

**Tower Ins. Co. of N.Y. v Hong Kong Supermarket,  
Inc.**

2014 NY Slip Op 31911(U)

July 11, 2014

Supreme Court, New York County

Docket Number: 102185/2010

Judge: Lucy Billings

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

PRESENT: LUCY BILLINGS  
J.S.C. Justice

PART 46

Index Number : 102185/2010  
TOWER INSURANCE  
vs.  
HONG KONG SUPERMARKET  
SEQUENCE NUMBER : 004  
ORDER OF PROTECTION

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

The following papers, numbered 1 to 2, were read on this motion to/for quash a subpoena

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

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). 2

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

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

*The court grants plaintiff's motion to quash and for a protective order against the subpoena served by defendant Hong Kong Supermarket on Paul Angelides to the extent set forth and otherwise denies the motion pursuant to the accompanying decision dated 7/11/14 and stipulation dated 8/15/13. C.P.L.R. §§ 2304, 3101(d)(1)(iii), 3103(a); 22 N.Y.C.R.R. § 202.21(d).*

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

**FILED**

JUL 24 2014

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 7/11/14

Lucy Billings, J.S.C.  
**LUCY BILLINGS**  
**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  
COUNTY OF NEW YORK: PART 46

-----x

TOWER INSURANCE COMPANY OF NEW YORK  
a/s/o A&M EAST BROADWAY LLC and  
CASTLEPOINT INSURANCE COMPANY a/s/o  
TRIPLE A LLC,

Index No. 102185/2010

Plaintiffs

- against -

DECISION AND ORDER

HONG KONG SUPERMARKET, INC., and  
PCK REALTY, INC.,

Defendants

**FILED**

-----x

LUCY BILLINGS, J.S.C.:

JUL 24 2014

I. INTRODUCTION

COUNTY CLERK'S OFFICE  
NEW YORK

Plaintiffs move to quash and for a protective order against enforcement of a subpoena duces tecum and ad testificandum served by defendant Hong Kong Supermarket, Inc., on plaintiff's identified witness Paul Angelides, in this subrogation action for damages to premises owned by plaintiffs' insureds at 107 East Broadway and 93 Henry Street in New York County. C.P.L.R. §§ 2304, 3103(a). Plaintiffs claim Hong Kong Supermarket, a tenant of the building at 109 East Broadway, adjacent to 107 East Broadway and 93 Henry Street, and co-defendant owner created conditions in their building that caused the spread of a fire that ignited there May 14, 2009, and caused their building's collapse. The collapse of 109 East Broadway in turn necessitated the demolition of 107 East Broadway.

Plaintiffs filed their note of issue October 19, 2012, six

months before Hong Kong Supermarket served its subpoena. Therefore Hong Kong Supermarket must show "unusual or unanticipated circumstances" that developed after the note of issue to proceed with Angelides's deposition or to warrant any other additional disclosure. 22 N.Y.C.R.R. § 202.21(d); Madison v. Sama, 92 A.D.3d 607 (1st Dep't 2012); Colon v. Yen Ru Jen, 45 A.D.3d 359, 360 (1st Dep't 2007); Schroeder v. IESI NY Corp., 24 A.D.3d 180, 181 (1st Dep't 2005). See Cuevas v. 1738 Assoc., L.L.C., 111 A.D.3d 416, 417 (1st Dep't 2013).

Eight days after Hong Kong Supermarket served its subpoena, plaintiffs served a response to its request for expert disclosure disclosing Angelides as plaintiffs' expert witness. C.P.L.R. § 3101(d)(1)(i). While this disclosure after the note of issue might qualify as "unusual or unanticipated circumstances" permitting Hong Kong Supermarket additional disclosure regarding the expert's opinions, 22 N.Y.C.R.R. § 202.21(d), had Hong Kong Supermarket limited a prior inquiry of this witness to factual testimony, to depose him as an expert Hong Kong Supermarket must show "special circumstances." C.P.L.R. § 3101(d)(1)(iii); Matter of New York City Asbestos Litig., 66 A.D.3d 600 (1st Dep't 2009); Martinez v. KSM Holding, 294 A.D.2d 111, 112 (1st Dep't 2002); Feldman v. New York State Bridge Auth., 40 A.D.3d 1303, 1305 (3d Dep't 2007).

On the other hand, if Hong Kong Supermarket has avoided the latter required showing by serving the subpoena before plaintiffs designated Angelides as an expert witness, then, without that

designation, Hong Kong Supermarket is relegated to the "unusual or unanticipated circumstances" requirement. Without the unanticipated disclosure of Angelides as an expert witness, this requirement remains unsatisfied, since plaintiffs disclosed his report and photographs more than two years before filing the note of issue.

In either event, Hong Kong Supermarket fails to satisfy the applicable requirement. The information Hong Kong Supermarket seeks from Angelides is not unique to an expert as opposed to a lay witness. Nor does any evidence thus far distinguish Angelides from other expert witnesses whose depositions are not permitted absent special circumstances. C.P.L.R. § 3101(d)(1)(iii); Feldman v. New York State Bridge Auth., 40 A.D.3d at 1305; Dixon v. City of Yonkers, 16 A.D.3d 542 (2d Dep't 2005); Ruthman, Mercadante & Hadjis v. Nardiello, 288 A.D.2d 593, 594 (3d Dep't 2001); Flex-O-Vit USA v. Niagara Mohawk Power Corp., 281 A.D.2d 980 (4th Dep't 2001). See Ramsey v. New York Univ. Hosp. Ctr., 14 A.D.3d 349, 350 (1st Dep't 2005). As Angelides sets forth in his report, like every other witness, expert or not, he was not permitted to enter 109 East Broadway where the fire ignited and the building collapsed or the adjacent building, 107 East Broadway, where the building was demolished shortly afterward. He merely observed the two premises' exteriors.

II. HONG KONG SUPERMARKET'S CLAIMED NEED FOR DISCLOSURE AT THIS STAGE

Hong Kong Supermarket maintains that, when plaintiff disclosed the photographs in August 2010, the photographer was not disclosed. Only when the court permitted Hong Kong Supermarket to depose plaintiffs' witness Charles Reilly after the note of issue and he was deposed, did Hong Kong Supermarket learn that Angelides took the photographs.

Hong Kong Supermarket further insists that only through Reilly's testimony did Hong Kong Supermarket learn the following. (1) Angelides was at the fire scene May 19, 2009, before the building at 107 East Broadway was demolished. (2) Immediately after the fire he met with the New York City Department of Buildings (DOB) chief engineer to review the damage to the building. (3) He participated and concurred in DOB's determination to demolish the building. (4) He concluded that the construction of the building's rear wall was insusceptible of shoring and pinning to prevent demolition of the building. All this information, however, was abundantly evident from Angelides's report disclosed to Hong Kong Supermarket in August 2010.

Reilly also speculated that Angelides "might" have been "able to physically enter" 107 East Broadway before the building was demolished. Aff. in Opp'n of Michael J. Case Ex. H, at 94. Reilly's testimony does not reveal any basis other than the information in Angelides's disclosed report, however, to draw such a conclusion. The report itself discloses that Angelides

gained access around the exterior of the building within a few days after the fire, before the building was demolished. Hong Kong Supermarket did not take advantage of the opportunity to inquire of Reilly regarding any further basis for his speculation. In fact, Reilly recalled no such basis:

Q. . . . due to the structural instability of 109 and 107, was Mr. Angelides able to physically enter either of those structures to inspect them?

A. He definitely did not get into 109. I don't know if he got into 107.

. . . .

Q. Okay. Did you ever discuss with Mr. Angelides as to whether he was able to get inside 107?

A. I don't recall.

Id.

In sum, Reilly's testimony provides no more suggestion that Angelides gained access to the interior of 107 East Broadway than Angelides's report and in fact suggests that, "due to the structural instability of . . . 107" admitted by Hong Kong Supermarket, id., Angelides did not gain access to the interior. Angelides's report sets forth that when he inspected 107 East Broadway May 19, 2009, "Access to the interior of 107 East Broadway was not permitted because the NYCDOB considered the building unsafe, unstable and in danger of collapse." Case Aff. Ex. E, at 1; Aff. in Supp. of Russell Monaco Ex. C, at 1. Hong Kong Supermarket points to no other evidence that suggests either that Angelides inspected the building before or after May 19, 2009, when he might have gained access to the interior, or that

DOB permitted access to the interior any time between the fire May 14, 2009, and when the building was demolished.

Perhaps more significantly, when Hong Kong Supermarket received Angelides's report in August 2010 disclosing that Angelides gained access around the exterior of the building within a few days after the fire, before the building was demolished, Hong Kong Supermarket did not seek to depose Angelides then. Similarly, when it received the photographs in August 2010, if the photographer was not evident from Angelides's report, which sets forth "Attachment: Photographs 1 through 13," neither did Hong Kong Supermarket seek further disclosure. Case Aff. Ex. E, at 5; Monaco Aff. Ex. C, at 5. See Ramsey v. New York Univ. Hosp. Ctr., 14 A.D.3d at 350; Martinez v. KSM Holding, 294 A.D.2d at 112; Ruthman, Mercadante & Hadjis v. Nardiello, 288 A.D.2d at 594-95.

Once Hong Kong Supermarket received the report, it possessed all the information necessary to decide whether to seek further disclosure from Angelides, such as his deposition. E.g., Rosenberg v. Scaringi, 279 A.D.2d 389, 390 (1st Dep't 2001); Tirado v. Miller, 75 A.D.3d 153, 161-62 (2d Dep't 2010). See Martinez v. KSM Holding, 294 A.D.2d at 112; Feldman v. New York State Bridge Auth., 40 A.D.3d at 1304-1305; Ruthman, Mercadante & Hadjis v. Nardiello, 288 A.D.2d at 594-95. Hong Kong Supermarket accepted the disclosure from plaintiffs regarding Angelides, however, as of when they filed the note of issue. Hong Kong Supermarket's lack of diligence or strategic decision in not

seeking further disclosure before the note of issue does not constitute "unusual or unanticipated circumstances." 22 N.Y.C.R.R. § 202.21(d); Madison v. Sama, 92 A.D.3d 607; Miller v. Metropolitan 810 7th Ave., 50 A.D.3d 474, 475 (1st Dep't 2008); Colon v. Yen Ru Jen, 45 A.D.3d at 359-60; Schroeder v. IESI NY Corp., 24 A.D.3d at 181.

III. HONG KONG SUPERMARKET'S NEED TO DEPOSE ANGELIDES AS AN EXPERT WITNESS

Plaintiffs' designation of Angelides as an expert witness does not change these circumstances. It only poses another hurdle to surmount to secure his deposition: "a showing of special circumstances," C.P.L.R. § 3101(d)(1)(iii), over and above "unusual or unanticipated circumstances." 22 N.Y.C.R.R. § 202.21(d). By virtue of the latter standard, even if examination of key evidence inside 107 East Broadway before it became unavailable to Hong Kong Supermarket would constitute "special circumstances," it lost its opportunities to (1) ascertain whether Angelides did inspect inside and, if he did examine key evidence rendered unavailable to Hong Kong Supermarket, (2) depose him. Martinez v. KSM Holding, 294 A.D.2d at 112. See Dixon v. City of Yonkers, 16 A.D.3d 542; Ruthman, Mercadante & Hadjis v. Nardiello, 288 A.D.2d at 594; Flex-O-Vit USA v. Niagara Mohawk Power Corp., 281 A.D.2d 980.

Moreover, Hong Kong Supermarket never suggests what that key evidence inside 107 East Broadway might be. If access inside was restricted after the fire, and the building was demolished shortly afterward, all the personal property inside likely was

lost. Hong Kong Supermarket does not point to any dispute over this issue or what light Angelides's inspection inside might shed on such an issue. Phoenix Life Ins. Co. v. Irwin Levinson Ins. Trust II, 70 A.D.3d 476, 477 (1st Dep't 2010); Bustos v. Lenox Hill Hosp., 29 A.D.3d 424, 426 (1st Dep't 2006); Monica W. v. Milevoi, 252 A.D.2d 260, 263-64 (1st Dep't 1999); Ruthman, Mercadante & Hadjis v. Nardiello, 288 A.D.2d at 594.

Nor does Hong Kong Supermarket explain why its access was any more restricted than plaintiffs' access. Rosenberg v. Scaringi, 279 A.D.2d at 390; Monica W. v. Milevoi, 252 A.D.2d at 263; Ruthman, Mercadante & Hadjis v. Nardiello, 288 A.D.2d at 594. See Matter of New York City Asbestos Litig., 66 A.D.3d at 601; Dixon v. City of Yonkers, 16 A.D.3d 542; Flex-O-Vit USA v. Niagara Mohawk Power Corp., 281 A.D.2d 980. If Angelides inspected inside 107 East Broadway, either it was accessible without a key, or he obtained a key from plaintiffs or their insured A&M East Broadway LLC. Hong Kong Supermarket occupied the adjacent 109 East Broadway and must have expected claims arising from the fire. Yet Hong Kong Supermarket does not indicate any attempt to gain access to the neighboring premises where the fire in Hong Kong Supermarket's premises caused damage, through its neighbor owner or tenants or otherwise. Ramsey v. New York Univ. Hosp. Ctr., 14 A.D.3d at 350; Martinez v. KSM Holding, 294 A.D.2d at 112; Monica W. v. Milevoi, 252 A.D.2d at 263; Ruthman, Mercadante & Hadjis v. Nardiello, 288 A.D.2d at 594. See Reich v. Reich, 36 A.D.3d 506, 507 (1st Dep't 2007);

Feldman v. New York State Bridge Auth., 40 A.D.3d at 1304-1305.

Finally, plaintiffs' designation of Angelides as an expert witness does not indicate that he will give any more opinion testimony than was in his report. Except for his report's conclusion that the construction of 107 East Broadway's rear wall was insusceptible of shoring and pinning to prevent demolition of the building, which concurs with DOB's conclusion that demolition was necessary, his expected testimony is factual. DOB witnesses were deposed regarding DOB's determinations before the note of issue and as factual witnesses. McCoy v. State of New York, 52 A.D.3d 121, 1213-14 (4th Dep't 2008). See Flex-O-Vit USA v. Niagara Mohawk Power Corp., 281 A.D.2d 980. Insofar as Angelides's conclusion is an opinion, it is not unique as to distinguish him from other expert witnesses who have not been required to provide anything more than the "reasonable detail" prescribed by C.P.L.R. § 3101(d)(1)(i). See Matter of New York City Asbestos Litig., 66 A.D.3d at 600-601; Dixon v. City of Yonkers, 16 A.D.3d 542; Ruthman, Mercadante & Hadjis v. Nardiello, 288 A.D.2d at 594; Flex-O-Vit USA v. Niagara Mohawk Power Corp., 281 A.D.2d 980.

Thus it is questionable how useful a deposition of Angelides would be to ascertaining what conditions contributed to the 107 East Broadway building's instability, such that its demolition was necessary, or ascertaining the loss or damage to the building and its contents as a result of the fire. Phoenix Life Ins. Co. v. Irwin Levinson Ins. Trust II, 70 A.D.3d at 477; Bustos v.

Lenox Hill Hosp., 29 A.D.3d at 426; Monica W. v. Milevoi, 252 A.D.2d at 263-64. If he inspected inside, his report and photographs surely would have disclosed that he did and what that inspection showed. Even regarding his inspection around the exterior, now, five years after his inspection, Hong Kong Supermarket does not suggest that he will recall any more than his report and photographs already disclose or how a deposition would be any more useful than the report and photographs. Reich v. Reich, 36 A.D.3d at 507; Bustos v. Lenox Hill Hosp., 29 A.D.3d at 426; Rosenberg v. Scaringi, 279 A.D.2d at 390; Ruthman, Mercadante & Hadjis v. Nardiello, 288 A.D.2d at 594. See Bermel v. Dagostino, 50 A.D.3d 303, 304 (1st Dep't 2008); Esteva v. Catsimatidis, 4 A.D.3d 210, 211 (1st Dep't 2004); Capati v. Crunch Fitness Intl., 295 A.D.2d 181 (1st Dep't 2002).

#### IV. CONCLUSION

Consequently, the court grants plaintiffs' motion to quash the subpoena ad testificandum served by defendant Hong Kong Supermarket, Inc., on Paul Angelides. C.P.L.R. §§ 2304, 3101(d)(1)(iii); 22 N.Y.C.R.R. § 202.21(d). These parties' stipulation dated August 15, 2013, resolves plaintiffs' motion to quash the subpoena duces tecum. Given this decision and the stipulation, plaintiffs' motion for a protective order against enforcement of the subpoena is moot and therefore denied. C.P.L.R. § 3103(a).

DATED: July 11, 2014

**FILED**

*Lucy Billings*

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LUCY BILLINGS, J.S.C.

JUL 24 2014

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J.S.C.

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