

Bellucia v CF 620 Owner One
2020 NY Slip Op 34104(U)
December 14, 2020
Supreme Court, New York County
Docket Number: 150207/2011
Judge: James E. d'Auguste
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JAMES EDWARD D'AUGUSTE PART IAS MOTION 55EFM

Justice

-----X

BELLUCIA, FRANCESCO, et. al.

Plaintiffs,

- v -

CF 620 OWNER ONE, et. al.

Defendants.

-----X

INDEX NO. 150207/2011

013, 014, 016,
017, 018, 019,

MOTION SEQ. NO. 020

**DECISION + ORDER
ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 013) 1184, 1185, 1186, 1187, 1188, 1189, 1190, 1191, 1192, 1193, 1194, 1195, 1196, 1197, 1198, 1199, 1200, 1201, 1202, 1203, 1204, 1205, 1206, 1207, 1208, 1209, 1210, 1211, 1212, 1213, 1214, 1215, 1216, 1217, 1218, 1219, 1220, 1221, 1222, 1248, 1249, 1250, 1251, 1252, 1253, 1254, 1255, 1256, 1257, 1258, 1259, 1260, 1261, 1262, 1263, 1264, 1265, 1266, 1267, 1268, 1269, 1270, 1271, 1272, 1273, 1274, 1275, 1276, 1277, 1278, 1279, 1280, 1281, 1282, 1283, 1284, 1285, 1286, 1287, 1288, 1289, 1290, 1291, 1292, 1293, 1294, 1295, 1296, 1297, 1298, 1299, 1300, 1301, 1302, 1355, 1357, 1359, 1361, 1362, 1363, 1364, 1365, 1366, 1367, 1368, 1377, 1378, 1379, 1380, 1389, 1390, 1393, 1394, 1397, 1398, 1399, 1400, 1401, 1402, 1403, 1404, 1451, 1452, 1454, 1455, 1458, 1460, 1461, 1477, 1478

were read on this motion to/for STRIKE PLEADINGS.

The following e-filed documents, listed by NYSCEF document number (Motion 014) 1223, 1224, 1225, 1226, 1227, 1228, 1229, 1230, 1231, 1232, 1233, 1234, 1235, 1236, 1237, 1238, 1239, 1240, 1241, 1242, 1243, 1244, 1245, 1246, 1247, 1303, 1304, 1305, 1306, 1307, 1308, 1309, 1310, 1311, 1312, 1313, 1314, 1315, 1316, 1317, 1318, 1319, 1320, 1321, 1322, 1323, 1324, 1325, 1326, 1327, 1328, 1329, 1330, 1331, 1332, 1333, 1334, 1335, 1336, 1337, 1338, 1339, 1340, 1341, 1342, 1343, 1344, 1345, 1346, 1347, 1348, 1349, 1350, 1351, 1352, 1353, 1354, 1358, 1360, 1369, 1370, 1371, 1372, 1373, 1374, 1375, 1376, 1391, 1392

were read on this motion to/for STRIKE PLEADINGS.

The following e-filed documents, listed by NYSCEF document number (Motion 016) 1441, 1442, 1443, 1444, 1445, 1446, 1448, 1449, 1450

were read on this motion to/for STRIKE PLEADINGS.

The following e-filed documents, listed by NYSCEF document number (Motion 017) 1479, 1480, 1481, 1482, 1483, 1484, 1485, 1486, 1487, 1488, 1489, 1490, 1491, 1492, 1493, 1494, 1495, 1496, 1497, 1498, 1499, 1500, 1501, 1502, 1503, 1504, 1532, 1533, 1534, 1547, 1556, 1558, 1559, 1560, 1561, 1562, 1563, 1564, 1565, 1566, 1567, 1568, 1569, 1570, 1572, 1573, 1588, 1589, 1590, 1591, 1592, 1609

were read on this motion to/for DISCOVERY.

The following e-filed documents, listed by NYSCEF document number (Motion 018) 1516, 1517, 1518, 1519, 1520, 1521, 1522, 1523, 1524, 1525, 1526, 1527, 1528, 1529, 1530, 1549, 1555, 1571, 1574,

1575, 1576, 1577, 1593, 1594, 1595, 1596, 1597, 1610

were read on this motion to/for

DISCOVERY

The following e-filed documents, listed by NYSCEF document number (Motion 019) 1535, 1536, 1537, 1538, 1539, 1540, 1541, 1542, 1543, 1544, 1545, 1546, 1548, 1579, 1580, 1598, 1599, 1600, 1601, 1602

were read on this motion to/for

ORDER OF PROTECTION

The following e-filed documents, listed by NYSCEF document number (Motion 020) 1581, 1582, 1583, 1584, 1585, 1586, 1587, 1603, 1604, 1605, 1606, 1607, 1608, 1611, 1612

were read on this motion to/for

DISCOVERY

Upon the foregoing documents, the motions and cross-motions are resolved as follows:

These motions and cross-motions arise from seven consolidated personal injury actions related to an elevator accident on May 18, 2011 in which a group of twenty-two (22) construction workers traveling in a freight elevator in a building owned by defendant CF 620 Owner One (“CF 620”) fell four floors to the building's basement, alleged causing significant injuries to many of these workers. The elevator in question was maintained and repaired by two elevator contractors, Schindler Elevator Corporation (“Schindler”) and Robinson Elevator LLC (“Robinson”).

As would be expected in litigation of this nature, parties all demanded disclosure of the various defendants' towers of insurance coverage. In 2014 and 2015, in response to multiple demands from various parties, Schindler repeatedly disclosed a declaration sheet (“dec” sheet) indicating two million (\$2,000,000.00) dollars in primary coverage. The dec sheet and Schindler’s discovery responses were silent as to excess coverage. In July 2017, the Court (Edmead, J) granted summary judgment dismissing the claims against Schindler. On May 16, 2019, the First Department reversed the dismissal of plaintiffs’ claims and CF 620’s cross-claim for indemnity. On June 6, 2019, following the reversal, counsel for Schindler revealed that it possessed previously undisclosed excess coverage in the amount of twenty-two million (\$22,000,000.00) dollars, thereby exposing, according to CF 620 and plaintiffs, Schindler’s alleged long-running fraud upon the Court and all parties of this litigation.

In response to these revelations, CF 620 filed motions seeking an order striking Schindler’s pleadings or rendering a judgment by default against Schindler in these consolidated actions based on its alleged fraudulent, misleading, frivolous, willful and/or contumacious discovery misconduct in relation to its insurance coverages. Some of the plaintiffs joined in CF 620’s motion. These movants also seek an order awarding sanctions and costs, including attorney’s fees, against Schindler for its alleged insurance disclosure misconduct, including but not limited to the cost of these motions. Schindler cross-moved against CF 620 and all plaintiffs alleging, inter alia, an unethical “Mary Carter” agreement.

On October 29, 2019, a motion conference was held concerning these motions and applications for relief. During this appearance, the undersigned stated that while “[t]he Court should have a more robust understanding of what took place” it “has declined to order the deposition of counsel for Schindler and instead has indicated that that information can be obtained, essentially written question or interrogatory-type questions to counsel.” NYSCEF Doc. No. 1587 at p. 4: 4-7. Subsequent to the appearance, each of the parties demanded various disclosures from one another, the refusals or failures to respond to which gave rise to a slew of additional discovery motions and cross-motions, most of which essentially seek clarity on the Court’s directives during the October 29, 2019 conference as to the nature and scope of the limited discovery the Court is expecting in advance of the evidentiary hearing contemplated herein.

Accordingly, the Court grants the instant motions and cross-motions to the extent described below and holds in abeyance all other relief sought, including requests for striking pleadings, default judgments and sanctions, pending an evidentiary hearing:

1. Within 60 days of this order, Schindler will make a “proper and complete insurance disclosure, with a complete description of Schindler’s complete tower of insurance,” including all excess, domestic and international, with coverage limits, as well as copies of the underlying policies, to the extent that Schindler must produce:

a. the “dec sheets” and copies of the full underlying insurance policies for any and all domestic insurance policies, including all excess insurance, that are potentially applicable to Schindler for any mass tort loss occurring in the U.S. at the time of the subject accident; and

b. the “dec sheets” and copies of the full underlying insurance policies for any and all international policies (i.e., the “Swiss coverage”) issued to Schindler Holding Ltd. (“Holding”), including all excess insurance, that are potentially applicable to any mass tort loss occurring in the U.S. at the time of the subject accident, subject to a confidentiality order as directed herein; and

c. an affidavit, by someone at Schindler with knowledge of, and responsibility in relation to, Schindler’s insurance coverages (e.g., risk management, corporate finance, etc.) identifying, by carrier and policy number, all domestic and international (foreign) insurance policies, including all excess insurance, and including any policies issued to Holding, that are potentially applicable to any mass tort loss occurring in the U.S. at the time of the subject accident, stating each policies’ limits (per occurrence and aggregate), and a statement that the listed insurance coverages is exhaustive any and all such insurance and that there are no other potentially applicable policies.

2. Within 60 days, Schindler and its attorneys will respond to all discovery demands already served upon them regarding Schindler's alleged failure to fully and timely disclose all potentially applicable insurance coverages, including all excess insurance, to the extent that:

a. Schindler and its attorneys must answer all questions, limited to the issues of what Schindler and their attorneys knew about the existence of excess insurance, when they knew it, their understandings and instructions concerning their obligations to disclose such insurance, the intention to disclose or not disclose such insurance, reasons for not disclosing and then disclosing, and the timeline of events and circumstances that resulted in the failure to disclose for a period of time and then to eventually disclose; and

b. Schindler and its attorneys must produce all documents responsive to already served document demands to the extent relevant to the issues stated in section 2a of this decision and order and, to the extent Schindler is claiming a privilege regarding any such responsive document, produce a privilege log regarding all such responsive documents.

c. To the extent such demands have not already been made, plaintiffs and co-defendants may, within 30 days, serve such demands to the extent limited in section 2a of this decision and order, to which Schindler and its attorneys must respond within 60 days of receipt.

3. Within 60 days, CF 620 and the moving plaintiffs will produce complete and unredacted copies of all settlement agreements between CF 620 and plaintiffs in the consolidated actions is granted and ordered to be produced within 60 days, subject to a confidentiality order as directed herein.

4. Within 60 days, Neil Greenburg, Brian Shoot, Charles Greene, Timothy Capowski, Robert Haynes, Andrew Fiore, Peter Creedon, and Brian Isaac (collectively, the "non-party respondents") will answer Schindler's "interrogatories" dated January 3, 2020, to the extent that:

a. The non-party respondents must answer all questions, but limited to the issues of any purported changes in tactics, litigation strategy, settlement posture, decisions to settle or not settle, decisions to file appeals or not file appeals, resulting from Schindler's failure to timely and fully disclose its available insurance; and

b. The non-party respondents will produce all documents responsive to any document demands already served upon them by Schindler to the extent such document requests and documents are responsive to the issues described in section 4a of this decision and order.

c. To the extent such demands have not already been made, Schindler may, within 30 days, serve such demands to the extent limited in section 4a of this decision and order, to which respondents must respond within 60 days of receipt.

5. Within 60 days, CF 620 and the moving plaintiffs will produce all documents and all communications relating to the “knowledge, information, or belief possessed by any party or its counsel regarding the existence or amount of Schindler's excess insurance, including all documents and communications relating to CF 620's statement that Schindler has \$25 million in excess insurance.” To the extent any such documents are claimed to be privileged, the responding party will provide a privilege log.

6. Within 60 days, CF 620 and the moving plaintiffs will produce all documents and all communications relating to the assertions that “[h]ad plaintiffs known that Schindler misled them all regarding its available insurance, all plaintiffs would have: (1) joined instead of opposed CF 620's motions for a stay of the seven trials pending appeal; (2) not settled for a discount for CF 620; and (3) appealed from the summary judgment order” is granted to the extent such documents and communications indicate the lack of insurance from Schindler was a factor in such decisions and were created and/or sent prior to and through the date(s) each such decision was made (i.e., the date(s) plaintiff(s) joined instead of opposed CF 620's motions for a stay of the seven trials pending appeal, the date(s) plaintiff(s) settled for a discount for CF 620; and the deadline to appeal from the summary judgment order”). In other words, the Court is not interested in after the fact documents and communications looking back as to what the parties believe they would have done, but rather, the factors considered in making such decisions and the degree to which, if any, CF 620 and the moving plaintiffs were prejudiced by (i.e., relied to their detriment upon) Schindler’s alleged misrepresentation regarding its available insurance coverage limits. To the extent any such documents are claimed to be privileged, the responding party will provide a privilege log.

7. The motion(s) seeking an order disqualifying the law firm Sabatini & Associates and Mr. Richard Sabatini from continued representation in these consolidated actions is granted to the extent that the Court orders discovery as described herein and holds in abeyance the relief sought in this regard pending an evidentiary hearing.

8. The motion(s) seeking an order granting plaintiff Molina, and all similarly situated plaintiffs in the consolidated actions, the identical relief obtained on appeal by the Marandola Plaintiffs (i.e., reversal of Judge Edmead’s summary judgment order dismissing all claims against defendants Schindler and Robinson) on the separate and independent bases of Schindler’s alleged fraudulent, willful and contumacious insurance discovery misconduct, CPLR 5015; and/or case law is granted to the extent that the Court orders discovery as described herein and holds in abeyance the relief sought in this regard pending an evidentiary hearing.


9. For all disclosures ordered herein for which the Court ordered production subject to a confidentiality order, the parties are directed to confer and agree upon a draft proposal based on the Commercial Part’s Model Confidentiality Order and, within 30 days of this decision and order, submit said proposed order to the Court via email to jszellan@nycourts.gov and ddmckenn@nycourts.gov. To the extent the parties cannot agree to such confidentiality order, the parties will, within 30 days of this decision and order, submit counter-proposed orders, each indicating the differences from the other.

10. The Court urges the parties to cooperate with one another regarding exchanging discovery consistent with this decision and order. The Court cautions the parties that any document(s) not disclosed during this period of limited discovery in preparation for the evidentiary hearing will not be admissible or considered by the Court at the hearing.

11. The parties are prohibited from filing any further discovery-related motions without leave from the Court after a Court conference regarding the discovery sought.

12. There will be a status conference by telephone in this and all of the related actions assigned to this Part on February 25, 2021 at 11:00 a.m. during which the Court will, *inter alia*, schedule the evidentiary hearing.

This constitutes the decision and order of the Court.

12/14/2020			
DATE			Hon. James E. d'Auguste, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE