

Riverside Ctr. Site Owner LLC v Lexington Ins. Co.

2020 NY Slip Op 31277(U)

May 11, 2020

Supreme Court, New York County

Docket Number: 650043/2019

Judge: Nancy M. Bannon

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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. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

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INDEX NO. 650043/2019

RIVERSIDE CENTER SITE OWNER LLC, RIVERSIDE
CENTER MEZZ LLC, EL AD RIVERSIDE LLC, RIVERSIDE
CENTER 5 HOLDCO LLC, SILVERSTEIN RIVERSIDE
HOLDING COMPANT LLC, AND EL AD US HOLDING, INC.

MOTION DATE 03/05/2020

MOTION SEQ. NO. 003

Plaintiffs,

- v -

LEXINGTON INSURANCE COMPANY, STARR SURPLUS
LINES INSURANCE COMPANY, HOUSTON CASUALTY
COMPANY, ALLIANZ GLOBAL RISK US INSURANCE
COMPANY, AND ILLINOIS UNION INSURANCE
COMPANY,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 56, 57, 58, 59, 60, 61, 62, 63, 64, 66, 67, 68, 69, 70, 71, 72

were read on this motion to/for COMPEL – NON-PARTY SUBPOENA.

In this action for breach of contract, the plaintiffs are suing the defendants for allegedly failing to indemnify them under builder’s risk insurance policies they issued to the plaintiffs. The plaintiffs are claiming they are owed indemnification of \$31,000,000 under these policies for purported construction delays in completing a construction project at One West End Avenue as a result of sprinkler and pipe fittings allegedly freezing, bursting and causing water damages.

On June 5, 2019, the defendants served a subpoena *duces tecum* on non-party Tishman Construction Corporation of New York (Tishman), the construction manager for the \$500,000,000 project. The defendants now move to compel Tishman to fully comply with the subpoena. Tishman opposed the motion, albeit after their time to do so expired under CPLR 2214(b). Notwithstanding that the opposition was untimely, the defendants replied. The plaintiffs did not oppose the motion. The motion is granted on the condition that the defendants comply with their obligations under CPLR 3122(d).

The subpoena was served on Tishman by the defendants on June 5, 2019. The subpoena contains 10 requests for categories of documents targeted at obtaining information concerning the primary defense to this action – that the delays in the plaintiffs’ completion of the project were not a result of the water damage caused by the bursting of the pipes. It is undisputed that Tishman failed to respond within the 20 days required under CPLR 3122, and instead ignored the subpoena for three months until receiving the defendants’ September 12, 2019 letter demanding compliance therewith. Tishman then provided an initial document production and stated in an email dated October 4, 2019 that it was collecting additional responsive documents for production. Despite follow-up requests from the defendants on October 20, 2019 and November 26, 2019, no additional documents were produced and Tishman continued to ignore the defendants’ demands. The defendants made this motion on January 21, 2020 by motion made returnable in Room 130 on February 18, 2020. Tishman did not file opposition until February 13, 2020 in violation of CPLR 2214(b), which made their opposition due on February 11, 2020. This court set an oral argument date of March 5, 2020, and Tishman also failed to appear at that time.

Under the liberal standard governing subpoenas set forth by the Court of Appeals in Kapon v Koch, 23 NY3d 32 [2014], documents must be produced in response to a non-party subpoena unless they are “utterly irrelevant to the action” or that “the futility of the process to uncover anything legitimate inevitable or obvious.” Here, the defendants have adequately demonstrated that they received documents in Tishman’s initial production in response to the subpoena and that are relevant to their defenses in this action. According to the defendants, these documents show that the delays resulted from events unrelated to the water damage cause by the pipe bursting. In its opposition to this motion, Tishman does not deny that (i) additional documents exist that are responsive to the subpoena, or that (ii) the documents demanded in the subpoena are privileged, irrelevant, outside its possession custody and control, or palpably improper. As such, the defendants are entitled to receive the documents they requested from the project’s construction manager, particularly since they are defending a \$31,000,000 indemnification claim for construction delays that appears to be replete with issues of fact contained in documents in the possession of Tishman. See Kapon v Koch, supra at 34.

Tishman’s belated objections to the subpoena, which were raised for the first time in opposition to this motion to compel, are that (i) the documents are purportedly available from the plaintiff and (ii) the cost of complying with the subpoena is onerous. However, none of the

requests in the subpoena are palpably improper nor does Tishman argue that they are. These objections, which were first raised in opposition to this motion nearly months after the subpoena was served and after it made its initial production without objection, are waived. See Anonymous v High Sch. for Env'tl Studies, 32 AD3d 353 (1st Dept. 2006); Roman Catholic Church of the Good Shepherd v Tempco Sys., 202 AD2d 257 (1st Dept. 1994). Likewise, Tishman's late filing of its opposition papers and its default in appearing for oral argument are also grounds for rejecting their objections are granting the motion.

However, even if the court excused Tishman's waiver of its objections, the untimeliness of their opposition and failure to appear for oral argument, Tishman has not articulated any substantive grounds to avoid compliance with the subpoena. Contrary to Tishman's argument, they cannot resist fully complying with the subpoena on the ground that the documents sought may be available from the plaintiffs. This argument has been squarely rejected by the Court of Appeals, which stated that the CPLR "imposes no requirement that the subpoenaing party demonstrate that it cannot obtain the requested disclosure from any other source." See Kapon v Koch, supra at 38. "So long as the disclosure sought is relevant to the prosecution or defense of an action, it must be provided by the nonparty." Id.

As to Tishman's concerns about the costs of the production, those are addressed by CPLR 3122(d), which provides that "[t]he reasonable production expenses of a non-party witness shall be defrayed by the party seeking discovery." CPLR 3122(d) is mandatory regardless of any objections and is eminently reasonable here given the defendants' claimed need for the documents to defend against a substantial claim. Thus, the defendants' motion to compel is granted on the condition that the defendants comply with their obligations under CPLR 3122(d).

Any further discovery issues, including issues concerning the subject subpoena and the costs of complying with the subpoena, may be addressed at the next status conference, which is adjourned from June 11, 2020, to August 20, 2020, at 9:30 a.m. In the interim, the parties are encouraged to proceed with all court ordered discovery to the extent practicable.

Accordingly, it is hereby,

ORDERED that the defendants' motion to compel Tishman Construction Corporation of New York to fully comply with the defendants' June 15, 2019 subpoena is granted in its entirety on the condition that the defendants comply with their obligations under CPLR 3122(d), and it is further

ORDERED that the status conference scheduled for June 11, 2020, is rescheduled to August 20, 2020, at 9:30 a.m.

This constitutes the Decision and Order of the court.


NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

<u>4/28/2020</u>				<u>NANCY M. BANNON, J.S.C.</u>	
DATE					
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
			DENIED		OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					REFERENCE