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| <b>Matter of 91st St. Crane Collapse Litig.</b>  |
| 2014 NY Slip Op 31395(U)   |
| May 28, 2014   |
| Sup Ct, NY County  |
| Docket Number: 117294/08   |
| Judge: Manuel J. Mendez  |
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MANUEL J. MENDEZ
Justice

PART 13

IN RE 91ST STREET CRANE COLLAPSE LITIGATION:

INDEX NO.: 771000 /10

MARIA LEO, ADMINISTRATRIX OF THE ESTATE OF HER SON, DONALD CHRISTOPHER LEO, deceased May 30, 2008, Plaintiffs

INDEX NO. 117294/08

MOTION DATE 05-21-2014

MOTION SEQ. NO.

MOTION CAL. NO.

Plaintiff(s),

- v -

JAMES F. LOMMA, J.F. LOMMA, INC., NEW YORK CRANE & EQUIPMENT CORP., TES INC., BRADY MARINE REPAIR CO., 1765 FIRST ASSOCIATES, LLC, LEON DEMATTEIS CONSTRUCTION CORPORATION, MATTONE GROUP CONSTRUCTION CO., LTD., MATTONE GROUP, LTD., MATTONE GROUP LLC and HOWARD I. SHAPIRO & ASSOCIATES CONSULTING ENGINEERS, P.C., Defendants.

XHEVAHIRE SINANAJ and SELVI SINANOVIC as CO-ADMINISTRATORS OF THE ESTATE OF RAMADAN KURTAJ, DECEASED, and SELVI SINANOVIC Individually, Plaintiff(s),

INDEX NO. 117469/08

MOTION DATE 05-21-2014

MOTION SEQ. NO.

MOTION CAL. NO.

- v -

NEW YORK CITY EDUCATIONAL CONSTRUCTION FUND, NEW YORK CRANE & EQUIPMENT CORP., J.F. LOMMA INC., TES INC., JAMES F. LOMMA, BRADY MARINE REPAIR CO., SORBARA CONSTRUCTION CORP., 1765 FIRST ASSOCIATES, LLC, LEON D. DeMATTEIS CONSTRUCTION CORPORATION, MATTONE GROUP CONSTRUCTION CO., LTD., MATTONE GROUP LTD., MATTONE GROUP, LLC and HOWARD I. SHAPIRO & ASSOCIATES CONSULTING ENGINEERS, P.C.,

DECISION MOTION TO QUASH JUDICIAL SUBPOENAS

Defendant(s).

AND ALL RELATED ACTIONS

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

The following papers, numbered 1 to 5 were read on each of these motions to quash subpoenas made by all defendants.

|   | <u>PAPERS NUMBERED</u> |
|---|------------------------|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | <u>1-2,</u>            |
| Answering Affidavits — Exhibits _____ cross motion _____          | <u>3-4</u>             |
| Replying Affidavits _____   | <u>5</u>               |

The defendants move to quash trial subpoenas served on them to produce documents, mainly financial records, and witnesses at trial.

#### **MOTION 78AND 99 BY NEW YORK CRANE DEFENDANTS**

Defendants James F. Lomma, James F. Lomma, Inc., TES, Inc., and New York Crane & Equipment, Corp., move to quash the subpoenas served on James F. Lomma, Philip Mascolo and Thomas Guzzi. Defendants argue that the subpoenas are overbroad, seek material that should have been sought during discovery and to the extent the materials are sought to prove punitive damages it is premature as plaintiffs must await a special verdict on liability entitling them to punitive damages before obtaining financial disclosure.

#### **MOTION 79 AND 100 BY DEFENDANT 1765**

Defendant 1765 First Associates LLC moves to quash the subpoenas served on it on the grounds that it seeks material that should have been sought in discovery, but discovery is now complete and a subpoena is not the proper vehicle. It also argues that to the extent this information is sought to prove punitive damages it is irrelevant as this court has already determined that plaintiffs are not entitled to punitive damages against this defendant.

#### **MOTION 80 AND 102 BY DEFENDANT DEMATTEIS**

Defendant Leon D. DeMatteis Construction Corporation, moves to quash the subpoenas served on it on the grounds that they are overbroad, seek material that should have been sought during discovery and to the extent the material is sought to prove punitive damages it is premature as plaintiffs must await a special verdict on liability entitling them to punitive damages before obtaining financial disclosure. Additionally DEMATTEIS moves to quash the subpoenas served on Richard and Scott DeMatteis as this is barred by Case Management Order #18 and this court's decision on motions sequences #59 and #82.

#### **MOTION 81 BY DEFENDANT SORBARA**

Defendant Sorbara Construction Corp., moves to quash the subpoena served on it on the grounds that they are overbroad, seek material that should have been sought during discovery and to the extent the materials are sought to

prove punitive damages it is premature as plaintiffs must await a special verdict on liability entitling them to punitive damages before obtaining financial disclosure.

#### **MOTION 82 AND 101 BY MATTONE DEFENDANTS**

Defendants Mattone Group Construction Co., LTD, Mattone Group LTD, and Mattone Group LLC, move to quash the subpoenas served on them on the grounds that they are overbroad, seek material that should have been sought during discovery and to the extent the materials are sought to prove punitive damages it is premature as plaintiffs must await a special verdict on liability.

#### **OPPOSITION**

Plaintiffs oppose the motions to quash on grounds that the defendants finances are evidence of motive, inter-relationships between co-defendants, property ownership interests as well as liability. They argue that a second trial would be prejudicial and cause the plaintiffs irreparable harm.

#### **DECISION**

Ordinarily a plaintiff is not entitled to pre-trial disclosure of a defendant's wealth as this information has no bearing with respect to compensatory damages. When the issue pertains to punitive damages a plaintiff must first obtain a special verdict adjudging defendants liable for punitive damages before obtaining disclosure on a defendant's wealth. This disclosure is generally in the nature of a sworn statement of net worth, together with copies of a defendant's income tax returns for a period not to exceed five years immediately preceding ( see *Rupert v. Sellers*, 48 A.D.2d 265, 368, N.Y.S.2d 904 [4<sup>th</sup> Dept. 1975]).

However, when plaintiffs have demonstrated some 'factual basis' for their punitive damages claim, examination of a defendant's financial records or status is permitted either to establish liability for punitive damages or the amount to be awarded therefor. That is "when punitive damages are sought, all circumstances immediately connected with the transaction tending to exhibit or explain a defendant's motivation for the conduct in question are admissible in evidence. A plaintiff who establishes a "factual basis" for punitive damages is entitled to discovery of financial information ( see *Moran v. International Playtex, Inc.*, 103 A.D.2d 375, 480 N.Y.S.2d 6 [2<sup>nd</sup>. Dept. 1984]; *Sterling National Bank v. Ernst & Young LLP*, 62 A.D.3d 584, 881 N.Y.S.2d 39 [1<sup>st</sup>. Dept. 2009]; *Kinkela v. Incorporated village of Mineola*, 306 A.D.2d 382, 761 N.Y.S.2d 284 [2<sup>nd</sup>. Dept. 2003]).

A party cannot use a subpoena to secure discovery that it failed to secure during the pretrial disclosure phase ( *Bour v. Bleecker, LLC*, 104 A.D.3d 454, 961 N.Y.S.2d 98 [1<sup>st</sup>. Dept. 2013]).

The fact that a witness is not deposed does not preclude production of such witness or subpoena of such witness at trial ( *Rivera v. City of New York*, 253 A.D.2d 597, 677 N.Y.S.2d 537 [1<sup>st</sup>. Dept. 1998]; *Guillen v. New York City Transit Authority*, 192 A.D.2d 506, 596 N.Y.S.2d 88 [2<sup>nd</sup>. Dept. 1993]).

Plaintiffs have demonstrated some factual basis for their punitive damages claim and are therefore entitled to obtain financial records from the defendants. Given the nature of this trial, the number of parties involved, the length of time it will take to try this case- and to allow the same jury that hears the case to also determine the amount of punitive damages to be awarded in the event the jury determines that an award for punitive damages is warranted- the court considers it practical to have the defendants provide the financial records prior to the jury returning a special verdict on liability for punitive damages.

However, some of the materials sought in the subpoenas are improper and should have been sought during the discovery phase of this matter.

Accordingly it is ORDERED that as to Motion 78 and 99 the court is granting in part and denying in part the motion, and it is further

ORDERED That the defendants James F. Lomma, James F. Lomma, Inc., TES, Inc., and New York Crane & Equipment Corp., shall comply with the subpoenas served upon individual defendant James F. Lomma by producing item (5) of the subpoena- "tax returns federal and state, with all schedules for the years 2006 through the present. the subpoena is quashed as to the remaining items. With respect to the subpoena served on Philip Mascolo, the defendants shall comply by producing items (5) "tax return, federal and state, with all schedules for the years 2006 through the present of defendants James F. Lomma, J.F. Lomma, Inc., New York Crane & Equipment Corp., and TES, Inc.; and (11) " balance sheet reports for the years 2006 through the present of defendants James F. Lomma, J.F. Lomma Inc., New York Crane & Equipment Corp., and TES, Inc. The subpoena is quashed as to the remaining items. With respect to the subpoena served on Thomas Guzzi, the defendants shall comply by producing items (6) "Tax returns, federal and state, with all schedules for the years 2006 through the present of TES Inc."; and (12) "balance sheet reports for the years 2006through the present of defendant TES Inc. The subpoena is quashed as to the remaining items, and it is further

**ORDERED that as to Motion 79 the court is granting the motion in its entirety. The punitive damages claim against this defendant, 1765 First Associates LLC, has been dismissed and the items requested in the subpoena should have been requested during discovery, the Subpoena is quashed as to this defendant, and it is further**

**ORDERED that as to Motion 80 and 102 the court is granting in part and denying in part the motion, and it is further**

**ORDERED that the defendant Leon D. DeMatteis Construction Corporation shall comply with the trial subpoena served upon the individuals Richard and Scott DeMatteis. They shall appear and testify at this trial when requested by the plaintiffs. Defendant shall comply with item number 18 of the subpoena by producing Federal and State Tax returns with all schedules, and Balance Sheets, from 2008 through the present for Leon D. Dematteis Construction Corporation, and it is further**

**ORDERED that as to Motion 81 the court is granting in part and denying in part the motion, and it is further**

**ORDERED that the defendant Sorbara Construction Corp., shall comply with the subpoena served upon it by producing Item (1) of the subpoena - "Federal and State Tax returns with all schedules, and balance sheets, from 2008 to the present"; and (3) "The original Daily Crane Inspection sheets/ Reports for the Azure project from April through May 2008", or an affidavit to the extent that the same does not exist, detailing all efforts made to locate and obtain the originals. The subpoena is quashed as to the remaining items, and it is further**

**ORDERED that as to Motions 82 and 101 the court is granting in part and denying in part the motion, and it is further**

**ORDERED that the Defendants The Mattone Group Construction Co., LTD., Mattone Group LTD., and Mattone Group LLC, shall comply with item number 18 of the subpoena by producing Federal and State Tax returns with all schedules, and Balance Sheets, from 2008 through the present for the defendants, the subpoena is quashed as to the remaining items, and it is further**

**ORDERED that the above financial records are to be delivered within 30 days to the Subpoenaed Records Room at the courthouse located at 60 Centre Street New York, N.Y., and are to be kept there under seal until the time such records are requested by this court in the event the jury returns a special verdict on punitive damages, and it is further**

ORDERED that Defendant Sorbara Construction Corp., shall comply with item (3) of the subpoena served on it by delivering the original Inspection Sheets/ Reports for the Azure project from April through May 2008, within 7 days from the date of this order, to this court at 71 Thomas Street, Room 210, N.Y.N.Y. 10013; Or providing plaintiff, within such time, with an affidavit to the extent that these documents do not exist, detailing all efforts made to locate and obtain the originals.

ENTER : MANUEL J. MENDEZ  
J.S.C.

Dated: May 28, 2014

  
MANUEL J. MENDEZ  
J.S.C.

Check one:  FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE