SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

----------x

RICHARD McDOUGAL and ELEANOR MARFOGLIA, Index No.:151533/13

Plaintiffs,

-against-

WWP OFFICE, LLC, TURNER CONSTRUCTION COMPANY, and NORMURA HOLDING AMERICA, INC.,

Defendants.

----------x

WWP OFFICE, LLC, TURNER CONSTRUCTION COMPANY, and NORMURA HOLDING AMERICA, INC., Third-Party Index No.: 595841/15

Third-Party Plaintiffs

-against-

SHLOMO KORNFIELD, and YOCHEVED STERN,

Third-Party Defendants

----------x

Joan A. Madden, J.:

In this action arising out of an injuries sustained at a construction site, defendants/third-party plaintiffs WWP Office, LLC ("WWP"), Turner Construction Company ("Turner") and Normura Holding America, Inc. ("Normura")(together "defendants") move, pursuant to CPLR 3103(b) for a protective order from plaintiffs' notice of discovery and inspection dated February 23, 2016 ("the demand") Plaintiffs oppose the motion and cross move for an order striking defendants' answer or, alternatively, compelling defendants to furnish the documents for discovery and inspection as requested in the demand by a time certain.[1]

[1]Plaintiffs also move to extend the time for filing the note of issue. At oral argument in connection with motion sequence no. 005, the court extended plaintiffs' time for filing the note of issue to December 31, 2016.

This action arises out of personal injuries allegedly sustained by plaintiff Richard McDougal ("McDougal") on February 12, 2013, at approximately 8:00 am, when he was performing construction work at Worldwide Plaza located at 50th Street and Eighth Avenue in Manhattan ("the building"). WWP, which owns the building, leased the office space there to Normura, which hired Turner in connection with certain construction work to be performed at the leased property. At the time of the accident, McDougal, an employee of non-party David Shuldiner Glass, Inc., was performing work at the seventh floor elevator lobby when the ceiling struck him, causing him to sustained serious injuries. In this action, plaintiffs seek to recovery under Labor Law §§ 240(1), 241(6) and 200 and for common law negligence.

At issue here is whether defendants properly moved for a protective order with respect to the demand and, if so, whether they are entitled to any relief. Plaintiffs argue that defendants were required to object to the demand within twenty days of its service as provided in CPLR 3122 (a), and that, by moving instead for a protective order pursuant to CPLR 3103, they have waived their objections to the requests, except with respect to those which are palpably improper. Under CPLR 3122(a), the objecting party is required "within twenty days of service of a notice.... [to] serve a response which shall state with reasonable particularity the reasons for each objection." Here, defendants do not claim they complied with CPLR 3122, which was amended to "encourage the parties to resolve discovery disputes without court intervention in order to reduce the volume of motion practice." Ashley v. City of New York , 240 AD2d 352, 353 (2d Dept 1997); see also, Budhram v. City of New York, 264 AD2d 796 (2d Dept 1999)(admonishing "the City for its failure to respond or object to the plaintiffs' notice for discovery and inspection in compliance with CPLR 3122). At the same time, however, it has

been held that the amendment to CPLR 3122(a) does not prevent the recipient of an overly broad request from moving for a protective order. See Velez v. Hunts Point Multi-Service Center, Inc., 29 AD3d 104, 110-111 (1st Dept 2006). Accordingly, the court will consider the merits of the motion for a protective order.

While CPLR 3101 (a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action," CPLR 3103 (a) authorizes the court to "issue a protective order denying, limiting, conditioning or regulating the use of any disclosure device, in order to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to the other party." See Spohn-Konen v Town of Brookhaven, 74 AD3d 1049, 1049 (2d Dept 2010]. Protective orders are designed for the "prevention of abuse" (CPLR 3103 [a]), and are entered only in extreme situations where there is clear abuse of the discovery process. See e.g. Tornheim v Blue & White Food Prods. Corp., 73 AD3d 745, 745 (2d Dept 2010) (protective order entered on ground that "plaintiff requested the production of any and all documents relating to a transaction which occurred seven years after the events at issue in this case transpired," and "[t]hose documents were irrelevant to the plaintiff's case"; thus, "the request was both overly broad and unduly burdensome").

"In making this determination as to whether disclosure is warranted, the courts employs a test of 'usefulness and reason,' balancing the importance to the [party's] claim of the information sought versus the consequences of disclosure" Feger v Warwick Animal Shelter, 59 AD3d 68, 70 (2d Dept 2008)(internal citation omitted). The trial court possesses broad discretion to deny demands that are unduly burdensome or that seek irrelevant or improper information. See Scalone v Phelps Mem. Hosp. Ctr., 184 AD2d 65 (2d Dept 1992); see Gilman & Ciocia, Inc. v

Walsh, 45 AD3d 531, 531 (2d Dept 2007)(the"'supervision of disclosure and the setting of reasonable terms and conditions therefor rests within the sound discretion of the trial court and, absent an improvident exercise of that discretion, its determination will not be disturbed'")(citation omitted); Weeks Office Products, Inc. v. Chemical Bank, 169 AD2d 560 (1st Dept 1991)(trial court did not abuse its discretion in granting a protective order where interrogatories and demand for documents did not relate to evidence material and necessary to the party's defense).

In addition, contrary to defendants' argument, they are not entitled to a protective order with respect to those demands seeking information regarding the repair on the ceiling on the ground that such information relates to subsequent remedial measures and is therefore not subject to disclosure. While evidence of subsequent repairs and remedial measures is generally not discoverable or admissible in a negligence action (Kaplan v. Einy, 209 AD2d 248. 252 [1st Dept 1994]), there are exceptions to this rule, including when proof of subsequent repairs reveal the nature and existence of a dangerous condition. Mercado v. St. Andrews Housing Development Fund Co., 289 AD2d 148 (1st Dept 2001); see also, Francklin v. New York Elevator Co., 38 AD3d 329, 329 (1st Dept 2007)(in an action for personal injuries relating to alleged malfunction of elevator, the court properly permitted discovery of post-accident repair records for the six-month period following the accident as long such records only be introduced a trial "upon a showing of relevance to the condition of the elevator at the time of the accident, and only if introduced in a way that does not reveal that repairs were made").

Here, records relating to the post- accident construction of the seventh floor ceiling are discoverable at least insofar they may provide information material and relevant to the cause of

the accident, including whether the alleged improper placement of securing devices was in contravention of the plans and specifications and the nature of the repairs.

The court also rejects at this stage of the action, defendants' argument that plaintiffs are not entitled to discovery as to the cause of the ceiling collapse as McDougal was not exposed to an elevation related risk under Labor Law § 240(1), as he was walking on the floor when the ceiling above him collapsed. Additional discovery, including depositions, are required as to the cause of the ceiling collapse before determining the applicability of the foreseeability standard articulated in Jones v. 414 Equities, LLC, 57 AD3d 65 (1st Dept 2008), and if applicable, whether it was forseeable that the ceiling would collapse so that the accident was within the purview of Labor Law § 240(1).

Based on the foregoing analysis, the court rules as follows with respect to the fourteen requests in the demand. Request No. 1, which requests that the defendants "[p]rovide correspondence, documents, emails, and tests regarding the investigation as to the cause of the ceiling collapse which struck plaintiff," is not unduly burdensome or broad as it is limited to the investigation as to the reasons for the ceiling collapse, which is relevant and material to the cause of the accident. Next, Request No. 2 must be responded to the extent of providing the name and business address of the person or company that maintain Turner's email accounts. As for Request No. 3, which seeks "meeting minutes for the meetings wherein the accident or cause of the accident was discussed," defendants shall provide those parts of the meeting minutes that address the accident and/or cause of the accident. Request No. 4, which seeks "meeting minutes for the meetings wherein the cause of the collapse was discussed," must be responded to only to the extent of providing those parts of the meeting minutes that addresses the cause of the collapse.

Request No. 5 seeks "the daily reports up to the date of the collapse ceiling was properly constructed." Such request must be responded to only to the extent that such daily reports relate to the repair of the ceiling from date of the accident to completion of the repair. As for Request No. 6, which seeks "the safety logs up to the date that the collapsed ceiling was properly constructed," defendants are required to respond only to the extent such safety logs relate to the repair of the ceiling from the date of the accident up to the date of completion of the repair. Request No. 7 seeks "cell phone records to include phone calls and texts of Darryl Fullerton from the date of the accident to the date that the collapsed ceiling was properly constructed," while Request No. 8 seeks "cell phone records to include phone calls and texts of any Turner supervisory personnel involved with ascertaining the cause of the collapsed ceiling and insuring its proper construction from the date the ceiling collapsed up to the date the ceiling was properly constructed." These requests are overly broad and lack specificity as to the basis for the requests, and defendants need not respond to them.

Request No. 9, which requests "the work records or documents, including correspondence, emails, etc in possession of defendants, to include documentation correspondence and emails submitted by subcontractors regarding the investigation of the collapse of the ceiling," seeks material and relevant information and is sufficient specific since it pertains to the investigation. Request No. 10 seeks "the work records or documents, including correspondence, emails, etc in possession of defendants, to include documentation correspondence and emails submitted by subcontractors regarding the pre-accident construction of the collapsed ceiling," whereas Request No. 11 seeks the same records with respect to the post -accident construction. Request Nos 10 and 11 must be responded to only to the extent documents and other records sought relate to problems and/or defects in the design and/or

construction of the ceiling. Request No. 12 seeks "correspondence, documents, emails, texts and other such medium regarding the collapse of the ceiling and its subsequent proper construction in the possession of defendants, to include documents, correspondence and emails etc, submitted by subcontractors." As with Requests No. 10 and 11, defendants' response shall be limited to issues related the problems and/or defects in design and/or construction of the collapsed ceiling. Defendants shall respond to Requests No. 13 and 14, which seek, respectively, "the blueprints, plans, shop drawing and schematics regarding the construction of the collapsed ceiling and subsequent reconstruction, and "the invoices, bills, receipts, charge backs, change orders or like documentation regarding the post-accident construction of the ceiling."

In view of the above, it is

ORDERED that defendants' motion for a protective order is granted only to the extent of finding that defendants need not respond Request Nos.7,8,13 and 14 and limiting their responses to Requests Nos. 2,3,4,5,6,10,11, and 12 as indicated above; and it is further

ORDERED that defendants are directed to respond to Request Nos. 1 and 9 and Requests Nos. 2,3,4,5,6,10,11, and 12 to the extent set forth herein within 20 days of efiling this order; and it is further

ORDERED that plaintiffs' cross motion to compel is granted to the extent of requiring defendants' to respond to the demand as directed above; and it is further

ORDERED that a status conference shall be held in Part 11, room 351, 60 Centre Street on October 6, 2016, at 9:30 am.

Dated: August 4, 2016

HON. JOAN A. MADDEN
J.S.C.