

**Lind v Tishman Constr. Corp. of N.Y.**

2018 NY Slip Op 32222(U)

September 7, 2018

Supreme Court, New York County

Docket Number: 154781/2016

Judge: Barbara Jaffe

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE  
*Justice*

PART 12

-----X

EARL LIND, JR. and DOROTHY LIND,  
Plaintiffs,

INDEX NO. 154781/2016

MOTION DATE \_\_\_\_\_

- v -

MOTION SEQ. NO. 4

TISHMAN CONSTRUCTION CORPORATION OF  
NEW YORK, TISHMAN CONSTRUCTION  
CORPORATION,  
Defendants.

**DECISION AND ORDER**

-----X

By order to show cause, defendants move pursuant to CPLR 3103 and 3101(f) for an order conditioning disclosure of their insurance policy on the issuance of a confidentiality order or agreement. Plaintiffs oppose and, by notice of cross motion, move for an order striking defendants' answer, granting a default judgment against defendants, and awarding sanctions, costs, and attorney fees, among other relief. Defendants oppose the cross motion.

I. DEFENDANTS' MOTION

Defendants contend, through their counsel, that the insurance policy at issue "contains sensitive proprietary information, including work rates, contractual figures, diagrams, World Trade Center drawings, and other materials that, if disclosed, could lead to abuse if widely disseminated, and that the proprietary construction information was obtained through their years of building experience and would be subject to abuse by their competitors or enemies. (NYSCEF

165). Plaintiffs assert that absent an allegation that the policy contains trade or business secrets, defendants are not entitled to a protective order, and that CPLR 3101(f) requires full disclosure of the policy. (NYSCEF 185).

CPLR 3101(f) permits a party to obtain discovery of the existence and contents of an insurance agreement. Pursuant to CPLR 3103, the court may issue a protective order conditioning or regulating the use of any discovery device, to prevent “unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice” to a party. The party moving for a protective order bears the burden of establishing the need for the order. (*Borgia v Rothberger*, 148 AD3d 1109 [2d Dept 2017]).

In *McLaughlin v Searle, Inc.*, on which defendants rely, the Court granted a protective order directing the confidentiality of information requested in discovery which contained “trade or business secrets, secret processes or research or any other confidential material.” (38 AD2d 810, 811 [1<sup>st</sup> Dept 1972]). It is unclear from the decision whether the requested discovery included insurance information.

Defendants also cite *Helm v Gwenn Lentine, M.D., P.C.*, wherein the Court affirmed the trial court’s grant of a protective order keeping confidential defendants’ malpractice insurance policies as their disclosure would subject it to abuse if widely disseminated. (60 AD3d 632 [2d Dept 2009]). The decision does not reflect the factual basis for the court’s conclusion that confidentiality was warranted.

To the extent that defendants assert that the insurance policy contains trade or business secrets, they fail to sustain their burden of establishing it absent an affidavit or statement from someone with personal knowledge or something more than their attorney’s conclusory allegations. (*See JPMorgan Chase Funding Inc. v Cohan*, 134 AD3d 455 [1<sup>st</sup> Dept 2015])

[plaintiff failed to show that documents sought contained trade secrets as its counsel's affirmation contained conclusory assertions; showing required by party seeking protective order against disclosure of trade secrets, while minimal, must be non-conclusory]; *Sheldon v Kimberly-Clark Corp.*, 111 AD2d 912 [2d Dept 1985] [affirming denial of application for protective or confidentiality order as movant's "showing of confidentiality consists of a brief, conclusory statement in an attorney's affirmation which fails to establish the existence of proprietary processes necessitating the imposition of a confidentiality order"]; *compare Jackson v Dow Chem., Inc.*, 214 AD2d 827 [3d Dept 1995] [submission of affidavit of one of defendant's officers sufficient to establish that disclosure would require it to reveal trade secrets]).

To the extent, if any, that *McLaughlin* applies to information that is generally confidential, and not just trade or business secrets, counsel's conclusory allegation is insufficient to meet defendants' burden. (*See New York State Businessmen's Group, Inc. v Dalton*, 154 AD2d 801 [3d Dept 1989] [conclusory statements in attorney affidavits that documents sought are "confidential" business records and "trade secrets" insufficient to satisfy burden on motion for protective order]).

## II. PLAINTIFFS' CROSS MOTION

In my decision and order dated May 1, 2018, I addressed many of plaintiffs' current claims regarding defendants' alleged failure to provide requested and required discovery. (NYSCEF 211). The only new items identified in plaintiffs' cross motion are a March 12, 2018 demand for a site inspection and a March 22, 2018 demand for the "SHEP" program. (NYSCEF 187).

Defendants submit proof that they responded to the request for the site inspection in a discovery response dated April 2, 2018, and advised that they did not own the subject property

and thus could not consent to the inspection. (NYSCEF 201). They also timely responded to the request for the "SHEP" information by advising plaintiffs that they previously provided it. (NYSCEF 288).

Plaintiffs continue to argue that defendants' failure to provide information about their subcontractors is willful and contumacious, and thus warrants the imposition of sanctions. At oral argument on March 7, 2018, I had directed defendants to provide immediately to plaintiffs the names of the subcontractors who were at the site on the date of plaintiff's accident and copies of their subcontracts with defendants. (NYSCEF 162). The record reflects that defendants served a discovery demand on March 7, 2018 containing the names of subcontractors. (NYSCEF 180).

Thereafter, by compliance conference order dated March 14, 2018, defendants were ordered to provide the subcontractors' contracts within 20 days (NYSCEF 176), which they provided on April 3, 2018 (NYSCEF 180). Thus, both of their responses complied with the court orders and were timely.

Defense counsel sufficiently explains defendants' original and erroneous belief that defendant Tishman Construction Corporation of New York was not a proper party defendant (NYSCEF 189, 210), and plaintiffs therefore fail to establish that defendants' witness perjured herself in her original affidavit (*see CDR Creances S.A.S. v Cohen*, 23 NY3d 307 [2014] [to establish fraud on court, party must demonstrate by clear and convincing evidence that offending party has acted knowingly in attempt to prevent factfinder's adjudication of case and adversary's defense]; *Peters v Peters*, 146 AD3d 503, 503 [1<sup>st</sup> Dept 2017] [plaintiff failed to establish by clear and convincing evidence that defendants' alleged misstatements "were particularly egregious and characterized by lies in furtherance of a scheme designed to conceal critical matters from the court"]]). In any event, plaintiffs do not set forth a legal basis for striking

defendants' answer and/or sanctioning them for this mistake. In the exercise of my discretion, I decline to impose sanctions.

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion for a protective order is denied, and defendants are directed, within 10 days of the date of this order, to provide plaintiffs with a copy of the pertinent insurance policy; and it is further

ORDERED, that plaintiffs' cross motion is denied.

9/7/2018

DATE

BARBARA JAFFE, J.S.C.

HON. BARBARA JAFFE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	DO NOT POST	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	