ESSA Realty Corp. v J. Thomas Realty Corp.

2010 NY Slip Op 31598(U)

June 21, 2010

Supreme Court, New York County

Docket Number: 105885/09

Judge: Carol R. Edmead

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SCANNED ON 6/24/2010

[* 1]

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

PRESENT: HON. CAROL EDMEAD, Justice — PART 35

Index Number : 115575/2009
SASTO, CHARLENE
VS.
BATTERY PARK CITY AUTHORITY, ET. AL.
SEQUENCE NUMBER : 001
STRIKE

INDEX NO. ______
MOTION DATE ______
MOTION SEQ. NO. ______
MOTION CAL. NO. ______

this motion to/for ______

PAPERS NUMBERED

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

FILED JUN 23 2010 NEW YORK COUNTY CLERK'S OFFICE

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

This is an oral argument and decision on motion by defendant Shepard Industries, LLC, for a protective order and to strike a Notice to Admit, dated March 11, 2010, by defendant/third-party plaintiff Sunbelt Rentals, Inc. An oral argument has been heard this day, June 21, 2010, [Ct Rptr Michael J. Daugenti], and the rulings are as follows.

It is hereby

ORDERED, that the issue of possession custody and control in this case is not an issue that can be responded to in a Notice to Admit; and it further

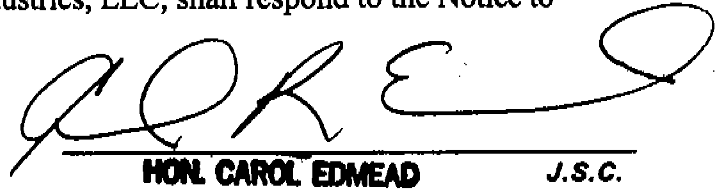
ORDERED, that to the extent that any request in the notice to admit requires an admission concerning possession, or custody, or control, that notice to admit request is stricken; and it is further

ORDERED, that item 13 will be responded to with the inclusion that it is not "exclusive;" and it is further

ORDERED, that counsel for Shepard Industries, LLC, shall respond to the Notice to Admit within 20 days of today's date.

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

Dated: 6/21/2010



HON. CAROL EDMEAD, 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 35
---X
ESSA REALTY CORP.,

Index No. 105885/09

Plaintiff,

-against-

J. THOMAS REALTY CORP.,

Defendant.
---X
HON. CAROL ROBINSON EDMEAD, J.S.C.

FILED
JUN 23 2010
NEW YORK
COUNTY CLERK'S OFFICE

MEMORANDUM DECISION

Defendant moves pursuant to CPLR §2304 to quash the subpoenas served on its experts and for a protective order. Plaintiff cross-moves pursuant to CPLR §3103 (a) for a protective order denying defendant the right to depose plaintiff's expert, for an order to compel disclosure and to vacate defendant's Bill of Costs.

For the reasons set forth below, the relief sought by defendant is granted in part and denied in part, and the relief sought by plaintiff is granted in part and denied in part.

Factual Background

Plaintiff commenced this action for declaratory, injunctive and monetary relief, claiming that defendant's adjacent building is leaning against and causing damages to its building. By a May 5, 2009 order, this Court directed defendant to rectify the situation by stabilizing the "touching wall" and provide plaintiff with "drawings and schemata" of its plan of repairs (first order). On or about May 7, 2009, defendant's engineer Charles Pisano ("Pisano"), a consultant at an architectural firm Eipel Barbieri Marschhausen, LLP, 274 West 35th Street, New York, New York ("Eipel"), inspected the two buildings (see Pisano Affidavit) and documented his findings

in his May 18, 2009 report. On May 26, 2009, this court issued another order directing defendant to comply with the previous order by repairing the crack and gaps in its building within ten days (second order). Shortly thereafter, defendant retained Joseph Lieber ("Lieber"), an engineer consultant of Axis Design Group International, LLC, 744 Broad Street, Newark, New Jersey ("Axis") who examined the facade of defendant's building, drafted plans of its repairs and submitted them to plaintiff's counsel.

On or about August 28, 2009, plaintiff designated Karl Chen ("Chen") as its expert for trial. On or about September 30, 2009, defendant designated Pisano and sometime thereafter, Lieber as its experts for trial. On or about November 17, 2009, defendant served a notice of deposition for Chen, to which plaintiff objected, arguing that defendant neither had a requisite court order to depose plaintiff's expert, nor showed special circumstances entitling plaintiff for such order. On or about March 2, 2010, plaintiff served Pisano, and shortly thereafter, Lieber, with a subpoena for testimony and their respective firms, Axis and Eipel, with a subpoena for documents. Defendant responded that files of its experts are privileged under CPLR §3101(d)(2). Plaintiff refused to withdraw the subpoenas, and hence, defendant filed this motion to quash the subpoenas and for a protective order prohibiting plaintiff from serving subpoenas on defendant's experts in the future and for costs and fees.

Defendant argues that the subpoenas served on Axis and Lieber in New Jersey are defective under CPLR §3108 since they were served without the requisite court order directing an issuance of a Commission to subpoena an out of state non-party witness. Further, defendant argues that Pisano's and Lieber's reports are shielded by CPLR §3101(d)(2) as prepared solely "in anticipation of litigation" because both Pisano and Lieber were retained following "this

Court's Orders directing [defendant] to inspect and repair its building," and plaintiff has not shown the substantial need as required by CPLR §3101(d)(2). Plaintiff has already obtained the substantial equivalent for the materials when plaintiff's own engineer (Chen) visited and inspected both buildings at least five times, and plaintiff continues to have an unfettered access to both buildings.

Further, defendant asserts that plaintiff cannot depose its experts Pisano and Lieber without showing special circumstances as required by CPLR 3101(d)(1)(iii), and, that plaintiff cannot compel Pisano and Lieber to testify against their will and without an adequate consideration. Thus, defendant requests that the court quash the subpoenas and issue a protective order prohibiting plaintiff from further serving subpoenas on defendant's experts.

In opposition and its cross-motion, plaintiff contends that the court should issue an order directing Pisano and Lieber to appear for depositions because plaintiff intends to depose them as fact witnesses and not as experts. Further, "there is no proof that [Lieber] lives outside [. . .] of New York;" and the service was proper since, even though Liber's place of business is in New Jersey, he is domiciled in Queens, New York, and CPLR §3101 (d)(1) "does not exempt an individual from obeying a subpoena . . . to take deposition" (cross-motion and opposition, ¶ 19). And, in the event this court decides to quash the subpoenas, the court should also preclude defendant from deposing plaintiff's expert Chen by issuing a protective order.

Further, plaintiff argues that Pisano's and Lieber's files are not privileged because defendant's principal William Fung testified in his deposition that defendant originally retained Pisano and Liber to determine what work needed to be done to remedy the claimed damage to plaintiff's building (William Fung deposition, exhibit I to cross-motion, at 24-25.)

Plaintiff further argues that, even if the court finds that the documents were prepared solely for litigation purposes, they should nevertheless be produced because "the observations of both engineers have become of critical importance for plaintiff" in view of Fung's testimony that a danger exists because of the crack in the facade of the defendant's building (Fung deposition, at 66).

Next, plaintiff argues that defendant should be compelled by the court to produce the documents requested during the deposition of William Fung, held on January 6, 2010, who testified that he had reports by the engineers [including Pisano's and Lieber's] and by the contractors who reviewed the cracks and gave estimates of the necessary work.

Plaintiff asserts that the court should compel defendant to respond to plaintiff's second set of interrogatories and second notice for discovery and inspection, which seek to supplement Mr. Fung's deposition responses and are effectively the same documents William Fung promised during his deposition to provide to plaintiff's counsel.[1]

Finally, plaintiff argues that defendant's Bill of costs filed on March 18, 2010, for a total of $2,982.57, should be reduced in half because the Appellate Division awarded costs on the reversal of the first order, but not on the reversal of the second order, and the amount of the Bill mostly represents the cost of printing the record on appeal[2] and the brief.

[1] Based on the record, plaintiff's second set of interrogatories and second notice for discovery and inspection were served on March 3, 2010, and the cross-motion was filed on April 14, 2010.

[2] Both orders were reversed by an Appellate Division First Department order dated February 16, 2010.

[* 6]

Discussion

Defendant's Motion

As a threshold matter, the court finds that the subpoena *duces tecum* served on Axis and the subpoena *ad testificandum* served on Lieber out of state are defective, and thus, must be quashed on this ground alone.

A New York subpoena may not be served outside the state without a commission or letters rogatory, obtained pursuant to CPLR § 3108 upon application to the court, as a device to secure disclosure[3] (*Lewis v Baker*, 279 AD2d 380 [1st Dept 2001]). "Even in situations in which, by analogy to summons service, authority might be spelled out for the service of a subpoena outside New York, the language used in § 2-b of the Judiciary Law, which speaks of subpoenas directed to persons 'found in the state,' has been applied to preclude *extrastate service* of a subpoena[4] (see Siegel NY Prac 383 [4th ed]). "This is a needlessly restrictive interpretation, but as long as it stands, a New York subpoena may not reach beyond New York borders whatever the bases or justifications may be in the particular situation" (*id.*; *Peterson v Spartan Industries, Inc.*, 40 AD2d 807 [1st Dept 1972] [out of state service of a subpoena on a non-resident void]; *cf.* 37 AD2d 768 *Coutts Bank (Switzerland) Ltd. v Anatian*, 275 AD2d 609, 713 NYS2d 45 [1st Dept 2000][subpoena served in New York on a non-resident judgment debtor's attorneys held valid]).

There is no dispute that Axis is a non-party to this action and a non-resident New Jersey company, and that plaintiff has not moved for a commission or letters rogatory pursuant to CPLR

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[3] Pursuant to CPLR § 3108, " . . . a commission or letters rogatory may be issued where necessary or convenient for the taking of a deposition outside of the state."

[4] Judiciary Law §2-b (1) confers upon a court the "power [. . .] to issue a subpoena requiring the attendance of a person found in the state to testify in a cause pending in that court."

§ 3108. And even though Lieber, allegedly a resident of Queens, New York, is subject to in-state service of the subpoena, plaintiff's subpoena served on him in New Jersey, is invalid without obtaining a commission pursuant to CPLR §3108. Thus, the motion to quash the subpoenas upon Lieber and Axis must be granted on this ground alone[5].

In addition to the above-stated subpoenas being procedurally improper, as explained below, the subpoenas served by plaintiff on Lieber/Axis and Pisano/ Eipel must be quashed on the basis that the testimony and documents plaintiff seeks are not within the scope of disclosure set forth in CPLR §3101.

Depositions of Experts

CPLR 3101(d)(1)(iii)

Defendant moves to quash the subpoenas for depositions of Pisano and Lieber, designated by defendant as its experts. Where a deposition of a non-party expert witness is at issue, CPLR § 3101(d)(1)(iii) mandates[6] that special circumstances must be shown before the deposition takes place (*Fekete v GA Ins. Co. of New York*, 279 AD2d 300 [1st Dept 2001]; *King Electronics of Graham Ave., Inc. v American Nat. Fire Inc. Co.*, 232 AD2d 273 [1st Dept 1996]; *Generali Ins. Co. of Trieste and Venice v Honeywell, Inc.*, 194 AD2d 442 [1st Dept 1993]; *Matthews v St. Vincent Hosp. and Medical Care of New York*, 6 Misc 3d 1009 (A), 800 NYS2d 349 (Table) [NY

[5] Contrary to defendant's contention, the subpoenas are not invalidated on the ground of noncompliance with CPLR 3101 (a)(4). Plaintiff articulated the need for the documents in its cross-motion and opposition papers and defendant has not shown any prejudice (*see Velez v Hunts Point Multi-Serv. Ctr., Inc.*, 29 AD3d 104, 111 [1st Dept 2006]; *Hauzinger v Hauzinger*, 43 AD3d 1289 [4th Dept 2007], aff'd 10 NY3d 923 [2008]).

[6] CPLR 3101 (d)(1)(iii) states:
Further disclosure concerning the expected testimony of any expert may be obtained only by court order upon showing of *special circumstances* and subject to restrictions as to scope and provisions concerning fees and expenses as the court may deem appropriate.

Sup Ct, New York County 2004]).

The courts are reluctant to permit an oral examination before trial of a party's expert in the absence of special circumstances, *i.e.*, where a physical evidence is lost or destroyed or where some other unique factual situation exists," (*Beauchamp v Riverbay Corp.*, 156 AD2d 172 [1st Dept 1989]; *Hallahan v Ashland Chem. Co.*, 237 AD2d 697 [3d Dept 1997]), such as proof that the information sought to be discovered cannot be obtained from other sources (*Generali Ins. Co. of Trieste and Venice v Honeywell, Inc.*, 194 AD2d 442 [1st Dept 1993]), or that one expert did not have the same opportunity for investigation as did his adversary's expert (*Rosario v General Motor Corp.* (148 AD2d 108 [1st Dept 1989]; *232 Broadway Corp v New York Property Ins. Underwriting Ass'n*, 172 AD2d 861 [2d Dept 1991]). Furthermore, where a report of a non-party expert witness pursuant to CPLR 3101(d)(1)(i) clearly indicates what the nature of his or her testimony will be, no special circumstances exist (*Melendez v Roman Catholic Archdiocese of New York*, 277 AD2d 64 [1st Dept 2000]).

In a factually similar case, *232 Broadway Corp v New York Property Ins. Underwriting Ass'n* (172 AD2d 86, *supra*), the court found that the deposition of the defendant's expert was unwarranted since there has been no showing that the physical evidence inspected by the defendant's experts, which consisted of a building owned by and in the possession and control of the plaintiff, was lost, destroyed, or otherwise rendered unavailable to the plaintiff prior to the time that the plaintiff had the incentive to have its own experts inspect the evidence.

Similarly, here, plaintiff failed to show that any physical evidence has been lost or destroyed - both buildings remain in place and are not being rebuilt or repaired, or that the information acquired by Pisano or Lieber as a result of their inspections, cannot be obtained from

other sources (*see Generali Ins. Co. of Trieste and Venice v Honeywell, Inc.),* or that plaintiff's expert did not have the same opportunity for investigation as did defendant's experts. Moreover, the statements of Lieber and Pisano in response to plaintiff's demand for expert witness information pursuant to CPLR 3101(d)(1)(i) clearly indicate what the nature of each of the expert's testimony will be (exhibit 12 to defendant's motion). Thus, no special circumstances exist warranting the testimony of Lieber and Pisano as experts.

Further, the fact that defendant originally hired Pisano and Lieber to inspect both buildings for the purposes of "rectifying the situation," rather than to provide expert testimony at trial and later designated them as its experts, neither deprives each of them of their statuses as experts nor relieves plaintiff of the burden of showing special circumstances warranting the depositions (*Flex-O-Vit USA, Inc. v Niagara Mohawk Power Corp.*, 281 AD2d 980 [4th Dept 2001], *citing Russo v Quincy Mut. Fire Ins. Co.*, 256 AD2d 1164, 683 NYS2d 445 [4th Dept 1998]).

Plaintiff's position that CPLR §3101(d)(1) does not apply where an expert is deposed merely as a factual witness is unsupported by any of the First Department precedent with facts similar to those in this case. To the contrary, the cases that do permit the deposition of an expert witness only as to facts, while not explicitly requiring a showing of special circumstances, necessarily base their conclusions on the presence of some unique facts or situation (*e.g.*, change in condition of the evidence, unique knowledge of facts, lack of access or unavailability of the evidence) in justifying the "factual observation" deposition testimony of such expert. For instance, in *Coello v Progressive Insur. Co.* (6 AD2d 282 [1st Dept 2004]), the court modified the trial court order by limiting to factual observations the deposition of a forensic engineer who "appeared to be *the only person who examined the automobile* after [it was stolen and later recovered, with

the ignition system intact], and thus, the only person with personal knowledge of its condition at the relevant time." In another case where, immediately after fire damage, the fire *debris was removed and rebuilding was under way* by the time the action was commenced, and the defendant had *no access to the premises* in the aftermath of the fire, the court held such circumstances were sufficient to warrant a deposition of the plaintiff's expert, limited to that person's factual observations and procedures and excluding any inquiry regarding expert opinion (*Flex-O-Vit USA, Inc. v Niagara Mohawk Power Corp.*, 281 AD2d 980 [4th Dept 2001]).

Here, plaintiff's unsupported, conclusory assertion that "imminent danger exists because of the crack in the facade," without showing of any changes in any of the cracks, is insufficient to demonstrate either the existence of special circumstances to warrant Pisano's or Lieber's depositions as experts, or necessary unique facts warranting their depositions as fact witnesses. Based on the record, the crack was discovered by plaintiff and inspected by his own engineer Mr. Chen almost five months before defendants engineers inspected the two buildings, thus Pisano and Lieber are not the only witnesses with personal knowledge of the condition of the defendant's building. Moreover, plaintiff, having the exclusive access to the scaffolding, had ample opportunity to have its expert inspect the premises before and immediately after Pisano and Lieber inspected them. Plaintiff did not show that any repairs have been made, or the condition of either building changed since the cracks were discovered.

Cases cited by plaintiff are also factually distinguishable. In *McCoy v State of New York* (52 AD3d 1212 [4th Dept 2008]), the court held that the deposition of the nonparty witness was not precluded under CPLR 3101(d)(1)(iii) because he was designated as an expert witness for the *other* party involved in the [automobile] accident in a *related* action, while his testimony in

McCoy action was sought only as a fact witness.

In *Krauss v Ford Motor Co.* (38 AD2d 680 [4th Dept 1971]), where, following an automobile crash, plaintiff sent certain parts of the automobile to a lab for testing, defendant sought to examine the plaintiff's experts, the employees of the lab, not as to their opinions, but as to the nature of their examination and any *changes in condition* of the automobile parts as a result of their examination. The court found that defendant was entitled to examine plaintiff's expert as to the facts to ascertain if automobile parts that plaintiff turned over to expert were all the parts claimed to have been defective, whether they were all of such parts, and what if anything, was done to them by plaintiff's expert which may have *altered* them.

In *Cartis v Gotham Builder and Renovators, Inc.* (20 Misc 3d 1126, 867 NYS2d 373 [NY Sup Ct, Kings County 2008]), where defendants sought a deposition of plaintiff's architect as a fact witness of the defendant's defective brick-laying work, even though he was an expert witness for plaintiff, the court, citing to *Krauss, supra*, concluded that CPLR §3101(d) did not apply if the "expert [was] deposed as to the facts," because plaintiff's architect was an active participant in the negotiation of the agreement at issue, made contemporaneous observations of the work being performed by defendant, was not designated as an expert at the time he was served with the subpoena, was identified as a fact witness by plaintiff in its response to defendant's discovery demands. At the same time, the court found that because the architect was intimately involved in the construction work performed by defendant which was at the heart of the controversy, special circumstance existed warranting the architect's deposition (*Cartis v Gotham Builder and Renovators, Inc.*)

Unlike the unrelated to the action expert in *McCoy*, Pisano and Lieber have been

designated as experts of defendant in this action; and, unlike the claim of the altered evidence in *Krauss*, plaintiff does not claim, that there has been a change in the condition of the buildings as a result of Pisano's and Lieber's inspections. Further, unlike the supervising architect in *Cartis*, Pisano and Lieber were not "intimately involved in the construction work" of the building or repairs, their "observations" are not uniquely "contemporaneous" as to the onset of the crack at issue in defendant's building, which has remained unrepaired, and at no point Pisano or Lieber were identified as fact witnesses by defendant, but rather, were designated as expert witnesses before plaintiff served its subpoenas upon them.

Therefore, the court holds that in the absence of a unique situation or facts with respect to a change in the condition or availability of the physical evidence, the depositions of Pisano and Lieber as fact witnesses are likewise unwarranted. Accordingly, motion to quash the subpoenas *ad testificandum* issued by plaintiff to Pisano and Lieber and for a protective order is granted.[7]

Discovery of Documents

CPLR §3101(d)(2)

Defendant also asserts privilege pursuant to CPLR 3101(d)(2) as to the documents sought by the subpoenas *duces tecum* served by plaintiff upon Axis (Lieber's file) and Eipel (Pisano's file). Immunity pursuant to CPLR 3101(d)(2)[8] applies only if the material sought was prepared

[7] Defendant does not cite the CPLR section under which it seeks a protective order.

[8] CPLR 3101 (d)(2) states in relevant part:
2. Materials. Subject to provisions of paragraph one of this subdivision, materials otherwise discoverable under subdivision (a) of this section and prepared in anticipation of litigation [. . .] maybe obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain a substantial equivalent of the materials by other means. . .

exclusively for litigation (*Lopez v New York City Hous. Auth.*, 7 Misc 3d 1006, 801 NYS2d 236 [Sup Ct Bronx County 2005]). The test is whether the document at issue was prepared primarily if not solely for litigation (*id. citing Spectrum Systems International Corporation v Chemical Bank*, 157 AD2d 444 [1st Dept 1990]). Reports prepared for different purposes, only one of which is for litigation, are not immune from discovery under this section (*id.*) The burden of showing that materials were prepared solely for the purpose of litigation, and not in the course of ordinary business, falls upon the party seeking the protective order (*Du Four v Blaw-Knox Corp.*, 89 AD2d 900 [2d Dept 1982]; *Dikun v New York Cent. R. R.*, 58 Misc 2d 439 [NY Sup Ct, Jefferson County 1968]).

Further, even materials prepared in anticipation of litigation are not absolutely immune from discovery, but instead, are conditionally immune (*id., citing Corcoran v Peat, Marwick, Mitchell and Co.*, 151 AD2d 445 [1st Dept 1989]; *Kandel v Tocher*, 22 AD2d 513 [1st Dept 1965]), meaning that if the person seeking to discover the document at issue can meet the requisites delineated within CPLR § 3101(d)(2), said document may be obtained (*Massachusetts Bay Ins. Co. v Stamm*, 228 AD2d 321, 644 NYS2d 230 [1st Dept 1996] ["Materials prepared for or in anticipation of litigation are discoverable upon a showing that there is a substantial need for the materials and the party seeking discovery is unable without undue hardship to obtain the substantial equivalent of the materials by other means . . . "]). Thus, once it is established that an item constitutes material prepared for litigation, the party seeking disclosure has the burden to meet the conditions of unduplicability and hardship (*Lopez supra, citing Corcoran v Peat, Marwick, Mitchell & Co.*).

Defendant has sustained its burden of showing that Pisano's and Lieber's reports are not

discoverable pursuant to CPLR §3101(d)(2). First, the record supports the conclusion that the engineers' reports were prepared solely for the purposes of litigation.

In *Silberberg v Hotpoint Division of General Electric Co.* (23 AD2d 754 [1st Dept 1965]), the court ordered defendant to inspect a defective washing machine, and pursuant to that order defendant had an engineer inspect the machine and plaintiff demanded the engineer's report. The court held "that this report prepared for litigation, is too clear for discussion." Similarly, here, the court's order(s) "to rectify the situation" and to submit plans of repairs triggered defendant's retention of Pisano and later, Lieber, to inspect the buildings, assess the situation and issue reports.

The reports at issue here did not exist prior to the commencement of this action and were not prepared in the course of ordinary business. Rather, they were prepared because this court ordered defendant to draw up plans for repairs of the defendant's building after the dispute arose as to the cause of the damage to plaintiff's building. Defendant's principal William Fung testified that the report by Lieber was prepared, among other things, "to see whether . . . that crack *that is in dispute* right now is affecting [plaintiff's] property" (Fung deposition, at 59). Thus, the only logical conclusion is that, but for this litigation dispute, the reports would not have come into existence.

Further, in *Kandel v Tocher* (22 AD2d 513 [1st Dept 1965]), the Court held that since, by definition, the very purpose of liability insurance "is simply litigation insurance," just about everything the insurer and its employees do with respect to securing accident reports and related documents is "in contemplation and in preparation for eventual litigation" *(supra,* at 515; see also, *Rogers v Sears, Roebuck and Co.*, 248 AD2d 156 [1st Dept 1998]). The record shows that Pisano

was retained by defendant's [liability] insurance company after the instant action was commenced by plaintiff (Fung deposition, exhibit I to cross-motion, at 24-25.) Thus, Pisano's report is presumptively "in anticipation of litigation." On the basis of the foregoing, the materials sought by plaintiff's subpoenas are at least conditionally precluded.

Next, plaintiff failed to demonstrate that these materials are nevertheless discoverable by showing of substantial need and the impossibility to obtain the substantial equivalent without an undue hardship (*Corcoran v Peat, Marwick, Mitchell and Co.*; *Kandel v Tocher*, *supra*). Specifically, plaintiff acknowledges that Pisano's and Lieber's reports are based on "visual observations of each engineer and what they saw when they examined the facades of 113 and 115 Mulberry Street" (Affirmation in opposition, ¶ 18). However, plaintiff's own engineer Chen examined both buildings almost five months before defendant's engineer Pisano performed his inspection.

Thus, plaintiff failed to show that Pisano's and Lieber's observations may necessarily differ from those of Chen, or that any changes occurred in the condition of the buildings after they were inspected by defendant's engineers. And, Lieber submitted his plans of repairs, pursuant to this Court order, to plaintiff's counsel on May 29, 2009.

Nor can plaintiff claim that it is unable without undue hardship to obtain a substantial equivalent of the materials by other means - plaintiff has had an exclusive access to the scaffolding in front of both buildings and is free to inspect them at any time. Moreover, in the absence of any demonstrated hardship by plaintiff because of non-disclosure, the requested files remain privileged (*Rogers v Sears, Roebuck and Co.*, 248 AD2d 156 [1st Dept 1998]; *Recant v Harwood*, 222 AD2d 372 [1st Dept 1995]).

Thus, since Pisano's and Lieber's files are protected by privilege, in addition to the subpoena for Axis documents being procedurally defective, defendant's motion to quash the subpoenas and for a protective order as to these files is granted. However, the branch of the motion prohibiting plaintiff from serving subpoenas on defendant's experts and their companies is denied as unwarranted and premature.

Costs and Fees

22 NYCRR § 130-1.1 gives the Court, in its discretion, authority to award costs "in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees" and/or the imposition of financial sanctions upon a party or attorney who engages in frivolous conduct." 22 NYCRR § 130-1.1 (c) states that conduct is frivolous if:

(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;

(2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or

(3) it asserts material factual statements that are false.

Here, the court does not find that plaintiff's conduct in serving the subject subpoenas is frivolous. Thus defendant's request for costs and fees is denied.

Plaintiff's Cross-Motion

Protective Order

Plaintiff moves pursuant to CPLR §3103(a) for a protective order denying defendant the right to depose plaintiff's expert Chen. CPLR §3103(a) states in the relevant part:

(a) Prevention of abuse. The court may at any time on its own initiative, or on motion of

> any party or of any person from whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.

The court holds that plaintiff should not be required to produce Chen for deposition. As discussed above, a non-party expert may be deposed only pursuant to a court order, and only if defendant shows that special circumstances exist [*see* supra]. While defendant argues that its experts did not inspect the two buildings as did Chen, who inspected the buildings three times prior to the institution of this suit[9], defendant failed to show that the facts of Chen's observations during those three visits cannot be obtained by other means or that Chen appears to be the only person with personal knowledge to examine the buildings at the relevant time, or that physical evidence has been lost or destroyed (*Ramsey v New York Univ. Hosp. Center*, 14 AD3d 349 [1st Dept 2005]; *Generali Ins. Co. of Trieste and Venice v Honeywell, Inc., supra*; *Coello v Progressive Insur. Co., supra*). Even though Chen inspected the buildings five months before the present suit was commenced, defendant failed to show that, for example, the buildings were repaired, rebuilt or demolished. Thus, the record is insufficient to show special circumstances to warrant Chen's deposition as an expert.

Further, since defendant failed to demonstrate the presence of a unique situation or that any change in the condition of either of the buildings occurred, Chen's deposition as to his factual observations is also unwarranted. Therefore, plaintiff's motion for a protective order is granted.

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[9] Chen documented his observations in his December 15, 2008 report (O'Connell Affidavit exhibits 4, 8 to plaintiff's Order to show cause, Chen's Affidavits).

[* 18]

Compel Discovery [10]

As to the branch of plaintiff's cross-motion to compel disclosure, the court notes that defendant, however belatedly, responded to plaintiff's second set of interrogatories and discovery demands which plaintiff seeks to compel (see Daniel McConnell Affirmation, dated June 8, 2010). In an effort to conserve judicial resources, the court considered the submitted responses and deems them sufficient for the purpose of complying with the disclosure. Thus, in view of the above and, since plaintiff acknowledges that the documents in its second discovery demands are, in effect, the same documents as were requested during the deposition of William Fung, plaintiff's cross-motion to compel is denied and dismissed as moot.

Bill of Costs

Upon the reversal of this court's orders of May 5, 2009 and May 26, 2009, defendant was awarded $2,982.57 in costs on the appeal. Plaintiff seeks to vacate defendant's Bill of Costs on the ground that the Appellate Division imposed costs on the reversal of the first order, but not on the reversal of the second order, and that the amount of the costs should be reduced in half.

If distinct and separate appeals are taken from different orders of the trial court, the appeal costs may be duplicated with respect to each, but the court may order otherwise, if the proceedings are in substance one (NY Jur Costs §282). Here, the two orders refer to the same action, as the second order was, in essence, directing defendant to comply with the first order. Further, it appears that defendant filed only one set of the appellate papers. Thus, the motion to vacate the

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[10] The court notes that plaintiff's failure to comply with 22 NYCRR § 202.7 (a)(2), requiring that motions related to disclosure must be accompanied by an Affirmation of good faith stating that "counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion" mandates denial of its motion on this ground alone (*Molyneaux v City of New York, 64 AD3d 406* [1st Dept 2009]; *Pezhman v City of New York*, 57 AD3d 326 [1st Dept 2008]; *Dunlop Development Corp. v Spitzer*, 26 AD3d 180 [1st Dept 2006]; *Pandolf v American International Group, Inc.*, 16 AD3d 315 [1st Dept 2005]).

Bill of Costs is denied.

Conclusion

Accordingly, it is hereby

ORDERED that the branch of the defendant's motion pursuant to CPLR §2304 to quash subpoenas *duces tecum* served by plaintiff Essa Realty Corp. upon Eipel Barbieri Marschhausen, LLP and Axis Design Group International, LLC, seeking the production of documents, is granted; and it is further

ORDERED that the branch of defendant's motion pursuant to CPLR §2304 to quash subpoenas *ad testificandum* served by plaintiff Essa Realty Corp. upon Charles Pisano and Joseph Lieber seeking their depositions is granted; and it is further

ORDERED that the branch of the defendant's motion for a protective order to prohibit plaintiff from serving subpoenas on Charles Pisano, Eipel Barbieri Marschhausen, LLP, Joseph Lieber and Axis Design Group International, LLC in the future, is denied; and it is further

ORDERED that the branch of defendant's motion for costs and fees is denied; and it is further

ORDERED that the branch of the cross-motion by plaintiff Essa Realty Corp., pursuant to CPLR §3103(a), for a protective order denying defendant J.Thomas Realty Corp. the right to depose plaintiff's expert Karl Chen is granted; and it is further

ORDERED that the branch of the plaintiff's cross-motion, for an order directing defendant to produce the documents requested at the deposition of William Fung is denied and dismissed as moot; and it is further

ORDERED that the branch of the plaintiff's cross-motion for an order pursuant to CPLR

§3126 directing defendant to respond to plaintiff's second set of interrogatories is denied and dismissed as moot; and it is further

ORDERED that the branch of the cross-motion by plaintiff Essa Realty Corp., for an order pursuant to CPLR §3126 directing defendant to respond to plaintiff's second set of discovery demands is denied and dismissed as moot; and it is further

ORDERED that the branch of the plaintiff's cross-motion for an order vacating defendant's Bill of Costs entered by this Court on March 18, 2010, is denied; and it is further

ORDERED that defendant make a discovery motion with respect to damages within 20 days; and it is further

ORDERED that the note of issue shall be filed by June 25, 2010; and it is further

ORDERED that the parties shall appear for a trial on Monday, September 27, 2010, 9:30 a.m. No adjournments of the trial date without a written order of this court; and it is further

ORDERED that the defendants shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: June 21, 2010

Hon. Carol R. Edmead, J.S.C.

HON. CAROL EDMEAD

FILED
JUN 23 2010
NEW YORK
COUNTY CLERK'S OFFICE