

<b>American Bankers Ins. Co. of Fla v Reliance Constr. LTD.</b>
2014 NY Slip Op 33730(U)
September 29, 2014
Supreme Court, New York County
Docket Number: 100886/08
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 35

-----X  
In re EAST 51st STREET CRANE COLLAPSE  
LITIGATION

Index No: 100886/08

-----X  
AMERICAN BANKERS INSURANCE COMPANY  
OF FLORIDA as assignee/subrogee of LAUREN AND  
SEAN CUTRONA and MELISSA DOLMAN,

**DECISION AND ORDER**

Index No.: 100754/09  
Motion Seq. Nos. 009,  
010, 011, 012

Plaintiff,

-against-

RELIANCE CONSTRUCTION LTD. d/b/a RCG GROUP,  
INC., RELIANCE CONSTRUCTION GROUP, JOY  
CONTRACTORS, INC., NEW YORK CRANE &  
EQUIPMENT CORPORATION, STROH ENGINEERING  
SERVICES, P.C., FAVELLE FAVCO CRANES (USA),  
INC., THE CITY OF NEW YORK, CONSOLIDATED  
EDISON COMPANY OF NEW YORK, INC., CIVETTA  
COUSINS JV LLC, RAPETTI RIGGING SERVICES  
INC., LIFT-ALL COMPANY, INC., LIFTEX  
CORPORATION, WEINSTOCK BROTHERS  
CORPORATION, METRO WIREROPE CORPORATION,  
C.S. MECHANICAL & EQUIPMENT CORPORATION,  
CRANE INSPECTION SERVICES, INC., BRADY MARINE  
REPAIR COMPANY, INC., LANGAN ENGINEERING &  
ENVIRONMENTAL SERVICES, INC. SHAW BELTING  
COMPANY and CONSTRUCTION & REALTY SAFETY  
GROUP, INC.,

Defendants.

-----X  
RELIANCE CONSTRUCTION GROUP LTD. d/b/a RCG  
GROUP,

Third-party Plaintiff,

-against-

EAST 51st STREET DEVELOPMENT COMPANY, LLC,

Third-party Defendant.

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-----X  
EAST 51st STREET DEVELOPMENT COMPANY, LLC,

Second Third-party Plaintiff,

-against-

INDUSTRIAL SALES COMPANY, INC. a/k/a INDUSCO  
and JOHN DOES 1-10 (fictitious),

Second Third-party Defendants.

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-----X

LEXINGTON INSURANCE COMPANY as assignee/  
subrogee OF EAST 51ST STREET DEVELOPMENT  
COMPANY, LLC,

Plaintiffs,

Index No:100205/09  
Motion Seq. Nos.:  
011, 012, 013

-against-

RELIANCE CONSTRUCTION LTD. d/b/a RCG GROUP,  
INC., RELIANCE CONSTRUCTION GROUP, JOY  
CONTRACTORS, INC., NEW YORK CRANE &  
EQUIPMENT CORPORATION, STROH ENGINEERING  
SERVICES, P.C., FAVELLE FAVCO CRANES (USA),  
INC., THE CITY OF NEW YORK, CONSOLIDATED  
EDISON COMPANY OF NEW YORK, INC., CIVETTA  
COUSINS JV LLC, RAPETTI RIGGING SERVICES, INC.,  
LIFT-ALL COMPANY, INC., LIFTEX CORPORATION,  
WEINSTOCK BROTHERS CORPORATION, METRO  
WIRE ROPE CORPORATION, C.S. MECHANICAL &  
EQUIPMENT CORPORATION, CRANE INSPECTION  
SERVICES, INC., BRADY MARINE REPAIR COMPANY,  
INC., LANGAN ENGINEERING & ENVIRONMENTAL  
SERVICES, INC., SHAW BELTING COMPANY and  
CONSTRUCTION & REALTY SAFETY GROUP, INC.,

Defendants.

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-----X  
EAST 51ST DEVELOPMENT COMPANY, LLC,

Third-party Plaintiff,

-against-

RELIANCE CONSTRUCTION GROUP,

Third-party Defendant.

-----X  
-----X

EAST 51st STREET DEVELOPMENT COMPANY, LLC,  
968 KINGSMEN, LLC, 964 ASSOCIATES, LLC,

Plaintiffs,

-against-

Index №: 650658/11  
Motion Seq. Nos.:  
023, 024, 025

THE CITY OF NEW YORK, NEW YORK CRANE AND  
EQUIPMENT CORPORATION, STROH ENGINEERING  
SERVICES, P.C., CIVETTA COUSINS JV LLC, RAPETTI  
RIGGING SERVICES, INC., FAVELLE FAVCO CRANE  
(USA) INC., C.S. MECHANICAL & EQUIPMENT  
CORPORATION, S. DESIMONE CONSULTING  
ENGINEERS, LLC, MACIA INSPECTION & TESTING  
LABORATORIES, INC., METRO WIRE ROPE  
CORPORATION, PAUL'S WIRE ROPE AND SLING INC.,  
BARKER STEEL COMPANY, INC., CERTIFIED TESTING  
LABORATORY, INC., J.F. LOMMA INC., TESE  
CONSTRUCTION, INC., CONSTRUCTION & REALTY  
SAFETY GROUP, INC., CONSOLIDATED EDISON  
COMPANY OF NEW YORK, INC., LIFT ALL COMPANY,  
INC., LOYOLA GROUP, INC., LIFTEX COMPANY,  
CRANE INSPECTION SERVICED, LTD., LANGAN  
ENGINEERING & ENVIRONMENTAL SERVICES, INC.,  
WEINSTOCK BROTHERS CORPORATION, BRADY  
MARINE REPAIR COMPANY, INC., JBS  
CONSTRUCTION MANAGEMENT, INC., JOY  
CONTRACTORS, INC., RELIANCE CONSTRUCTION  
GROUP and RELIANCE CONSTRUCTION LTD d/b/a  
RCG GROUP, INC.

-----X

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METRO WIRE ROPE CORPORATION,

Third-party Plaintiff,

-against-

INDUSTRIAL SALES COMPANY, INC. a/k/a INDUSCO.

Third-party Defendant.

-----X

-----X

CHRIS GARCIA,

Plaintiff,

-against-

THE CITY OF NEW YORK, EAST 51ST STREET  
DEVELOPMENT COMPANY, LLC, RELIANCE  
CONSTRUCTION GROUP, RCG GROUP, INC., NEW  
YORK CRANE & EQUIPMENT CORP., STROH  
ENGINEERING SERVICES, P.C., and RAPETTI  
RIGGING SERVICES, INC.,

Defendants.

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Index №:118879/09  
Motion Seq. Nos.:  
008 and 009

-----X  
EAST 51ST STREET DEVELOPMENT COMPANY, LLC,

Third-party Plaintiff,

-against-

JOY CONTRACTORS, INC., CONSOLIDATED EDISON  
COMPANY OF NEW YORK, INC., FAVELLE FAVCO  
CRANES (USA), INC., CIVETTA COUSINS JV LLC,  
LIFT-ALL COMPANY, INC., LIFTEX CORPORATION,  
WEINSTOCK BROTHERS CORPORATION, C.S.  
MECHANICAL & EQUIPMENT CORPORATION,  
CRANE INSPECTION SERVICES, LTD, BRADY  
MARINE REPAIR COMPANY, INC., LANGAN  
ENGINEERING & ENVIRONMENTAL SERVICES,  
INC., METRO WIRE ROPE CORPORATION, SHAW  
BELTING COMPANY, CONSTRUCITON & REALTY  
SAFETY GROUP, INC., INDUSTRIAL SALES

COMPANY, INC., and JOHN DOES 1-10,

Third-party Defendants.

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-----X

MARGARET R. SCHORSCH,

Plaintiff,

-against-

EAST 51st STREET DEVELOPMENT COMPANY, LLC,  
RELIANCE CONSTRUCTION LTD d/b/a RCG GROUP,  
INC., NEW YORK CRANE & EQUIPMENT CORP.,  
STROH ENGINEERING SERVICES, P.C., RAPETTI  
GIGGING SERVICES INC., JOY CONTRACTING, INC.  
and THE CITY OF NEW YORK,

Defendants.

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Index №: 108439/09  
Motion Seq. No.: 006

-----X  
EAST 51st STREET DEVELOPMENT COMPANY, LLC,

Third-party Plaintiff,

-against-

FAVELLE FAVCO CRANES (USA), INC., CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., CIVETTA COUSINS JV LLC, LIFT-ALL COMPANY, INC., LIFTEX CORPORATION, WEINSTOCK BROTHERS CORPORATION, C.S. MECHANICAL & EQUIPMENT CORPORATION, CRANE INSPECTION SERVICES LTD., BRADY MARINE REPAIR COMPANY, INC., LANGAN ENGINEERING & ENVIRONMENTAL SERVICES, INC., METRO WIRE ROPE CORPORATION, SHAW BELTING COMPANY, CONSTRUCTION & REALTY SAFETY GROUP, INC., INDUSTRIAL SALES COMPANY, INC. a/k/a INDUSCO, and JOHN DOES 1-10 (fictitious),

Third-party Defendants.

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-----X  
KATIA AZOUAOUI,

Plaintiff,

-against-

EAST 51st STREET DEVELOPMENT COMPANY, LLC, RELIANCE CONSTRUCTION GROUP, RCG GROUP, INC., JOY CONTRACTORS, INC., NEW YORK CRANE & EQUIPMENT CORPORATION and STROH ENGINEERING SERVICES, P.C.,

Defendants.

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Index No: 108716/10  
Motion Seq. Nos.:  
003 and 004

-----X  
EAST 51st STREET DEVELOPMENT COMPANY, LLC,

Third-party plaintiff,

-against-

THE CITY OF NEW YORK, RAPETTI RIGGING SERVICES, INC., CONSOLIDATED EDISON COMPANY OF NEW YORK, FAVELLE FAVCO CRANES (USA), INC., CIVETTA COUSINS JV LLC, LIFT-ALL COMPANY, INC., LIFTEX CORPORATION, WEINSTOCK BROTHERS CORPORATION, C.S. MECHANICAL & EQUIPMENT CORPORATION, CRANE INSPECTION SERVICES, INC., BRADY MARINE REPAIR COMPANY, INC., LANGAN ENGINEERING & ENVIRONMENTAL SERVICES, INC., METRO WIRE ROPE CORPORATION, SHAW BELTING COMPANY, CONSTRUCTION & REALTY SAFETY GROUP, INC., INDUSTRIAL SALES COMPANY, INC. a/k/a INDSUSCO, and JOHN DOE 1-10,

Third-party defendants.

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-----X

JEAN SQUERI,

Plaintiff,

-against-

EAST 51st STREET DEVELOPMENT COMPANY, LLC, KENNELLY DEVELOPMENT COMPANY, LLC, JBS CONSTRUCTION MANAGEMENT, INC., RELIANCE CONSTRUCTION LTD, RCG GROUP, LLC, JOY CONTRACTING, INC., RAPETTI RIGGING SERVICES, INC., NEW YORK CRANE & EQUIPMENT CORP., STROH ENGINEERING SERVICES, P.C. and THE CITY OF NEW YORK,

Defendants.

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Index No: 103802/09  
Motion Seq. Nos.: 008  
and 009

-----X  
EAST 51st STREET DEVELOPMENT COMPANY, LLC,

Third-party plaintiff,

-against-

CONSOLIDATED EDISON COMPANY OF NEW YORK,  
INC., FAVELLE FAVCO CRANES (USA), INC., CIVETTA  
COUSINS JV, LLC, LIFT-ALL COMPANY, INC., LIFTEX  
CORPORATION, WEINSTOCK BROTHERS  
CORPORATION, C.S. MECHANICAL & EQUIPMENT  
CORPORATION, CRANE INSPECTION SERVICES, INC.,  
BRADY MARINE REPAIR COMPANY, INC. LANGAN  
ENGINEERING & ENVIRONMENTAL SERVICES, INC.,  
METRO WIRE ROPE CORPORATION, SHAW BELTING  
COMPANY, CONSTRUCTION & REALTY SAFETY  
GROUP, INC., INDUSTRIAL SALES COMPANY, INC.,  
a/k/a INDUSCO, and JOHN DOES 1-10,

Third-party defendants.

-----X  
-----X

METROPOLITAN PROPERTY AND CASUALTY  
INSURANCE COMPANY, As Subrogee of Bridget McCann,

Plaintiff,

Index №: 401735/10  
Motion Seq. Nos.: 001

EAST 51st STREET DEVELOPMENT COMPANY, LLC,  
RELIANCE CONSTRUCTION GROUP, RCG GROUP, INC.,  
RCG, LLC, JOY CONTRACTORS, INC., NEW YORK  
CRANE & EQUIPMENT CORP. and STROH ENGINEERING  
SERVICES, P.C.

Defendants.

-----X

-----X  
EAST 51st STREET DEVELOPMENT COMPANY, LLC,

Third-party plaintiff,

-against-

THE CITY OF NEW YORK, RAPRETTI RIGGING SERVICES, INC., CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., FAVELLE FAVCO CRANES (USA), INC., CIVETTA COUSINS JV LLC, LIFT-ALL COMPANY, INC., LIFTEX CORPORATION, WEINSTOCK BROTHERS CORPORARTION, C.S. MECHANICAL & EQUIPMENT CORPORATION, CRANE INSPECTION SERVICES, INC., BRADY MARINE REPAIR COMPANY, INC., LANGAN ENGINEERING & ENVIRONMENTAL SERVICES, INC., METRO WIRE ROPE CORPORATION, SHAW BELTING COMPANY, CONSTRUCTION & REALTY SAFETY GROUP, INC., INDUSTRIAL SALES COMPANY, INC., a/k/a INDUSCO, and JOHN DOES 1-10.

Third-party defendant.

-----X  
CAROL R. EDMead, J.S.C.:

**BACKGROUND**

These consolidated cases arise from the collapse of a tower crane at a construction site in Manhattan on March 15, 2008. This decision resolves 18 discovery motions. Nine of the motions are brought by three products-liability defendants: Favelle Favco Cranes (USA) (Favco), Lift-All Company, Inc. (Lift-All), and Liftex Corporation (Liftex) (together, the product-liability defendants). The product-liability defendants seek penalties under CPLR 3126 against various products liability plaintiffs, including American Bankers Insurance Company of Florida a/s/o Lauren and Sean Cutrona and Melissa Dolman (American Bankers), East 51st Street Development Company, LLC (East 51st Street), Lexington Insurance Company a/s/o East 51st Street (Lexington), Reliance Construction LTD d/b/a RCG Group (RCG), and Kennelly

Development Company LLC (Kennelly). Product-liability defendants contend that sanctions are appropriate under CPLR 3126 as product-liability plaintiffs' response to interrogatories have been inadequate.

More specifically, Favco, the manufacturer of the crane involved in the accident, seeks dismissal or preclusion and leave to file summary judgment against East 51st Street, RCG and Kennelly in the following actions: *East 51st Street v City of New York* (index No. 650658/11, motion seq. No. 024), *Lexington Insurance v Reliance Construction, LTD* (index No. 100205/09, motion seq. No. 012), and *American Bankers Insurance v Reliance Construction* (index No. 100754/09, motion seq. No. 012). In the same three cases, Lift-All, which manufactured slings that were used on the subject crane, seeks dismissal or preclusion and leave to file summary judgment against East 51st Street, RCG, American Bankers and Lexington (index No. 650658/11, motion seq. No. 023; index No. 100205/09, motion seq. No. 011; index No. 100754/09, motion seq. No. 009). Liftex, another sling manufacturer, seeks preclusion against East 51st Street across these three actions (index No. 650658/11, motion seq. No. 025; index No. 100205/09; motion seq. No. 013; index No. 100754/09, motion seq. No. 010).

The remaining nine motions are brought by RCG and East 51st Street for penalties under CPLR 3126 against various plaintiffs for failures to provide discovery. Specifically, RCG seeks dismissal of the complaint, or an order pursuant to CPLR 3042 precluding plaintiff from offering any evidence for which discovery has not been provided in *Garcia v City of New York* (index No. 111879/09, motion seq. No. 008), *Azouaoui v East 51st Street Development Co.* (108716/10, motion seq. No. 003), *Squeri v East 51st Street* (index No. 103802/09, motion seq. No. 008) and *American Bankers v Reliance Construction* (index No. 100754/09, motion seq. No. 11). East 51st

Street seeks dismissal of the complaint and attorney's fees in *Garcia v City of New York* (index No. 111879/09, motion seq. No. 009), *Azouaoui v East 51st Street Development Co.* (108716/10, motion seq. No. 004), *Squeri v East 51st Street* (index No. 103802, motion seq. No. 009), *Metropolitan Property and Casualty Insurance Co. v East 51st Street*, (index No. 401735/10, motion seq. No. 001), and *Schorsch v East 51st Street Development* (108439/09, motion seq. No. 006). These motions are consolidated for disposition.

**I. The Products-Liability Defendant Motions** (*East 51st Street v City of New York*, index No. 650658/2011, motion seq. Nos. 023, 024, 025; *Lexington Insurance v Reliance Construction*, index No. 100205/09; motion seq. Nos. 011, 012, 013; *Americans Bankers v Reliance Construction*, index No. 100754/09, motion seq. Nos. 009, 010, 012)

These motions follow in the wake of previous motions, also relating to interrogatory responses, made by the same parties, that were resolved by a decision and order dated December 10, 2013 (December 2013 Order). Among other things, the December 2013 Order directed that product liability plaintiffs were to provide additional interrogatory responses. Parties were given until January 31, 2014 to expand their interrogatory responses to include more specific information relating to their design, manufacture, and warnings claims. The December 2013 Order also provided that the products liability-plaintiffs would be precluded from offering at trial any specific claims not raised in their interrogatories. For example, if product-liability plaintiffs failed, by January 31, 2014, to raise a specific feasible, alternative design, then they are precluded from raising one at trial. Similarly, product-liability plaintiffs cannot, at trial, argue that product-liability defendants should have provided a specific warning that it did not raise in the interrogatories.

In these follow-up motions, product-liability defendants attempt to creatively misinterpret the December 2013 Order. That is, product-liability defendants argue that the December 2013 Order provides that product-liability plaintiffs will be precluded from offering *any* evidence as to their design, manufacture, and warning claims if the supplementary responses were unsatisfactory. It does not. As these motions rely on this overbroad reading of the December 2013 Order, they must be denied. The December 2013 Order has already, at length, resolved the issues raised by products-liability defendants in these motions. Moreover, the applications of Favco and Lift-All for leave to file summary judgment are also denied.

## II. RCG Motions

### a. **Garcia v City of New York** (index No. 111879/09, motion seq. No. 008)

Plaintiff Chris Garcia (Garcia) has missed several deadlines and provided incomplete disclosure. For example, Garcia responded to the first and second master set of document requests on October 22, 2012, more than two years after the court's deadline for production. RCG sent letters to Garcia regarding his outstanding discovery on July 16, 2010, November 11, 2013, and February 20, 2014. Garcia only tried to supplement his discovery when faced with motions to dismiss and, despite these efforts, authorizations for Garcia's income tax returns for the years 2000 through 2007 remain outstanding.

In opposition, Garcia's counsel argues that his failures through the disclosure process have arisen from sparse attorney-client communication following Garcia's relocation to Georgia. Moreover, Garcia provided an affidavit explaining his difficulties in providing disclosure relating to his lost earnings claim:

“Deponent has tried to obtain documents to support his claim for lost earnings but some of the paperwork has been hard for deponent to find. While deponent has been able to obtain a copy of his W-2 forms for the period of 2008-2013 after he relocated to Georgia, he has been unable to find any earlier ones, when he was employed in New York. Deponent attempted to obtain copies of the forms by contacting the facility in Staten Island that helped prepare his tax returns while he was living in New York but all numbers for the entity are non-operational. Deponent believes they are no longer in business. Deponent has similarly tried to obtain information from the Social Security Office but due to the fact that his identity was stolen when he moved to Georgia he is currently locked out of their online system and he has been unable to receive any helpful information over the phone or in person”

(Garcia April 18, 2014 aff, ¶¶ 6-7).

Garcia also notes that he has been deposed as to liability and is willing to fly to New York again for a further deposition on the issue of damages (*id.*, ¶ 8).

Here, RCG is entitled to an order precluding Garcia from presenting evidence at trial as to lost earnings. The Court of Appeals has recently reaffirmed the principle that “[i]f the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity” (*CDR Créances S.A.S. v Cohen*, 23 NY3d 307, 318 [2014] [internal quotation marks and citation omitted]). The Court added that “[c]ompliance requires a timely response and one that evinces a good-faith effort to address the requests meaningfully,” and that “[a] trial court has discretion to strike pleadings under CPLR 3126 when a party’s repeated noncompliance is dilatory, evasive, obstructive and ultimately contumacious” (*id.* [internal quotation marks and citation omitted]).

The court’s concern with the integrity of the judicial system is especially acute where, as here, it is balancing the complexity and volume of a large consolidated litigation. While Garcia’s conduct in discovery has not risen to a level warranting dismissal of his complaint, it does rise to a level warranting preclusion. Here, Garcia’s responses to the first and second master set of

document requests were over two years late and his authorizations for tax returns predating the accident remain outstanding. While the court is sympathetic to difficulties Garcia has encountered since relocating to Georgia, it cannot allow Garcia's repeated failures to provide discovery escape penalty under CPLR 3126. The preclusion order applies to Garcia's lost earnings claim because that is the area where Garcia's failures have been most egregious and are still ongoing.

- b. *Azouaoui v East 51st Street Development Co.* (motion seq. No. 108716/10, motion seq. No. 003)

Plaintiff Katia Azouaoui (Azouaoui) has failed to appear for a deposition in this matter. Moreover, Azouaoui has failed to meet numerous discovery deadlines, as well as formal requirements for discovery in these consolidated cases.

Under case management order No. 24, the deadline for Azouaoui, as a ninth-wave plaintiff under case management order No. 23, to respond to defendants' first master set of document requests was June 10, 2011. Azouaoui failed to produce documents by this date.

On August 16, 2012, Azouaoui served a bill of particulars claiming \$24,000 in lost earnings, but provided no document responses relating to this claim. On September 5, 2012, Azouaoui responded to the first master set of documents requests Nos. 1 through 5 by stating: "To be provided, if applicable under separate cover." When documents were finally provided, on October 10, 2012, sixteen months after the court's deadline, Azouaoui's document production was not made in the form required by the court, as the documents were not Bates stamped or individually identified.

On December 12, 2012, RCG sent Azouaoui's counsel a letter noting that Azouaoui's production violated the court's case management orders because it did not contain Bates stamp numbers and was not divided and uploaded by document. The letter demanded that Azouaoui supplement her production within 20 days. On June 12, 2013, RCG sent a follow-up letter demanding the still-outstanding discovery. On October 13, 2013, RCG phoned Azouaoui's counsel in regard to the outstanding discovery and to set up a deposition. As Azouaoui had moved to France, her counsel was unsure about the deposition and advised that a response would be made within a few weeks. On November 8, 2013, RCG sent a follow-up letter demanding that response. Azouaoui did not respond.

In response to this motion, Azouaoui served a supplemental bill of particulars on May 5, 2014 withdrawing her claim for lost earnings and a second supplemental bill of particulars referencing the Bates stamp numbered documents relating to her property damage claims. As to the deposition, Azouaoui's counsel states that she has not been able to maintain consistent contact with her client, but that she would try to make her available for a video conference. Counsel also stated that it would seek to be removed as counsel.

As to Azouaoui's repeated failures during the discovery process, Azouaoui's counsel states that she did not receive certain communications, such as RCG's follow-up letters, that were served solely to the court's e-filing system.

This excuse is unavailing, as case management order Nos. 1 and 3 require all parties to register on the court's e-filing system. Moreover, Azouaoui's repeated failures to comply with the court's discovery orders and her inability to appear for a deposition warrant the dismissal of her complaint. As such, RCG's motion is granted (*see McKanic v Amigos del Museo del Barrio*,

74 AD3d 639, 639-640 [1st Dept 2011] [failure to comply with discovery obligations justified dismissal of the complaint]).

**c. Squeri v East 51st Street (index No. 103802/09, motion seq. No. 008)**

Jean Squeri (Squeri) is a second-wave plaintiff. Under case management order No. 4, Squeri was to complete document production and responses to the first master set of document requests by July 10, 2009. Squeri failed to do so. Squeri did produce documents on October 15, 2009, October 27, 2010, and August 4, 2011. However, on October 7, 2013, East 51st Street served a supplemental document request which asked that Squeri respond by November 7, 2013. Squeri did not respond or provide any additional documents. On February 25, 2014, East 51st Street sent a letter to Squeri regarding her failures to comply with discovery obligations. As the court set March 10, 2014 as a deadline for motions relating to discovery failures, East 51st Street asked that Squeri produce all responsive documents by March 10, 2014. Squeri provided a response to the supplemental demand on May 2, 2014.

RCG maintains that Squeri is still in violation of case management order No. 4, as its May 2, 2014 responses are insufficient because they improperly rely on boilerplate objections to certain document demands.

In opposition, Squeri argues that, as she has not violated any court orders, dismissal would be wildly inappropriate. Moreover, Squeri argues that the motions are moot in light of her May 2, 2014 responses. Finally, Squeri argues that RCG cannot seek discovery penalties for its failure to respond to supplemental demands made by another party, namely East 51st Street.

Here, Squeri is incorrect that she has not violated any court orders. Clearly, Squeri violated case management order No. 4, filed on May 13, 2009, which required Squeri complete

responses and document production related to the first master set of requests by July 10, 2009. Moreover, Squeri frustrated the court's attempts to coordinate efficient discovery by failing to timely respond to East 51st Street's demand for supplemental discovery. Squeri is also incorrect that RCG cannot rely on a failure to respond to East 51st Street's demands. The scheme of discovery devised by the court to reduce duplication and waste in these consolidated cases allows for similarly situated parties to speak for one another – and for one party to take the lead in making supplemental demands.

In these circumstances, Squeri is correct that dismissal would be too harsh a sanction. However, given her history of frustrating the progress of discovery, RCG is entitled to an order precluding Squeri from offering at the time of trial any evidence for which discovery has not been provided at this time. If Squeri's May 2, 2014 responses are as thorough as Squeri claims, this order should be no imposition to her prosecution of this action.

**d. American Bankers Insurance v Reliance Construction** (index No. 100754/09, motion seq. No. 011)

Under case management order No. 4, American Bankers, as a second-wave plaintiff, was to complete production of documents and responses to the master set of demands by July 10, 2009. RCG sent a letter to American Banker's counsel on April 15, 2010, requesting that American Bankers comply with its discovery demands and specifically requesting particularized responses regarding the claim relating to its subrogor, Melissa Dolman (Dolman). American Bankers' counsel emailed a response on April 15, 2010 indicating that it would be withdrawing the claims for subrogors Sean and Lauren Cutrona and limiting its claim to the amount paid to

Dolman. On September 20, 2012, RCG sent a notice to take the deposition of the adjustor who worked on Dolman's claim.

On November 18, 2013, RCG sent a follow up email regarding American Bankers' failure to provide a copy of Dolman's policy and to schedule a deposition of the adjustor. Since the court issued case management order No. 46, which extended the time for any discovery-related motions, American Bankers' have been notified of their outstanding obligations multiple times, including outstanding discovery charts circulated to all parties on September 30, 2013 and October 11, 2013. Nevertheless, American Bankers has provided no supplemental discovery responses since 2010 and has not produced an adjustor to testify in regard to Dolman's claim.

American Bankers has not opposed this motion. American Bankers' repeated and contumacious failures in discovery warrants dismissal of its complaint as against RCG. As such, RCG's motion is granted.

### **III. East 51st Motions**

#### **a. Garcia v City of New York (index No. 111879/09, motion seq. No. 009)**

As discussed above in relation to RCG's motion, Garcia has missed several deadlines and provided incomplete disclosure. For example, Garcia responded to the first and second master set of document requests on October 22, 2012, more than two years after the court's deadline for production. East 51st Street sent a letter to Garcia regarding his outstanding discovery on November 11, 2013. Additionally, East 51st Street sent him letters on three other occasions. Garcia only tried to supplement his discovery when faced with motions to dismiss and, despite

these efforts, authorizations for Garcia's income tax returns for the years 2000 through 2007 remain outstanding.

In opposition, Garcia's counsel argues that his failures through the disclosure process have arisen from sparse attorney-client communication following Garcia's relocation to Georgia. Moreover, Garcia provided an affidavit explaining his difficulties in providing disclosure relating to his lost earnings claim (Garcia April 18, 2014 aff, ¶¶ 6-7). Garcia also notes that he has been deposed as to liability and is willing to fly to New York again for a further deposition on the issue of damages (*id.*, ¶ 8).

Here, East 51st Street is entitled to an order precluding Garcia from presenting evidence at trial as to lost earnings. The courts concern with the integrity of the judicial system is especially acute where, as here, it is balancing the complexity and volume of a large consolidated litigation. While Garcia's conduct in discovery has not risen to a level warranting dismissal of his complaint, it does rise to a level warranting preclusion. Here, Garcia's responses to the first and second master set of document requests were over two years late and his authorizations for tax returns predating the accident remain outstanding. While the court is sympathetic to the difficulties Garcia has encountered since relocating to Georgia, it cannot allow Garcia's repeated failures to provide discovery escape penalty under CPLR 3126. The preclusion order applies to Garcia's lost earning claims because that is the area where Garcia's failures have been most egregious and are still ongoing. The branch of this motion seeking attorney's fees is denied.

b. *Azouaoui v East 51st Street Development Co.* (108716/10, motion seq. No. 004)

Azouaoui has failed to appear for a deposition in this matter. Moreover, Azouaoui has failed to meet numerous discovery deadlines, as well as formal requirements for discovery in these consolidated cases.

As discussed above, under case management order No. 24, the deadline for a response to defendants' first master set of document requests was June 10, 2011, which Azouaoui failed to produce.

On August 16, 2012, Azouaoui served a bill of particulars claiming \$24,000 in lost earnings, but provided no document responses relating to this claim. On September 5, 2012, Azouaoui responded to the first master set of documents requests Nos. 1 through 5 by stating: "To be provided, if applicable under separate cover." When documents were finally provided, on October 10, 2012, sixteen months after the court's deadline, Azouaoui's document production was not made in the form required by the court, as the documents were not Bates stamped or individually identified.

In response to this motion, Azouaoui served a supplemental bill of particulars on May 5, 2014 withdrawing her claim for lost earnings and a second supplemental bill of particulars referencing the Bates stamp numbered documents relating to her property damage claims. As to the deposition, Azouaoui's counsel states that she has not been able to maintain consistent contact with her client, but that she would try to make her available for a video conference. Counsel also stated that she would seek to be removed as counsel.

As to Azouaoui's repeated failures during the discovery process, Azouaoui's counsel

states that she did not receive certain communications, such as RCG's follow-up letters, that were served solely to the court's e-filing system.

However, all parties were required to register on the court's e-filing system. Azouaoui repeatedly failed to comply with the court's discovery orders, and this, as well as her inability to appear for a deposition, warrants the dismissal of her complaint. East 51st's motion to dismiss Azouaoui's complaint is granted. The branch of this motion seeking attorney's fees is denied.

**c. Squeri v East 51st Street** (index No. 103802/09, motion seq. No. 009)

Jean Squeri (Squeri) is a second-wave plaintiff. Under case management order No. 4, Squeri was to complete document production and responses to the first master set of document requests by July 10, 2009. Squeri produced documents on October 15, 2009, October 27, 2010, and August 4, 2011. On October 7, 2013, East 51st Street served a supplemental document request. Responses were due by November 7, 2013. Squeri failed to respond. East 51st Street sent a letter to Squeri regarding her failures to comply with discovery obligations and requested that Squeri produce all responsive documents by March 10, 2014. Squeri provided a response to the supplemental demand on May 2, 2014.

East 51st Street maintains that Squeri is still in violation of case management order No. 4, as its May 2, 2014 responses are insufficient because they improperly rely on boilerplate objections to certain document demands. In opposition, Squeri argues that, as she has not violated any court orders, dismissal would be wildly inappropriate. Moreover, Squeri argues that the motions are moot in light of her May 2, 2014 responses.

Here, Squeri violated case management order No. 4 by failing to produce responses and document production related to the first master set of requests by July 10, 2009. Squeri also frustrated the discovery scheme for these consolidated cases by failing to timely respond to defendants' demand for supplemental discovery. Accordingly, East 51st Street is entitled to an order precluding Squeri from offering at the time of trial any evidence for which discovery has not been provided at this time. The branch of this motion seeking attorney's fees is denied.

**d. *Metropolitan Property and Casualty Insurance Co. v East 51st Street***

(index No. 401735/10, motion seq. No. 001)

Metropolitan Property and Casualty Insurance Co. (Metropolitan) is a fourth-wave plaintiff. Metropolitan filed its complaint on May 26, 2009.<sup>1</sup> Case management order No. 6 required Metropolitan to complete document production and to serve written responses by January 14, 2010. However, Metropolitan did not respond or produce any documents by this date.

On September 19, 2012, East 51st Street sent a letter to Metropolitan regarding its failure to respond and provide documents, asking that it produce responsive documents by September 28, 2012. On September 20, 2012, counsel for East 51st Street spoke with counsel for Metropolitan on the phone regarding the deficiencies. Metropolitan's counsel followed up to assure opposing counsel that "[W]e'll get right on this." On October 22, 2012, Metropolitan produced certain documents responsive to the master sets of discovery requests.

On June 21, 2013, RCG served supplemental document requests on Metropolitan. These

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<sup>1</sup> The index No. reflects a later date because plaintiff failed to timely file its RJI.

requests sought a copy of Metropolitan's insurance policy, copies of subrogation receipts, and copies of any correspondence to and from the adjuster. However, Metropolitan has not responded to these requests.

In opposition, Metropolitan argues that it never "opted in" to the e-filing system and thus does not receive notice of e-filed documents. Metropolitan also argues that East 51st Street did not comply with the good faith provision of section 202.7 of the Uniform Rules for N.Y. Trial Courts. Finally, Metropolitan claims that there is no outstanding discovery remaining.

Here, East 51st Street is entitled to dismissal of Metropolitan's complaint.

Metropolitan's discovery obligations have not been satisfied because it has not responded to RCG's June 21, 2013 supplemental document request. Moreover, it failed to turn over any documents by the original deadline for all documents. Thus, it remains in violation of case management order No. 6. Furthermore, it is no excuse that Metropolitan decided not to "opt-in" to the e-filing system. Metropolitan was not at liberty to make such a choice as case management order Nos. 1 and 3 clearly direct all parties to register for e-filing and request inclusion in the master service list. Metropolitan's refusal to do so, and its repeated failures to comply with discovery orders has frustrated the discovery process enough to justify dismissal of its complaint. However, East 51st Street's application for attorney's fees is denied.

**e. *Schorsch v East 51st Street Development (108439/09, motion seq. No. 006)***

Margaret Schorsch (Schorsch) is a third-wave plaintiff. As such, case management order No. 5 set September 18, 2009 as the deadline for her to complete document production and

responses to the first master set of requests. Schorsch failed to turn over any documents or responses by this date. Seven months after the deadline Schorsch produced documents.

On November 13, 2012, counsel for RCG spoke to Schorsch's counsel about deficiencies in the production and followed up with an email the same day to demand the outstanding discovery, including authorizations needed prior to deposition. On July 2, 2013, RCG served a supplemental document request which sought documents that Schorsch failed to produce. Schorsch has not responded or produced any additional documents. Moreover, Schorsch has not opposed this motion.

In light of Schorsch's repeated failures to comply with discovery orders, East 51st Street is entitled to dismissal of her complaint. However, the branch of East 51st Street's motion that seeks attorney's fees is denied.

#### CONCLUSION

Based on the foregoing, it is

ORDERED that the motions of product-liability defendant Favelle Favco Cranes (USA) for dismissal or preclusion and leave to file summary judgment in *East 51st Street v City of New York* (index No. 650658/11, motion seq. No. 024), *Lexington Insurance v Reliance Construction LTD* (index No. 100205/09, motion seq. No. 012), and *American Bankers Insurance v Reliance Construction* (index No. 100754/09, motion seq. No. 012) are denied; and it is further

ORDERED that the motions of product-liability defendant Lift-All Company, Inc. for dismissal or preclusion and leave to file summary judgment in *East 51st Street v City of New York* (index No. 650658/11, motion seq. No. 023), *Lexington Insurance v Reliance Construction*

*LTD* (index No. 100205/09, motion seq. No. 011), and *American Bankers Insurance v Reliance Construction* (index No. 100754/09, motion seq. No. 009) are denied; and it is further

ORDERED that the motions of product-liability defendant Liftex Corporation in *East 51st Street v City of New York* (index No. 650658/11, motion seq. No. 025), *Lexington Insurance v Reliance Construction LTD* (index No. 100205/09, motion seq. No. 013), and *American Bankers Insurance v Reliance Construction* (index No. 100754/09, motion seq. No. 010) are denied; and it is further

ORDERED that the motion of defendant Reliance Construction Ltd. for discovery sanctions against plaintiff Chris Garcia in *Garcia v City of New York* (index No. 111879/09, motion seq. No. 008) is granted to the extent that plaintiff is precluded from presenting evidence at trial as to his lost earnings claim; and it is further

ORDERED that the motion of defendant Reliance Construction Ltd. for discovery sanctions against plaintiff Katia Azouaoui (index No. 108716/10, motion seq. No. 003) is granted and plaintiff's complaint is dismissed as against defendant Reliance Construction Ltd.; and it is further

ORDERED that the motion of defendant Reliance Construction Ltd. for discovery sanctions against plaintiff Jean Squeri (index No. 103802/09, motion seq. No. 008) is granted to the extent that plaintiff is precluded from offering at trial any evidence which has not been provided by the date of this order; and it is further

ORDERED that the motion of defendant Reliance Construction Ltd. for discovery sanctions against plaintiff American Bankers Insurance Company a/s/o Melissa Dolman (index No. 100754/09, motion seq. No. 11) is granted and plaintiff's complaint is dismissed as against

defendant Reliance Construction Ltd.; and it is further

ORDERED that the motion of defendant East 51st Street Development Company for discovery sanctions against plaintiff Chris Garcia (index No. 111879/09, motion seq. No. 009) is granted to the extent that Garcia is precluded from presenting evidence at trial as to lost earnings; the branch of the motion seeking attorney's fees is denied; and it is further

ORDERED that the motion of defendant East 51st Street Development Company for discovery sanctions against plaintiff Katia Azouaoui (index No. 108716/10, motion seq. No. 004) is granted to the extent that plaintiff's complaint is dismissed; the branch of the motion seeking attorney's fees is denied; and it further

ORDERED that the motion of defendant East 51st Street Development Company for discovery sanctions against plaintiff Jean Squeri (index No. 103802, motion seq. No. 009) is granted to the extent that plaintiff is precluded from offering at trial any evidence for which discovery has not been provided as of the date of this order; the branch of the motion seeking attorney's fees is denied; and it is further

ORDERED that the motion of defendant East 51st Street Development Company for discovery sanctions against plaintiff Metropolitan and Casualty Insurance Co. (index No. 401735/10, motion seq. No. 001) is granted to the extent that plaintiff's complaint is dismissed; the branch of the motion seeking attorney's fees is denied; and it is further

ORDERED that the motion of defendant East 51st Street Development Company for discovery sanctions against plaintiff Margaret Schorsch (index No. 108439/09, motion seq. No.

006) is granted to the extent that plaintiff's complaint is dismissed; however, the branch of the motion seeking attorney's fees is denied.

Dated: Sept. 29, 2014

ENTER:



Hon. CAROL R. EDMEAD, J.S.C.

**HON. CAROL EDMEAD**