

Bovis Lend Lease LMB Inc. v Patent Constr. Sys.

2015 NY Slip Op 31146(U)

June 8, 2015

Supreme Court, Bronx County

Docket Number: 251365-12

Judge: Laura G. Douglas

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 11

BOVIS LEND LEASE LMB INC., BAYROCK/ZAR
SPRING LLC, BAYROCK/ZAR REALTY LLC,
BAYROCK GROUP LLC, BAYROCK/SAPIR
ORGANIZATION LLC, THE SAPIR ORGANIZATION,
SPRING STREET LLC and THE TRUMP
ORGANIZATION

Plaintiffs,

Index No. 251365-12

- against -

DECISION AND ORDER

PATENT CONSTRUCTION SYSTEMS

Defendant.

HARSCO CORPORATION,

Third-Party Plaintiff,

-against-

Third-Party
Index No. 83760-12

DIFAMA CONCRETE INC.

Third-Party Defendant.

HON. LAURA G. DOUGLAS:

The third-party defendant Difama Concrete Inc. ("Difama") has moved to compel the plaintiffs Bovis Lend Lease LMB Inc., Bayrock/Zar Spring LLC, Bayrock/Zar Realty LLC, Bayrock Group LLC, Bayrock/Sapir Organization LLC, The Sapir Organization, Spring Street LLC and The Trump Organization (collectively "Plaintiffs") to respond to Difama's Notice for Discovery & Inspection dated and served May 28, 2013. The defendant/third party plaintiff Harsco Corporation ("Harsco") has moved to strike the plaintiffs' complaint or, in the alternative, for a self-executing order striking the plaintiffs' complaint unless the closing papers in all eight underlying actions are furnished by the

plaintiffs within ten days.

The Plaintiffs have brought this proceeding seeking reimbursement of sums paid out in settlement of four personal injury actions resulting from the partial collapse of a shoring platform at a construction project ("Trump Soho") at 246 Spring Street, New York, N.Y. on January 14, 2008. Difama was the concrete subcontractor at the job site. Harsco/Patent Construction Systems¹ furnished shoring equipment at the job site. A total of eight personal injury actions were commenced arising out of the collapse of the platform.

This proceeding brought by the plaintiffs against Patent Construction Systems ("Patent") was commenced as a third party action to four of the personal injury actions. It was severed, together with the third party action commenced by Harsco, by order of the Court dated March 19, 2012 [SUAREZ, J.]. All of the underlying eight personal injury lawsuits have now been settled.

Harsco and Difama have served discovery demands seeking disclosure by the plaintiffs of the settlement agreements and closing papers in all eight settled personal injury matters. The plaintiffs have furnished redacted responses to these demands identifying the parties, the settlement amounts, the identities of the entities who paid the settlement amounts, and the contents of the related confidentiality agreements.

Harsco served a Notice to Produce dated April 18, 2013 seeking the closing papers and all settlement agreements referable to the *Wainwright* matter under index number 301147-08. In this Notice, Harsco also seeks "the closing papers and all settlement papers in any other action in which [plaintiffs] claim damages are owed by third party defendant

¹Harsco has appeared as "Harsco Corporation i/s/h/a Patent Construction Systems." The same counsel represents Harsco and Patent.

Harsco Corporation arising out of any other related matters to the *Wainwright* case [sic].” Plaintiffs have resisted turning these materials over to Harsco, relying on an indemnification and confidentiality agreement. Harsco labels such reliance willful and contumacious conduct, as the agreement in question bars disclosure by the personal injury plaintiffs in the underlying actions, not by Plaintiffs herein.

According to the third-party proceeding commenced under third-party index number 84214-11², which is currently proceeding under index number 25135-2012, the Plaintiffs seek damages against Patent for its wrongful conduct with respect to the shoring tower arising out of their exposure “by reason of possible verdict, judgment or future settlement of the remaining pending cases” [i.e. the *Palizzotto*, *Wainwright*, *Dougherty* and *Trochia* personal injury cases]. The pleading seeks damages in both common law indemnity and contribution.

The third-party complaint filed by Harsco seeks contractual indemnification against Difama in whole or in part of any sum which may be recovered against Patent/Harsco in the proceeding brought by Plaintiffs, together with attorneys fees and costs. Therefore both of these pending matters concern the *Palizzotto*, *Wainwright*, *Dougherty* and *Trochia* matters. They do not concern the four other personal injury matters [the *Vanchytska*, *Borrelli*, *Verni* and *Carluccio* matters], since Plaintiffs make no claim for damages arising out of those other matters.

Accordingly, the Court determines that the confidentiality agreement is inapplicable to these discovery demands, since the parties to this action are not bound by its terms.

²Neither this pleading, nor the pleading filed by Harsco which is proceeding as the third party action under Third-Party Index No. 83760-12 have been annexed to the moving papers.

Indeed, the plaintiffs have abandoned this argument in their papers, asserting instead that the law favors the confidentiality of settlement agreements, or that the materials sought are irrelevant to this proceeding. However, the burden of resisting disclosure under these circumstances is on the party opposed to it. The mere assertion of privilege by plaintiffs is insufficient to demonstrate that the settlement papers are immune from disclosure. Moreover, the scope of discovery is determined by the pleadings filed herein.

Turning to the specific discovery demands at issue, the Notice to Produce filed by Harsco, which is dated April 18, 2013, is hereby amended to the extent that the plaintiffs are directed to provide the closing papers and all settlement agreements pertaining to the *Palizzotto, Wainwright, Dougherty and Trochia* matters. Beyond this, the Notice is stricken. The plaintiffs are directed to comply with said Notice, as amended herein, within 30 days after the date of service of a copy of this order with notice of entry thereon.

With regard to Difama's Notice of Discovery and Inspection dated May 28, 2013 the Court finds that plaintiffs are obligated to provide information regarding the erosion of the policy of insurance provided by Lloyds of London and all claims against such policy [items 1 and 2 of the said Notice of Discovery & Inspection]. The balance of said Notice of Discovery and Inspection is stricken. Plaintiffs are directed to comply with said items 1 and 2 within 30 days after service of a copy of this order with notice of entry thereon.

All remaining branches of the motions are denied.

This constitutes the decision and order of the Court.

Dated: 6-8-15



HON. LAURA G. DOUGLAS
J.S.C.