To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER-COMPLIANCE PART

----------x

CHARLES ANDREW SALZBERG AND
ANITA SALZBERG,

Plaintiffs,

-against-

KENNETH SENA, JOSEPH MAZZAFERRO,
LUXURY MORTGAGE CORP. AND WEBSTER BANK,

Defendants

----------x

DECISION & ORDER

Index No. 50399/2016
Motion Date: Oct 23, 2017
Seq. Nos. 7, 8

LEFKOWITZ, J.

The following papers were read on: the motion (sequence number 7) by plaintiffs for an order (i) pursuant to CPLR 3124 compelling defendants Kenneth Sena and Joseph Mazzaferro ("defendants") to produce any and all documents and communications demanded in plaintiffs' First Notice of Discovery and Inspection ("plaintiffs' discovery demands") relating to Stewart Title Insurance Company ("Stewart") and the action entitled *Sena and Mazzaferro v Stewart Title Insurance Company*, Index No. 57251/2016 (the "related action"); and (ii) pursuant to CPLR 3126 striking defendants' pleadings or in the alternative, that portion of defendants' pleadings relating to plaintiffs' claim of trespass, and entering a final judgment against defendants for their willful failure to comply with plaintiffs' discovery demands and refusal to produce the documents from the related action; (iii) pursuant to Part 130 of Title 22 of the Rules of the Chief Administrator of the Courts awarding costs and legal fees associated with prosecution of the instant motion and any continued depositions of defendants; and (iv) for such other and further relief as the court deems just and proper; and on the motion (sequence number 8) by defendants for an order: (i) granting defendants costs, expenses and/or fees for the continued deposition of plaintiff Charles Andrew Salzberg ("Dr. Salzberg"); and, (ii) for such other and further relief as this court deems just and proper.

Motion Sequence No. 7
Order to Show Cause, Affirmation in Support, Exhibits A-O, Memorandum of Law in Support

Affirmation in Opposition by Jessica J. Kastner, Esq., on behalf of defendants, Exhibits A-C, Memorandum of Law in Opposition
Affirmation in Partial Opposition by James P. Truitt, III, Esq., on behalf of Stewart
Affirmations of Service

Motion Sequence No. 8
Order to Show Cause, Affirmation in Support, Exhibit A, Memorandum of Law in Support
Affirmation in Opposition by Michael B. Kramer, Esq., on behalf of plaintiffs
Court file (NYSCEF Docs. Nos. 1, 18)

Upon the foregoing papers and proceedings held on October 23, 2017 these motions are determined as follows:

Relevant Facts and Procedural History[1]

This action involves a dispute over a parcel of land (the "strip") which runs along the shared boundary line between plaintiffs' property located at 43 Finney Farm Road, and defendants' property located at 19-21 Finney Farm Road, both in Croton-on-Hudson, New York. Plaintiffs purchased their property in September 2011 from Daniel T. Scalzi ("Scalzi"). Plaintiffs contend that their right to possess the strip was established by adverse possession by Scalzi, who when he still owned plaintiffs' property, cleared trees and brush from a portion of the strip and also erected a split post and rail fence on the strip. Defendants purchased their property in April 2014. Plaintiffs contend that they continued to use the strip without objection or incident until November 2015 when plaintiffs repaired the existing fence and extended it beyond the strip onto defendants' property. Plaintiffs state that at this time defendants claimed that the strip belonged to them. Plaintiffs state that they requested to meet with defendants to reach a resolution but asked that the status quo be maintained while they were attending the funeral of Dr. Salzberg's mother out of town. While plaintiffs were out of town, defendants removed the fence.

Plaintiffs commenced this action by filing a summons and complaint on January 13, 2016 seeking a declaratory judgment that they adversely possess the strip; injunctive relief prohibiting defendants from entering upon the strip or making further use of the strip; damages as a result of defendants' trespass onto the strip; and punitive damages (NYSCEF Doc. No. 1). Defendants joined issue by the service of an answer dated April 21, 2016, generally denying plaintiffs' claims and asserting counterclaims seeking damages for the removal of certain trees by plaintiffs from the strip, a declaratory judgment concerning the ownership of the strip, and damages for trespass onto the strip (NYSCEF Doc. No. 18).

Defendants and plaintiffs interposed motions for summary judgment. Both motions were

---

[1] A full recitation of the facts was set forth in this court's (Jamieson, J.) Decision and Order entered on March 21, 2017 (Plaintiffs' Exhibit A).

denied by this court (Jamieson, J.) by Decision and Order entered on March 21, 2017. Plaintiffs' counsel states that during the course of preparing its reply papers to defendants' motion, its office first became aware of the related action, which was commenced by defendants on May 26, 2016 (Plaintiffs' Exhibit B). In their complaint in the related action, defendants herein claimed, among other things, that Stewart was obligated to defend defendants in this action and to provide coverage with respect to any loss. In its answer Stewart denied defendants' allegations and alleged as an affirmative defense that defendants accepted their property subject to several exceptions as noted in the survey including, "Owner may be out of possession to strip of land between post and rail fence and portions of the southeasterly record line of title" (Plaintiffs' Exhibit C, ¶18).

On May 15, 2017, plaintiffs served defendants with plaintiffs' discovery demands (Plaintiffs' Exhibit E). Included in plaintiffs' discovery demands were the following demands:

17. All documents and communications concerning any claims filed by Defendants with any insurance company regarding the Strip, including but not limited to a copy of the title claim submitted by defendants to Stewart Title Insurance Company.

18. All documents and communications concerning any claims complained of in *Sena and Mazzaferro v. Stewart Title Insurance Company, Index No. 57251/2016.*

19. To the extent not already provided above, the determination letter and any other correspondence received from Stewart Title Insurance Company or any other title insurance or abstract company regarding the Defendants' claims which are the subject of litigation in *Sena and Mazzaferro v. Stewart Title Insurance Company, Index No. 57251/2016.*

Defendants served their responses to plaintiffs' discovery demands on or about June 30, 2017 wherein defendants objected to the demands 17-19 (the "Stewart documents") on the grounds that they sought documents which were irrelevant, overly burdensome, not reasonably likely to lead to admissible evidence and which contained confidential information (Plaintiffs' Exhibit F).

On July 13, 2017, the related action was discontinued by the filing of a Stipulation of Discontinuance (Plaintiffs' Exhibit I).

By letter dated July 21, 2017, plaintiffs' counsel advised that, among other items, the Stewart documents were missing from defendants' responses to plaintiffs' discovery demands (Plaintiffs' Exhibit G). Defendants' counsel responded in a letter dated August 1, 2017, that defendants had properly objected to the production of documents pertaining to the related action and that plaintiffs were not entitled to those documents. Defense counsel additionally noted that in any event, plaintiffs were already in possession of the title insurance policy issued to defendants by Stewart as well as the pleadings and exhibits in the related action (Plaintiffs' Exhibit H).

On August 11, 2017, plaintiffs' counsel emailed defense counsel about the status of the outstanding documents. Defendants' counsel advised that she was reviewing documents and conferring "on my end with regard to the Stewart documents" (Plaintiffs' Exhibit J).

On August 18, 2017, defendants' counsel advised that she would try to have the documents and any additional responses to plaintiffs' counsel the following week (Plaintiffs' Exhibit K).

When plaintiffs' counsel contacted defense counsel on August 25, 2017, defense counsel stated that while they had initially interposed objections to the demands concerning the Stewart documents, counsel was reconsidering (Plaintiffs' Exhibit L). She added that it would take a little time to locate the documents, review them and confer regarding their production in light of defendants' previous objections. Later that same day, defense counsel advised plaintiffs' counsel that defendants would not produce all of the Stewart documents for a number of reasons, including relevancy and confidentiality (Plaintiffs' Exhibit L). However, defense counsel indicated that she was still reviewing and considering producing some of the Stewart documents.

The parties appeared for a compliance conference on September 6, 2017 at which time defense counsel advised that they would not be producing the requested documents because they were subject to a confidentiality provision contained in the settlement agreement executed between defendants and Stewart in the related action. Plaintiffs were then provided a briefing schedule for the present motion.

On September 13, 2017, plaintiffs' counsel spoke with Stewart's counsel, James Truitt, III, Esq. ("Truitt"). Plaintiffs' counsel memorialized this conversation with Truitt in an email to defendants' counsel, copying Truitt, in which plaintiffs' counsel relayed Truitt's position that if defendants were willing to waive the confidentiality provision of the settlement agreement, then Truitt would speak to his client (Plaintiffs' Exhibit M). A series of emails were exchanged, during which defense counsel maintained defendants' objections concerning the relevance of the documents being sought to the present action and stated that if Stewart agreed to waive the confidentiality provision, then defense counsel would consider it as well.

Sequence No. 7

The Parties' Contentions.

In support of their motion, plaintiffs contend that contrary to defendants' assertions otherwise, the documents which plaintiffs seek are relevant to their claims. Plaintiffs argue that the documents and correspondence between defendants and Stewart directly relate to the issue of who has legal title to the strip, and that these documents are also relevant to plaintiffs' claim of trespass. Plaintiffs include an email exchange from January 20-21, 2016 between defendant Kenneth Sena ("Sena") and Stewart which was filed to NYSCEF in the related action wherein Sena mentions plaintiffs, conversations with Scalzi, and defendants' observations concerning the

strip (Plaintiffs' Exhibit O). Plaintiffs state that a review of other documents filed in the related action show the existence of other communications, including claim letters and denials, which plaintiffs argue are all highly relevant to plaintiffs' claims and crucial to their ability to effectively depose defendants.

Additionally plaintiffs argue that the documents should not be shielded from discovery merely because the settlement agreement provides for their confidentiality. Plaintiffs also argue that defendants' claim that the documents are confidential is belied by the fact that numerous documents responsive to plaintiffs' discovery demands have already been filed to, and are publicly available, on NYSCEF.

Plaintiffs contend that they have made numerous efforts over the past months to resolve these discovery issues without court intervention. Plaintiffs argue that despite these efforts defendants have engaged in gamesmanship by interposing frivolous objections, claiming to be reviewing documents and then failing to raise the existence of a settlement agreement. Plaintiffs contend that such conduct constitutes a willful failure to disclose information in an effort to obstruct and frustrate plaintiffs' ability to obtain documents and depose defendants.

Plaintiffs seek to strike defendants' pleadings on the grounds that they failed to disclose on their motion for summary judgment the existence of the title policy, the exceptions to the title policy, and the existence of the related litigation with Stewart. Plaintiffs contend that Sena's affirmation in support of defendants' summary judgment motion misrepresented to the court that the survey and title insurance indicated that the disputed strip belonged to defendants, despite the exception contained in the title insurance policy.

Plaintiffs also seek costs and legal fees and for any continued depositions of defendants based upon defendants' allegedly frivolous conduct with respect to the demanded discovery, including defendants' failure to disclose the title policy, the exceptions to the title policy, and the existence of the related litigation and counsels' failure to inform plaintiffs of the settlement agreement (and confidentiality provision) until nearly four months after the title documents were demanded, defendants' frivolous objection of relevancy concerning the Stewart documents, and defense counsel's refusal to ask defendants if they would waive the confidentiality provision without first securing Stewart's waiver.

In opposition, defendants request that this motion be denied in its entirety, or that any documents ordered to be produced be limited to exclude confidential settlement communication, and deny plaintiffs' application for sanctions. Defendants first argue that the documents which plaintiffs seek are not relevant to the instant action. Specifically defendants state that this action concerns plaintiffs' assertion of adverse possession with respect to the strip which began in 1986 and ripened into title 10 years later in or about 1996/7, while Scalzi was still the owner of plaintiffs' property. Defendants state that the documents which plaintiffs seek relate to an insurance coverage dispute filed in 2016 after Stewart denied defendants' claim for coverage. Defendants contend that the insurance coverage dispute is ancillary to the present action and has no bearing on plaintiffs' claims.

Defendants further contend that pursuant to a confidentiality clause in the settlement agreement, materials and communications related to the settlement of the related action shall not be disclosed unless compelled or required in certain enumerated proceedings. Additionally, it is defendants' contention that the bulk of the communications being sought by plaintiffs is protected by CPLR 4542.

Defendants argue that if the Court does grant plaintiffs' motion, the documents sought should be narrowed to relate only to this dispute and should exclude confidential settlement communications. Defendants contend that title documents as defined by plaintiffs in their motion papers would include all settlement communication between the parties and their counsel which is excluded from discovery by CPLR 4547 and CPLR 3101(b). Defendants argue that CPLR 4547 precludes the use of any statements made during settlement negotiations.

Defendants contend that they have acted in good faith during the discovery process. Defendants assert that they have properly objected to demands 17-19. Defendants state that they have produced all title reports, the title policy, all surveys and their entire closing file with respect to defendants' property. Defendants aver they have only objected to the production of documents concerning the related action and the resolution thereof. Defendants further contend that they agreed to confer and consider plaintiffs' request to reconsider defendants' objections to producing the Stewart documents in the interests of resolving the discovery issues. Defendants aver that it was upon so conferring that defendants ultimately decided to maintain those objections based upon relevancy and confidentiality concerns. Defendants argue that they did not initially raise objections concerning the confidentiality provision of the settlement agreement because their objections, dated June 30, 2017, predated the finalization of the settlement agreement.

Defendants argue that plaintiffs are not entitled to sanctions and costs as defendants have been acting in good faith. Defendants state that their argument on the motion for summary judgment was that plaintiffs could not meet their burden to demonstrate adverse possession, and the contents of defendants' insurance policy with Stewart was irrelevant to that argument. Moreover, defendants maintain that based upon the legal description annexed to the deed for defendants' property, Sena's statements that his insurance documents indicated that the strip was part of defendants' property is true.

Stewart offers partial opposition to the motion. Stewart takes no position with respect to the production of documents, other than the settlement agreement, in the related action. Stewart does oppose the production of the settlement agreement including all communications that lead to that agreement. Stewart contends that the settlement agreement contains express language that the agreement is to be kept confidential subject only to certain exceptions not relevant here. Stewart states that communications between Stewart (and its attorneys) and defendants (and their attorneys) with respect to settlement were made with the understanding and expectation that those negotiations shall not be discoverable or admissible for any purpose. Stewart contends that the possibility that such communications could be made public would result in a chilling effect

on future settlement discussions. However, Stewart states that should the court be concerned that the settlement documents contain information relevant to the present action, those documents should be reviewed by the court in camera for a determination.

Analysis

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action." The phrase "material and necessary" is "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*see Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). Although the discovery provisions of the CPLR are to be liberally construed, "a party does not have the right to uncontrolled and unfettered disclosure" (*see Merkos L'Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 408 [2d Dept 2009]; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531 [2d Dept 2007]). "It is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims" (*see Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). The trial court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*see Auerbach v Klein*, 30 AD3d 451 [2d Dept 2006]; *Feeley v Midas Properties, Inc.*, 168 AD2d 416 [2d Dept 1990]).

"The nature and degree of the penalty to be imposed on a motion pursuant to CPLR 3126 is a matter generally left to the discretion of the Supreme Court" (*Carbajal v Bobo Robo*, 38 AD3d 820, 821 [2d Dept 2007] [internal quotation marks omitted]). To invoke the drastic remedy of striking a pleading a court must determine that the party's failure to disclose is willful and contumacious (*see Maiorino v City of New York*, 39 AD3d 601 [2d Dept 2007]). "Willful and contumacious conduct can be inferred from repeated noncompliance with court orders, ... coupled with either no excuses or inadequate excuses" (*Russo v Tolchin*, 35 AD3d 431, 434 [2d Dept 2006]; *see Prappas v Papadatos*, 38 AD3d 871, 872 [2d Dept 2007]).

Here plaintiffs seek any and all documents and communications demanded in plaintiffs' discovery demands from the related action and which relate to defendants' title insurance company Stewart. Defendants have opposed production of these documents first on the grounds that they are irrelevant to the present action. Defendants seek to avoid disclosure of the Stewart documents on the grounds that the present case and the related case are rooted in distinct causes of action. However, the court would be unduly constrained to accept defendants' argument that the related case has no bearing on the present action. At the core of this case is the ownership of the strip. The related case was only commenced by defendants as a result of the existence of this case. But for the commencement of this case, the related case would not have been filed. While the relief sought in the two cases is dissimilar many of the underlying facts apply to both cases. Accordingly, to the extent that those documents are not privileged or otherwise excluded from discovery they are relevant to plaintiffs' claims herein insofar as they relate to the disputed strip of land.

Defendants and Stewart have also argued that the bulk of the documents responsive to plaintiffs' demands are excluded from discovery because they are "deemed confidential" per the terms of the parties' settlement agreement in the related action and pursuant to CPLR 4547 [Defendants' Memorandum of Law In Opposition, p. 14).[2] With respect to the alleged confidentiality provision of the settlement agreement, it is noted that the court has not been provided with a copy of the settlement agreement, nor has the court been provided with the language which defendants and Stewart argue excludes the Stewart documents from discovery. Other than the broad and generalized assertions by defendants and Stewart there is no factual predicate before the court which demonstrates an understanding between defendants and Stewart that the Steward documents were to be confidential. Accordingly, the court is unable to exclude the Steward documents from discovery on that basis.

Pursuant to CPLR 4547 settlement of a disputed claim or an offer to settle the claim is inadmissible to prove either the liability of the alleged wrongdoer or the weakness of a claimant's case (Vincent C. Alexander, Practice Commentaries, McKinney's Cons. Laws of NY, 2012 Electronic Update, CPLR 4547). However, there are a number of exceptions to this exclusionary rule. For example, evidence of settlement is admissible when it is being offered for another purpose (*In Re Liquidation of Midland, Ins. Co*, 87 AD3d 487 [1st Dept 2011]) [evidence that a reinsurer had entered into settlements of claims pursuant to a specific protocol in other cases was admissible against that reinsurer in a separate later proceeding where reinsurer claimed that such protocol was improper]). Additionally, pre-dispute communications or statements made outside the negotiation context are not excluded (Vincent C. Alexander, Practice Commentaries, McKinney's Cons. Laws of NY, 2012 Electronic Update, CPLR 4547). The exclusionary rule only applies to documents or statements initially generated for the purpose of settlement negotiations and does not apply to pre-existing documents or other materials revealed during settlement negotiations (*id.*, and *see Nineteen Eight-Nine, LLC v Icahn*, 96 AD3d 603 [1st Dept 2012] [emails exchanged between attorneys for parties to a contract were not settlement discussions but were intended to set forth parties' positions regarding their respective rights and obligations under a contract and were not excludable under CPLR 4547]). Moreover, CPLR 4547 only acts to bar *admissibility* of certain documents and does not limit the *discoverability* of

---

[2] CPLR 4547 provides: "Evidence of (a) furnishing, or offering or promising to furnish, or (b) accepting, or offering or promising to accept, any valuable consideration in compromising or attempting to compromise a claim which is disputed as to either validity or amount of damages, shall be inadmissible as proof of liability for or invalidity of the claim or the amount of damages. Evidence of any conduct or statement made during compromise negotiations shall also be inadmissible. The provisions of this section shall not require the exclusion of any evidence, which is otherwise discoverable, solely because such evidence was presented during the course of compromise negotiations. Furthermore, the exclusion established by this section shall not limit the admissibility of such evidence when it is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay or proof of an effort to obstruct a criminal investigation or prosecution."

evidence (*Collins v 628 West End, LLC*, 127 AD3d 495, 495 [1st Dept 2015]; *City of Newburgh v Hauser*, 126 AD3d 926, 927 [2d Dept 2015]; *Town of Waterford v New York State Dept. Of Environmental Conservation*, 77 AD3d 224, 233 [3d Dept 2010]).

As argued by defendants, plaintiffs are seeking to prove their entitlement to the strip as a result of adverse possession, which is distinguishable from defendants' claims in the related action concerning insurance coverage. Plaintiffs are not seeking to utilize the documents for proving the issue of whether Stewart was obligated to defend and indemnify against plaintiffs' claims made in the present case. Rather plaintiffs are seeking to prove their claim of adverse possession and relief related to that issue. In light of the foregoing, plaintiffs are clearly entitled to the Stewart documents which existed prior to the settlement negotiations and to those documents which were not created as part of the negotiations which resulted in the settlement agreement, and which relate to the strip, and/or plaintiffs herein. With respect to any additional documents responsive to demands 17-19 which defendants claim should be withheld pursuant to CPLR 4547, defendants are directed to submit those documents to the court for in camera review as set forth herein.

While the court finds disturbing the possible lack of candor concerning defendants' failure to disclose the confidentiality provision of the settlement agreement prior to the September 6, 2017 compliance conference, the court does not find that such conduct warrants striking defendants' pleadings. The court also declines to impose sanctions or costs on defendants.

Sequence No. 8

The Parties' Contentions

Defendants have cross moved pursuant to CPLR 3126 for an order directing plaintiffs to pay the costs, expenses and/or fees to continue and finish Dr. Salzberg's deposition. Defendants contend that his deposition could not go forward based upon the conduct of plaintiffs' counsel during the deposition. Specifically, defendants state that plaintiffs' counsel improperly asserted at the start of the deposition a blanket objection: "[t]o save time and save pages, just for the record, every one of your questions will be deemed tabbed an objection by me as to form so I don't have to say 'objection as to form each time'" (Exhibit A, Deposition Transcript of Dr. Salzberg, p.6). Additionally, in response to a question posed by defendants' counsel, plaintiffs' counsel speaking directly to Dr. Salzberg, stated, "As your attorney, you shouldn't be making answers to legal conclusions. You are not a lawyer, okay? So, the correct answer is, 'I don't know'" (Exhibit A, p. 34). Defendants state that during the course of the deposition, plaintiffs' counsel made additional improper interruptions and objections, such as testifying for the witness, coaching the witness as to the correct answer, and inappropriately objecting and directing the witness not to answer questions, to such an extent that the deposition had to be halted.

In opposition plaintiffs' counsel states that during the course of the deposition a dispute arose between him and defendants' counsel concerning the propriety of certain questions relating

to the removal of trees. Plaintiffs' counsel contends he believed that defendants' counsel was purposefully misstating the record or contents of documents in an attempt to confuse Dr. Salzberg in an attempt to obtain a different answer. Plaintiffs' counsel contends that he and defendants' counsel went back and forth at which point defense counsel indicated that they could contact the court, but instead defendants' counsel decided to end the deposition. Plaintiffs' counsel stated that he asked defense counsel to finish with his other question and reserve the questions in dispute but that defense counsel refused, said he was going to file a motion and stormed out of the room. The attorneys ultimately returned to the deposition so that counsel for defendant Webster Bank could question Dr. Salzberg. At the conclusion of that questioning, defense counsel suggested contacting the court for guidance, but plaintiffs' counsel refused on the grounds that defense counsel had ended the deposition and had several times declared he was going to make a motion despite requests by plaintiffs' counsel to continue with the deposition and while reserving the disputed line of questioning. Plaintiffs contend that defendants could have reserved the line of questions for determination by the Court and continued with the deposition. Plaintiffs argue that defendants' motion should be denied as they come to this with unclean hands having forced plaintiffs to move to compel the production of relevant document after months of frivolous delay.

Analysis

Pursuant to the Uniform Rules of the Trial Courts [22 NYCRR] § 221.2, a deponent shall answer all questions at a deposition except to preserve a privilege or right of confidentiality, to enforce a court ordered limitation, or when the question is plainly improper and would, if answered, cause significant prejudice to any person. An attorney shall not direct a witness not to answer except under these limited circumstances or pursuant to an objection set forth in CPLR 3115 (*see Parker v Ollivierre,* 60 AD3d 1023 [2d Dept 2009]). Additionally, Uniform Rules of the Trial Courts [22 NYCRR] § 221.1(b) provides that "[s]peaking objections [are] restricted. Every objection raised during a deposition shall be stated succinctly and framed so as not to suggest an answer to the deponent and, at the request of the questioning attorney, shall include a clear statement as to any defect in form or other basis of error or irregularity. Except to the extent permitted by CPLR Rule 3115 or by this rule, during the course of the examination persons in attendance shall not make statements or comments that interfere with the questioning." "[G]enerally, the proper procedure is to allow a witness to answer all questions subject to objections which are reserved for trial in accordance with CPLR 3115" (*Walter Karl, Inc. v Wood,* 161 AD2d 704, 706 [2d Dept 1990]).

A review of the transcript reveals numerous instances in which plaintiffs' counsel improperly interfered with Dr. Salzberg's deposition by coaching and/or providing testimony to the witness, and raising improper objections on the basis of form and "asked and answered" in violation of the Uniform Rules. In light of the circumstances, an award of costs associated with this motion in the amount of $100.00, and an additional $250.00 for costs and attorneys' fees associated with the time and costs of Dr. Salzberg's deposition is warranted (*see CPLR 3126; O'Neill v Ho*, 28 AD3d 626 [2d Dept 2006]). Additionally, plaintiffs' counsel is cautioned to

review Part 221 of the Uniform Rules of the Trial Courts and refrain from speaking objections and instructing the witness not to answer except in the limited circumstances enumerated in the rules.

In view of the foregoing, it is:

ORDERED that the motion (sequence number 7) by plaintiffs is granted to the following limited extent:

(1) that to the extent not already provided, defendants Kenneth Sena and Joseph Mazzaferro are directed to serve on plaintiffs, so as to be received in hand on or before November 6, 2017, responses to plaintiffs' First Discovery Demand, demands 17-19, such responses being limited to those documents/ communications which existed prior to the settlement negotiations, were not created as part of the negotiations which resulted in the settlement agreement, and which refer or relate to: the parcel of land which is in dispute and the subject of this action, and/or plaintiffs Charles Andrew Salzberg and/or Anita Salzberg, and

(2) to the extent that additional responsive documents exist that defendants Kenneth Sena and Joseph Mazzaferro claim should be withheld pursuant to CPLR 4547, they shall submit a privilege log, pursuant to CPLR 3122 (2)(b) and the documents which they seek to withhold on that basis, including the settlement agreement dated July 10, 2017, to the Compliance Part Clerk, 8th floor, of this courthouse for in camera review so as to be received by November 6, 2017, and

(3) defendants Kenneth Sena and Joseph Mazzaferro shall provide the court with two sets of any documents submitted to the court for in camera review, one set redacting any material that defendants Kenneth Sena and Joseph Mazzaferro allege should be withheld pursuant to CPLR 4547, and the other set unredacted; and it is further

ORDERED that the branches of plaintiffs' motion seeking to strike defendants' pleadings and for costs and sanctions are denied; and it is further

ORDERED that the cross motion (sequence number 8) by defendants Kenneth Sena and Joseph Mazzaferro is granted only to the extent that on or before November 6, 2017, plaintiffs' counsel shall pay $100.00 for costs associated with making this motion, and an additional $250.00 for costs and attorneys' fees associated with the deposition of Charles Andrew Salzberg to counsel for Kenneth Sena and Joseph Mazzaferro, and shall file proof of payment to NYSCEF on or before November 6, 2017; and it is further

ORDERED that the further depositions of defendants Kenneth Sena and Joseph Mazzaferro are directed to occur on December 7, 2017 and December 8, 2017, at a place and

time to be agreed upon by counsel located in Westchester County, NY; and it is further

ORDERED that the parties are directed to appear for a conference in the Compliance Part, Room 800 on October 26, 2017, at 9:30 A.M.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
October 24, 2017

HON. JOAN B. LEFKOWITZ, J.S.C.

TO:

Michael B. Kramer, Esq. and Peter T. Salzler, Esq.
Michael B. Kramer & Associates
Attorneys for Plaintiffs
150 East 58th Street, 12th Floor
New York, New York 10155
By NYSCEF

Jonathan B. Nelson, Esq. and Jessica J. Kastner, Esq.
Dorf & Nelson, LLP
Attorneys for Defendants Kenneth Sena and Joseph Mazzaferro
555 Theodore Fremd Avenue, Suite A3000
Rye, NY 10580
By NYSCEF

Bill Tsevis, Esq.
Solomon & Siris, P.C.
Attorneys for Defendants Luxury Mortgage Corp. and Webster Bank
100 Quentin Roosevelt Blvd., Suite 504
Garden City, NY 11530
By NYSCEF

Amy E. Abbandondelo, Esq.

Thomas G. Sherwood, LLC
Attorneys for Non-Party Stewart Title Insurance Company
300 Garden City Plz., Suite 222
Garden City, NY 1150
By NYSCEF

cc: Compliance Part Clerk