

<b>AIG Prop. Cas. Co. v Precision Aquatics Group, LLC</b>
2022 NY Slip Op 31565(U)
May 11, 2022
Supreme Court, New York County
Docket Number: Index No. 155300/2019
Judge: Sabrina Kraus
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. SABRINA KRAUS PART 57TR**

*Justice*

-----X

AIG PROPERTY CASUALTY COMPANY A/S/O BRAD PELTZ AND DARREN PELTZ, SENECA INSURANCE COMPANY, INC. A/S/O CAMELOT PROPERTY MANAGEMENT SERVICES CORP. AND 290 WEST STREET CONDOMINIUM, HAMILTON INSURANCE COMPANY INDIVIDUALLY AND AS SUBROGEE OF ITS INSURED, 290 WEST VE LLC, PACIFIC EMPLOYERS INSURANCE COMPANY A/S/O FRANZ-FERDINAND BUERSTEDDE,

Plaintiff,

- v -

PRECISION AQUATICS GROUP, LLC, FOUNDATIONS INTERIOR DESIGN CORP., BEST PLUMBING & HEATING, INC., RECREATION & FITNESS MANAGEMENT, LLC, CAVCO ROOFING & SIDINGS, INC.,

Defendant.

-----X

PRECISION AQUATICS GROUP, LLC,

Plaintiff,

-against-

RECREATION & FITNESS MANAGEMENT LLC

Defendant.

-----X

FOUNDATIONS INTERIOR DESIGN CORP.

Plaintiff,

-against-

RECREATION & FITNESS MANAGEMENT LLC, CAVCO ROOFING & SIDINGS, INC.

Defendant.

-----X

INDEX NO. 155300/2019  
MOTION DATE May 12, 2022  
MOTION SEQ. NO. 006

**DECISION + ORDER ON MOTION**

Third-Party  
Index No. 595274/2020

Second Third-Party  
Index No. 595926/2020

The following e-filed documents, listed by NYSCEF document number (Motion 006) 191, 192, 193, 194, 195, 196, 197, 198, 199, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 218, 219 were read on this motion to/for ORDER OF PROTECTION.

### **BACKGROUND**

Plaintiff AIG Property Casualty Company a/s/o Brad Peltz and Darren Peltz (AIG) commenced this action against Defendant Foundations Interior Design Corp (Foundations) seeking to recover amounts it alleged to pay its subrogor as a result of an overflow of a rooftop pool at 290 West Street, New York, New York that occurred on April 27, 2017.

Seneca Insurance Company, Inc. a/s/o Camelot Property Management Services Corp. and 290 West Street Condominium (Seneca) commenced a separate action against Foundations also seeking to recover certain amounts it alleges to have paid its subrogors, as a result of the same incident.

Hamilton Insurance Company, Individually and as a subrogee of its insured, 290 West VE LLC (HAMILTON) commenced an action against Foundations likewise seeking to recover certain amounts it alleges to have paid its subrogor as a result of the incident.

Pacific Employers Insurance Company a/s/o Franz-Ferdinand Buerstedde commenced an action Foundations seeking to recover certain amounts it alleges to have paid its subrogor.

The above-referenced actions were consolidated by Order on January 27, 2020.

Foundations was the construction manager for the construction of a building at 290 West Street, New York, New York. Foundations' subcontractors relevant to this action were Precision Aquatics Group, LLC (pool subcontractor), Best Plumbing and Heating Inc. (plumbing subcontractor), and Cavco Roofing and Sidings, Inc. (waterproofing and insulation subcontractor).

AIG's insureds, Peltz, occupied a penthouse apartment in the building located at 290 West Street, New York, New York. The Building has approximately 11 floors and 13 units including the penthouse. There is pool located on the southwest corner on the rooftop of the Building. The Building and Rooftop Pool were constructed in or around 2015 and the Rooftop Pool was located directly above the Peltz Unit.

### **PENDING MOTIONS**

On January 21, 2022, Foundations moved for an order pursuant to CPLR §3103(a), granting a protective order against the December 2, 2021, Notice to Admit served by AIG or alternatively, for an extension of 30 days to respond to the Notice to Admit.

On the same date AIG cross-moved for an order pursuant to CPLR §3124 compelling Foundations to provide supplemental responses to AIG's Combined Demands dated December 10, 2019; and AIG's Notice to Produce dated December 22, 2021.

On May 12, 2022, the court heard oral argument and reserved decision. For the reasons stated below the motion and cross-motion are granted.

#### ***The Motion for a Protective Order as to the Notice to Admit is Granted***

On December 2, 2021, Plaintiff AIG filed a Notice to Admit seeking an admission or denial to the following:

1. Annexed to defendant Best Plumbing & Heating Inc.'s ("Best") Response to Notice to Produce dated July 13, 2020, is a true copy of the Ninth Floor Plumbing Plan bearing identification number P-106.02 (the "Plumbing Plan").
2. Foundations received the Plumbing Plan prior to the completion of Best's Plumbing work at the Building.

3. Foundations did not provide a change order to Best Plumbing regarding the Plumbing Plan or any modifications to the plumbing plans for the pool overflow drainage system depicted in the Plumbing Plan prior to the completion of Best's plumbing work at the Building.

4. Prior to April 27, 2017, the overflow drainage plumbing system for the pool was not installed in compliance with the Plumbing Plan bearing identification number P-106.02.

5. Subsequent to April 27, 2017, the overflow drainage system for the pool was modified.

6. Subsequent to April 27, 2017, a pipe for the pool overflow drainage system was installed which caused the overflow drain to be connected to a building waste line.

Foundations moves this court for a Protective Order striking the aforesaid Notice to Admit. Foundations argues that the requests contained therein are palpably improper as they are not, in any reasonable manner, intended to resolve factual matters pertaining to the elements of the claim in this case which will not be in dispute at trial. This court agrees.

CPLR §3123 provides in pertinent part:

At any time after service of the answer or after the expiration of twenty days from service of the summons, whichever is sooner, and not later than twenty days before the trial, a party may serve upon any other party a written request for admission by the latter of the genuineness of any papers or documents, or the correctness or fairness of representation of any photographs, described in and served with the request, or of the truth of any matters of fact set forth in the request, as to which the party requesting the admission reasonably believes there can be no substantial dispute at the trial and which are within the knowledge of such other party or can be ascertained by him upon reasonable inquiry.

N.Y. C.P.L.R. 3123 (McKinney).

A plaintiff can't expect to make the defendant admit negligence or other fault with a notice to admit, and no part of the statute is meant to serve that purpose. *See Glasser v. City of New York*, 265 A.D.2d 526 (2d Dep't 1999) (notice to admit seeking admission going to "heart of matter at issue" improper); *Midland Funding LLC v. Valentin*, 40 Misc.3d 266, 268 (Dist. Ct., Nassau Co. 2013) (court concluded that the notice to admit was "unquestionably improper since

it requires defendant to admit or deny what amounts to all of [the] elements of plaintiff's prima facie proof in its cause of action for breach of contract and account stated"). Similarly, the notice to admit cannot be used to secure admissions concerning legal conclusions. *Matter of Luthmann v. Gulino*, 131 A.D.3d 636, 637 (2d Dep't 2015), *lv. denied*, 25 N.Y.3d 914.

With respect to item 1 of AIG's Notice to Admit, there are allegedly multiple Plumbing Plans that were generated in the course of this construction project, and it is undisputed that the plumbing plan at issue was not prepared by Foundations and was not attached to the Notice to Admit.

Similarly, the request that Foundations admit that it received "the" Plumbing Plan prior to the completion of Best's work at the building is equally improper. It is alleged that work was done before and after this incident, with numerous plumbing plans being generated. Additionally, this request, calls for admissions of fundamental and material issues of fact, and a protective order is warranted.

Paragraphs 3 and 4 of AIG's Notice to Admit do not relate to the genuineness of a document, but seek admissions of ultimate and material issues of fact relating to work that was or was not done, not only by Foundations, but by other contractors as well, concerning the pool and pool drainage system. Those are issues that are material and disputed, and not properly the subject of a request for admissions.

Similarly, paragraphs 5 and 6 of the Notice to Admit relate to ultimate and material issues of fact concerning the work done on the pool drainage system, which warrants a protective order. Additionally, it is alleged that those two paragraphs seek information relating to subsequent remedial measures, and relate to the actual work that was performed, not by Foundations, but by other professionals who worked on the pool and drainage system at this building.

A Notice to Admit is intended for use with “clear-cut matters of fact” and, it may not be used for matters which constitute the very dispute of the lawsuit, as AIG has attempted to do here. *Orellana v. City of New York*, 203 A.D.2d 542, 543, 612 N.Y.S.2d 943 (2d Dep't 1994).

Based on the foregoing, Foundations motion for a protective order is granted in its entirety.

***AIG's Cross-Motion to Compel is Granted***

Foundations asserted at oral argument that after submission of the motion it made a substantial additional document production in response to the outstanding demands.

Foundations is hereby directed to produce copies of all tender letters which Foundations sent to other parties requesting the other party to defend and/or indemnify Foundations, and copies of all responses to Foundations' tender letters.

Foundations is further directed to produce the P-106.02 Plumbing Plan, and any change orders regarding the installation of the pool or associated plumbing system through the date of the incident.

Further to the extent not already produced Foundations shall produce documents or information responsive to items 6, 17 and 18 of the December 10, 2019 demands including documents or information pertaining to the identities of all entities or third parties that performed work on the Rooftop Pool and/or overflow drain, or documentation reflecting the alleged liability of any third parties that installed the Rooftop Pool or overflow system.

**CONCLUSION**

WHEREFORE it is hereby:

ORDERED that plaintiff's motion to compel is granted to the extent set forth above; and it is further

ORDERED that Foundations shall produce to plaintiff on or before June 15, 2022 the above specified documents and the depositions shall take place after such production; and it is further

ORDERED that the motion for a protective order of defendant Foundations as to the Notice to Admit is granted in its entirety; and it is further

ORDERED that the parties shall appear for a virtual status conference before the court on July 19, 2022 at 2:30 PM; and it is further

ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)); and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.

5/11/2022

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

SUBMIT ORDER

FIDUCIARY APPOINTMENT

REFERENCE

202205121143555BKRAUSB978715E3B54406E9FB3AF27AC1F5E65

SABRINA KRAUS, J.S.C.