

**Foucher v Port Auth. of N.Y. & N.J.**

2013 NY Slip Op 34147(U)

April 20, 2013

Supreme Court, New York County

Docket Number: 158315/2015

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 46

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TIMOTHY FOUCHER and KIMBERLY FOUCHER, Index No. 158315/2015

Plaintiffs

- against -

PORT AUTHORITY OF NEW YORK AND NEW  
JERSEY and DELTA AIR LINES, INC.,

Defendants

-----X

-----X

DELTA AIR LINES, INC. Index No. 595913/2015

Third Party Plaintiff

- against -

BAY CRANE SERVICE OF LONG ISLAND,  
INC.,

Third Party Defendant

-----X

DECISION AND ORDER

LUCY BILLINGS, J.S.C.:

The court grants plaintiffs' motions for penalties due to defendants' and third party defendant's nondisclosure and to compel their disclosure to the extent of compelling their disclosure as set forth below. C.P.L.R. § 3124. Before May 3, 2017, defendants and third party defendant shall respond to plaintiffs' requests for production of documents as follows. Defendants and third party defendant shall produce all written communications among their own employees and agents, between defendants' respective employees and agents, and between each

defendant's employees or agents and third party defendant's employees or agents regarding the hoisting and removal of the aircraft that plaintiffs claim caused Timothy Foucher's injury. These communications are not limited to communications among persons at the site of the aircraft.

Each defendant and third party defendant also shall serve on plaintiffs an affidavit from the person most knowledgeable, other than the party's attorney, attesting that the party has produced all the documents specified above that are in its possession, custody, or control, and attesting to each party's search for those documents. The affidavits shall detail where the documents are likely to be kept, where the search for them was conducted, the extent and thoroughness of the search, and the time spent conducting the search. Vazquez v. Lambert Houses Redevelopment Co., 110 A.D.3d 450, 451-52 (1st Dep't 2013); Henderson-Jones v. City of New York, 87 A.D.3d 498, 505 (1st Dep't 2011).

In response to plaintiffs' request for documents regarding any investigation conducted into the hoisting and removal of the aircraft, defendants have withheld interview notes and reports that defendants claim are protected material prepared in anticipation of litigation. C.P.L.R. § 3101(d)(2). By April 28, 2017, defendants shall identify the authors of these withheld interview notes and reports. This information is necessary to identify the particular notes or reports. C.P.L.R. § 3122(b).

Moreover, the protection under C.P.L.R. § 3101(d)(2) is construed narrowly, Hudson Ins. Co. v. Oppenheim, 72 A.D.3d 489,

construed narrowly, Hudson Ins. Co. v. Oppenheim, 72 A.D.3d 489, 490 (1st Dep't 2010), and is available only if plaintiffs do not show substantial need for the material or undue hardship in obtaining the material by other means. C.P.L.R. § 3101(d)(2); Spectrum Sys. Intl. Corp. v. Chemical Bank, 78 N.Y.2d 371, 377 (1991); Beach v. Touradji Capital Mgt., L.P., 99 A.D.3d 167, 171 (1st Dep't 2012); Drizin v. Sprint Corp., 3 A.D.3d 388, 390 (1st Dep't 2004); Lamitie v. Emerson Elec. Co.-White Rodgers Div., 208 A.D.2d 1081, 1082 (3d Dep't 1994). Therefore, if plaintiffs intend to depose any of these authors, plaintiffs may be able to obtain the material through the authors and, through them, the interviewees' identities and the interviews' purpose and contents.

Defendants have not, however, met their burden to show that the authors prepared their notes or reports in anticipation of litigation. Material prepared for litigation may include material obtained through an investigation, internal or otherwise, such as statements obtained through interviews, but is not always or necessarily prepared for litigation, here for litigation concerning injury from the hoisting and removal of the aircraft, rather than for prevention of similar occurrences, for example. Regarding the notes or reports by those authors whom plaintiffs do not intend to depose, therefore, defendants shall produce the notes and reports that defendants claim are protected to the court May 3, 2017, for an in camera review.

The parties' stipulation dated December 16, 2016, and the

stipulated Status Conference Order dated April 17, 2017, further resolve plaintiffs' motions for penalties due to defendants' and third party defendant's nondisclosure and to compel their disclosure. Any remaining relief sought by the motions shall be addressed May 3, 2017.

DATED: April 20, 2013



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LUCY BILLINGS. J.S.C.

**LUCY BILLINGS**  
J.S.C.