SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

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VIRGINIA BEADELL and KAYLA GREENINGER, Individually and as Co-Administratrix(es) of the Estate of NOAH C. BEADELL, Deceased, and KAYLA GREENINGER, Individually,

Plaintiffs,

- v -

EROS MANAGEMENT REALTY, LLC, WYNDHAM HOTEL MANAGEMENT, INC., CHRISTIAN ALDOY, TRYP MANAGEMENT, INC., HCS HOSPITALITY, INC., RONICA SHARMA, "JOHN DOE 1-10", and "JANE DOE 1-10,"

Defendants.

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INDEX NO. 159152/2017

MOTION DATE 05/25/2023

MOTION SEQ. NO. 004, 005

DECISION + ORDER ON MOTIONS

The following e-filed documents, listed by NYSCEF document number (Motion 004) 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 163, 164, 165, 166, 167, 168, 183, 184, 185, 186

were read on this motion to/for VACATE NOTE OF ISSUE.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 187, 188, 189, 190

were read on this motion to/for SANCTIONS.

I. INTRODUCTION

This is an action to recover damages for wrongful death, based on the alleged negligence of the defendants Eros Management Realty, LLC, and Tryp Management, Inc. (together the defendants), in failing timely to contact the police despite promising to do so, after having been informed that the plaintiffs' decedent, who was one of their hotel guests, intended to commit suicide. The plaintiffs contended that the defendants' 25-minute delay in calling the police after promising to do so at 7:12 p.m. on May 26, 2017, and the defendants' inability to gain immediate access to the decedent's room when the police finally arrived, contributed to their decedent's commission of suicide when he jumped from his11th-floor hotel room window.

Under Motion Sequence 004, the defendants move pursuant to 22 NYCRR 202.21(e) to vacate the note of issue, pursuant to CPLR 3103 for a protective order quashing two so-ordered subpoenas issued by this court, and to preclude the plaintiffs from asserting a claim to recover for the decedent's conscious pain and suffering. The first of the two subject subpoenas, issued on April 11, 2023, directed the defendants to produce the names and contact information of two French hotel guests who witnessed the suicide and apparently observed the decedent alive for several minutes after he crashed through a skylight and landed in their hotel room. The second of the two subpoenas, issued on April 28, 2023, compelled the post-note of issue nonparty deposition of New York City Police Department (NYPD) Officer Daniel Dabren, who was one of the officers who responded to the scene of the decedent's suicide. The plaintiffs oppose that motion. The defendants' motion is denied.

Under Motion Sequence 005, the plaintiffs move pursuant to 22 NYCRR part 130 for the imposition of sanctions upon the defendants based on litigation misconduct during discovery, including the striking of their answer, for the award of treble damages against the defendants' attorneys pursuant to Judiciary Law § 487, and pursuant to 22 NYCRR 202.21(d) for permission to conduct a remote post-note of issue deposition of the French witnesses. In the May 19, 2023 order to show cause initiating that motion, the court granted permission to the plaintiffs to conduct that deposition in the courtroom by remote conference application at any convenient time between May 19, 2023 and the commencement of trial on June 15, 2023. The court also stayed the automatic suspension of that deposition that otherwise was imposed by virtue of the defendants' motion pursuant to CPLR 3103. At oral argument on May 25, 2023, a date for that deposition was scheduled. The remainder of the plaintiffs' motion is granted to the extent that the defendants are precluded from affirmatively adducing any eyewitness or expert testimony at trial in connection with the issue of whether the decedent consciously experienced pain and suffering after he landed, they are assessed a sanction in the sum of $25,000.00, payable to the Clerk of the Court, and they shall pay costs to the plaintiffs in the form of reasonable attorneys'

fees for the time incurred by the plaintiffs' attorneys in litigating the two motions presently before the court, as well as the cost incurred by the plaintiffs in retaining a private investigator to locate the French witnesses. The plaintiffs' motion is otherwise denied.

II. FACTUAL BACKGROUND

The facts of the underlying dispute are set forth in detail in this court's July 12, 2022 order that, among other things, denied the defendants' motion for summary judgment dismissing the complaint as to them (SEQ 003). As relevant to the instant motions, in a 2017 proceeding for pre-action disclosure, the court (Tisch, J.) granted the petition, and directed Eros Management Realty, LLC, the owner of the hotel, to preserve and provide all discovery demanded in the petition (*Matter of Beadell v City of New York*, Index No. 156308/2017 [Sup Ct, N.Y. County, Aug. 7, 2017]), which included "reports, security reports and internal memorandums maintained by THE HOTEL" that related to the decedent's suicide, "all written reports and documents prepared by THE HOTEL's general manager and hotel executives related to the subject incident," and "all investigative reports about the incident from THE HOTEL's security department." The plaintiffs commenced the instant action on October 13, 2017. In a preliminary conference order dated August 16, 2018, the court (Wan, J.) directed all parties to exchange the names and addresses of all eyewitnesses and notice witnesses on or before September 17, 2018. In a notice for discovery and inspection dated May 26, 2020, the plaintiffs demanded that the defendants provide them with a

> "[c]opy of all incident reports made to defendants' liability insurance company by Kelsie Garcia, Leslie Tapia, Maodo Sow, Raymond Minaya Marte, Yajaira Faciert, *Monica Sharma,* and the unidentified housekeeper who cleaned the room of Dr. Noah Beadell following his suicide on May 26th"

(emphasis added). In response to that demand, the defendants alleged that they

> "are not in possession of any incident reports made to defendants' Liability insurance company by Kelsie Garcia, Leslie Tapia, Maodo Sow, Raymond Minaya Marte, Yajaira Faciert, Monica Sharma, and the unidentified housekeeper who cleaned the room of Noah Beadell following his suicide on May 26, 2017."

In their May 26, 2020 demand, the plaintiffs further requested the defendants to produce a

> "[c]opy of all other reports, investigation notes, correspondence and memorandum from Monica Sharma or any other department head supervisors or hotel executives made to the defendants' insurance companies following the May 26th suicide of Dr. Noah Beadell in addition to the incident reports referenced in item #10 submitted to defendants' insurance company in the two weeks following the suicide of Dr. Noah Beadell on May 26th 2017, including documents, investigation notes made by Kelsie Garcia, Leslie Tapia, Maodo Sow, Raymond Minaya Marte, Yajaira Faciert and the unidentified housekeeper who cleaned the room of Dr. Noah Beadell following his suicide."

In response to that demand, the defendants asserted that "[d]efendants object to this demand as overly broad, unduly burdensome, irrelevant, vague, and palpably improper."

Crucially, the plaintiffs also demanded that the defendants provide them with "[t]he identities and addresses of the French tourists occupying the room where decedent was found by the NYPD following the jump to his death" and "[c]opies of all correspondence sent by the TRYP Hotel to these French tourists following the day of the suicide." Rather than providing a response to either of those demands, the defendants objected that the demands were "overly broad, unduly burdensome, irrelevant, vague, and palpably improper."

The defendants never provided the plaintiffs with the identities or addresses of the French eyewitnesses, and never provided the plaintiffs with any memoranda or correspondence between the defendants or their insurance adjustor and the French eyewitnesses.

At an April 11, 2023 settlement conference, this court ordered the defendants to provide the location of former Tryp Hotel employee, Kelsey Garcia, within 10 days and that, if that information were not provided, she would be precluded from testifying at trial. The hotel defendants complied with that order and advised that Garcia is residing at some unknown location in Europe and, as such, would not be produced for trial. Over the defendants' objections that discovery had been completed and that the French witnesses who allegedly saw the decedent alive after he landed in their hotel room enjoyed some sort of vague right of privacy preventing the disclosure of their names and addresses, the court also so-ordered a subpoena duces tecum on that date, directing the defendants to provide the plaintiffs with the

identities of, and contact information for, the French witnesses. In response, the defendants advised that court that they no longer had information concerning the French witnesses or any other guests from 2017. On April 28, 2023, the court so-ordered a judicial subpoena directing the nonparty deposition of PO Dabren. This court also set a firm trial date of June 15, 2023. Rather than comply with the subpoenas, the defendants instead moved, on May 8, 2023, to vacate the note of issue and quash the subpoenas that the court already had so-ordered.

After the April 11, 2023 conference, the plaintiffs, through the services of a private investigator, ascertained that the names of the French witnesses were Ibrahima Faty and Huguette Faty, that they resided in Paris, and that, less than one week after the decedent's suicide, they began to exchange a series of emails with hotel management concerning their own claim to recover for emotional distress. Ibrahima Faty sent his first email on May 31, 2017 to hotel manager Monica Sharma, who referred the Fatys to the hotel defendants' insurance adjustor, Robin Kohn, the latter of whom engaged with them for a period of several weeks in negotiations concerning their claim. The Fatys provided the plaintiffs' investigator with copies of these emails, which are dated between May 31, 2017 and June 19, 2017. As Mr. Faty described the incident in one of his emails to Kohn,

> "all the family was in the room, my wife and I were on the bed and we heard a big noise and something like a big explosion. The window of the roof crashed on us while we were just under, and the roof itself crashed too on the bed. If my wife and I are still alive and able to write you that email, it is thanks to an extraordinary reflex I had to pull out my wife from the bed devasted by pieces of glass and stone. We had those pieces of glass and stone on our bodies, especially in the feet.
>
> "Completely shocked, stunned, we believed in a terrorist attack and with the children, we quickly left the room without taking care to dress really and without personal affairs (telephone, identity papers . . .).
>
> "When we arrived panicked at the reception desk, the staff explained to us, quietly, that a guest had been received by the hotel, obviously disturbed, that was in a room on the 11th floor and posed so much trouble that the hotel was forced to call the police. Indeed, it was at that point that we understood why the police has been able to intervene so quickly in our room '102', which had been considered a crime scene. So we could not get in, our belongings exposed to all."

> "In other words, the police were warned of imminent danger . . . and not us, the guests, yet the first concerned. In any case, the man jumped from the 11th floor and simply stumbled upon our room which he completely devastated. With my wife, we were on the bed exactly underneath!
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> "If necessary, the police can provide you with their report. This seems useful to me in order not to underestimate the extent of the extremely serious events."

According to the plaintiffs' investigator, the Fatys indicated that the decedent was still alive for several minutes after he landed on their bed, a fact which, if accepted by a jury, might support a claim by the plaintiffs to recover for the decedent's conscious pain and suffering.

The plaintiffs' attorneys wrote a letter to the court to report the results of their investigator's efforts. Although the parties attempted to litigate the issue via letters to the court, the court directed the plaintiffs to move for appropriate relief by order to show cause, and accelerated the return date of the defendants' motion to vacate the note of issue and for a protective order, so that the two motions could be heard together.

III. DISCUSSION

A. Defendants' Request to Vacate Note of Issue and Prohibit Post-Note of Issue Disclosure

A court may vacate a note of issue where it appears that a material fact set forth therein, i.e., the representation that discovery is complete, is incorrect (*see* 22 NYCRR 202.21[e]; *Rivers v Birnbaum*, 102 AD3d 26 [2d Dept 2012]; *Gomes v Valentine Realty LLC*, 32 AD3d 699 [1st Dept 2006]; *Herbert v Sivaco Wire Corp.*, 1 AD3d 144 [1st Dept 2003]). Usually, such a motion must be made within 20 days after the filing of the note of issue (*see* 22 NYCRR 202.21[e]), although a court may entertain the motion after the expiration of the 20-day period "for good cause shown" (*id.*). Nonetheless,

> "[w]here unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice, the court, upon motion supported by affidavit, may grant permission to conduct such necessary proceedings"

(22 NYCRR 202.21[d]). In this regard, "[a] court, in its discretion, may allow post-note of issue discovery without vacating the note of issue as long as prejudice to either party would not result" (*WVH Hous. Dev. Fund Corp. v Brooklyn Insulation & Soundproofing, Inc.*, 193 AD3d 523, 523 [1st Dept 2021]; *see Samuelsen v Wollman Rink Operations, LLC,* 196 AD3d 408, 408-409 [1st Dept 2021] [permitting defendant to conduct IME while action remained on the trial calendar]). Stated another way, post-note of issue disclosure "may be permitted to prevent substantial prejudice where unusual or unanticipated circumstances develop subsequent to the filing of the note of issue" (*Esteva v Catsimatidis,* 4 AD3d 210, 210-211 [1st Dept 2004]), particularly where, as here, discovery otherwise is nearly completed.

While mere lack of diligence in pursuing discovery is insufficient to support a showing of such "unusual or unanticipated circumstances" (*see Tirado v Miller*, 75 AD3d 153 [2d Dept 2010]; *Marks v Morrison*, 275 AD2d 1027, 1027 [4th Dept 2000]), the plaintiffs cannot be faulted with lack of diligence here. Rather, the defendants clearly, and likely willfully, violated both Justice Tisch's August 7, 2017 order granting pre-action disclosure and Justice Wan's August 18, 2018 preliminary conference order in this action directing them to provide the names and addresses of the French witnesses and documents prepared by hotel management. They knew of the witnesses' names and addresses as early as May 31, 2017, and knew as early as August 7, 2017 that they were judicially compelled to preserve and produce memoranda prepared by their employees and agents. After failing to produce the email exchanges between Sharma and Kohn, on the one hand, and Mr. Faty, on the other, the defendants, in response to the August 7, 2017 order, withheld that information, and also wrongfully withheld production in this action, despite already being under judicial compulsion pursuant to Justice Tisch's order.

Furthermore, notwithstanding the compulsion of Justice Tisch's order, "[o]nce a party reasonably anticipates litigation, it must, at a minimum, institute an appropriate litigation hold to prevent the routine destruction of electronic data" by, among other things, "direct[ing] appropriate employees to preserve all relevant records" (*VOOM HD Holdings LLC v EchoStar*

Satellite LLC, 93 AD3d 33, 41 [1st Dept 2012]; *see Parkis v City of Schenectady*, 211 AD3d 1444, 1446 [3d Dept 2022]; *Bruno v Peak Resorts, Inc.*, 190 AD3d 1132, 1135 [3d Dept 2021]; *Gitman v Martinez*, 169 AD3d 1283, 1287 [3d Dept 2019]). The defendants reasonably should have anticipated some sort of litigation by May 31, 2017 at the earliest, and by July 17, 2017 at the latest, when the plaintiffs commenced the proceeding for pre-action disclosure. Therefore, when the defendants discarded or destroyed email evidence, presumably by the end of 2017 or the beginning of 2018, they already had an obligation to preserve it (*see Harry Winston, Inc. v Eclipse Jewelry Corp.*, 215 AD3d 421, 421 [1st Dept 2023]; *see also Pegasus Aviation I v Varig Logistica S.A.,* 26 NY3d 543, 547 [2015]; *VOOM HD Holdings LLC v EchoStar Satellite LLC,* 93 AD3d at 36), but nonetheless failed to institute any litigation hold and failed to ensure that email records generated by hotel manager Sharma and insurance adjustor Kohn were preserved (*see Harry Winston, Inc. v Eclipse Jewelry, Corp.*, 215 AD3d at 421).

The defendants cannot justify their willful refusals to turn over this information by disingenuously asserting that it was the plaintiffs' obligation to move again and again to compel its disclosure.

Unusual or unanticipated circumstances can be inferred where, as here, after the filing of a note of issue, a party learns of new, relevant information or documentation that had been withheld or unknown (*see Lewis v City of New York*, 206 AD3d 896, 897-898 [2d Dept 2022] [additional deposition warranted where defendant learned that plaintiff had been in accident subsequent to the accident that was the subject of the action]; *Hickey v City of New York*, 159 AD3d 511, 511 [1st Dept 2018] [permitting defendant to conduct IME while action remained on the trial calendar]; *cf. Bour v 259 Bleecker LLC*, 104 AD3d 454, 455-456 [1st Dept 2013] [plaintiff's post-note of issue discovery subpoenas properly quashed because, unlike here, plaintiff had not raised underlying discovery issue prior to filing note of issue]).

Moreover, contrary to the defendants' contention that PO Dabren is not a newly discovered witness, the court notes that NYPD records erroneously indicated that an "officer

Davern" secured the room in which the decedent landed, and that the plaintiffs only learned of the correct spelling of the officer's name and his true identity in late April 2023, after their private investigator looked further into the matter.

It is quite presumptuous of, or, more aptly, outrageous for, the hotel defendants to seek to penalize the plaintiffs by requesting the court to vacate the note of issue, and thus delay the trial in this action for a significant period of time. It was the hotel defendants' egregious conduct in withholding critical, discoverable information and documentation that led to the need for the plaintiffs to conduct further disclosure in the first instance. This court will not countenance the defendants' attempt to benefit from their own litigation misconduct.

In any event, the court concludes that there would be no prejudice to any party in permitting the plaintiffs to conduct the nonparty depositions of both the Fatys and PO Dabren while the action remains on the trial calendar, as there is sufficient time prior to trial to complete those depositions. To be sure, the defendants cannot claim prejudice, as they had sole possession of the information pertaining to the French witnesses for six years, and in fact, negotiated a claim over this incident with them. The depositions are anticipated to be brief, since they will be limited to the issues of what the Fatys and PO Dabren observed, whether the decedent remained alive for a short period of time after he landed in the Fatys hotel room, and whether the decedent evinced any level of consciousness during that period of time. Since, as described below, the court is precluding the defendants from adducing their own eyewitness and expert testimony in connection with the issue of the decedent's conscious pain and suffering, there will be no prejudice based on any delay that might be engendered were they to need time to locate and retain an expert to testify at trial.

B. Defendants' Request to Preclude Conscious Pain and Suffering Claim

In light of the court's conclusion that the defendants willfully and wrongfully withheld, for a significant period of time, the only information that would have supported the plaintiffs' claim to

recover for their decedent's conscious pain and suffering, they cannot now be heard to complain that it would be prejudicial for the plaintiffs to pursue that claim.

EPTL 11-3.2(b) provides that, in addition to a wrongful death cause of action,

> "[n]o cause of action for injury to person or property is lost because of the death of the person in whose favor the cause of action existed. For any injury an action may be brought or continued by the personal representative of the decedent,"

thus permitting the representative of the estate to prosecute a so-called "survival action" to recover for the conscious pain and suffering or other compensable damages caused by the defendant and sustained by a decedent while the decedent remained alive (*see generally Cragg v Allstate Indem. Corp.*, 17 NY3d 118, 121 [2011]; *Heslin v County of Greene*, 14 NY3d 67, 76-77 [2010]).

The plaintiffs correctly pointed out that, although their complaint did not, by its terms, refer to EPTL 11-3.2(b), it did allege, at paragraph 20 thereof, that the "defendants' negligence was the proximate cause *of great conscious pain and suffering, grave serious physical injuries* and the untimely demise DECEDENT suffered by virtue of his suicide while he was a guest on the premises and under the care and custody of defendant" (emphasis added). Moreover, the plaintiffs also asserted, in their July 10, 2018 bill of particulars, that the "[d]ecedent was conscious during a brief period of time following his fatal injuries resulting in death by suicide." Those allegations are sufficient to place the defendants on notice that the plaintiffs intended to pursue a claim to recover for conscious pain and suffering. To the extent that it is necessary, however, the court is amenable to entertaining a motion to conform the pleadings to the proof (*see generally Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 412-413 [2014]; *Murray v City of New York*, 43 NY2d 400, 404 [1977]).

C. Plaintiffs' Request for Imposition of Sanctions

CPLR 3101(a) provides that "there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." This language is "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" (*Osowski v AMEC Constr. Mgt., Inc.*, 69 AD3d 99, 106 [1st Dept 2009], quoting *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406-407 [1968]). CPLR 3126 authorizes a court to sanction parties who "refuse[ ] to obey an order for disclosure or wilfully fail[ ] to disclose information which the court finds ought to have been disclosed" (*Kutner v Feiden, Dweck & Sladkus*, 223 AD2d 488, 489 [1st Dept 1998]). A failure to comply with discovery obligations, particularly after a court order has been issued, "may constitute the dilatory and obstructive, and thus contumacious, conduct warranting the striking of the[ ] answer[ ]" (*id.; see CDR Creances S.A. v Cohen,* 104 AD3d 17 [1st Dept 2012]; *Reidel v Ryder TRS, Inc.*, 13 AD3d 170 [1st Dept 2004]).

Under most circumstances, however, a motion pursuant to CPLR 3126 to impose sanctions for the willful failure to make disclosure must be made prior to the filing of the note of issue and certificate of readiness since, by that filing, a party represents that all discovery has been completed and that there are no outstanding discovery requests (*see Flanagan v Wolff,* 136 AD3d 739, 741 [2d Dept 2016]). The failure to make a motion pursuant to CPLR 3126 prior to the filing of the note of issue and certificate of readiness is deemed a waiver of any contention that an adverse party has failed to meet his or her disclosure obligations (*see id.; K-F/X Rentals & Equip., LLC v FC Yonkers Assoc., LLC,* 131 AD3d 945, 946 [2d Dept 2015]; *Marte v City of New York*, 102 AD3d 557, 558 [1st Dept 2013]; *Rivera-Irby v City of New York*, 71 AD3d 482, 482 [1st Dept 2010]).

Nonetheless, a court may impose a sanction for frivolous conduct committed in the course of litigation. 22 NYCRR 130-1.1(a) provides, in pertinent part, that

> "[t]he court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who

> engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Part."

22 NYCRR 130-1.1(c)(1) provides that conduct is frivolous if it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification, or reversal of existing law. 22 NYCRR 130-1.1(c) also recites that

> "[i]n determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, or should have been apparent, or was brought to the attention of counsel or the party."

Frivolous conduct that may be the subject of a sanction pursuant to 22 NYCRR 130-1.1(a) includes dilatory conduct and misconduct committed in the context of discovery proceedings (*see Place v Chaffee-Sardinia Volunteer Fire Co.,* 143 AD3d 1271, 1272-1273 [4th Dept 2016]; *Eberhardt v Frasca*, 286 AD2d 748, 349 [2d Dept 2001]; *Congregation Yetev Lev D'Satmar, Inc. v Nachman Brach Inc.*, 2008 NY Slip Op 51825[U], 2008 NY Misc LEXIS 5335 [Sup Ct, Kings County, Sep. 10, 2008]).

As explained above, the defendants willfully and wrongfully withheld the names and addresses of the French witnesses, as well as email correspondence between its manager and insurance adjustor and those witnesses, without any basis in law or fact, and in contravention of several court orders. It has long been the law in New York that the names of eyewitnesses and notice witnesses are discoverable (*see Zellman v Metropolitan Transp. Auth.,* 40 AD2d 248, 251 [2d Dept 1973] [eyewitnesses]; *Hoffman v Ro-San Manor,* 73 AD2d 207, 210 [1st Dept 1980] [notice witnesses]). As the Appellate Division, First Department, has held, the "names of witnesses are essential to a judicious resolution" of a controversy, and the discovery of witnesses, "even though the result of an attorney's zeal and investigative efforts, does not qualify as attorney's work product" (*Hoffman v Ro-San Manor,* 73 AD2d at 211; *see Kaye v Penguin Cab Corp.*, 40 Misc 2d 476, 479 [Sup Ct, Queens County 1963] [defendants must

disclose the names and addresses of witnesses known to them, along with witness statements made to their attorneys relating to the subject accident]).

Moreover, contrary to the defendants' suggestion, while the courts of this state frequently have directed the disclosure of the names and addresses of eyewitnesses, they have never recognized a common-law privilege to withhold the names of eyewitnesses on the ground of a vague and broad assertion of customer privacy (*see Matter of 381 Search Warrants Directed to Facebook, Inc. v New York County Dist. Atty's Off.,* 132 AD3d 11 [1st Dept 2015] [rejecting omnibus attempt by Facebook to quash warrants directing it to disclose customer information]; *Gechoff v Our Lady of Victory Hosp.*, 190 AD2d 1060, 1060 [4th Dept 1993] [plaintiffs entitled to discover name and address of individual who previously fell in lobby of defendant hospital because that person could testify to existence and defendant's notice of defective condition; disclosure of identity of that nonparty witness did not violate doctor-patient privilege]; *Matter of Norkin v Hoey,* 181 AD2d 248, 240 [1st Dept 1992] [bank customer had no legitimate expectation of privacy in preventing the disclosure of his or her bank records pursuant to subpoena]; *Citibank, N.A. v Recycling Carroll Gardens, Inc.,* 116 AD2d 494, 495 [1st Dept 1986] [denying bank's motion for protective order with respect to nonparty customers' loan applications]; *Butler v Friedman,* 2019 NY Slip Op 32272[U], 2019 NY Misc LEXIS 4190 [Sup Ct, Bronx County, Jun. 3, 2019] [the identity of permissive operators of a vehicle owned by defendant is not privileged where police accident report indicated that operator fled scene of underlying accident without providing identification information]; *United Realty Mgmt. Co v Capital One Bank, N.A.,* 2016 NY Misc LEXIS 17515, 2016 WL 5672957 [Sup Ct, N.Y. County, Sep. 29, 2016] [Oing, J.] [denying motion to quash subpoena to produce a nonparty customer's relevant bank records]; *cf. City of Los Angeles v Patel*, 576 US 409 [2015] [annulling, as unconstitutional, a municipal ordinance obligating hotel operators not only to maintain records containing identities and contact information of their guests, but requiring them to turn over that information to the police immediately upon request, without a warrant or court order]).

In addition, the First Department has rejected the narrow construction of statutory disclosure obligations, urged by the defendants here, that witnesses are not actually eyewitnesses or "occurrence" witnesses where they didn't directly observe the relevant underlying event. Although the defendants rather disingenuously argued that the Fatys did not actually witness the decedent fall through their room's skylight, or observe him after he fell, but only saw glass and debris fall onto their hotel bed, even if that were true, eyewitnesses and occurrence witnesses include witnesses to the *circumstances* giving rise to the underlying occurrence (*see Gomez v New York City Hous. Auth.*, 217 AD2d 110, 114 [1st Dept 1995]). In *Gomez*, the plaintiff commenced an action against the New York City Housing Authority (NYCHA), alleging that, due to its negligence in providing adequate security at her apartment building, she was raped by an assailant who gained access to the building. The plaintiff later learned that NYCHA knew the identity of two nonparty witnesses who claimed to have seen the plaintiff voluntarily enter the building with her assailant, suggesting that she already knew him or consented to his entry. The First Department made abundantly clear that, even though the nonparty witnesses did not observe the rape itself, they nonetheless were "occurrence" witnesses whose identities were required to be disclosed by NYCHA.

In light of the foregoing, the imposition of a sanction upon the defendants pursuant to 22 NYCRR part 130 is appropriate. As the court noted on the record at oral argument, the defendants' current attorneys, Brody, O'Connor & O'Connor, Esqs., were only substituted in as counsel on April 3, 2023, and the court concludes that that firm was not responsible for the egregious litigation conduct that warrants the imposition of a sanction here. At most, that firm made a perhaps ill-advised motion to prevent the plaintiffs from conducting depositions that the court already had ordered; nonetheless, there is nothing that prevented them from making that motion. Rather, the sanctionable conduct was committed by the defendants themselves and, if any attorney were to be held responsible, it would be Margaret G. Klein & Associates, which represented the defendants until April 3, 2023. Nonetheless, in their order to show cause, the

plaintiffs did not request the court to direct the firm of Margaret G. Klein & Associates to show cause why *it* should be subject to sanctions. Hence, any 22 NYCRR part 130 sanctions will be imposed solely upon the defendants themselves.

While the striking of the defendants' answer might be appropriate here, a lesser equitable sanction is warranted in light of the fact that the plaintiffs' case was not fatally compromised by the defendants' concealment of the relevant email messages and the identities of nonparty witnesses, since the plaintiffs ultimately will be able to depose the nonparty witnesses whose identities were withheld (*see Payne v Sole Di Mare, Inc.*, _____AD3d_____, 2023 NY Slip Op 02728, *3 [3d Dept, May 18, 2023]; *Parkis v City of Schenectady*, 211 AD3d at 1447; *Giuliano v 666 Old Country Rd., LLC,* 100 AD3d 960, 962 [2d Dept 2012]; *VOOM HD Holdings LLC v EchoStar Satellite LLC,* 93 AD3d at 47; *cf. Esteva v Catsimatidis*, 4 AD3d at 210-211 [conditional order striking answer was appropriate if defendants did not provide wrongfully withheld information by a date certain]). Nonetheless, since the defendants' selective preservation and concealment of the email messages between their employee and agent and the Fatys "evinces a higher degree of culpability than mere negligence" (*Harry Weiss, Inc. v Moskowitz*, 106 AD3d 668, 669, [1st Dept 2013]; *see Harry Winston, Inc. v Eclipse Jewelry, Corp.*, 215 AD3d at 421), the court concludes that the appropriate sanction here is to preclude the defendants from affirmatively adducing any eyewitness or expert testimony (*see Harry Winston, Inc. v Eclipse Jewelry, Corp.*, 215 AD3d at 421; *Harry Weiss, Inc. v Moskowitz*, 106 AD3d at 669; *Shan Palakawong v Lalli*, 88 AD3d 541, 542 [1st Dept 2011]) in connection with the issues of whether the decedent survived for several minutes after he landed in the Fatys' hotel room, and whether the decedent consciously experienced pain and suffering from the time that he landed to the time that he died.

This ruling does not, however, preclude the defendants from cross-examining any eyewitness or expert witness that the plaintiffs may call to the stand to testify at trial in connection with these issues.

The court also concludes that the defendants should be subject to a monetary sanction in the sum of $25,000.00, payable to the Clerk of the court (*see* 22 NYCRR 130-1.3). Although 22 NYCRR 130-1.2 limits the amount of sanctions that the court may impose to $10,000.00 for any single occurrence of frivolous conduct, the court finds that it is appropriate to sanction the defendants in the sum of $10,000.00 for their willful disobedience of Justice Tisch's August 7, 2017 order directing them to produce relevant documentation, an additional $10,000.00 for their willful disobedience of Justice Wan's preliminary conference order directing them to provide the identification of eyewitnesses, and an additional $5,000.00 for their willful destruction of relevant emails between Sharma and Kohn and Mr. Faty that caused them to assert, in response to the plaintiffs' May 26, 2020 demand, that they had no such documents in their possession.

The defendants also shall be responsible for costs, consisting of the payment of attorneys' fees to the plaintiffs, equal to the value of the time spent by the plaintiffs' attorneys in litigating Motion Sequences 004 and 005, along with the costs that the plaintiffs incurred in retaining a private investigator to locate and speak with the Fatys. In this regard, the plaintiffs' attorneys are directed to submit an affirmation of attorneys' services and the investigator's invoices referable to that work within 45 days of the entry of this order.

D. Plaintiffs' Claim To Recover Under Judiciary Law § 487

Judiciary Law § 487 provides, in relevant part, that

> "An attorney or counselor who:
>
> "(1) Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; . . . Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action"

It is well settled that a cause of action to recover under Judiciary Law § 487 does not lie against the client, but only against the attorney (*see Bill Birds, Inc. v Stein Law Firm, P.C.*, 35 NY3d 173, 179 [2020], citing *Looff v Lawton*, 14 Hun 588, 590 [2d Dept 1878] [the statute is limited to

a particular class of citizens consisting of attorneys]; *Neroni v Follender,* 137 AD3d 1336, 1338 [3d Dept 2016] [holding that Judiciary Law § 487, by its terms, does not apply to non-attorneys]). As the defendants correctly argued, they discharged their former counsel, and now are represented by different counsel. Therefore, even if this court properly could find a violation of Judiciary Law § 487 by an attorney, the plaintiffs have not sufficiently demonstrated that the defendants' current attorneys intended to deceive the court or the plaintiffs (*see* Judiciary Law § 487[1]); *Agostini v Sobol*, 304 AD2d 395, 396 [1st Dept 2003]). Specifically, the plaintiffs adduced no proof that, as of April 3, 2023, the defendants' current counsel was, in fact, in possession of the Fatys' names and addresses or the emails exchanged in 2017 between the Fatys and hotel representatives, but nonetheless withheld this material from production.

In any event, the plaintiffs have failed to show how they were damaged by any deceit that may have been committed by the defendants' prior counsel. They are now being given the opportunity to adduce proof of the decedent's conscious pain and suffering, and will not sustain a loss because they were denied that opportunity. Moreover, other than the attorneys' fees and costs of investigation that the defendants themselves are being directed to pay, the plaintiffs have sustained no out-of-pocket losses arising from the withholding of the Fatys' identity and the Fatys' emails with Sharma and Kohn.

IV CONCLUSION

The defendants' June 1, 2023 letter application to adjourn the commencement of jury selection is denied. As noted above, the defendants are being precluded from affirmatively adducing any eyewitness or expert testimony in connection with the issue of the decedent's conscious pain and suffering and, hence, the court concludes that it is not necessary to afford them additional time within which to retain an expert. Moreover, as this court has made quite clear, to the extent that any "crisis" exists in this regard, it is a crisis of the defendants' own creation, as they are solely responsible for withholding crucial evidence as to the decedent's

conscious pain and suffering for more than six years. Thus, if anyone has sustained prejudice here, it is the plaintiffs.

In light of the foregoing, it is

ORDERED that the motion of the defendants Eros Management Realty, LLC, and Tryp Management, Inc. (SEQ 004), to vacate the note of issue, for a protective order quashing so-ordered subpoenas issued by this court, to preclude the plaintiffs from conducting post-note of issue nonparty depositions of Ibrahima Faty, Huguette Faty, and Police Officer Daniel Dabren, and to preclude the plaintiffs from pursuing a survival cause of action to recover for their decedent's conscious pain and suffering, is denied; and it is further,

ORDERED that the plaintiffs' motion (SEQ 005) is granted to the extent that (a) they may conduct post-note of issue nonparty depositions of Ibrahima Faty, Huguette Faty, and Police Officer Daniel Dabren prior to trial, (b) the defendants Eros Management Realty, LLC, and Tryp Management, Inc., are precluded from affirmatively adducing any eyewitness or expert testimony at trial in connection with the issue of whether the plaintiffs' decedent consciously experienced pain and suffering between the time that he landed from his jump and the time that he died, (c) the defendants Eros Management Realty, LLC, and Tryp Management, Inc., are jointly and severally assessed a sanction in the sum of $25,000.00, which they shall pay to the Clerk of the Court, and (d) the defendants Eros Management Realty, LLC, and Tryp Management, Inc., shall jointly and severally pay the plaintiffs, as an award of costs, the plaintiffs' reasonable attorneys' fees for the time incurred in litigating Motion Sequences 004 and 005, along with costs that the plaintiffs incurred in retaining a private investigator to locate and speak with Ibrahima Faty and Huguette Faty, and the plaintiffs' motion is otherwise denied; and it is further,

ORDERED that, within 45 days of the entry of this order, the plaintiffs' attorneys shall submit an affirmation of legal services rendered in connection with litigating Motion Sequences

004 and 005, and an invoice for the fees of the private investigator retained to locate and speak with Ibrahima Faty and Huguette Faty.

This constitutes the Decision and Order of the court.

6/1/2023
DATE

JOHN J. KELLEY, J.S.C.

SEQ 004 CHECK ONE:	☐	CASE DISPOSED		☐	NON-FINAL DISPOSITION		
	☐	GRANTED	☒ DENIED	☐	GRANTED IN PART	☐	OTHER
APPLICATION:	☐	SETTLE ORDER		☐	SUBMIT ORDER		
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN		☐	FIDUCIARY APPOINTMENT	☐	REFERENCE

SEQ 005 CHECK ONE:	☐	CASE DISPOSED		☒	NON-FINAL DISPOSITION		
	☐	GRANTED	☐ DENIED	☒	GRANTED IN PART	☐	OTHER
APPLICATION:	☐	SETTLE ORDER		☐	SUBMIT ORDER		
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN		☐	FIDUCIARY APPOINTMENT	☐	REFERENCE