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

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LOIS QUINN,

Plaintiff,

-against-

20 EAST CLINTON, LLC, HUDSON CONTRACTORS, INC., and EMILY BURLEY,

Defendants.

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DECISION & ORDER
Index No.: 58779/2018
Seq. No.: 4

LEFKOWITZ, J.

The following papers were read on this motion by defendants 20 East Clinton, LLC and Emily Burley (hereinafter "movants") for an order pursuant to CPLR §3124 compelling plaintiff to allow access to her property for a site visit by movants' environmental consultant, or precluding from evidence plaintiff's remediation estimates:

Notice of Motion - Affirmation in Support - Exhibits A-F
Affirmation in Support (co-defendant) - Exhibits
Affirmation in Opposition - Exhibits A-H
Reply Affirmation
NYSCEF File

Upon the foregoing papers, this motion is determined as follows:

Plaintiff commenced this environmental contamination action by the filing of a Verified Complaint on June 14, 2018 and an Amended Verified Complaint on September 6, 2018. Issue was joined by movants by the service and filing of a Verified Answer on September 26, 2018 and by Hudson Contractors, Inc. on October 9, 2018.

In her Amended Complaint, plaintiff, who owns a house at 20 East Clinton Avenue in Irvington, New York, claims that defendant, 20 East Clinton, LLC, purchased a house next door to plaintiff s house, and soon thereafter began renovations. Plaintiff claims that during the construction process movants contaminated a portion of her property when construction debris containing lead and asbestos fell onto her property. Plaintiff commenced this action asserting causes of action for nuisance, negligence, trespass, violation of building codes, conversion and the imposition of a license agreement pursuant to RPAPL 88.

As discovery proceeded in this matter, plaintiff served two expert reports. One report, prepared by U.S. Environmental Protection ("EPA") and issued on August 9, 2018, confirmed the presence of contamination and identified areas of concern with respect to the construction

and renovation on the 20 East Clinton, LLC Property. A second report was prepared by Environmental Assessments & Solutions, Inc. dated June 5, 2018 ("EAS Report"). Movants thereafter retained Quality Environmental Solutions & Technologies, Inc. ("QuES&T") to review and comment thereon. QuES&T submitted a report dated June 19, 2018 ("QuES&T Report") to counter plaintiff's expert. The QuES&T Report was not based on personal knowledge of the Quinn Property or the results of a site visit thereof. Rather, the QuES&T Report is based on a review of the EAS Report, and, plaintiff asserts, consists entirely of commentary regarding the methodology used and conclusions drawn by the EAS Report. Defendants relied on the QuES&T Report in their summary judgment motion papers.

Upon the instant motion, movants seek permission to conduct a site inspection of plaintiff's property by their expert, QuES&T, to assess the condition of the property and the cost of remediation, or to preclude plaintiff from offering evidence of remediation estimates served after the note of issue was filed. In support of the motion, movants allege that (a) access to the premises is necessary for the defendants to assess the condition of the property and the claimed damages in order to adequately defend themselves; (b) plaintiff can prove no prejudice; and (c) plaintiff contributed to the delay in the completion of the site inspection by suggesting movants await updated remediation estimates from plaintiff which were not served until one month after the note of issue was filed. Co-defendant Hudson Contractors, Inc. submitted an affirmation in support of the motion on the same grounds cited by movants.

The case was certified ready for trial on September 23, 2019 and all discovery was deemed complete or waived as of that date. Nevertheless, movants state they discussed a site visit with plaintiff's counsel at the conference, but did not receive a response from plaintiff's counsel until September 25, 2019. No mention of an outstanding site visit is referenced in the order of September 23, 2019. Plaintiff filed a note of issue on October 15, 2019 without objection from movants. To date, no motion to vacate the note of issue, now more than one year old, has been filed.

Plaintiff opposes the motion. Plaintiff argues the motion is untimely, as it should have been filed, if at all, prior to the completion of discovery and the filing of a note of issue. Plaintiff submits that movants have been on notice of the contamination to her property and a claim for damages pertaining to its remediation beginning in June, 2018. Nevertheless, defendants failed to secure a site visit of plaintiff's property to determine the cost of remediation. In addition to the foregoing, plaintiff alleges that allowing the site visit at this time would be prejudicial to plaintiff in that it would allow movants' expert to produce a further report to which plaintiff would be compelled to respond, resulting in delay of the trial and additional expense.

Plaintiff asserts that movants were offered access to her property to estimate clean-up costs after the EPA site visit on June 14, 2018. In his deposition testimony, plaintiff's son Michael Quinn testified that the family permitted defendants access to the property to assess the extent of paint chip and asbestos distribution so they could provide estimates of the clean-up. Having been given permission and an opportunity for a site visit long before the note of issue was filed, plaintiff submits that movants cannot now be heard to complain why they failed to

carry it out.

On the basis of the EAS Report, Plaintiff obtained estimates from contractors for the cost of removing the contaminated soil from the Quinn Property, testing the soil to confirm remediation of the contaminants, and then bringing in clean soil. Plaintiff obtained an estimate on or about June 18, 2019 from BSB Construction, Inc. in the amount of almost $86,868.00, plus $3,250 in fees, for the complete clean-up and disposal of soil and materials in accordance with NYS ICR 56, Federal EPA, OSHA, and all local guidelines ("BSB Estimate"). The BSB Estimate was produced and exchanged to movants prior to the Trial Readiness Conference and prior to filing of the Note of Issue. Plaintiff alleges movants failed to counter the BSB Estimate with an estimate of their own.

Plaintiff obtained two supplemental estimates, one for third party air monitoring during the abatement, and one for bringing in clean soil, grading it, and seeding the lawn after the abatement in order to return the site to its original pre-contaminated state. These estimates were obtained post Note of Issue and allegedly exchanged in furtherance of settlement discussions with defendants, which did not reach fruition. Plaintiff asserts these estimates were based upon the pre-Note of Issue exchanged BSB Estimate and in fact, did not require a site visit; the estimate for clean fill, seeding, and grading involved a site visit only to confirm the conditions of access to the relevant portion of the plaintiff's property, but otherwise relied on the measurements provided in the EAS Report.

To the extent that movants claim that plaintiff's supplemental estimates should be precluded because movants cannot conduct a post note of issue site visit, plaintiff states she "may be amenable to the site visit being performed for the limited purpose of estimating the specific items addressed by the supplemental estimates only. However, the question of whether or not the supplemental estimates may be admitted at trial to support plaintiff's damages is not properly before this Court on the present motion" (NYSCEF Doc. 189).

In reply, movants argue, *inter alia*, that the coronavirus pandemic caused delay in this matter. However, as movants acknowledge in their papers, the quarantines which may have prevented or inhibited litigation began in March, 2020, a full five months after the note of issue was filed in this case.

It is axiomatic that under CPLR 3101(a), a party is entitled to "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" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968] [internal quotation marks omitted]). The party seeking disclosure has the burden 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 *(Foster v Herbert Slepoy Corp.*, 74 AD3d 1139, 1140 [2d Dept 2010). The 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 *(Mironer v City of New York,* 79 AD3d 1106, 1108 [2d Dept 2010]; *Auerbach v Klein*, 30 AD3d 451, 452 [2d Dept 2006]).

The filing of a note of issue denotes the completion of discovery, not the opportunity to launch another phase of it (*see Arons v Jutkowitz*, 9 NY3d 393 [2007]). A certificate of readiness certifies that all discovery is completed, waived or not required, and the action is ready for trial (*see Tirado v Miller*, 75 AD3d 153 [2d Dept 2010]). Once a note of issue has been filed and discovery presumably completed, section 202.21(d) and (e) of the Uniform Rules for Trial Courts (22 NYCRR) set the standard for allowing additional discovery: if a party seeks to vacate the note of issue within 20 days of its service, that party need show only that a material fact in the certificate of readiness is incorrect or that it fails to comply with that section in a material respect. However, if more than 20 days elapsed since service of the note of issue, the moving party must demonstrate good cause for the motion and the existence of unusual or unanticipated circumstances which developed subsequent to the filing of the note of issue to demonstrate that further discovery proceedings are required.

Here, it is undisputed that movants did not object to the issuance of a Trial Readiness Referee Report and Order on September 23, 2019, and did not seek a pre motion conference to file a motion to vacate the note of issue on or after October 15, 2019. Now, more than one year later, movants seek an order compelling further discovery in this matter. Movants' motion must be denied. Movants are not entitled, post note of issue, to seek to compel further discovery and have failed to demonstrate sufficient cause to establish that movants were unable to conduct a site inspection prior to the close of discovery in this matter. Indeed, movants were on notice of plaintiff's damage claims since the inception of this matter in June, 2018. To the extent this Court has been liberal in granting extensions of discovery as a result of the COVID-19 pandemic, in this case the note of issue had been filed a full five months prior to the institution of preventative social distancing and quarantine measures in New York.

To the extent movants seek an order precluding plaintiff from offering evidence or testimony at trial regarding remediation estimates disclosed for the first time after the filing of the note of issue, the motion is granted. Plaintiff cannot both participate in and object to post-note of issue discovery. Plaintiff's remediation estimates should have been disclosed prior to the filing of the note of issue.

All other arguments raised on this motion and evidence submitted by the parties in connection thereto have been considered by this court, notwithstanding the specific absence of reference thereto.

Accordingly, it is

ORDERED that the branch of defendants 20 East Clinton, LLC and Emily Burley's

motion seeking an order compelling plaintiff to permit a site visit of her property is denied; and it is further

ORDERED that the branch of the motion which seeks an order precluding plaintiff from offering evidence or testimony at trial regarding remediation estimates disclosed for the first time after the filing of the note of issue, is granted; and it is further

ORDERED that movants shall serve a copy of this decision and order upon all parties with notice of entry within 10 days of entry.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
December 10, 2020

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

TO:

All Counsel by NYSCEF

cc: Compliance Part