13th & 14th St. Realty, LLC v Hudson Meridian Constr. Group LLC

2013 NY Slip Op 31218(U)

June 5, 2013

Sup Ct, New York County

Docket Number: 100061/11

Judge: Barbara Jaffe

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

PRESENT: BARBARA JAFFE J.S.C. Justice PART 12

Bd. Mngrs A Building
VS -v-
13th & 14th Street Realty

INDEX NO. 100061/2011
MOTION DATE
MOTION SEQ. NO. 004
MOTION CAL. NO.

The following papers, numbered 1 to ______ were read on this motion to/for Dismiss

	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

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

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

Dated: JUN 05 2013

J.S.C.
BARBARA JAFFE
J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

---x

THE BOARD OF MANAGERS OF THE A BUILDING CONDOMINIUM, *et al.*,

Plaintiffs,

-against-

13TH & 14TH STREET REALTY, LLC, *et al.*,

Defendants,

Index No. 100061/11

DECISION AND ORDER

Argued: 1/23/13, 3/27/13
Mot. Seq. Nos.: 004, 006, 007, 011

---x

13TH & 14TH STREET REALTY, LLC,

Plaintiff,

-against-

HUDSON MERIDIAN CONSTRUCTION GROUP LLC, CRYSTAL CURTAIN WALL SYSTEM CORP., and CRYSTAL WINDOW & DOOR SYSTEMS, LTD.,

Defendants,

Index No. 651062/11

Mot. Seq. No.: 001

---x

HUDSON MERIDIAN CONSTRUCTION GROUP LLC,

Third-party plaintiff,

-against-

DEMAR PLUMBING CORP., *et al.*,

Third-party defendants.

Third-party Index No. 590536/12

---x

BARBARA JAFFE, J.:

By order of December 9, 2011, under Index No. 100061/2011, the two above-captioned actions, along with *Luke Baker, et al. v 13th & 14th Street Realty, LLC, et al.*, Index No. 100403/2011, *Joseph DelRio, et al. v 13th & 14th Street Realty, LLC, et al.*, Index No. 101133/2011, and *Atlantic Specialty Insurance, etc. v 13th & 14th Street Realty, LLC, et al.*, Index

No. 112397/2010, were transferred to this part for purposes of joint supervision of discovery. Motion sequence numbers 001 and 004, 006, 007, and 011 are consolidated for disposition.

I. OVERVIEW

The first action is brought by the Board of Managers (Board) of the A Building Condominium (Condominium), for itself and on behalf of the individual unit owners of the Condominium, located at 425 East 13th Street, New York, NY (Buildings). Defendants 13th & 14th Street Realty, LLC and the Ascend Group, LLC were sponsors of the Condominium offering plan. Defendants Benjamin Shaoul and Robert Kaliner are the principals of the sponsors who, together with defendants 13th & 14th Street Realty, LLC, and the Ascend Group, LLC, are included in all references to sponsors herein.

Defendants John A. Cetra Architecture, PC/Cetra/Ruddy, Inc., and John A. Cetra (Architects) were the architects retained by sponsors to design the Buildings and prepare the offering plan. Defendant Hudson Meridian Construction Group (Hudson) was the construction company retained by sponsors to construct the Buildings. Defendant Taube Management Corp. (Taube) was the management company initially retained by sponsors to manage the Condominium. It was succeeded by Magnum Management, LLC (Magnum). Defendants Crystal Curtain Wall System Corp. (Crystal Curtain), Crystal Window & Door Systems, Ltd. (Crystal Window, the parent of Crystal Curtain) (collectively, Crystal defendants), and TingWall, Inc. (TingWall) were allegedly responsible for the installation, design, and manufacture of the window and curtain wall systems of the Buildings.

In the complaints, it is alleged that defendants knowingly and intentionally, and/or negligently engaged in conduct constituting violations of the New York City Building Code, and

failed to meet the standards of locally accepted building practices. This conduct allegedly resulted in construction defects, including defects in the physical, structural, mechanical, and design elements of the Buildings. Plaintiffs also allege defective installation of the fire protection, plumbing, electrical, heating, cooling, ventilation, and roofing systems; defective installation of parapets, copings, and railings; spall, cracking, and dislodging of balcony concrete, causing leakage; defects in the exterior walls; improper installation of windows; defective flooring; and other interior workmanship defects. And they complain that sponsors and the managing agents of the Condominium knowingly and intentionally, and/or negligently raided and misused Condominium funds.

In the first action, 100061/11, plaintiffs seek: (I) monetary damages in an amount to be determined at trial, but believed to exceed $10,000,000, based on causes of action for negligence, professional malpractice, defective construction, breach of warranty, fraud and/or negligent misrepresentation, breach of contract, breach of fiduciary duty obligations, and conversion; (ii) injunctive relief; (iii) declaratory relief; (iv) attorney fees and costs incurred by plaintiffs; and (v) punitive damages.

In the second action, 651062/11, plaintiffs seek to recover for: (I) negligence and/or negligent supervision by Hudson; (ii) breach of contract by Hudson; and (iii) negligence, breach of contract, breach of warranty, and breach of guaranty as against Crystal Curtain.

In the third-party action, 590536/12, Hudson seeks, from a series of subcontractors, common-law and contractual indemnification, recovery for negligence and contribution, breach of contract damages, and recovery for failure to procure insurance coverage. No motions pend in the third-party action.

In a fourth, related action against sponsors pending in Part 11 of this court, plaintiffs Giovanni Villamar and Julissa Cruz seek: (I) to rescind their original purchase agreement; (ii) a declaratory judgment directing sponsors to return amounts tendered for the purchase of their unit; (iii) breach of contract; (iv) damages for fraud or fraudulent concealment; (v) negligent misrepresentation; (vi) breach of the implied covenant of good faith and fair dealing; and (vii) deceptive trade practices. (*Giovanni Villamar and Julissa Cruz v 13th and 14th Street Realty LLC* [Index No. 105759/10]).

II. TINGWALL'S MOTION TO DISMISS

By notice of motion dated December 1, 2011, TingWall moves pursuant to CPLR 3211 (a)(1) and (7) for an order dismissing the complaint upon documentary evidence and for failure to state a claim upon which relief may be granted. Plaintiffs advance three claims specifically against TingWall: breach of contract, professional malpractice, and negligence. TingWall argues that plaintiffs have no direct contractual relationship with it, and that therefore, the action should be dismissed.

On a motion to dismiss, the pleading is to be afforded a liberal construction. (CPLR 3026). The court accepts as true the facts as alleged in the complaint, accords the plaintiffs the benefit of every possible favorable inference, and determines only whether the facts as alleged fit within any cognizable legal theory. (*Morone v Morone,* 50 NY2d 481, 484 [1980]; *Rovello v Orofino Realty Co.,* 40 NY2d 633, 634 [1976]). Pursuant to CPLR 3211(a) (1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law. (*See e.g. Heaney v Purdy,* 29 NY2d 157 [1971]). In assessing a motion under CPLR 3211(a)(7), however, a court may freely consider affidavits submitted by

the plaintiff to remedy any defects in the complaint (*Rovello,* 40 NY2d at 635), and "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." (*Guggenheimer v Ginzburg,* 43 NY2d 268, 275 [1977]; *Rovello,* 40 NY2d at 636; *see generally Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

A. Contentions

TingWall contends that as the contracts allegedly breached were between defendants and Advanced Building Systems, Inc. (ABS), a Delaware corporation and a subsidiary of TingWall, and not directly with TingWall, plaintiffs are not third-party beneficiaries, and thus, the professional malpractice claims fail. It also argues that as plaintiffs' causes of action for negligence merge into the professional malpractice claim, they too fail.

According to the allegations set forth by plaintiffs in the complaint, TingWall was retained by other defendants to design, engineer, and install the window and curtain wall systems of the Buildings. While ABS is identified as a party to two licensing agreements whereby Crystal Wall was permitted to use and incorporate its patented technologies (*see e.g.* November 26, 2002 "Licensing Agreement"), plaintiffs maintain that the contractual relationship, in terms of the services provided, was with TingWall.

B. Analysis

In paragraph 16 of the Licensing Agreement, licensor ABS assigns to TingWall its performance requirements and consideration for all services set forth in paragraphs 4, 5, 6, 7, 8b, 8c, and 13, and Exhibits B and D of the agreement. ABS also represents in the agreement that TingWall agrees to accept the assignment. Engineering services and design drawings are referenced in paragraphs 4 and 7, respectively. Moreover, emails from Dr. Ting of TingWall

include a handout for a meeting with a description of "TingWall Behavior on E 13th Project," and a reference to "slab edge location tolerance," "deflection components," and the effect of each on "column creep" and "slab edge creep." Several drawings illustrate the points.

Plaintiffs submit numerous drawings by TingWall, produced by Crystal Window and identified as the "TingWall Project Drawings, November 3, 2006," which include TingWall General Notes, TingWall Elevations, TingWall Details, and TingWall Wall Sections, all bearing the name of 13th & 14th Street Realty, LLC, the name of the architect, and the address of the Buildings. Architects submit "TingWall Project Drawings" dated September 28, 2006, which include TingWall General Notes, TingWall Elevations, and TingWall Details, again, all bearing the name of 13th & 14th Street Realty, LLC, and the address of the Buildings. Sponsors submit TingWall plans and drawings, apparently obtained from Architects and bearing the TingWall name and identifying them to 13th & 14th Street Realty, LLC and the specific Buildings.

Given this documentation naming TingWall as assignee of the "performance requirements and consideration for all services," and notwithstanding the general terms of the License Agreements, the absence of a contract between TingWall and defendants does not warrant a dismissal of the complaint as against TingWall. In any event, the documentation, at the very least, raises a question as to TingWall's role in the construction of the Buildings, and controverts its assertion that there is no contractual relationship between it and the Buildings.

"In order for a contract to confer enforceable third-party beneficiary rights, it must appear that 'no one other than the third party can recover if the promisor breaches the contract[, or that] the contract language otherwise clearly evidences an intent to permit enforcement by the third party.'" (*Fourth Ocean Putnam Corp. v Interstate Wrecking Co.*, 66 NY2d 38, 45 [1985]; *see*

also Artwear v Hughes, 202 AD2d 76, 81-82 [1st Dept 1994]). Here, the parties to the License Agreements understood that "performance requirements and consideration for all services" would be assigned to TingWall, thereby warranting the reasonable inference that ABS was disavowing liability for performance requirements under the contract, and that a third party could sue based on those requirements. Such inferences preclude a dismissal. (*Morone v Morone,* 50 NY2d 481, 484 [1980]).

Moreover, there is much evidence of TingWall's ongoing participation in the construction of the Buildings, as TingWall project drawings were issued for mock-ups as early as September 11, 2006, and pre-issued and re-issued for approval and construction of the Buildings in 2007. The drawings all bear the name of 13th & 14th Street Realty, LLC, and the address of the Buildings. In addition, Architects reviewed and certified compliance with the drawings throughout the construction. This evidence of active participation in the construction of the Buildings is, independently, sufficient to withstand a motion to dismiss all the tort causes of action, without regard to the absence of a contractual relationship, because these causes of action rely on a defect in design, manufacture, and installation, not only breach of a contractual duty. (*See Pramer S.C.A. v Abaplus Intl. Corp.*, 76 AD3d 89, 99-100 [1st Dept 2010] [breach of duty distinct from contractual obligations may result in liability for tort]; *cf Clark-Fitzpatrick v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987] [in some circumstances a contracting party may be separately liable in tort arising from breach of a duty distinct from, or in addition to, breach of contract]).

In order to establish a cause of action for professional malpractice, plaintiffs must show that TingWall was aware that its design services were to be used and relied upon for the

particular purpose of constructing the Buildings, and there must have been conduct directly linking TingWall to plaintiffs, thereby evincing TingWalls's understanding of the reliance. (*Compare Credit Alliance Corp. v Arthur Andersen & Co.*, 65 NY2d 536, 551 [1985]; *Bullmore v Ernst & Young Cayman Is.*, 45 AD3d 461, 464 [1st Dept 2007]).

Here, as noted above, TingWall prepared drawings that were specifically issued and re-issued to plaintiffs and the parties constructing the building, with the address of the building on them, for "approval," before and throughout the construction phase. This constituted an active exchange of expertise, not mere authorization to use the TingWall product. TingWall's allegation that all of these services were rendered without knowledge that the parties to whom the drawings were being sent were relying on them is fatally conclusory.

III. PLAINTIFFS' MOTION FOR DISCOVERY SANCTIONS

By notice of motion dated July 3, 2012, plaintiffs move for an order imposing discovery sanctions against sponsors (mot. seq. no. 006). Specifically, they seek to preclude sponsors from relying at trial on any documents or evidence responsive to their demand for documents concerning curtain wall plans and testing (Pl. Demand, dated Feb. 10, 2012), in their possession, custody or control other than a specific set of documents identified as "Sponsor 1 to Sponsor 32 and DLLL 1 to DLLL 5141" in the discovery materials.

They also seek an order: (I) declaring that sponsors have waived any claim of privilege or immunity from production with regard to any document regarding water testing undertaken by the consulting firm Simpson Gumperz & Heger (SGH) in or about April 2011, due to sponsors' failure to provide a privilege log as directed by the court; (ii) directing the immediate production of all reports and other documents relating to later testing undertaken by SGH in or about April

2011; (iii) declaring that sponsors have waived any claim of privilege or immunity from production with regard to any other document responsive to their demand, other than claims of privilege asserted by redactions contained in documents numbered "DLLL 1 to DLLL 5141"; (iv) imposing monetary discovery sanctions against sponsors and their attorneys, D'Agostino, Levine, Landesman & Lederman, LLP (DLLL) in an amount not less than $2,000.00; and (v) imposing additional monetary discovery sanctions against sponsors and DLLL in the amount of costs, attorney fees, and expenses in making this motion and plaintiffs' prior efforts at securing compliance with their demand.

As of February 3, 2012, the occupants of the Buildings were being inconvenienced with leaks that persisted in the curtain walls. Thus, the justice then presiding in this part, pursuant to CPLR 3120, so-ordered a stipulation that "document discovery and/or requests for on-site inspections may proceed notwithstanding any party filing a dispositive motion." Plaintiffs hired their own expert, Superstructures Engineers & Architects (SEA), to investigate the potential defects in the curtain-wall system, and propose repairs, and they needed background information on the curtain-wall system, including floor plans, drawings, specifications, and other documents concerning any probes and/or testing done to the curtain wall, as well as documents concerning any repairs done. On February 10, 2012, plaintiffs served their demand on all parties.

On or about March 26, 2012, sponsors produced 32 pages of plans and drawings ("Sponsor 1-32"), and on or about March 27, 2012, they produced a formal response indicating that with regard to each demand, they "will produce responsive documents to the extent they exist and are within [their] possession, custody and control, and to the extent they are not privileged." Sponsors' continued failure, more than a year later to produce responsive

documents or a privilege log after this undertaking could have concluded the matter.

Nonetheless, at a discovery conference held on March 28, 2012, the court so-ordered a stipulation directing defendants to provide the remaining discovery under plaintiffs' demand by April 13, 2012, and also directed, with respect to the second action, that "responses to discovery demands in this case [ ] be served on all parties in related action, Index # 100061/2011."

It is undisputed sponsors produced no responsive documents. Nor did they timely advise as to the existence of other responsive documents, or produce a privilege log showing that they were withholding any documents under a claim of privilege.

By letter dated April 20, 2012, plaintiffs again asked that sponsors produce all responsive documents or, if no such documents exist, a formal response stating that all responsive documents have been produced. Sponsors did not respond.

At a discovery conference held on May 16, 2012, plaintiffs again asserted that sponsors had failed to produce any documents responsive to their demand, other than the 32 pages previously provided, and had failed to state whether the production was complete. The court so-ordered sponsors to "provide supplemental responses to [plaintiffs' demand] by May 30, 2012." That order went unheeded.

At a discovery conference held on May 30, 2012, at which counsel for sponsors indicated that they had a report on water testing on the building's curtain wall by consultants SGH, when asked to produce it, counsel refused, claiming privilege. Plaintiffs maintain, without dispute, that no privilege log was ever produced containing the SGH Report.

At oral argument on TingWall's motion to dismiss, held on June 26, 2012, plaintiffs advised the court and sponsors that they intended to seek discovery sanctions in lieu of another

conference on the discovery matter.

Concurrent with the course of discovery related to plaintiffs' demand, the *Villamar* action was proceeding in Part 11. In that action, the plaintiffs sued sponsors for, among other things, defects in the curtain-wall system causing repeated water leaks in their particular unit, and limited themselves to the remedy of rescission of the Purchase Agreement for the unit based upon a several equitable theories.

At a January 19, 2012 hearing on an order to show cause, that court ordered, under threat of discovery sanctions, that sponsors produce all documents as ordered in a September 29, 2011 order within 45 days, with the proviso that "if defendant fails to comply with this order, sanctions per CPLR 3216 will be imposed, including but not limited to the determination of the issues upon which the discovery is material and relevant in accordance with plaintiffs' claims . . . ."

In the instant action, on July 12, 2012, sponsors produced a CD-ROM disc that they had produced in *Villamar* as early as March 5, 2012, containing approximately 5,141 pages, referred to above as "DLLL 1 to DLLL 5141," relating to various issues in the Buildings, including documents within the scope of plaintiffs' demand. It thus appears that despite directions from the previously presiding justice, and notwithstanding their possession of the relevant documents, sponsors failed to comply, by not: (I) producing the responsive documents; (ii) advising the parties that there were no further documents; or (iii) producing a privilege log showing that some documents would be withheld under a claim of privilege.

Plaintiffs thus seek sanctions precluding sponsors from relying at trial on any documents responsive to plaintiffs' demand other than those previously produced (Sponsor 1-32 and DLLL 1-5141).

The nature and degree of the penalty to be imposed pursuant to CPLR 3126 is a matter within the court's discretion. (*Kingsley v Kantor*, 265 AD2d 529, 529 (2d Dept 1999). On the one hand, there is a strong public policy in favor of resolving cases on the merits. (*See e.g. Peter Gisondi & Co. v Evans Dev. Corp.*, 131 AD2d 651, 651 [2d Dept 1987]). As such, in order to invoke the drastic remedy of preclusion for failure to disclose pursuant to CPLR 3126 (2), the court should be fully convinced that the "offending party's lack of cooperation with disclosure was willful, deliberate, and contumacious." (*Blauman-Spindler v Blauman,* 68 AD3d 1105, 1107 [2d Dept 2009]; *Pryzant v City of New York*, 300 AD2d 383, 383 [2d Dept 2002]; *Kingsley*, 265 AD2d at 529).

On the other hand, "[t]he public policy favoring resolution of cases on their merits is not promoted by permitting a party . . . to impose an undue burden on judicial resources to the detriment of all other litigants. Nor is the efficient disposition of the business before the courts advanced by undermining the authority of the trial court to supervise the parties who appear before it." (*Arts4All, Ltd. v Hancock*, 54 AD3d 286, 286-287 [1st Dept 2008], *affd* 12 NY3d 846 [2009]).

Here, willful and contumacious intent is reasonably inferred from sponsors' repeated and unexplained failures to comply with discovery demands and orders. (*See Arpino v F.J.F. & Sons Elec. Co.*, 102 AD3d 201, 210 [2d Dept 2012] [defendants' neglect of court-ordered deadline and misrepresentation of their knowledge or possession of clearly discoverable material and information, without providing any excuse for doing so, deemed willful and contumacious]). Moreover, sponsors were warned that a motion for sanctions under CPLR 3126 would ensue. (*See Northern Leasing Sys., Inc. v Estate of Turner*, 82 AD3d 490, 490 [1st Dept 2011]

[imposition of sanctions affirmed where willful and contumacious refusal to cooperate with discovery inferred from two years of noncompliance with plaintiff's requests and defendants' failure to comply with three court orders and warning them of sanctions]). Sponsors remain, to date, in delinquency of those directions from the court.

A. Waiver of privilege as to the SGH Report

As sponsors also failed to provide a privilege log related to plaintiffs' demand as directed by the court, plaintiffs seek a declaration that sponsors waived any claim of privilege or immunity from production with regard to the SGH Report, or any related document.

Some New York courts apply factors set forth by the Eastern District of Washington in *Hearn v Rhay,* 68 FRD 574 (ED Wash 1975), when determining whether a privilege has been waived. These factors include: (I) whether the assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting party; (ii) whether through this affirmative act the asserting party put the protected information in issue by making it relevant to the case; and (iii) whether application of the privilege would deny the opposing party access to information vital to its defense. (*See Goldberg v Hirschberg*, 10 Misc 3d 292, 296-297 [Sup Ct, NY County 2005]; *see also Jakobleff v Cerrato, Sweeney & Cohn*, 97 AD2d 834, 835 [2d Dept 1983] [finding waiver "where invasion of the privilege is required to determine the validity of the client's claim or defense and application of the privilege would deprive the adversary of vital information.").

Here, the withholding of the SGH Report does not ultimately result in plaintiffs being denied access to information vital to their claims. Rather, plaintiffs assert that the delay in producing documents, including the SGH Report, "caused [SEA] to spend a substantial amount

of field and office time investigating the structure and design of the Curtain Wall System in an effort to understand its operation and method of installation," and that "it is impossible to quantify the exact amount of time [SEA] would have saved had this information been provided . . . ." (Reply memo at 10). Consequently, plaintiffs have otherwise acquired the information they need to proceed with this matter, and the SGH Report is no longer vital to their claims.

Nonetheless, any information responsive to plaintiffs' demand, including the SGH Report, which is not listed in a duly served privilege log, should be excluded as privileged. (*See Anonymous v High School for Envtl. Studies,* 32 AD3d 353, 359-360 [1st Dept 2006] ["defendants' failure to supply a privilege log or indeed, any timely substantive responses to the court's numerous orders amounts to a waiver of any claim of privilege for the documents sought"]). Although directed to provide a privilege log, sponsor have failed to comply, thereby foregoing any claim to privilege. Consequently, privilege on all documents, including the SGH Report, and exclusive of claims of privilege asserted by redactions contained in documents numbered Sponsor 1-32 and DLLL 1-5141, is waived to the extent provided below.

Plaintiffs also seek monetary discovery sanctions against sponsors and their attorneys, DLLL, in an amount not less than $2,000.00, and additional recompense for the good faith efforts of plaintiffs to seek compliance with their demand, and in making this motion.

The record reflects that, as early as March 5, 2012, sponsors had in their possession, and had prepared documents within the scope of plaintiffs' demand. Since that date, sponsors were instructed by the court no fewer than three times to produce the documents. To date, for instance, sponsors have persisted in failing to produce a formal response stating that all relevant documents have been produced or a privilege log.

Given that the relief herein, conditionally granting the motions to preclude and for a declaration of waiver, could easily have been avoided by sponsors if they had complied with court directions (*see Anonymous,* 32 AD3d at 359-360), the application for costs, attorney fees, and expenses for making this motion is granted in the amount of $2,000.00. (*See United States Fire Ins. Co. v J.R. Greene*, 272 AD2d 148, 149 [1st Dept 2000] ["[u]nder circumstances that evince the willful frustration of plaintiffs' discovery efforts" sanctions are appropriate]).

IV. MOTION TO AMEND CAPTION/MOTION TO CONSOLIDATE WITH *VILLAMAR* ACTION

By notice of motion dated August 29, 2012, Villamar plaintiffs seek an order granting leave to amend the caption and parties (mot. seq. no. 007) by withdrawing their names as plaintiffs without prejudice to their present or future claims. And by order to show cause dated February 25, 2013, defendants in the first action seek an order directing consolidation of the *Villamar* action and the third-party action with the first action for all purposes, including discovery. They oppose the motion of Villamar plaintiffs to withdraw without prejudice, and maintain that any such withdrawal, if granted should be with prejudice.

On March 27, 2013, at oral argument before this court, the Villamar plaintiffs indicated that they would withdraw from this action with prejudice. (*See* amended transcript of proceedings of 3/27/2013. Thus, there remains no contention about their request to withdraw from the first action.

However, sponsors still seek to consolidate the *Villamar* action with this action. Pursuant to CPLR 602 (a), "[w]hen actions involving a common question of law or fact are pending before a court, the court, upon motion, . . . may order the actions consolidated . . . ." The decision to

consolidate matters is within the sound discretion of the court. (*Matter of Hill v Smalls*, 49 AD2d 724 [1st Dept 1975]). Where actions involve common questions of law or fact, there is a preference for consolidation in the interest of judicial economy, unless the rights of a party are substantially prejudiced thereby. (*Matter of Progressive Ins. Co.* [*Vasquez – Countywide Ins. Co.*], 10 AD3d 518, 519 [1st Dept 2004]; *Raboy v McCrory Corp.*, 210 AD2d 145, 147 [1st Dept 1994]).

The fundamental thrust of the *Villamar* action is rescission of the Purchase Agreement for the unit belonging to Villamar plaintiffs, whereas plaintiffs here do not seek rescission. Moreover, in *Villamar*, there pends a motion for partial summary judgment.

And *Villamar* has been pending in Part 11 for some three years (*see e.g. Amitrano v Board of Educ. Of City of N.Y*, 55 NYS2d 535 [Sup Ct, Kings County 1945] [failure to consolidate for two years led to denial of motion]), discovery is, or is nearly, complete (*see MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 34 Misc 3d 1202[A], 2011 NY Slip Op 52323 [U] [Sup Ct, NY County 2011], *affd* 94 AD3d 255 [1st Dept 2012] [denying consolidation of causes of action sharing common legal and factual issues as the actions were in very different phases of discovery]), defendants have affirmed that as of March 12, 2013, they have produced all documents in their possession that are responsive to plaintiffs' demands, and depositions were scheduled for April 18 through May 16, 2013.

Meanwhile, in this action, discovery is nowhere near complete. Some parties are still at the pleading stage, document discovery is still underway, and dates for depositions have not been scheduled. (*See Maurer v Maurer*, 96 AD3d 417 [1st Dept 2012] ["[t]he motion court properly exercised its discretion in denying consolidation of the actions since one action was ready for

trial and the others were not"]).

Although many issues in *Villamar* parallel issues here such as third-party actions based on theories of contractual and common-law indemnification, the rights of Villamar plaintiffs to continue their action in Part 11 apace outweighs any benefit to sponsors and third-party defendants to avoid having to defend their positions in two venues.

V. MOTION TO QUASH SUBPOENA AND FIX CONDITIONS

By notice of motion dated October 20, 2011, Crystal defendants move pursuant to CPLR 2304, for an order quashing a subpoena *duces tecum* served by plaintiffs on nonparty Utica National Assurance Group (Utica). Their initial objection was that due to the bankruptcy of Crystal Curtain, under which an automatic stay under 11 USC § 362 renders the subpoena void *ab initio*. Utica also objects to the subpoena on the grounds that it: (I) is overbroad and burdensome; (ii) seeks information not subject to disclosure and otherwise protected as attorney work product and by the attorney-client privilege; and (iii) seeks material that is irrelevant to the liability issues raised in the action.

The information plaintiffs seek from Utica is to determine whether any insurance coverage is available to Crystal defendants in this action. As of April 25, 2012, the parties entered into a so-ordered stipulation providing that Utica would: (I) provide policies under which Crystal Window is covered; (ii) provide copies of the most recent disclaimer of coverage and/or a reservation of rights letter setting forth Utica's current coverage position, with redactions, and a log providing the basis for redaction; and (iii) after those submissions, allow plaintiffs the opportunity to object to the redactions.

Crystal defendants provide a "Partial Disclaimer of Coverage and Reservation of Rights"

(First Disclaimer), and "Third Supplemental Reservation of Rights and Partial Disclaimer of Coverage" (Third Disclaimer), and plaintiffs object to the redactions. Crystal defendants argue that the redactions are proper because the information contained within the disclaimer is irrelevant and beyond the scope of the subpoena, and/or prepared in anticipation of litigation.

On May 30, 2012, the parties appeared before the justice previously presiding in this part for a hearing on the matter. At that hearing, the justice determined that the email and name of Crystal Curtain's general counsel, as redacted on the first page of both the First and Third Disclaimers, was not privileged. The name of the counsel was given as Ryan P. Burke. The court also determined that the words "related to mold," as contained on the first page of the Third Disclaimer, was also not privileged.

This court has reviewed the remaining information *in camera* and finds that the third redaction of the First Disclaimer is not privileged. The redaction is "[p]lease allow this correspondence to serve as an acknowledgment of an ACORD form, dated May 25, 2011 from your agent Karen Pierson of Sterling and Sterling, Inc." The remaining redacted language, in both the First and the Third Disclaimers, is either irrelevant, or subject to the attorney-client privilege.

The request to remove the redactions from the First and Third Disclaimers is partially granted to the extent of the language disclosed in open court, and the language quoted hereinabove, and it is otherwise denied.

VI. CONCLUSION

Accordingly it is hereby

ORDERED, that, with reference to Index No. 100061/11 (mot. seq. no. 004), the motion

of TingWall, Inc. to dismiss the complaint is denied; it is further

ORDERED, that, with reference to Index No. 100061/11 (mot. seq. no. 006), the motion of defendants for discovery sanctions against defendants 13th & 14th Street Realty, LLC, the Ascend Group, LLC, Benjamin Shaoul, and Robert Kaliner is granted as follows:

(A) defendants named in this paragraph are precluded from relying at trial on any documents or evidence responsive to the "Plaintiffs' Demand for the Production of Documents Concerning Curtain Wall Plans and Testing," dated February 10, 2012, other than the documents identified as SPONSOR 1-32 and DLLL 1-5141; and

(B) 30 days after service of this order with notice of entry, unless a privilege is log is provided, this court will issue, upon written affirmation of counsel, without need of any further hearing or submissions, an order that the defendants named in this paragraph have waived any claim of privilege or immunity from production, exclusive of claims of privilege asserted by redactions contained in documents numbered SPONSOR 1-32 and DLLL 1-5141, with regard to any report on water testing on the building's curtain wall by consultants Simpson Gumperz & Heger, or any other related document; and

(C) the court having determined that defendants named in this paragraph could have avoided the need for this application simply by complying with repeated court directions, the application for costs, attorney fees, and expenses for making this motion is granted, plaintiffs' motion for costs is granted and counsel for the defendants shall reimburse plaintiffs for actual expenses reasonably incurred, and

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reasonable counsel fees in the total amount of $2,000, and plaintiffs are to provide defendants with a statement of expenses within a week of the date of this decision and order; it is further

(i) ORDERED, that payment of these costs shall be delivered to counsel for plaintiffs and written proof of such payment shall be provided to the Clerk of Part 12 within 30 days after service of a copy of this order with notice of entry; it is further

(ii) ORDERED, that, in the event timely payment is not made, the Clerk of the court, upon service upon him of a copy of this order with notice of entry and an affirmation or affidavit reciting the fact of such non-payment, shall enter a judgment in favor of the plaintiffs and against said counsel in the aforesaid sum; it is further

ORDERED, that, with reference to Index No. 100061/11 (mot. seq. no. 007), the motion of plaintiffs Giovanni Villamar and Julissa Cruz to amend the caption by withdrawal of their names as plaintiffs granted, with prejudice; it is further

ORDERED, that all papers, pleadings, and proceedings in the above-entitled action be amended by removing the names of Giovanni Villamar and Julissa Cruz as plaintiffs; it is further

ORDERED, that counsel for plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to amend their records to reflect such change in the caption herein; it is further

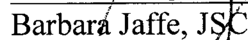
ORDERED, that with reference to Index No. 100061/11 (mot. seq. no. 011), the motion for an order, pursuant to CPLR 602, consolidating the action entitled *Giovanni Villamar and*

Julissa Cruz v 13th & 14th Street Realty LLC (Index No. 105759/10) and third-party action *13th & 14th Street Realty LLC v Hudson Meridian Construction Group Inc., et al.* (Index No. 590144/13) for all purposes, including discovery is denied; it is further

ORDERED, that with reference to Index No. 651062/11 (mot. seq. no. 001), the motion to quash a subpoena served upon nonparty Utica National Assurance Group and fix conditions is granted only to the extent hereinabove described, and is otherwise denied; and it is further

ORDERED, that all counsel are directed to appear for a status conference in Room 279, 80 Centre Street, on June 26, 2013, at 2:15 ~~a.m.~~/p.m.

ENTER:



Barbara Jaffe, JSC

DATED: June 5, 2013
New York, New York