn to February 2, 2009;

Affirmation of Frank T. Mahady, Esq, undated;
Affidavit of Mary E. Leffler sworn to February 19, 2009 with Exhibits annexed;

Reply Affidavit of John C. Woolsey, Esq. sworn to February 26, 2009 with Exhibits 1-7 annexed.

Notice of Motion dated March 16, 2009;

Affidavit of James M. Woolsey, Jr., Esq. sworn to March 16, 2009 with Exhibits 1-22 annexed;
Affidavit of Paul Dillon sworn to March 17, 2009;

Affidavit of Terése P. Burke, Esq. sworn to March 26, 2009 with Exhibits A-F annexed;
Memorandum of Law dated March 26, 2009;

Affirmation of Frank T. Mahady, Esq, undated;

Reply Affidavit of James M. Woolsey, Jr., Esq. sworn to April 1, 2009 with Exhibits 1-13 annexed.

Notice of Motion dated March 17, 2009;
Affidavit of John C. Woolsey, Esq. sworn to March 17, 2009 with Exhibits 1-3 annexed;

Affirmation of Frank T. Mahady, Esq dated March 27, 2009 with Exhibit annexed;

Reply Affidavit of James M. Woolsey, Jr., Esq. sworn to April 1, 2009.