

American Concrete Pumping Inc. v Homem
2020 NY Slip Op 35095(U)
December 7, 2020
Supreme Court, Westchester County
Docket Number: Index No. 56658/2019
Judge: Joan B. Lefkowitz
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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

AMERICAN CONCRETE PUMPING INC.,
Plaintiff,

-against-

ARMANDO HOMEM, ALDINA HOMEM, HUDSON EFT LLC,
MATTHEW A. NOVIELLO, P.E., and VILLAGE OF OSSINING,
Defendants.

-----X

HUDSON EFT LLC,
Third-Party Plaintiff,

-against-

GAC BUILDERS LTD. and SHAWN'S LAWNS, INC.,
Third-Party Defendants.

-----X

GAC BUILDERS LTD.,
Second Third-Party Plaintiff,

-against-

AMAZON CONCRETE INC. and
SESI CONSULTING ENGINEERS PC,
Second Third-Party Defendants.

-----X

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

-----X

PROGRESSIVE CASUALTY INSURANCE COMPANY
A/S/O AMERICAN CONCRTE PUMPING, INC.,
Plaintiff,

-against-

ARMANDO HOMEM, ALDINA HOMEM, HUDSON EFT LLC,
MATTHEW A. NOVIELLO, P.E., and VILLAGE OF OSSINING
Defendants.

-----X

DECISION & ORDER

Index No.:

[Action 1] #56658/2019 ✓ 4+5

[Action 2] #60533/2019

[Action 3] #158658/2019¹

[Action 4] #70674/2019

[Action 5] #56568/2020

Action 1:

#56658/2019

Action 2:

#60533/2019

1 By Decision and Order dated 10/13/2020 [NYSCEF Doc. 208], Action 3 was transferred from Supreme Court, New York County to Supreme Court, Westchester County to permit all five related matters to be joined for purposes of discovery and trial. Pending the transfer and assignment of a Westchester County case index number for Action 3, this Court referenced the New York County case index number.

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

-----X
DAIN BAIRD-ROGERS,

Plaintiff,

Action 3:
#158658/2019

-against-

HUDSON EFT LLC and AZIMUTH DEVELOPMENT GROUP, LLC,
Defendants.

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

-----X
ARMANDO HOMEM and ALDINA HOMEM,

Plaintiffs,

Action 4:
#70674/2019

-against-

HUDSON EFT, LLC,

Defendants.

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

-----X
CONTINENTAL WESTERN INSURANCE COMPANY
as subrogee of ARMANDO HOMEM and ALDINA HOMEM,

Plaintiff,

Action 5:
#56568/2020

-against-

HUDSON EFT, LLC and GAC BUILDERS LTD.,
Defendants.

-----X
GAC BUILDERS LTD.,

Third-Party Plaintiff,

-against-

SHAWN'S LAWNS, INC., AMAZON CONCRETE INC., and
SESI CONSULTING ENGINEERS, P.C.,

Third-Party Defendants.

LEFKOWITZ, J.

The following papers were read and considered on the motion filed by GAC Builders Ltd. (Motion Seq. 4) pursuant to CPLR §3124 for court order compelling access to the subject premises for a site inspection and related relief. Also considered was the cross-motion filed by Armando and Aldina Homem (Motion Seq. 5) pursuant to CPLR §3103 for a protective order limiting, conditioning, or regulating any such site inspections.²

Notice of Motion [Motion Seq. 4]- Attorney Affirmation- Exhibits A-C –
Amended Notice of Motion – Amended Affirmation- Exhibits A-D
Notice of Cross-Motion [Motion Seq. 5]- Attorney Affirmation - Exhibits A-K-
Proposed Protective Order
Affirmation in Reply and Opposition [filed by GAC Builders Ltd.]- Exhibit A
Affirmation in Opposition to Motion Seq. 5 [filed by Hudson EFT LLC] – Exhibits 1-2
Affirmation in Reply in Further Support of Cross-Motion [filed by Homem]- Exhibit A
NYSCEF Record

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

Background Facts:

The underlying action arises out of the collapse of a retaining wall located at 60 Main Street, Ossining, New York (“premises” or “site”). In the interest of judicial economy those facts pertinent to the instant motions before the Court are recited herein. At all relevant times, Armando and Aldina Homem (collectively hereinafter, “Homem”) owned the premises. Matthew Noviello, P.E., a licensed engineer, was hired to design the retaining wall on the premises. American Concrete Pumping Inc. (“American Concrete”) owned and operated a concrete business from the premises. It is alleged that American Concrete also provided concrete-related services to construct the retaining wall. Hudson EFT is the adjacent property owner located at 80 Main Street, Ossining, New York. Hudson EFT hired GAC Builders, Ltd. (“GAC”) to construct a 25-unit apartment building upon its parcel. The retaining wall was installed on the Homem premises due to the significant elevation differentials between the Homem site and Hudson EFT site. On or about 8/13/2018, the retaining wall collapsed, and litigation ensued.

A Preliminary Conference Order was filed on 10/23/2019. This matter has been the subject of five compliance conferences in connection with monitoring of progression of discovery in this matter (*see* NYSCEF Doc. 67, 126, 181, 193, 224). As pertinent to the instant application, at the first compliance conference held on 2/25/2020, the parties discussed the parameters by which defense experts may be permitted to conduct any site inspection of the subject premises. Absent resolution at the conference, the Court noted that any site inspection shall occur within 60 days thereof. The Village of Ossining requested that its general objection be noted in the compliance

² Due to the COVID-19 pandemic, the Court permitted motions and cross-motions filed by notice of motion without leave of the Court at the time of the filing of the instant applications before the Court. Counsel are reminded that the Court has since resumed the standard practice under the Court’s DCM protocol of (i) a pre-motion conference and leave of the Court to file motions, and (ii) no cross-motion unless otherwise directed by the Court.

order to reserve its right to consult with the Village officials and raise any issues at future compliance conferences and/or motion practice. (NYSCEF Doc. 67). The Court held the second compliance conference on 7/21/2020. The Compliance Conference Order indicated, in part, that absent resolution of the site inspection issue, the site inspection dispute shall be adjudicated by motion practice. (NYSCEF Doc. 126). The 7/21/2020 compliance conference order noted that GAC previously filed a motion to compel a site inspection (Motion Seq. 4). Thereafter, Homem filed opposition to GAC's motion to compel a site inspection and cross-moved for a protective order (Motion Seq. 5).

Motion Seq. 4: GAC's Motion to Compel Site Inspection

GAC filed a motion for a court order to compel the occupants of the premises, American Concrete to permit access to the premises for a site inspection or, in the alternative, a court order of conditional preclusion of any such evidence at trial. GAC also moved for an order to strike the pleadings based on the refusal to permit access for a site inspection. (Motion Seq. No. 5). Counsel argues that the 2/25/2020 Compliance Conference Referee Report and Order constituted a directive to compel the site inspection. GAC contends that the ability to conduct a site inspection of the collapsed retaining wall is vital to its defense in this action. GAC states that American Concrete improperly demand that the parties enter into a stipulation whereby the parties agree to (1) a waiver of the right to sue for injuries sustained at the site of the retaining wall collapse, (2) indemnification for any injuries sustained on their property, and (3) procure insurance to shield American Concrete (and by extension, the Homems) from any liability arising from such site inspection. Counsel argues that such conditions to a site inspection are "independently unconscionable" as they negate the property owner's duty of care and prevent the parties or their experts from recovery for any damages arising therefrom.

Counsel for GAC filed an amended affirmation (NYSCEF Doc. 105) which, in part, contends that the property owners, Homem, filed a separate action against Hudson EFT LLC [Supreme Court, Westchester County Index #70674/2019] based on claims arising from the same retaining wall collapse. It is alleged that Homem subsequently asserted the same position as American Concrete to the extent that Homem also required the same stipulation terms prior to any site inspection. Counsel notes that neither American Concrete nor Homem asserted objections to the site inspection at prior conferences.

Motion Seq. 5: Homem's Cross-Motion for a Protective Order

Counsel for Homem filed a cross-motion for a protective order pursuant to CPLR §3103 limiting, conditioning or otherwise regulating any site inspection upon providing proof of liability insurance in favor of the Homems and entering into a "proposed agreement" containing, amongst other requirements, liability insurance and hold harmless provisions. (NYSCEF Doc. 129). Counsel asserted three main arguments. First, the site inspection issue should be held in abeyance pending a prior motion to join this action with several other related actions to provide incoming parties with an opportunity to weigh in on this issue.³ Second, GAC never made a formal demand

³ By Decision and Order dated 10/13/2020 (NYSCEF Doc. 208), the Court granted joinder of a total of five actions.

for a site inspection. Third, counsel contends that the Homems cannot ensure the safety of anyone traversing the premises which has been deemed hazardous. Counsel states that Hudson EFT, in its own complaint, alleged that the collapsed retaining wall site is a continuous "private nuisance" (NYSCEF Doc. 133). Moreover, counsel states that the Village issued a Notice of Unsafe Building - Order to Demolish and an Order to Remedy Violation, dated February 7, 2020, (the "Violations") wherein the Village identified the Premises is "dangerous to the life, health, property or safety of the public or the occupants." (NYSCEF Doc. 136). Counsel contends that, based on the foregoing, the Homems require proper insurance and hold harmless agreements from all experts prior to any such expert site inspections. Following the 2/25/2020 compliance conference, counsel to the parties engaged in discussions regarding the parameters to performing any site inspections. According to Homem, Hudson EFT circulated a proposed stipulation that included the following language setting forth parameters of site inspection which was acceptable to Homem:

"In consideration of the terms and conditions herein, [EXPERT NAME] and its agents, employees, insurers, and representatives hereby irrevocably, unconditionally and generally release [Homems/Hudson] and its agents, employees, workers, directors, officers, owners, attorneys, insurers, experts, representatives, assigns, beneficiaries, successors, administrators and executors from and in connection with the site inspection of the premises located at 60 Main Street, Ossining, NY and 80 Main Street, Ossining, NY and hereby waives and/or settles, with prejudice, any and all actions, causes of action, suits debts, dues, sums of money, accounts, controversies, agreements, promises, damages, judgments, executions, or any liability, claims or demands, known or unknown and of any nature whatsoever and which [EXPERT] and ever had, now has or hereafter can, shall or may have arising directly or indirectly out of any aspect of said site inspection." [NYSCEF Doc. 138 for the proposed stipulation; *see also* NYSCEF Doc. 143 for the proposed protective order containing the same language].

GAC filed opposition to Homem's cross-motion for a protective order. (NYSCEF Doc. 174-176). Hudson EFT also filed opposition to Homem's cross-motion for a protective order. (NYSCEF Doc. 177-179). They argue, in part, that Homem failed to previously raise any objections or limitations to provide access for any site inspection at the 2/25/2020 compliance conference. Counsel for Hudson EFT noted that, in March 2020, counsel for Homem indicated that it was their preference to conduct "joint inspections of the premises" without raising any limitations or requirement of liability insurance and general releases prior to permitting access to the site. Hudson EFT contends that, although it previously circulated a proposed stipulation in a good faith effort to address Homem's newly raised concerns, Hudson EFT takes the position that the site inspection should proceed without any pre-conditions regarding liability insurance and/or general releases.

referenced in the case caption herein for purposes of discovery and trial. At the 11/20/2020 compliance conference, counsel for all newly-joined cases represented that they did not request additional time to submit affirmations on the site inspection issue and, instead, requested that the Court render a determination on the motion papers presently before the Court.

DECISION

As a preliminary matter, GAC's motion record is devoid of any written demand for a site inspection by the movant. The issue of a site inspection was raised at the first compliance conference held on 2/25/2020 which, pursuant to the DCM protocol, was scheduled for the purpose of monitoring the progress of discovery. Notably, counsel for the movant, GAC, was not present at the first compliance conference. In accordance with the DCM protocol, the referee set a deadline that "any site inspection...shall occur within 60 days". Per the request of counsel for the Village, the Village's objection to any site inspection was noted to reserve its right to consult with the Village officials and raise any issues at future compliance conferences and/or motion practice. Counsel for the parties were to continue their discussions related to the parameters of facilitating any such site inspection and report the status of same to the Court at the next compliance conference. At the second compliance conference held on 7/21/2020, counsel reported the parties were unable to agree on the parameters for a site inspection. Absent accord, the site inspection issue was fully briefed in the instant motions before the Court for determination.

Pursuant to CPLR §3101(a), a party is entitled to "full disclosure of all matters 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]; see *Matter of Kapon v Koch*, 23 NY3d 32 [2014]). 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. 2011]). 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]). However, "unlimited disclosure is not permitted, and...the supervision of disclosure is generally left to the sound discretion of the trial court" (*Silcox v City of New York*, 233 AD2d 494 [2d Dept. 1996]).

CPLR §3103(a) provides that "[t]he court may at any time on its own initiative, or on motion of any party or of any person from whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts."

In applying the aforementioned legal principles governing discovery to the case at bar, GAC failed to establish the requisite burden to compel a site inspection under the circumstances presented. The movant, GAC, states in a conclusory fashion that GAC cannot properly prepare a defense without a site inspection. However, GAC failed to establish the relevance of conducting a site inspection where the retaining wall at issue collapsed and thus is no longer in the same condition. Furthermore, there is no indication that the disclosure sought could not be obtained from any other sources (i.e., offsite visual inspection, photographs, topography surveys, engineering records, municipal application(s) and record(s) related to the retaining wall, and/or

any other sources containing information related to the site condition prior to or at the time of the collapse). Moreover, the property owners have submitted documentary evidence demonstrating that the site contains hazardous conditions and poses safety risks for which the Homems cannot ensure any invitee's safety. Specifically, the Village of Ossining Building Department issued a "Notice of Unsafe Building – Order of Demolish" dated 2/7/2020. The Village deemed the site and improvement thereon are in violation of applicable village codes insofar as (i) the site contains "an unsafe building" with "parts thereof... that they may fall and injure members of the public or property", and (ii) the site conditions "have become dangerous to life, safety, morals or the general health and welfare of the occupants or the people of the Village of Ossining." (NYSCEF Doc 136). Accordingly, the Village issued "an order requiring the building be demolished." (NYSCEF Doc 136). Notably, the Village's Order of Demolish was not previously presented to the Court; rather, the Village's findings have been presented to the Court for the first time in connection with the Homem's cross-motion for a protective order. Based on the Village's findings of the apparent risks posed by the hazardous site, the Court is constrained to deny GAC's motion to compel a site inspection and related relief, thus rendering the Homems' cross-motion for a protective order with respect to same as moot.

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

Based on the foregoing, it is

ORDERED that GAC's motion to compel a site inspection and related relief is denied. It is further

ORDERED that the Homems' cross-motion is denied as moot based on the aforementioned determination. It is further

ORDERED that all parties shall appear for a virtual conference to be held by Microsoft Teams in accordance with the Virtual Courtroom Protocol implemented in the Ninth Judicial District on **January 11, 2021 at 9:00a.m.** It is further

ORDERED that GAC shall serve a copy of this decision and order with notice of entry within 10 days of entry.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
12-7, 2020


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

TO:
All Counsel by NYSCEF
cc: Compliance Part