

Leo v City of New York
2011 NY Slip Op 33683(U)
August 16, 2011
Sup Ct, New York County
Docket Number: 117294/2008
Judge: Paul G. Feinman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PAUL G. FEINMAN

PRESENT: _____ J.S.C.

PART 12

Index Number : 117294/2008 *E*

LEO, DONALD RAYMOND

vs.

CITY OF NEW YORK

SEQUENCE NUMBER : 043

COMPEL DISCLOSURE

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 _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DENIED IN ACCORDANCE WITH THE ANNEXED DECISION AND ORDER.

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

Dated: 8/16/2011

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

-----X
IN RE 91ST STREET CRANE COLLAPSE LITIGATION:
-----X

Index No. 771000/2010E

DONALD R. LEO, ADMINISTRATOR OF THE
ESTATE OF HIS SON, DONALD CHRISTOPHER
LEO, DECEASED MAY 30, 2008,

Index No. 117294/2008E
Mot. Seq. No. 043

Plaintiff,

-against-

DECISION and ORDER

THE CITY OF NEW YORK, NEW YORK CITY,
DEPARTMENT OF BUILDINGS, MICHAEL
CARBONE, PATRICIA J. LANCASTER, ROBERT
LIMANDRI, NEW YORK CRANE & EQUIPMENT
CORP., JAMES F. LOMMA, LOMMA TRUCKING &
RIGGING, J.F. LOMMA INC., TES INC., J F LOMMA
TRUCKING & RIGGING, JF LOMMA RIGGING AND
SPECIALIZED SERVICES, BRADY MARINE REPAIR
CO., TESTWELL, INC., BRANCH RADIOGRAPHIC
LABORATORIES INC., CRANE INSPECTION
SERVICES, LTD., SORBARA CONSTRUCTION
CORP., 1765 FIRST ASSOCIATES, LLC, LEON D.
DEMATTEIS CONSTRUCTION CORPORATION,
MATTONI GROUP CONSTRUCTION CO. LTD.,
MATTONI GROUP LTD., MATTONI GROUP LLC,
CITY OF NEW YORK SCHOOL CONSTRUCTION
AUTHORITY, CITY OF NEW YORK SCHOOL
CONSTRUCTION FUND, HOWARD I. SHAPIRO &
ASSOCIATES CONSULTING ENGINEERS, P.C.,
NEW YORK RIGGING CORP., TOWER RIGGING
CONSULTANTS, INC., TOWER RIGGING, INC.,
UNIQUE RIGGING CORP. LUCIUS PITKIN, INC.,
MCLAREN ENGINEERING GROUP, M.G.
MCLAREN, P.C. and JOHN/JANE DOES 1 THROUGH
10,

Defendants.

-----X

Appearances:

For Plaintiff Leo:
Bernadette Panzella, P.C.
By: Bernadette Panzella, Esq.
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114 E 13th St., 5A
New York, NY 10003
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For Defendant Leon D. DeMatteis Construction Corp.:
Smith Mazure Director Wilkins Young & Yagerman, P.C.
By: Mark Levi, Esq.
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New York, NY 10038-3198
(212) 964-7400

**For Defendants New York Crane & Equipment Corp.,
James F. Lomma, Lomma Trucking & Rigging, J.F.
Lomma Inc., TES Inc., J.F. Lomma Trucking &
Rigging, and JF Lomma Rigging and Specialized
Services:**

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP
By: Glenn J. Fuerth, Esq.
150 East 42nd St.
New York, NY 10017-5639
(212) 490-3000

Papers considered in review of this motion:

E-Filing Document Number

DeMatteis's amended notice of motion, Levi affirmations and attached exhibits A-T
Fuerth affirmation in support of motion and attached exhibits A-G
Panzella affirmation in opposition
Fuerth reply affirmation in further support
Levi reply affirmation in further support and attached exhibits A-H

673
721
786
789
791

PAUL G. FEINMAN, J.:

Defendant Leon D. DeMatteis Construction Corporation moves to compel plaintiff Donald Raymond Leo, as administrator of the estate of his son, Donald Christopher Leo, to comply with its notice of post-deposition discovery and inspection pursuant to CPLR 3124, and for discovery sanctions under CPLR 3126. Defendant New York Crane & Equipment Corp. has submitted an affirmation and reply affirmation in support of DeMatteis's motion. Plaintiff opposes. For the reasons that follow, DeMatteis's motion is granted to the extent provided in this decision and order and otherwise denied.

Background

This is a wrongful death action arising out of the collapse of a tower crane on May 30, 2008, at 333-335 East 91st Street, New York County. The numerous actions that were commenced following the crane collapse were joined for the purpose of conducting discovery under the general name, *In re 91st Street Crane Collapse Litigation*, index no. 771000/2010. The reader's familiarity with the numerous case management orders and over forty prior motion decisions and orders arising in this litigation is presumed.

Plaintiff, Donald Raymond Leo, is the administrator of the estate of Donald Christopher Leo, the operator of the tower crane at issue at the time of its collapse. In this wrongful death action, plaintiff seeks recovery for “[d]ecedent’s personal injuries, pre-impact terror, pre-death terror and wrongful death; for punitive damages, as are allowed at law, arising from defendants’ negligence, gross negligence and violations of the Labor Law” (Doc. 673-3¹, Ex. D, summons with notice). Plaintiff’s verified bill of particulars asserts claims for lost earnings of a “minimum of [] (\$7,000,000) together with the loss of accumulated benefits including, but not limited to pension, profit sharing, accumulated leave time, health care and other earnings-related benefits, bonuses, raises, promotions and opportunities for advancement” (Doc. 673-5, Ex. I, bill of part. at ¶ 10).

In the Fall of 2010, plaintiff was deposed over the course of two days. Throughout the deposition, counsel for various defendants called for the production of certain documents referenced by plaintiff in his testimony, and plaintiff’s counsel directed defendants to submit these requests in writing. Thereafter, on January 4, 2011, DeMatteis served post-deposition discovery demands comprised of 28 separate items. On February 1, 2011, counsel for DeMatteis sent a follow-up letter “as a good faith effort to avoid judicial intervention,” stating that DeMatteis had not yet received responses from plaintiff. On February 10, 2011, plaintiff e-filed his responses to the demands, objecting to each of the 28 demands. In fact, it does not appear from the record that plaintiff produced any new responsive documents or information (Doc. 673-6, Ex. L, Leo’s post-EBT resp.).

¹ Unless otherwise indicated, all references are to e-filing document numbers in *Leo v City of New York* (index no.117294/2008).

The court notes that many of the items included in DeMatteis's post-deposition demands are essentially the same as those found in defendant's original discovery demands to plaintiff. Those demands and plaintiff's responses and objections thereto were the subject of a so-ordered compliance conference transcript. Thereafter, the parties disagreed as to whether plaintiff's supplemental responses to defendants' initial discovery demands were sufficient. Rather than further delay the start of depositions in this litigation until these discovery issues could be sorted out, the court allowed the plaintiff's deposition to proceed subject to defendants' right to seek an additional deposition from plaintiff or renew its prior discovery requests after plaintiff had been deposed, if necessary (*see* Case Management Order #4, *In re 91st Street Crane Collapse Litigation*, Sup Ct, NY County, Oct. 12, 2010, Feinman, J., index no. 771000/2010, Doc. 504).

Analysis

The scope of discovery provided by CPLR 3101 is "generous, broad, and is to be construed liberally" (*Mann v Cooper Tire, Co.*, 33 AD3d 24, 29 [1st Dept 2006]). The words "material and necessary" are to be "interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist in the preparation for trial" (*id.* at 29; quoting *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). The scope of discovery extends not only to admissible proof, but also "to testimony or documents which may lead to the disclosure of admissible proof" (*id.*; citing *Fell v Presbyterian Hosp. in the City of New York*, 98 AD2d 624, 625 [1st Dept 1983]).

The procedure for raising objections to discovery demands is clearly set forth in the applicable provisions of the CPLR. A party served with a CPLR 3120 notice must, within twenty days, serve a response stating with "reasonable particularity the reasons for each objection"

(CPLR 3122 [a]). If the party withholds documents that appear to be within the category of documents required by the notice, then notice must be given to the party seeking disclosure that such documents are being withheld (CPLR 3122 [b]). This “notice shall indicate the legal ground for withholding each such document, and shall provide ...” specific information as to each document, including: “(1) the type of document; (2) the general subject matter of the document; (3) the date of the document; and (4) such other information as is sufficient to identify the document for a subpoena duces tecum” (CPLR 3122 [b]). Objections must be timely raised up front and cannot simply be saved for later use in opposition to a CPLR 3124 motion to compel (Connors, Practice Commentaries, McKinney’s Cons Laws of NY, CPLR 3124:2). The failure to provide objections within the time set forth in CPLR 3122 (a) generally limits the court’s review to the question of privilege under CPLR 3101 (b) (*Anonymous v H.S. for Env’tl. Studies*, 32 AD3d 353, 358 [1st Dept 2006]). Even with respect to documents claimed to be privileged, the mere assertion of boilerplate and/or untimely objections without including a detailed privilege log as required by CPLR 3122 (b), may “constitute[] a waiver of any objections to disclosure” (*id.* at 359).

1. Plaintiff’s Arguments for Summary Denial

Contrary to plaintiff’s contention, the record sufficiently demonstrates DeMatteis’s good faith efforts to obtain the discovery sought in this motion without resort to judicial intervention. In addition, the court rejects plaintiff’s argument that the instant motion must be summarily denied because DeMatteis had a “full and fair opportunity to depose [p]laintiff, and [p]laintiff answered all questions fairly and completely the best he could” (Doc. 786, Panzella affirm. at ¶ 20). There is nothing in the CPLR or relevant case law that precludes a party from subsequently

serving written demands seeking documents referred to during deposition testimony (*see* Siegel, NY Prac § 350, at 589 [5th ed]). Further, plaintiff fails to reconcile his practice of serving extensive post-deposition discovery demands following defendants' lengthy depositions, while at the same time arguing that the same practice must be denied when the disclosure is being sought from him. Indeed, plaintiff's argument is impudent, or phrased differently, the height of "chutzpah." Accordingly, the court refuses to summarily deny DeMatteis's motion to compel, and will now address each individual discovery demand objected to by plaintiff.

2. Individual Discovery Demands at Issue

Demand #1:

This demand seeks an authorization to obtain decedent's academic records and attendance records from SUNY Cortlandt. While the burden typically rests on the party resisting discovery to establish a sufficient basis for such resistance, records of academic performance, though not within any privilege, "are not discoverable unless the party seeking their production establishes their relevance and materiality for discovery purposes" (*Monica W. v Milevoi*, 252 AD2d 260, 262 [1st Dept 1999] [*internal quotation omitted*]). Here, DeMatteis fails to meet this standard. It is purely speculative that the records sought through this authorization would provide, as DeMatteis contends, evidence of decedent's indebtedness at the time of his death, particularly with respect to student loans.

At his deposition, upon being asked whether decedent had any outstanding debts other than a mortgage and car loan, plaintiff testified that he did not know for sure, but that "[m]aybe he still had his student loan. I'm not sure of that ... I haven't received any paperwork on it ..." (Doc. 673-7, Ex. S, plaintiff transcript at 195-196). Thus, plaintiff's testimony and lack of

subsequent clarification has created uncertainty as to potentially relevant facts. Notably, plaintiff has not objected to the relevance of decedent's indebtedness. Thus, while the court is not satisfied that the requested authorization for academic records is appropriate, this does not mean plaintiff has no discovery obligations as to the decedent's potential student loan debt. Plaintiff can easily find information related to decedent's federal student loans or financial aid online through the National Student Loan Data System. Information related to both federal and private student loans would also be found on decedent's credit report. As administrator of decedent's estate, plaintiff is perhaps the only individual authorized to make such inquiries and cannot rely on his claim that he has not personally received any paperwork regarding decedent's student loans. Accordingly, DeMatteis's motion is granted as it pertains to demand #1 but solely to the extent that plaintiff must produce responsive documents related to decedent's outstanding student loan obligations at the time of his death, and is otherwise denied.

If, after diligent search, plaintiff determines that no such loans existed, plaintiff must submit an affidavit representing that to be the case and providing with particularity the basis for reaching such conclusion, providing, among other relevant information, that sources referred to by plaintiff in his search.

Demand #2:

DeMatteis seeks "authorizations to obtain all records for benefits that had accumulated on behalf of Donald Christopher Leo from the Concrete Union that he belonged to from the time that he began working up until the time of his death" (Doc. 791-1, Ex. A). Plaintiff objected claiming that the requested authorization was previously provided to Glenn Fuerth, Esq., attorney for the New York Crane defendants, who was the "agreed defendants' designee, to receive and

process authorizations on behalf of the defendants in this action...” (Doc. 673-6, Ex. L at ¶ 2). However, plaintiff did not specify the date when this authorization was provided or any other related details. In opposition to the instant motion, plaintiff reiterates this argument, citing four previously produced documents that plaintiff claims satisfied this demand.

Of the four documents cited by plaintiff, three are clearly not responsive in that they do not authorize defendants to obtain records from the Concrete Union. The last document contains a letter from plaintiff’s counsel, dated August 16, 2010, enclosing two authorizations allowing defendants to obtain decedent’s International Union of Operating Engineers, Local 14 and Laborers’ Local 18A Local 18A Concrete Workers Union Membership records. However, these authorizations expressly excluded “health/medical benefits payments & any portions of the union files which may include medical/physical examinations, which have been subpoenaed to the [c]ourt for an in-camera inspection” (Doc. 673-6, Ex. P [*capitalization omitted*]). Upon receipt of these authorizations, counsel for the New York Crane defendants rejected them both, claiming that “they inappropriately and unilaterally limit[ed] both the nature and duration of the documents to be released to defendants ... [T]he defendants are entitled to all documents maintained by the Union including, but not limited to, records regarding Mr. Leo’s pension, retirement, annuity plans, health benefits, physical examinations and dues” (Doc. 673-6, Ex. M). Plaintiff fails to mention defendants’ rejection of the authorizations, either in his initial objections or in opposition to the instant motion, and in doing so, plaintiff waived his opportunity to challenge the appropriateness of such rejection.

The mere fact that defendants rejected the previously provided authorization did not constitute a waiver of their ability to obtain the requested documents, nor did it relieve plaintiff

of his obligation to facilitate the timely discovery of all matters that are material and necessary to his pecuniary damages claim. In light of this state's general liberal approach to discovery, and the importance of the materials covered by this demand to plaintiff's pecuniary damages claim, the court should resolve any ambiguities in the record regarding the sufficiency of plaintiff's prior production in DeMatteis's favor. Accordingly, DeMatteis's motion to compel is granted as it pertains to demand #2.

Demand #3:

This demand seeks authorizations to obtain decedent's records from Local 14/14B of the Operating Engineers, including "his attendance records, employment records, benefit plan, health insurance, pension annuity, vacation and any other benefits that he would be entitled to including his salary from Local 14/14-B [and] all W-2's, 1099's or any other income statements (Doc. 791-1, Ex. A). Plaintiff's objection to this demand is identical to that asserted in response to demand #2, again omitting any discussion of the fact that defendants rejected the authorization previously provided by plaintiff. Based on the same reasoning the court provided above in connection with demand #2, the court finds that plaintiff has failed to sufficiently establish his compliance with demand #3. Accordingly, DeMatteis's motion is granted as it pertains to this demand.

Demand #4:

This demand seeks an authorization to obtain the decedent's license information from the New York City Department of Buildings for his Class A operator's license. Plaintiff's response argues that these records were previously delivered to the court by the Municipal defendants² for

² For purposes of this decision and order, the court's reference to the "Municipal defendants" includes The City of New York, New York City Department of Buildings, Patricia J. Lancaster, and Robert LiMandri.

in camera inspection, and “any defense counsel who wishes to obtain a copy of this incomplete record from defense counsel for the DOB in these proceedings has [p]laintiff’s permission to do so, attention Michael Tobin, Esq., who produced the incomplete records” (Doc. 673-6, Ex. L at ¶ 4). Plaintiff, however, fails to identify by reference to Bates numbers, production dates, or other identifier sufficient to enable this court to evaluate the accuracy of plaintiff’s argument. This uncertainty must be resolved against plaintiff. Accordingly, DeMatteis’s motion is granted as it pertains to demand #4.

Demand #5:

This demand seeks an authorization allowing defendants to obtain “non-privileged” records from the estate attorney for the decedent, Howard Dresher, “as well as his address for Surrogates Court, Probate Court, filings, estate tax filings in both New York and New Jersey and with the Federal Government” (Doc. 791-1, Ex. A). Plaintiff “objects to this demand and declines to respond; there is no portion of this file that is not privileged” (Doc. 673-6, Ex. L at ¶ 4). Plaintiff’s refusal to produce any documents responsive to this demand based on his assertion of a general and unspecified “privilege” fails to meet CPLR 3122 (a)’s “reasonably particularity” requirement. Such boilerplate claims of privilege are insufficient as a matter of law (*Anonymous v H.S. for Envtl. Studies*, 32 AD3d 353, 359 [1st Dept 2006]). Therefore, plaintiff has not met his burden of establishing that all documents in the possession of decedent’s estate’s attorney are shielded from discovery by any particular privilege (*id.*; citing *Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 377 [1991]). Moreover, plaintiff also fails to provide a detailed privilege log in complying with the specific requirements set forth in CPLR 3122 (b).

Nonetheless, demand #5 in its current form is overly broad and lacks specificity as to the

particular documents being requested. At the same time, it is highly likely that the decedent's estate attorney has in his possession materials that are relevant to plaintiff's pecuniary damage claim. Plaintiff has provided no indication that these materials have been searched for documents responsive to DeMatteis's 28 post-deposition discovery demands. Many of these demands seek documents that would be necessary for the proper fulfillment of plaintiff's duties as administrator of decedent's estate. To balance the need for this discovery with the potential burden that it could impose, demand #5 should be modified as simply requiring plaintiff to include all records held by the decedent's estate attorney in responding to all discovery compelled by this decision and order. Accordingly, DeMatteis's motion is granted as it pertains to demand # 5, but solely as such demand has been modified herein.

Demand #6:

This demand seeks authorizations for employment records for the decedent "for work that he performed at the McCombs Bridge for Broadway Show and their address" (Doc. 791-1, Ex. A). Plaintiff's original response simply states that he "cannot respond to the form of this demand/question as stated" (Doc. 673-6, Ex. L at ¶ 6). Plaintiff attempts to raise an additional argument in his opposition papers to the instant motion, claiming that DeMatteis's motion must be denied because it has not demonstrated that it cannot obtain the information sought in this demand from some other source. However, not only is this new contention meritless, plaintiff waived this argument by not raising it in his original response to this demand. Furthermore, the court holds that the objection that plaintiff actually did raise in his original response fails to meet the "reasonable particularity" standard of CPLR 3122 (a). Accordingly, DeMatteis's motion to compel is granted as it pertains this demand.

Demand #7:

This demand seeks authorizations to obtain records from Sorbara Construction Corp. for the decedent, Donald Christopher Leo, and plaintiff, Donald Raymond Leo,³ for the “91st Street Project or any other records that Sorbara has regarding them working at this job site” (Doc. 791-1, Ex. A). Plaintiff objected, arguing that Sorbara had already uploaded “all records concerning the names and dates for each Local 14-14B Operating Engineer(s) who operated the ... [c]rane ...” at the 91st Street construction site to the *In re 91st Street Crane Collapse Litigation*’s discovery website (Doc. 673-6, Ex. L at ¶ 7).

However, plaintiff fails to identify, by Bates number, production date, or any other reasonably specific identifier that would enable the court to properly evaluate the accuracy of plaintiff’s contention that all responsive documents have already been produced by Sorbara to the general litigation online document depository. Furthermore, demand #7 seeks an authorization for documents that is not limited to “names and dates for each Local 14-14B Operating Engineer(s).” Accordingly, DeMatteis’s motion to compel is granted as it pertains to this demand.

Demand #8:

This demand seeks an authorization to obtain membership records for both Donald Christopher Leo and Donald Raymond Leo from Local 14/14-B from the time that they joined the union through June 1, 2008. Plaintiff objects, first arguing that the requested authorization has already been provided for decedent’s records, and then simply “decline[s]” to provide an

³ In addition to serving as administrator of decedent’s estate, plaintiff testified at his deposition that he is also licensed crane operator and had himself operated the crane at issue in this action at the 91st Street construction site.

authorization for plaintiff's union records. For the reasons provided above in connection with demands #2 and 3, the authorizations previously provided do not provide a sufficient basis for nondisclosure of decedent's records. Furthermore, as to his own union records, plaintiff fails to state with reasonable particularity the reasons for his objection. Although plaintiff later attempts in his opposition papers to challenge the relevance of his union membership records, such objection was waived by omitting it from his original response. In light of plaintiff's deposition testimony that he had himself operated the crane at issue in this action, discovery of his union membership records may lead to material and necessary information. While defendants may be entitled to records spanning decedent's entire career to aid in the calculation of pecuniary damages, discovery of plaintiff's membership records should be limited to the five years prior to decedent's death through the present. Furthermore, the authorization for plaintiff's records should expressly exclude plaintiff's medical records. Accordingly, DeMatteis's motion to compel is granted as it pertains to demand #8, as modified by this decision and order with respect to plaintiff's records.

Demand #9:

This demand seeks "[c]opies of the job diary/handbook that Donald Christopher Leo and/or Donald Raymond Leo maintained for the 91st Street job site from January 1, 2008 through June 1, 2008" (Doc. 791-1, Ex. A). As to the portion of this demand seeking copies of decedent's job diary/handbook, plaintiff must produce the requested materials or otherwise submit an affidavit of the individual who performed the search for the records, setting forth the details of the search, including the locations that were searched, and the search results (*see Jackson v City of New York*, 185 AD2d 768, 769 [1st Dept 1992]). Plaintiff's unsupported claim

that the requested job diary/handbook may be in the possession of another party is not responsive because the demand asks for documents that are in his possession, custody or control. As to the portion of demand #9 seeking plaintiff's job diary/handbook, in light of plaintiff's testimony that he operated the crane at issue at the 91st Street construction site and that he still had his job diary/handbook from the applicable time period in his possession, plaintiff must produce a copy to the defendants. Accordingly, DeMatteis's motion to compel is granted as it pertains to demand #9.

Demand #10:

This demand seeks "the last known address of Donald Christopher Leo's mother, Marie Leo, and proof of the benefits she received as a result of Donald Christopher Leo's death from the union, Local 14-B, the Concrete Workers Union, the Workers Compensation Board, the Social Security Administration, life insurance, annuity, pension or other funds" (Doc. 791-1, Ex. A). Since the filing of the instant motion to compel, plaintiff has been directed to provide defendants with Marie Leo's address in connection with another order issued by the court, thus rendering that portion of DeMatteis's motion academic (*see In re 91st Street Crane Collapse Litigation*, index no. 771000/2010, case management order no. 10, March 23, 2011). As to the remaining portion of demand #10 seeking proof of benefits received by Marie Leo, plaintiff's response simply stated, "[p]reviously provided; [p]laintiff cannot otherwise respond to the form of this demand/question as stated" (Doc. 673-6, Ex. L at ¶ 10). The court holds this objection to be insufficient as a matter of law. Furthermore, the additional arguments plaintiff attempts to raise for the first time in his opposition papers were waived by plaintiff's failure to timely raise them in his original response to this demand.

The court further notes that plaintiff clearly has relied on some sort of documentation in

drafting the portion of his amended bill of particulars that sets forth specific monetary values for certain benefits that plaintiff claims were paid out to Marie Leo. These documents are clearly discoverable and should have been turned over to the defendants in response to its original discovery demands served on plaintiff more than a year ago. As such, if plaintiff insists on maintaining his contention that he has no discovery obligation with respect to these documents because they are not in his possession, plaintiff has a heavy burden to sustain, by affidavit of an individual with personal knowledge of the relevant facts, in explaining how he was able to use these documents in drafting his bill of particulars but now no longer has possession, custody or control over them. Accordingly, DeMatteis's motion to compel is granted as it pertains to this demand.

Demand #11:

This demand seeks "the full names and addresses of Donald Christopher Leo's siblings, his sister Jessica and his brother, Shawn" (Doc. 791-1, Ex. A). Plaintiff's response simply stated that he "objects to this demand and declines to respond" (Doc. 673-6, Ex. L at ¶ 11). This objection fails to meet the "reasonable particularity" requirement of CPLR 3122. Furthermore, to the extent that plaintiff appears to be objecting to the relevance of this information for the first time in his opposition papers to the instant motion, such objection was waived by plaintiff's failure to raise it in his initial responses. Accordingly, DeMatteis's motion is granted as it pertains to demand #11. The court notes, however, that this decision and order only directs disclosure of decedent's siblings' full names and addresses, and makes no determination as to whether a nonparty deposition or any other particular discovery request directed to these nonparties would be appropriate.

Demand #12:

This demand seeks “[a]ny and all documents regarding the transfer of Donald Christopher Leo’s shared interest of the home that he shared with Jeannine Belcastro after his death on May 30, 2008[,] that Donald Raymond Leo testified to at his deposition” (Doc. 791-1, Ex. A). Plaintiff initially stated that he could not “respond to the form of this demand/question as stated; the deed transferring the property was duly recorded and therefore a public record; the information and/or documents/materials/information is not in [p]laintiff’s possession” (Doc. 673-6, Ex. L at ¶ 12). Although plaintiff later argued for the first time in his opposition papers that DeMatteis has failed to establish how these documents “have any relevance to this proceeding,” (Doc. 786, Panzella affirm.), this argument was waived by plaintiff’s failure to assert it in his original response to this demand. Further, DeMatteis did offer its reasons why it believed the requested documents to be relevant in its affirmation in support of the instant motion, but plaintiff apparently chose not to address DeMatteis’s points on this issue. Thus, the court will not deny the requested discovery on this basis.

In addition, the fact that some relevant documents may be publicly available does not relieve plaintiff of his obligation to respond to this demand, which encompasses documents that would not necessarily be filed on the public record. The court notes that plaintiff has obtained extensive discovery from parties in this action, such as the Municipal defendants, that consisted almost exclusively of publicly available records. Finally, plaintiff, the administrator of decedent’s estate, fails to reconcile his claim that he, in his capacity as distributee of decedent’s estate, made the transfer of the property at issue in this demand, (Doc. 786, Panzella affirm. at 17), but now claims not to have any responsive documents in his possession. At the very least,

plaintiff would need to provide a proper *Jackson* affidavit on this issue. Accordingly, DeMatteis's motion is granted as it pertains to demand #12.

Demand #13:

This demand seeks “[n]ames, addresses, and account numbers for all bank accounts whether savings, checking or any other accounts maintained by Donald Christopher Leo from 2003 until December 31, 2008, and authorizations to obtain the bank/checking/saving account records” (Doc. 791-1, Ex. A). Plaintiff responded that it “cannot respond to the form of this demand/question as stated; no such documents/materials/information are in [p]laintiff’s possession” (Doc. 673-6, Ex. L at ¶ 13). Plaintiff does not dispute the relevance of the materials sought by this demand, or assert any other objections. As administrator of the decedent’s estate, plaintiff is authorized to obtain these documents if he does not have them in his possession. Moreover, the bare assertion that plaintiff does not possess these materials is insufficient without a proper *Jackson* affidavit (*see Jackson*, 185 AD2d at 769). Accordingly, DeMatteis’s motion to compel is granted as it pertains to this demand.

Demand #14:

This demand seeks “[a]ny records regarding the San Diego project” (Doc. 791-1, Ex. A). In plaintiff’s initial response, he stated that he could not “respond to the form of this demand/question as stated ...” (Doc. 673-6, Ex. L at ¶ 14). However, he then proceeded to describe the so-called “San Diego Project” in the next three pages. This description is, in itself, of little evidentiary value, because it comes from plaintiff’s attorney, and not a person with personal knowledge of the underlying facts. Moreover, plaintiff refuses to provide any proof that supports plaintiff’s attorney’s account of the “San Diego Project.” Although the court need not

make a determination as to the admissibility or viability of the element of plaintiff's pecuniary damage claim, plaintiff should not be allowed to introduce evidence at trial related to the "San Diego Project" that has not been provided in response to this demand.

Accordingly, DeMatteis's motion is granted as it pertains to demand #14. If plaintiff fails to produce records responsive to this demand within the time provided by this decision and order, absent a showing of good cause, plaintiff will be precluded from offering such records at trial. If plaintiff seeks to maintain that no documents related to the "San Diego Project" exist, he must submit a proper *Jackson* affidavit stating this position. In addition, plaintiff must also provide a list of any witnesses that he may be call to testify to the existence of the San Diego Project/Plan at trial. If plaintiff fails to provide this list, he will be precluded from calling any such witnesses at trial, absent a sufficient showing of good cause.

Demand #15:

This demand seeks "[a]ny documents or proof regarding gifts given by Donald Christopher Leo to family members from 2003 through 2008" (Doc. 791-1, Ex. A). In plaintiff's initial response, he claims that he cannot "respond to the form of this demand/question as stated ..." (Doc. 673-6, Ex. L at ¶ 14). Plaintiff does not dispute the relevancy of this demand, nor does he assert any applicable claims of privilege. Accordingly, DeMatteis's motion to compel is granted as it pertains to this demand.

Demand #16:

This demand seeks "[a]uthorizations to obtain records from the New York Yankees baseball team regarding the Yankee package testified to by Donald Raymond Leo at [his] deposition that was allegedly maintained by Donald Christopher Leo from the time that he

purchased the plan up until and through the time of his death” (Doc. 791-1, Ex. A). DeMatteis’s claim that this demand seeks relevant information because “[s]eason ticket packages, whether full or partial [,] are expensive, and constitute a potential gift of tickets to family” (Doc. 673-2, Levi affirm. at ¶ 32 [p]), is purely speculative absent any evidence that he did indeed gift any of the tickets to family members. Accordingly, DeMatteis’s motion is denied as it pertains to this demand.

Demand #17:

This demand seeks authorizations for New Jersey, New York City and New York State Income tax returns for the decedent from 2003 through 2008. Plaintiff objected, claiming that IRS authorizations were already provided. However, the authorization cited by plaintiff only covers the decedent’s federal tax returns and thus is not responsive to this demand.

While it is true that disclosure of tax returns should be limited to situations where the party seeking such disclosure has established that the information contained in the returns is indispensable to the litigation and unavailable from other sources, (Doc. 786, Pänzella affirm. at 19; citing *McKanic v Amigos del Museo del Barrio*, 74 AD3d 639 [1st Dept 2010]), the court has previously held in this action that such a showing had been made in ordering plaintiff to provide authorizations for its federal tax returns. Plaintiff did not seek appellate review of that order, and subsequently provided the relevant authorization. Moreover, in light of plaintiff’s general reluctance to produce responsive documents that may have otherwise provided the information found in the decedent’s state and local tax returns, the court cannot conclude that DeMatteis could obtain this information elsewhere. Accordingly, DeMatteis’s motion to compel is granted as it pertains to this demand.

Demand #18:

This demand seeks “[a]uthorizations to obtain the Estate tax returns from the Internal Revenue Service/United States, the State of New York, the City of New York and the State of New Jersey” (Doc. 791-1, Ex. A). Plaintiff initially stated only that he “objects to this demand and declines to respond” (Doc. 673-6, Ex. L at ¶ 18). Plaintiff does not dispute the relevancy of the requested materials, or otherwise assert any applicable privilege. Moreover, in light of plaintiff’s failure to produce documents responsive to several discovery demands on the basis that the requested documents were not in his possession, it would appear that the information that would be contained in the decedent’s estate’s tax returns is not available elsewhere. Accordingly, DeMatteis’s motion is granted as it pertains to this demand.

Demand #19:

This demand seeks “[a]uthorizations to obtain all records regarding Donald Christopher Leo’s car loan records from 2003 through 2008 for any cars that he purchased or leased” (Doc. 791-1, Ex. A). Plaintiff initially responded that he could not respond to this demand, arguing, the decedent “was a 30 year old man when he was killed, therefore his [p]laintiff [f]ather i[s] not in possession of such records if any exist; the last car [p]laintiff’s [d]ecedent was using is sitting in his [p]laintiff [f]ather’s driveway and the [p]laintiff has been making the payments for this car” (Doc. 673-6, Ex. L at ¶ 19). However, plaintiff fails to explain how he could be making payments on the decedent’s car yet possess no documents responsive to this demand. Accordingly, DeMatteis’s motion to compel is granted as it pertains to demand #19.

Demand #20:

This demand seeks records showing that the decedent paid “his operator’s license to the

New York City Department of Buildings for his crane operator's license from 2001 through 2008" (Doc. 791-1, Ex. A). In response, plaintiff indicated that any such pay records would have previously been delivered to the court by the Municipal defendants for an in camera inspection, adding, "any defense counsel who wishes to obtain [a] copy of this incomplete record from defense counsel for the DOB in these proceedings has [p]laintiff's permission to do so, attention Michael Tobin, Esq., who produced the incomplete records" (Doc. 673-6, Ex. L at ¶ 20).

As the party resisting disclosure, plaintiff has the burden of establishing that the requested records have indeed already been produced by the Municipal defendants. However, plaintiff does not support his argument by specific reference to any particular production, either by Bates number, production date, or other identifying information sufficient to enable the court to evaluate the accuracy of his claim. Thus, plaintiff has not met his burden of establishing that the requested materials have already been produced. Accordingly, DeMatteis's motion is granted as it pertains to this demand.

Demand #21:

This demand seeks "[a]uthorizations to obtain and/or records [of] the purchase of the condo in New Jersey as well as the deed for the purchase, the offering plan and the payment schedule and name of the bank that had the mortgage for the property..." (Doc. 791-1, Ex. A). The demand further seeks "authorizations to obtain the records from the bank and the mortgage company for the condo that was purchased by Jeannie Belcastro and Donald Christopher Leo in New Jersey as testified to by Donald Raymond Leo at his deposition" (*id.*). For the same reasons provided in connection with DeMatteis's demand #12, DeMatteis's motion is granted as it pertains to this demand.

Demand #22:

This demand seeks “[a]uthorizations to obtain Donald Christopher Leo’s periodic health examinations request[ed] by the New York City Department of Buildings in order for him to obtain and maintain his Class A operator’s license for cranes and derricks” (Doc. 791-1, Ex. A). Plaintiff’s initial response stated that “[a]ny such records would be included in the records previously delivered to the [c]ourt for an in-camera inspection by the Municipal defendants ... any defense counsel who wishes to obtain [a] copy of this incomplete record from defense counsel for the DOB in these proceedings has [p]laintiff’s permission to do so...” (Doc. 673-6, Ex. L at ¶ 22).

Plaintiff fails to sufficiently identify the particular responsive documents that he claims were previously produced by the Municipal defendants, thus preventing the court from properly evaluating his claim. The court further notes that plaintiff does not assert any privileges with respect to this demand. Accordingly, DeMatteis’s motion to compel is granted as it pertains to demand #22. Plaintiff must provide a HIPAA-compliant authorization allowing the defendants’ appointed designee to obtain the requested materials from the Municipal defendants, and upload them to the litigation’s online document depository.

Demand #23:

This demand seeks “[a]uthorizations to obtain records from Donald Christopher Leo’s accountant, Larry Schwartz, as well as his address for all income tax returns [,] and backup data used to prepare Donald Christopher Leo’s returns from 2001 through 2008 for both Federal, State and Local income tax returns” (Doc. 791-1, Ex. A). Plaintiff’s initial response to this demand was that an IRS authorization had previously been provided and that “[p]laintiff otherwise

objects and declines to respond” (Doc. 673-6, Ex. L at ¶ 23). In opposition to the instant motion, plaintiff adds this demand seeks records from the decedent’s accountant, not from the plaintiff, and therefore plaintiff cannot be compelled to produce this information.

Plaintiff does not, however, dispute the potential relevancy of these materials or claim the protection of any privilege. Furthermore, plaintiff’s reference to the previously provided IRS authorization is not responsive to this demand, which seeks the underlying materials used by the decedent’s accountant in preparing those tax returns. Although generally the court would be reluctant to allow a production of this nature, plaintiff’s failure to produce documents relevant to his pecuniary damage claim on the basis that such documents are not in his possession requires defendant to obtain responsive materials from other sources. Accordingly, DeMatteis’s motion to compel is granted as it pertains to this demand, except that the requested authorization should be limited to the period of 2003 through 2008.

Demand #24:

This demand seeks “[a]uthorizations to obtain records from Local 14/14-B of the Operating Engineers for all safety courses taken by Donald Christopher Leo prior to his accident on May 30, 2008” (Doc. 791-1, Ex. A). Plaintiff claims that this authorization was previously provided to counsel for the New York Crane defendants. However, plaintiff omits any reference to the fact that counsel for the New York Crane defendants rejected this authorization upon receipt, claiming that plaintiff had improperly limited its scope to a shortened time period and to certain types of documents. Furthermore, plaintiff has not shown that the prior authorization would cover the particular category of documents sought in this demand. Records of safety courses attended by the decedent are relevant to determining plaintiff’s pecuniary damages,

specifically, the portion seeking to increase the amount of lost earnings to be recovered based on the decedent's lost opportunities for future advancement. Accordingly, DeMatteis's motion is granted as it pertains to this demand.

Demand #25:

This demand seeks "[t]he last known address and/or present address of Donald Raymond Leo's present wife, Maureen Leo, and her maiden name" (Doc. 791-1, Ex. A). DeMatteis argues this demand relates to the decedent's stepmother and she could potentially have relevant information regarding claims of pecuniary loss. At his deposition, plaintiff testified that Maureen Leo lived on "Staten Island" on "Cole Avenue," but he did not remember the number (Doc. 673-8, Ex. T, plaintiff's trans. at 503-504). Plaintiff claims that he has lived separate from Maureen Leo for the last 12 to 15 years, although they are not legally separated. He also testified that Maureen Leo is not the decedent's mother and the decedent did not provide Maureen Leo with any financial support (*id.*). In light of this testimony, DeMatteis's unsupported assertion that Maureen Leo would potentially have relevant information is purely speculative. Accordingly, DeMatteis's motion is denied as it pertains to this demand.

Demand #26:

This demand seeks "Donald Raymond Leo's personal logbook for 2008 and Donald Christopher Leo's personal logbook for 2008, if it still exists, and if not [,] a [] statement/affidavit that it no longer exists as testified to by Donald Raymond Leo at his deposition (Doc. 791-1, Ex. A). It is unclear whether this demand seeks different materials than those requested in demand #9, which calls for the production of plaintiff's and decedent's "job diary/handbook." Plaintiff's objection to demand #9 and demand #26 appears to treat the two terms

interchangeably. Accordingly, for the reasons provided above in connection with demand #9, DeMatteis's motion to compel is granted as it pertains to demand #26.

Demand #27:

This demand seeks “[a]uthorizations to obtain Donald Christopher Leo’s records from the Social Security Administration regarding applications, benefits, or benefits paid as a result of his death on May 30, 2008” (Doc. 791-1, Ex. A). Plaintiff initially objected that he could not “respond to the form of this demand/question as stated; Donald Christopher Leo is dead, therefore it is impossible to ‘obtain Donald Christopher Leo’s’ [records] regarding benefits ‘paid as result of his death’” (Doc. 673-6, Ex. L at ¶ 27).

Plaintiff relies on a mischaracterization of DeMatteis’s demand, which seeks documents related to benefits “paid as a result of his death,” *not* benefits “paid *to him* as a result of his death.” Even if it had used the latter phrasing, plaintiff’s refusal to respond solely on that basis alone demonstrates a lack of good faith by his attorney in providing diligent and accurate discovery responses. If, as plaintiff claims, no applications have been submitted for benefits from the Social Security Administration, plaintiff simply should have stated this to be the case through an appropriate affidavit. However, he did not do so. Accordingly, DeMatteis’s motion is granted as to this demand.

Demand #28:

This demand seeks the “last known address of John Samuels, the second crane operator that worked with Donald Raymond Leo and Donald Christopher Leo at the 91st Street construction site from March 2008 through May 30, 2008” (Doc. 791-1, Ex. A). Plaintiff’s response was “this information [is] not within plaintiff’s knowledge.” The court finds nothing in

the record that suggests otherwise. Accordingly, DeMatteis's motion is denied as it pertains to this demand.

3. DeMatteis's Motion for Sanctions under CPLR 3126

DeMatteis also seeks an order either: (1) precluding plaintiff from offering any evidence at trial concerning pecuniary loss and damages; (2) precluding plaintiff from offering any evidence at trial concerning pecuniary loss and damages associated with an alleged business plan between plaintiff and the decedent involving a new business venture in San Diego; or (3) striking plaintiff's pleadings and resolving all issues in favor of and granting judgment to the DeMatteis, if plaintiff fails to comply with DeMatteis's post-deposition discovery demands.

CPLR 3126 provides various penalties that may be imposed on a party that wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to article 31 of the CPLR. "A complete failure to disclose is not a prerequisite to the imposition of sanctions pursuant to CPLR 3126, the relevant factor being whether the failure to disclose relevant documents was willful and contumacious" (*Waltzer v Tradescape & Co., LLC*, 31 AD3d 302, 303 [1st Dept 2006]). A court may strike an answer as a sanction under CPLR 3126 "where the moving party establishes that the failure to comply was willful, contumacious or in bad faith. Upon such showing, the burden shifts to the nonmoving party to demonstrate a reasonable excuse" (*Fish v Schindler*, 75 AD3d 219, 220 [1st Dept 2010] [*internal quotation marks and citation omitted*]). Striking defendant's answer may be appropriate where, for example, defendant disobeys three successive court orders directing him to appear for depositions, as this "constitute[s] precisely the sort of dilatory and obstructive, and thus contumacious, conduct warranting the striking of [his] answers" (*Reidel v Ryder TRS, Inc.*, 13 AD3d 170, 171 [1st Dept.

2004)). However, because actions should be resolved on the merits whenever possible, the moving party must make a “clear showing” that defendant’s failure to comply was willful and contumacious, which generally requires a repeated and persistent pattern of noncompliance with multiple, successive disclosure orders (*see Rodriguez v United Bronx Parents, Inc.*, 70 AD3d 492 [1st Dept 2010]). The “mere lack of diligence in furnishing some of the requested materials may not be grounds for striking a pleading” (*Elias v City of New York*, 71 AD3d 506, 507 [1st Dept 2010]). In such cases, “some lesser sanction, monetary or otherwise, is warranted...” (*De Socio v 136 East 56th Street Owners, Inc.*, 74 AD3d 606, 608 [1st Dept 2010]).

DeMatteis has not sufficiently established a persistent pattern of willful noncompliance by plaintiff of successive disclosure orders, which would warrant the drastic remedy of striking plaintiff’s pleadings. Because the record does suggest a lack of diligence from plaintiff in providing requested materials, a lesser sanction may be warranted.

DeMatteis also seeks to preclude plaintiff from introducing certain evidence at trial. “It is well settled that in order to impose the drastic remedy of preclusion, the court must determine that the offending party’s failure to comply with discovery demands was willful, deliberate and contumacious” (*Siegman v Rosen*, 270 AD2d 14, 15 [1st Dept 2000]; citing CPLR 3126 [2]; *Dexter v Horowitz Mgt.*, 267 AD2d 21 [1st Dept 1999]; *Maillard v Maillard*, 243 AD2d 448 [2d Dept 1997]). However, the Appellate Division, First Department, has held that a trial court erred in issuing an order pursuant to CPLR 3126 precluding plaintiff from introducing certain categories of evidence, “where there was no discovery order outstanding as to those items and no notice had been given to plaintiff that the imposed sanction for failure to comply with discovery requests was imminent” (*Cherokee Owners Corp. v DNA Contracting, LLC*, 74 AD3d 411, 411

[1st Dept.2010)].

Here, the drastic remedy of preclusion is inappropriate because DeMatteis has not established that plaintiff was given notice that preclusion was imminent if plaintiff failed to immediately provide the requested discovery. However, the record does show that plaintiff, or his attorney, has seemingly approached his discovery obligations without exercising the appropriate degree of diligence or good faith required. As a result, the court has resolved any ambiguities in the record as to particular discovery demands in DeMatteis's favor. Moreover, plaintiff is hereby put on notice that his failure to strictly comply with the directives provided in this order within the time provided below will result in sanctions to be determined at that time, including, but not limited to, a possible order of preclusion prohibiting plaintiff from offering evidence in support of his claim of pecuniary loss and or monetary sanctions.

Accordingly, it is

ORDERED that DeMatteis's motion to compel is granted, to the extent set forth above; and it further

ORDERED that all document productions required by this decision and order must be produced within 45 days of notice of entry of this decision and order by uploading the documents to the *In re 91st Street Crane Collapse* litigation website's document depository, in accordance with Case Management Order #1 (index no. 771000/2010, Doc. 442); and it is further

ORDERED that any affidavit to be provided pursuant to this decision and order must be produced within 45 days of notice of entry of this decision and order, by providing the original copy of each affidavit to counsel for defendant Leon D. DeMatteis Construction Corporation and uploading a copy of the e-filing website for both this action (index no. 117294/2008) and the *In*

re 91st Street Crane Collapse litigation (index no. 771000/2010); and it is further

ORDERED that any authorization served pursuant to this decision and order must be provided to counsel for New York Crane & Equipment Corp., Glenn Fuerth, Esq., within 20 days of notice of entry of this decision and order, in accordance with the procedure set forth in Case Management Order #1 (index no. 771000/2010); and it is further

ORDERED that any discovery previously produced by plaintiff in this action that has not been uploaded to the *In re 91st Street Crane Collapse* litigation website's document depository pursuant to Case Management Order #1 (index no. 771000/2010) must be uploaded within 20 days of notice of entry of this decision and order; and it is further

ORDERED that the branch of DeMatteis's motion for sanctions under CPLR 3126 is granted solely to the extent that plaintiff is precluded from offering any evidence at trial concerning pecuniary loss and damages, including, but, not limited to, the so-called "San Diego Project," unless within 45 days of notice of entry of this decision and order, plaintiff submits the disclosure as specified in this decision and order; and it is further

ORDERED that the branch of DeMatteis's motion which seeks to strike plaintiff's pleadings is denied; and it is

ORDERED that the defendant DeMatteis is awarded statutory costs on the motion in the amount of \$100 pursuant to CPLR 8106 and 8202.

This constitutes the decision and order of the court.

Dated: August 16, 2011
New York, New York



J.S.C.