

Allstate Ins. Co. v 1765 First Assoc., LLC

2012 NY Slip Op 33444(U)

May 2, 2012

Supreme Court, New York County

Docket Number: 108613/2009

Judge: Paul G. Feinman

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: PAUL G. FEINMAN

PART 12

In re 91st Street Crane Collapse ^{Justice} Litigation

771000/2010E

Allstate Insurance Company, etc.

INDEX NO. 108613/09E

1765 First Associates, et al

MOTION DATE _____

MOTION SEQ. NO. 006

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is denied in accordance
with the annexed decision & order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 5/2/2012

PAF, J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

-----X
IN RE 91ST STREET CRANE COLLAPSE LITIGATION:
-----X

ALLSTATE INSURANCE COMPANY and/or
ALLSTATE INDEMNITY COMPANY A/S/O Enchev,
Gumal, Damour, Raetz, St. John, Feldman and Langel,
Plaintiffs,

Index No. 771000/2010E

Index No. 108613/2009E

Mot. Seq. No. 006

DECISION AND ORDER

- against -

1765 FIRST ASSOCIATES, LLC, LEON D. DEMATTEIS
CONSTRUCTION CORPORATION, NEW YORK
CRANE AND EQUIPMENT CORP., SORBARA
CONSTRUCTION CORP., THE CITY OF NEW YORK;
BRADY MARINE REPAIR CO. INC., TESTWELL INC.,
CRANE INSPECTION SERVICES, LTD, and BRANCH
RADIOGRAPHIC LABS, INC.

Defendants.

-----X

Appearances:

For the Plaintiff

Grear Levantos, LLC
By: Kenneth B. Grear, Esq.
255 W. 36th St., ste. 800
New York, NY
(212) 300-2072

For Defendant Leon D. DeMatteis Construction Corp.

Smith Mazure Director Wilkins Young & Yagerman, P.C.
By: Mark Levi, Esq.
111 John St., 20th fl.
New York, NY 10038-3198
(212) 964-7400

Papers considered in review of this motion:

Notice of motion, Levi good faith affirmation and Levi affirmation and
annexed exhibits A - I
Grear affirmation in opposition and annexed exhibits A - B
Levi reply affirmation and annexed exhibit A

E-Filing Document Numbers

41 - 41-3
42
45

PAUL G. FEINMAN, J.:

Defendant, Leon D. DeMatteis Construction Corp., moves pursuant to CPLR 3126 to
dismiss plaintiffs' complaint for failure to appear at their court-ordered depositions pursuant to
Case Management Order Nos. 1, 4, 6, 16 and 17 issued in the *In re 91st Street Crane Collapse
Litigation*, index no. 771000/2010. Plaintiffs oppose. For the reasons provided below, the
motion is granted in part.

Background

This case arises out of the collapse of a Kodiak tower crane at a construction site near the intersection of East 91st Street and First Avenue, on May 30, 2008. Plaintiff, Allstate Insurance Company, insured the seven subrogees identified by last name in the caption, who each filed claims with plaintiff for damages resulting from the crane's collapse. Pursuant to the terms of the applicable insurance policies, Allstate paid these claims and now is subrogated to each insured's rights against the defendants to the extent of the payments made. The complaint seeks damages from all defendants in a sum in excess of \$20,000.00 (Doc. 41-3, ex. A, Compl.).

Case Management Order Nos. 4 and 6 scheduled October 27 and November 1, 2010, as the dates for the depositions of Allstate and its insureds. However, Allstate failed to appear as directed. The schedule was subsequently revised in Case Management Order No. 16, which scheduled Allstate's depositions for October 19, 2011. The order also required any Group 2 Plaintiff, such as Allstate, that had failed to provide responses to discovery demands served upon them to provide such responses within 20 days, as well as any authorizations due under Case Management Order No. 1. The court warned that the "failure to comply with this order may result in the imposition of sanctions, including, but not limited to, monetary sanctions, an order of preclusion, or dismissal of plaintiff's complaint." According to a letter submitted by Allstate's attorney, dated October 14, 2011, memorializing a telephone conversation that he had that day with DeMatteis's counsel, Allstate had informed DeMatteis that it would not be providing an adjuster for the October 19, 2011 deposition date, because DeMatteis's attorney had told him that "depositions are backed up and that it would not be possible for an Allstate adjuster to be deposed on that date," and that a new order with revised deposition dates would soon be

provided.

Shortly thereafter, the court issued Case Management Order No. 17, dated October 17, 2011, which revised the deposition schedule so as to set aside three separate days for Allstate and its subrogees, including October 26, October 28, and October 31, 2011. In opposition to the instant motion, Allstate's counsel contends that the parties did not have "an opportunity to solidify a schedule for plaintiffs' insureds' depositions including the deposition of an Allstate adjuster, before the [c]ourt issued Case Management Order #17 ..." (Doc. 42, Grear affirm. at 5). He also concedes that the depositions did not go forward on the dates scheduled in that order, because [s]everal of plaintiffs' insureds are not in the United States any longer and/or are stateside on an infrequent basis making it extremely difficult to schedule all seven (7) depositions in the manner set forth in the Case Management Orders" (*id.*).

The record contains a letter from DeMatteis's attorney to Allstate's counsel, dated October 26, 2011, in which Allstate was reminded that depositions had been scheduled to commence that day for Allstate. The letter indicates that Allstate's counsel had advised defendants as to the status of certain subrogees, stating that Enchev was out of the country for one month, Allstate's counsel had not been able to reach St. John, Feldman and Langel, that Raetz just recently had a baby, but could be available at a future date, and finally, that the claims adjuster was on vacation. DeMatteis's attorney concluded this letter by asking Allstate's counsel to advise as to when its clients would be available for a deposition, and reminding him that the next compliance conference in this litigation was to be held on November 3, 2011.

An attorney appeared on Allstate's behalf at that conference (*see* Doc 41-3, ex. I, Nov. 3 transcript), stating on the record that she had a "list of reasons why their people didn't show up

...[but t]hey want to reschedule and [she had] a list of dates for availability” (*id.* at 53). The court advised the parties to work together to find new dates, while expressing its concern that no progress was being made with these depositions to the detriment of the Group 1 Wrongful Death Plaintiffs and other Group 2 plaintiffs who have been deposed but still had supplemental depositions of nonparties waiting to be scheduled (*id.* at 54). According to DeMatteis’s attorney, counsel for Allstate never contacted him to set up new deposition dates.

Therefore, on November 18, 2011, DeMatteis brought the instant motion for sanctions under CPLR 3126. The return date on the motion was originally set for December 12, 2011 and no opposition was filed. However, Allstate’s counsel did not attempt to e-file its opposition until January 4, 2012 (Doc. 42). The opposition consisted of an affirmation of Allstate’s counsel and two exhibits: a letter sent to DeMatteis’s counsel by facsimile dated October 14, 2011, and an uncertified copy of a 50-H hearing of Bob Mituniewicz of Allstate. The court so-ordered the parties’ stipulation to restore the motion to the motion calendar for January 25, 2012, and deemed Allstate’s late submission timely (Doc. 43).

Allstate’s motion opposition papers provided a “list of Allstate’s insureds who are ready to be deposed and those who will need additional time to make alternative arrangements to be present for their depositions due to the fact they have moved and/or live outside the United States and/or have been completely inaccessible despite diligent efforts to make contact with them” (Doc. 42, Grear affirm. at 3). The list included the following individuals and corresponding notes: (1) Regis Demour, who “lives outside the US but is in New York on a once a month basis,” and both a New York business address and Paris address were provided; (2) “Thomas Grey (Gina Raetz),” who lives in New York and is “generally available;” (3) Sergio Feldman,

who now lives in Florida at an address listed in the affirmation; (4) Elizabeth Langel, who resides in New York and is generally available; (5) Sonya Kearney, an “additional Allstate Rep available for deposition”; (6) Plamen Enchev, who is “most likely now not in US,” and did not “answer when called”; and (7) Yuksel Gumal, who was “no[t] responsive to inquiry” (*id.* at 3-4).

Analysis

CPLR 3126 authorizes a court to issue sanctions “[i]f any party, or a person who at the time a deposition is taken ... is ... under a party’s control, refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders ... as are just” Under this authority, the court may issue sanctions including resolving the relevant issue against the disobedient party, striking the disobedient party’s pleadings, precluding the disobedient party from producing evidence on the relevant issues at trial, staying the action until the court’s prior orders are obeyed, or even dismissing the action or any part thereof or rendering a judgment by default against the disobedient party (CPLR 3126 [1] - [3]). However, a more drastic sanction, such as striking a pleading, is “inappropriate absent a clear showing that the failure to comply with discovery directives was willful, contumacious or the result of bad faith” (*Banner v New York City Hous. Auth.*, 73 AD3d 502, 503 [1st Dept 2010]; citing *Delgado v City of New York*, 47 AD3d 550 [1st Dept 2008]; *Cespedes v Mike & Jac Trucking Corp.*, 305 AD2d 222 [1st Dept 2003]). A party’s failure may be found to be wilful, contumacious or in bad faith in “instances when a party deliberately destroys evidence, or repeatedly fails to appear for scheduled depositions while also failing to provide responsive answers upon appearing, or when the failures to appear or comply are repetitive” (*Cespedes*, 305 AD2d at 222-223 [*internal citations*

omitted]). Here, in asking the court to dismiss the Allstate's complaint, DeMatteis seeks "the most drastic sanction contemplated by CPLR 3126 for failure to comply with discovery" (*Tsai v Hernandez*, 284 AD2d 116, 117 [1st Dept 2001]). DeMatteis has the initial burden of making a "clear showing" that Allstate's failure to comply was "willful, contumacious or in bad faith," and if this standard is met, the burden "shifts to the nonmoving party to demonstrate a reasonable excuse" (*Fish v Schindler*, 75 AD3d 219, 220 [1st Dept 2010]; quoting *Reidel v Ryder TRS, Inc.*, 13 AD3d 170, 171 [1st Dept 2004]). Dismissal is not appropriate where a party shows that it fully complied with outstanding obligations, even if such compliance was not timely, and has "provided a reasonable excuse for [its] dilatoriness and there is no indication of bad faith" (*Cespedes*, 305 AD2d at 223).

Here, DeMatteis argues that Allstate failed to comply with several court orders concerning deposition scheduling. First, Allstate did not comply with the terms of Case Management Order Nos. 4 and 6, by failing to conduct any depositions on either October 27 and November 1, 2010. Subsequently, Allstate also failed to conduct any depositions on the dates scheduled in Case Management Order Nos. 16 and 17. Allstate submits an affirmation of its counsel in opposition, in which he claims that Allstate has not willfully disobeyed the court's directives because his office "made 1/2 phone calls to [DeMatteis's attorney's] office to follow up on [DeMatteis's] October 26, 2011 letter ..." (Doc. 42, Grear affirm. at 2-3). He adds that "because of the plaintiff's counsel's trial and deposition schedule in other unrelated cases, in addition to the transient nature of most of plaintiff's insureds at the time, scheduling of the depositions would have proved difficult at the very least in light of the [T]hanksgiving and upcoming holiday season" (*id.* at 3). Counsel also claims that Allstate has "in every way

complied with all written discovery request[s], and in fact even produced an Allstate rep, Bob Mituniewicz, for deposition in a 50-h hearing/deposition on February 20, 2009” (*id.* at 3).

Allstate’s attorney’s affirmation is insufficient for a number of reasons. First, his claim that he “made 1/2 phone calls” to DeMatteis’s attorney and that he had unspecified scheduling conflicts are insufficiently detailed or supported by an affidavit. Furthermore, counsel’s silence as to any efforts to reschedule the depositions or comply with the specific procedure set forth in the court’s case management orders for making changes to the deposition schedules provided therein, shows that no good faith efforts to comply with the court’s orders was made. Next, the fact that one of Allstate’s representatives was deposed in a 50-h proceeding is irrelevant, as any such deposition was not part of this proceeding and eight of the nine defendants in this action have never been given an opportunity to depose any individual on behalf of Allstate.

In light of the above, the court finds that Allstate has failed to comply with successive orders of this court requiring it to appear for depositions on particular dates. Allstate does not dispute that it is required to comply with the case management orders issued by the court under the *In re 91st Street Crane Collapse Litigation* general index number, 771000/2010 (*see In re 91st Street Crane Collapse Litigation*, Sup Ct, NY County, April 5, 2010, Feinman, J., index no. 771000/2010 Case Management Order No. 1, e-file doc. 2, at *4 [joining for the purposes of discovery all “actions arising out of or relating to the crane collapse on May 30, 2008, at East 91st Street”]). A prior decision and order of this court deemed this matter a part of the *In re 91st Street Crane Collapse Litigation* and made the parties bound by Case Management Order No. 1, and subsequently issued orders (*Allstate Ins. Co. and/or Allstate Indemnity Co., et. al. v 1765 First St. Assoc., LLC*, Sup Ct, NY County, June 15, 2010, Feinman, J., index no. 108613/2009,

mot. seq. nos. 001 - 004).

Thus, Allstate was required to abide by the directives set forth in Case Management Orders No. 4 and 6, scheduling depositions for certain dates in October and November of 2010, which Allstate does not deny. Nonetheless, it provides no excuse whatsoever for its noncompliance with these first two orders. In fact, there is no indication in the record that Allstate did anything in connection with this action between at least October of 2010 and October of 2011, over a year later, when the court gave Allstate a second opportunity to take depositions. Even when given another chance, Allstate failed to comply with the deposition dates directed in Case Management Order No. 16 and 17, and did not follow the procedures set forth in in each of these orders for making alterations to the deposition schedule (*see* Case Management Order No. 16 at 3). Case Management Order No. 16 also gave specific notice to Allstate that the “failure to comply with this order may result in the imposition of sanctions, including, but not limited to, monetary sanctions, an order of preclusion, or dismissal of plaintiff’s complaint” (*id.* at 1).

In light of the above, and especially to the extent that some of Allstate’s deponents live in New York and are admittedly “generally available,” Allstate’s failure to comply with the directives of four successive court orders setting forth deposition dates, or sufficiently demonstrate good faith efforts to reschedule any of these depositions to date, supports an inference that Allstate’s failure to comply was “willful, contumacious or in bad faith” (*Reidel*, 13 AD3d at 171). This conclusion is particularly warranted with respect to Sonya Kearney, who is employed by Allstate. As to the other deponents, the fact that there whereabouts appear to be unknown does not prevent the imposition of the requested sanction of dismissal (*id.*; *see also Wong v Kim*, 17 AD3d 128, 129 [1st Dept 2005]). Although there is nothing in counsel’s

affirmation or otherwise in the record to suggest that Allstate would comply if given another opportunity to conduct a deposition, when it has failed to do so in response to the court's four prior orders without providing a sufficiently detailed and reasonable excuse, given that dismissal is the most drastic remedy, the court will condition dismissal in accordance with the directives which follow.

Defendant Leon D. DeMatteis Construction Corp., having established that plaintiff has willfully and contumaciously failed to provide discovery as directed in Case Management Orders 4, 6, 16 and 17, in that plaintiff has failed and refused, despite specific directives in said orders, and without good cause, to appear for deposition on the dates directed therein, it is hereby

ORDERED that the motion of defendant to strike the plaintiff's pleading and dismiss this case is granted to the extent that the complaint shall be deemed stricken and the action dismissed as against movant unless,

1) plaintiff Allstate pays movant's counsel \$2,500.00 as a sanction representing the partial costs associated with this motion on or before May 31, 2012; and

2) plaintiff Allstate produces all its witnesses located in New York City for examination before trial on or before June 29, 2012; and

3) plaintiff Allstate produces all its witnesses located outside of New York City for examination before trial on or before August 31, 2012; and

4) plaintiff sends a proposed deposition schedule, in writing via NYSCEFS, that complies with the above to movant's counsel and the other defendants by May 14, 2012, and, after consultation with defense counsel, submits a joint proposal for a final schedule to be so ordered by the court by May 21, 2012. The dates selected need not be restricted as to day of the

week by any previous CMO, but shall not conflict with any EBT date set by the court in the currently controlling case management order, CMO #22, nor with any order that may issue as a result of the May 3, 2012 compliance conference; and

5) plaintiff Allstate submits proof of compliance with paragraph 1 and paragraph 4 to the court for the June 2012 compliance conference; and it is further

ORDERED that in the event of non-compliance with the foregoing, movant shall submit a proposed order dismissing the complaint as against it on seven days' notice to the plaintiff, together with an affidavit outlining plaintiff's non-compliance; and it is further

ORDERED that movant shall, within five days of entry of this order, serve a copy of this order on plaintiff and all other parties together with notice of its entry.

This constitutes the decision and order of the court.

Dated: May 2, 2012
New York, New York



J.S.C.