

**Barone v Elizabeth Firehouse, LLC**

2014 NY Slip Op 30231(U)

January 22, 2014

Sup Ct, New York County

Docket Number: 110404-2010

Judge: Eileen A. Rakower

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

HON. EILEEN A. RAKOWER

PRESENT: \_\_\_\_\_  
Justice

PART 15

Index Number : 110404/2010  
BARONE, LAURA  
vs.  
ELIZABETH FIREHOUSE, LLC  
SEQUENCE NUMBER : 003  
ORDER OF PROTECTION

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s) 1, 2, 3

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s) 7

Replying Affidavits \_\_\_\_\_ | No(s) \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

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

DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER

**FILED**  
JAN 28 2014  
NEW YORK  
COUNTY CLERKS OFFICE

Dated: 1/22/14

  
\_\_\_\_\_  
HON. EILEEN A. RAKOWER, J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
PRESENT: Hon. EILEEN A. RAKOWER PART 15

Justice

LAURA BARONE, individually and as Administratrix of the  
Estate of Vincent Barone, Deceased.

Plaintiff,

- v -

ELIZABETH FIREHOUSE, LLC AND, ELIZABETH  
STREET GALLERY, INC., AND ELIZABETH STREET  
GALLERY, LLC AND MAJOR ELEVATOR CORP.,

Defendants.

INDEX NO. 110404-2010

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 3

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion for/to

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

Answer — Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1, 2

3

**FILED**

JAN 28 2014

Cross-Motion: Yes  No  **NEW YORK COUNTY CLERKS OFFICE**

Plaintiff Laura Barone, individually and as administratrix of the Estate of Vincent Barone, brings this action for alleged injuries sustained by Vincent Barone as a result of an incident that occurred on June 25, 2009 at 209 Elizabeth Street when he was on duty as a firefighter, and responding to a fire emergency.

Defendants Elizabeth Firehouse, LLC, Elizabeth Street Gallery Inc., and Elizabeth Street Gallery, LLC (collectively, "Elizabeth Firehouse"), now move for an Order, pursuant to CPLR §§2302(a), 2304(a) and 3103 for a protective order and to quash the subpoena issued by co-defendant Major Elevator Corp. ("Major Elevator") to the non-party Russo Fire Investigations and Joseph P. Banahan, IAAI-CFI c/o Russo Fire Investigations ("Russo Fire Investigations" or "Russo Fire").

Elizabeth Firehouse is the owner of the building where the fire occurred and Major Elevator was retained to perform services at the building, specifically the installation of an elevator, at or around the time of the fire. There are issues as to

whether Major Elevator's use of an alleged cutting torch contributed to the fire.

The Subpoena served by Major Elevator on Russo Fire Investigations ("the Subpoena") seeks (1) the investigative file; (2) records, notes and memos pertaining to interviews with employees of Major; and (3) records, notes, memos, correspondences with Seneca Insurance Company ("Seneca"). The Subpoena also seeks a deposition of Russo Fire's investigator, Mr. Joseph Banahan, who took statements from Major's employees.

Elizabeth Firehouse submits the attorney affirmation of Heather L. Smar and the affidavit of Mark Finck, a Claims Examiner for Seneca, Elizabeth Firehouse's insurance company. Finck avers that Russo Fire's claim files and the information requested was created solely in contemplation of litigation, and that more specifically, Russo Fire was retained by Seneca to gather all of the relevant facts surrounding the building fire in order to properly defend against any litigation that would arise.

Elizabeth Firehouse also contends that the Subpoena is facially defective because it does not contain any language stating the "circumstances or reasons" why the disclosure is sought for a non-party in accordance with CPLR § 3101(a)(4) and because it improperly noticed the return date of the Subpoena for September 30, 2013, less than twenty days after it was served on Defendants.

Elizabeth Firehouse also contends that the Subpoena is overly broad as the demands do not set forth any dates for the discovery sought or limits the request to the June 25, 2009 incident.

Major Elevator opposes, contending that the discovery is needed as there are conflicting accounts and conclusions contained in Russo's reports and the deposition taken of Major's employee, Mr. Braulio Hernandez. Major Elevator also opposes Elizabeth Firehouse's argument that Major is seeking material prepared for litigation, as the "Russo materials are dated July 7, 2009 and July 30, 2009" and "contain entries of June 26, 2009, one day before the fire" and that the materials were related to the prior property damage/subrogation actions which have been resolved.

CPLR §3101(a) generally provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." The Court of Appeals has held that the term "material and necessary" is to be given a

liberal interpretation in favor of the disclosure of "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity," and that "[t]he test is one of usefulness and reason" (*Allen v. Cromwell-Collier Publishing Co.*, 21 N.Y.2d 403, 406 [1968]).

However, CPLR §3103(a) provides that:

The court may at any time on its own initiative, or on motion of any party or of any person from whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.

Here, the subject Subpoena, as written, is overly broad and fails to specifically and narrowly identify the information sought. While discovery is liberal, it is not unfettered and cannot be used as a fishing expedition.

Wherefore, it is hereby,

ORDERED that defendants Elizabeth Firehouse, LLC, Elizabeth Street Gallery Inc., and Elizabeth Street Gallery, LLC's motion is granted to the extent that the subpoena issued by co-defendant Major Elevator Corp. to the non-party Russo Fire Investigations and Joseph P. Banahan, IAAI-CFI c/o Russo Fire Investigations is quashed.

This constitutes the decision and order of the Court. All other relief requested is denied.

**FILED**

JAN 28 2014

NEW YORK  
COUNTY CLERKS OFFICE

Dated: JANUARY 22, 2014

HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE