Polsky v 145 Hudson St. Assoc. L.P.
2015 NY Slip Op 32071(U)
August 14, 2015
Supreme Court, New York County
Docket Number: 107108/2011
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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JAMES POLSKY and BERNADETTE POLSKY,

Plaintiffs

- against -

145 HUDSON STREET ASSOCIATES L.P., HUDSON SQUARE MANAGEMENT CORPORATION, ROGERS MARVEL ARCHITECTS, PLLC, and JOSEPH PELL LOMBARDI,

Defendants

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Index No. 107108/2011

DECISION AND ORDER

LUCY BILLINGS, J.S.C.:

I. THE MOTIONS TO BE DETERMINED

The remaining defendants, 145 Hudson Street Associates L.P. and Hudson Square Management Corporation, move for a protective order against disclosure of a confidential settlement agreement, unredacted, between defendants and nonparty Board of Managers of the 145 Hudson Street Condominium. C.P.L.R. § 3103(a). Defendants insist that this settlement agreement is immaterial to any claim or defense in this action and that a privilege applicable to settlement negotiations under C.P.L.R. § 4547 protects the settlement agreement from disclosure. Plaintiffs cross-move to compel disclosure of the settlement agreement, unredacted, and related categories of documents plaintiffs requested from defendants during disclosure. C.P.L.R. § 3124.

Plaintiffs separately move to compel nonparty Board of Managers of the 145 Hudson Street Condominium to produce the same documents. This motion also seeks to compel the Board and Rogers

Marvel Architects, PLLC (RMA), formerly a defendant, to produce all documents concerning (1) plaintiffs' compliance with alteration agreements entered in 2007 and 2012 between plaintiffs and the Board and (2) efforts to obtain a Certificate of Occupancy (CO) for the building at 145 Hudson Street, New York County, and why a CO was not obtained. C.P.L.R. §§ 2308(b), 3124. Finally, plaintiffs' motion seeks to compel (1) RMA's production of all documents concerning its work or proposals for plaintiffs' condominium unit since 2007 and (2) the deposition of RMA's architect Matthew Peckham, also a nonparty, concerning this subject and the two subjects delineated above. Id. The Board of Managers cross-moves to quash the subpoena served on the Board to produce the documents plaintiffs seek from it, C.P.L.R. § 2304, and for a protective order against the subpoena's enforcement. C.P.L.R. § 3103(a).

When plaintiffs cross-moved against defendants and then moved against the nonparties to compel disclosure, plaintiffs were unaware of defendants' motion for summary judgment that now is pending and has stayed disclosure. C.P.L.R. § 3214(b). As neither defendants nor either nonparty affected by the disclosure sought offers any countervailing reason, the court considers plaintiffs' cross-motion and motion as seeking to lift the stay on disclosure.

II. BACKGROUND FACTS

The City Planning Commission (CPC) issued a Special Permit to defendants permitting them to build loft residential units in

the building at 145 Hudson Street. Plaintiffs' purchase of one of those units from defendants, the sponsor of the building condominium, closed September 19, 2006, after the parties executed a Purchase Agreement February 17, 2006, and plaintiffs received the condominium's Offering Plan and any amendments to the plan that defendants had filed with the State Attorney General. Plaintiffs claim defendants breached the parties' Purchase Agreement by providing plaintiffs a condominium unit that included less than two entrances to it and a mechanical room, required by the CPC Special Permit, that was not to be used as habitable space.

Defendants counterclaim for damages from plaintiffs' alterations that converted their mechanical room into habitable space, blocked the unit's main entrance, and used the mechanical space as an entrance, in violation of the Special Permit, an alteration agreement, and their plans that were approved by defendants' architect and the New York City Department of Buildings (DOB). Although defendants are not parties to either of plaintiffs' alteration agreements with the Board of Managers of the Condominium, defendants maintain that the condominium's Offering Plan confers on them the right to enforce unit owners' compliance with their alteration agreements. Defendants claim plaintiffs' violations of such an agreement, the Special Permit, and the approved plans have prevented defendants from obtaining a permanent CO as required by the Offering Plan and caused them to incur expenses for legal and architectural services to compel

plaintiffs to cure their violations. Significantly, defendants have not moved for summary judgment on any counterclaim.

RMA does not dispute that defendants used RMA to assist in obtaining a CO for 145 Hudson Street and to supervise alterations to plaintiffs' unit pursuant to the alteration agreements, as well as alterations to other residential units in the building, or that Peckham is the RMA architect most knowledgeable about the subjects for which plaintiffs seek his deposition. The Board of Managers of the Condominium has produced documents concerning (1) plaintiffs' compliance with the alteration agreements and (2) efforts to obtain a CO and why it was not obtained, but RMA has not produced any such documents or documents concerning work by RMA for plaintiffs' unit, and Peckham has not appeared for his deposition. Nor have defendants or the Board produced the unredacted settlement agreement or the related documents requested from defendants and the Board, which are emails or other correspondence between defendants and the Board leading up to the settlement.

III. THE SETTLEMENT AGREEMENT

Defendants and the Board of Managers of the Condominium entered a settlement agreement June 8, 2011, regarding the building's construction and the conversion to a condominium, providing that the terms remain confidential. When plaintiffs requested the settlement agreement during disclosure, defendants produced only the term regarding plaintiffs' unit, subject to a stipulation providing that this disclosure remain confidential.

As publicly presented by defendants, the term regarding plaintiffs' unit provides that the Board would cooperate with defendants in compelling plaintiffs' restoration of their mechanical space to comply with the Special Permit and enable defendants to obtain a permanent CO.

Plaintiffs maintain, and defendants do not dispute, that the settlement agreement's full terms will disclose the Board of Managers' and defendants' (1) understandings of what the Offering Plan promised to purchasers regarding mechanical spaces and (2) responsibilities to each other, including defendants' responsibilities to be carried out for the building to obtain a CO. Parties' or a nonparty's understanding of the Offering Plan's promises is immaterial to this action, unless the plan, at least insofar as it bears on plaintiffs' claims, is ambiguous, such that its plain terms do not evince its meaning. Kolbe v. Tibbetts, 22 N.Y.3d 344, 355 (2013). See Schron v. Troutman Sanders LLP, 20 N.Y.3d 430, 436 (2013). Although nothing in the court's prior decision denying defendants' motion to dismiss plaintiff's breach of contract claims delineated above contemplates resorting to extrinsic evidence to construe an ambiguity, the court has not yet determined this issue. Defendants' understanding, at minimum, of a promise to purchasers in the Offering Plan, may be material and necessary to construction of an ambiguity in that promise, such as for a unit with two entrances or with unrestricted habitable space. Osowski AMEC Constr. Mgt., Inc., 69 A.D.3d 99, 106-107 (1st Dep't 2009);

Mahoney v. Turner Constr. Co., 61 A.D.3d 101, 104 (1st Dep't 2009); American Re-Ins. Co. v. United States Fid. & Guar. Co., 19 A.D.3d 103, 104 (1st Dep't 2005); Masterwear Corp. v. Bernard, 298 A.D.2d 249, 250 (1st Dep't 2002).

Moreover, since defendants claim damages from plaintiffs' breach of their alteration agreement with the Board of Managers, it would have perceived such a breach in the first instance. Plaintiffs point out, and defendants do not dispute, that, when the Board notified defendants in December 2007 of issues it wanted resolved, plaintiffs' alterations were not among those issues. Then, in June 2011, in the settlement agreement, the Board agreed to cooperate with defendants in compelling plaintiffs' restoration of their mechanical space to its pre-alteration condition. See Mahoney v. Turner Constr. Co., 61 A.D.3d at 104.

Insofar as the settlement agreement's terms will disclose evidence of defendants "furnishing, or offering or promising to furnish, . . . any valuable consideration in compromising or attempting to compromise a claim" by the Board of Managers comparable to a claim by plaintiffs here, those terms may "be inadmissible as proof of liability" on defendants' part for that claim. C.P.L.R. § 4547. This protection against admissibility, however, does not confer a privilege on a settlement, nor a protection against disclosure. Moreover, the Board's liability is not being proved, see Matter of Midland Ins. Co., 87 A.D.3d 487, 491 (1st Dep't 2011); American Re-Ins. Co. v. United States

Fid. & Guar. Co., 19 A.D.3d at 104, but Board members may be witnesses regarding the parties' claims, counterclaims, or defenses. Evidence of the Board "accepting, or offering or promising to accept, any valuable consideration in compromising or attempting to compromise a claim," C.P.L.R. § 4547, by the Board comparable to a claim by plaintiffs thus may reveal a bias relevant to Board members' credibility. Therefore, even if the court determines that the Offering Plan is unambiguous, the settlement agreement still may be material and necessary for impeachment purposes. Matter of Midland Ins. Co., 87 A.D.3d at 491; Mahoney v. Turner Constr. Co., 61 A.D.3d at 104; American Re-Ins. Co. v. United States Fid. & Guar. Co., 19 A.D.3d at 104.

To respect and preserve the confidentiality agreement between defendants and the Board of Managers of the Condominium, defendants' disclosure of the settlement agreement shall be subject to the same stipulation providing for confidentiality as covers the term of the agreement already disclosed, unless plaintiffs, defendants, and the Board of Managers agree otherwise. Defendants also may redact the names of unit owners other than plaintiffs and the numbers of units other than plaintiffs' unit that the agreement refers to. Susan D. Fine Enters., LLC v. Steele, 66 A.D.3d 613, 614 (1st Dep't 2009); Mahoney v. Turner Constr. Co., 61 A.D.3d at 105-106; Masterwear Corp. v. Bernard, 298 A.D.2d at 251.

Significantly, defendants claim no "annoyance, expense, embarrassment, disadvantage, or other prejudice" from disclosure

of the settlement agreement or the related correspondence discussed below, other than the breach of confidentiality. C.P.L.R. § 3103(a). The stipulation preserving the documents' confidentiality protects that interest. Mahoney v. Turner Constr. Co., 61 A.D.3d at 105-106; Masterwear Corp. v. Bernard, 3 A.D.3d 305, 307-308 (1st Dep't 2004); Masterwear Corp. v. Bernard, 298 A.D.2d at 250-51.

IV. THE CORRESPONDENCE

A. Materiality and Necessity

The other documents plaintiffs seek via their cross-motion are emails and other correspondence between defendants and the Board of Managers regarding (1) the mechanical space requirements imposed on 145 Hudson Street's units and (2) elements of the building's construction or alteration that prevented the building from obtaining a CO. This correspondence culminated in the settlement agreement, but does not become unnecessary once defendants disclose the ultimate agreement. The correspondence may reflect facts relevant to one of the two issues above, defendants' position on the issues, and areas of agreement between defendants and the Board relevant to the issues that did not end up in the settlement agreement.

To the same extent that the Offering Plan's terms relating to mechanical space requirements or the lack thereof may be ambiguous, defendants' interpretation of those terms may be material and necessary to plaintiffs' claim that the mechanical space restrictions on the alteration and use of their unit breach

their Purchase Agreement, which incorporates the Offering Plan. The second category of information sought from the correspondence bears directly on the extent to which plaintiffs' alterations, as opposed to other elements of construction or alteration, prevented the procurement of a permanent CO, the gravamen of defendants' counterclaims. Osowski AMEC Constr. Mgt., Inc., 69 A.D.3d at 106-107; Mahoney v. Turner Constr. Co., 61 A.D.3d at 104; American Re-Ins. Co. v. United States Fid. & Guar. Co., 19 A.D.3d at 104; Masterwear Corp. v. Bernard, 298 A.D.2d at 250. Even if defendants were obligated to achieve a restoration of plaintiffs' mechanical space to comply with the Special Permit and obtain a permanent CO, if other elements of construction or alteration delayed or impeded obtaining a CO, the damages attributable to that delay or denial of a CO may not have been caused by plaintiffs.

Plaintiffs seek emails or other related correspondence beginning in December 2007 through the settlement agreement in June 2011. For the starting point, plaintiffs rely on the Board of Managers' notification to defendants December 18, 2007, of issues the Board wanted resolved, including the two issues above: (1) defendants' restriction on the use of designated mechanical spaces in the units and (2) construction defects in violation of applicable codes that might impede procurement of a CO. Defendants do not challenge this period, but stand on their insistence that this correspondence constitutes privileged settlement negotiations. C.P.L.R. § 4547 similarly provides no

privilege for settlement negotiations, nor any protection against their disclosure. If any email or other correspondence does not offer or accept a settlement of any claim, but simply states defendants' position on one of the two issues, C.P.L.R. § 4547 does not even bar the statement's admission in evidence. Nineteen Eight-Nine, LLC v. Icahn, 96 A.D.3d 603, 606-607 (1st Dep't 2012); Java Enters., Inc. v. Loeb, Block & Partners LLP, 48 A.D.3d 383, 384 (1st Dep't 2008); People v. Newman, 107 A.D.3d 827, 829 (2d Dep't 2013); Murray v. Farrell, 97 A.D.3d 953, 955 (3d Dep't 2012).

Not all settlement negotiations, however, are necessarily relevant to the two issues. Since those two issues are the only grounds plaintiffs identify for the correspondence's disclosure, defendants need not disclose emails or other correspondence that does not pertain to either of those issues. Insofar as an email or other correspondence discloses the ultimate settlement agreement's actual terms, it also shall be subject to the same stipulation providing for confidentiality as covers the term of the agreement already disclosed, unless plaintiffs, defendants, and the Board of Managers agree otherwise. Defendants also may redact the names of other unit owners and the numbers of other units that the correspondence refers to. Susan D. Fine Enters., LLC v. Steele, 66 A.D.3d at 614; Mahoney v. Turner Constr. Co., 61 A.D.3d at 105-106; Masterwear Corp. v. Bernard, 298 A.D.2d at 251.

B. The Work Product Privilege

The Board of Managers, albeit not defendants, seeks a protective order against disclosure of the correspondence, C.P.L.R. § 3103(a), because it is privileged work product of the Board's attorney. C.P.L.R. § 3101(c). The burden of establishing that the documents sought are covered by a privilege rests on the Board as the proponent of the privilege. Spectrum Sys. Intl. Corp. v. Chemical Bank, 78 N.Y.2d 371, 377 (1991); Ambac Assur. Corp. v. DLJ Mtge. Capital, Inc., 92 A.D.3d 451, 452 (1st Dep't 2102); 148 Magnolia, LLC v. Merrimack Mut. Fire Ins. Co., 62 A.D.3d 486, 487 (1st Dep't 2009); Anonymous v. High School for Envtl. Studies, 32 A.D.3d 353, 359 (1st Dep't 2006).

A client or its attorney may waive the privilege attached to the attorney's work product. The very act of forwarding correspondence from the Board's attorney to defendants or their attorney demonstrated an expectation by the Board's attorney that the correspondence was not confidential and would be accessible to defendants and their attorney. People v. Kozlowski, 11 N.Y.3d 223, 246 (2008); Netherby Ltd. v. G.V. Trademark Invs., Ltd., 261 A.D.2d 161, 161 (1st Dep't 1999); Bluebird Partners, L.P v. First Fidelity Bank, 248 A.D.2d 219, 225 (1st Dep't 1998); Eisic Trading Corp. v. Somerset Marine, Inc., 212 A.D.2d 451, 451 (1st Dep't 1995). See Matter of New York City Asbestos Litig., 109 A.D.3d 7, 10 n.1, 15 (1st Dep't 2013); Gama Aviation Inc. v. Sandton Capital Partners, L.P., 99 A.D.3d 423, 424 (1st Dep't 2012). The Board has not demonstrated that, in the

communications by its attorney regarding all the issues listed above with defendants or their attorney, the Board's attorney indicated that any of these communications was confidential or cautioned defendants or their attorney to keep the contents of their communications confidential. People v. Kozlowski, 11 N.Y.3d at 246; Bluebird Partners, L.P v. First Fidelity Bank, 248 A.D.2d at 225. This exchange with defendants and their attorney thus shows a waiver of any work product privilege to be claimed by the Board or its attorney covering their correspondence.

Nor has the Board shown that the correspondence includes an attorney's work product. Work product derives from attorneys' professional skills and judgment; includes the attorneys' analysis of legal principles, their legal opinions, and their strategic decisions; and is narrowly construed. Spectrum Sys. Intl. Corp. v. Chemical Bank, 78 N.Y.2d at 377; Matter of New York City Asbestos Litig., 109 A.D.3d at 12; Fewer v. GFI Group Inc., 78 A.D.3d 412, 413 (1st Dep't 2010); Hudson Ins. Co. v. Oppenheim, 72 A.D.3d 489, 490 (1st Dep't 2010). The work product privilege protects against the disclosure of factual information and observations only by an attorney, as they may be clothed with the attorney's mental impressions and personal beliefs, but not against disclosure of facts or observations from the attorney's client. Beach v. Touradji Capital Mgt., L.P., 99 A.D.3d 167, 170 (1st Dep't 2012); Netherby Ltd. v. G.V. Trademark Invs., Ltd., 261 A.D.2d at 161; Eisic Trading Corp. v. Somerset Marine, Inc., 212 A.D.2d at 451.

The Board of Managers presents nothing more than a boilerplate claim of work product privilege, which is "insufficient as a matter of law." Anonymous v. High School for Envtl. Studies, 32 A.D.3d at 359. The Board has not demonstrated that its attorney's correspondence included anything other than the Board's own factual information, observations, impressions, or beliefs that its attorney was forwarding to defendants. These facts, observations, impressions, or beliefs do not become privileged work product merely because the Board's attorney compiled them. National Union Fire Ins. Co. of Pittsburgh, Pennsylvania v. TransCanada Energy USA, Inc., 119 A.D.3d 492, 493 (1st Dep't 2014); Brooklyn Union Gas Co. v. American Home Assur. Co., 23 A.D.3d 190, 191 (1st Dep't 2005); Netherby Ltd. v. G.V. Trademark Invs., Ltd., 261 A.D.2d at 161; Salzer v. Farm Family Life Ins. Co., 280 A.D.2d 844, 846 (3d Dep't 2001).

V. DOCUMENTS AND TESTIMONY CONCERNING PLAINTIFFS' ALTERATIONS AND THE PROCUREMENT OF A CO

Plaintiffs claim documents and testimony concerning RMA's work on alterations or proposed alterations to plaintiffs' unit will reveal the understanding of defendants' architect whether two entrances were permitted, as plaintiffs insist the Offering Plan promised, and a restricted mechanical space was required, as they insist contravened the plan's promises, in their unit. Again, insofar as the plan's terms relating to the number of entrances or the mechanical space requirements may be ambiguous, those terms' interpretation by defendants' architect may be material and necessary to plaintiffs' claim that their unit's

lack of two entrances and the mechanical space restrictions on its alteration and use breach their Purchase Agreement.

Most importantly, documents and testimony concerning plaintiffs' compliance with the alteration agreements, which defendants retained RMA to supervise, defendants' efforts to obtain a CO, with which RMA also assisted defendants, and why it was not obtained bear directly on defendants' counterclaims. The counterclaims maintain that plaintiffs' alterations violated their alteration agreement, as well as their plans that both RMA and DOB approved. These violations, as well the alterations' violation of the Special Permit, in turn prevented defendants from obtaining a CO, causing them to incur expenses for legal and architectural services to achieve compliance with the Special Permit, alteration agreement, and approved plans.

Although RMA and Peckham dispute plaintiffs' suggestion that plaintiffs retained or sought to retain RMA to perform services for plaintiffs, such a dispute does not render the requested disclosure immaterial. Documents and testimony concerning work by RMA to review or approve plaintiffs' plans for alterations, propose revisions to the plans or actual alterations, supervise plaintiffs' alterations, or obtain a CO after plaintiffs performed their alterations, just as examples, are material to defendants' counterclaims as well as the interpretation of the Offering Plan's terms. Smile Train, Inc. v. Ferris Consulting Corp., 117 A.D.3d 629, 631 (1st Dep't 2014).

RMA's and Peckham's only further grounds for refusing to

produce the requested documents and to appear for a deposition are that RMA and Peckham are nonparties and that defendants' motion for summary judgment has stayed disclosure. Nonparty status is not a viable ground on which to object to disclosure. Kapon v. Koch, 23 N.Y.3d 32, 36, 38-39 (2014); Smile Train, Inc. v. Ferris Consulting Corp., 117 A.D.3d at 631; Ledonne v. Orsid Realty Corp., 83 A.D.3d 598, 599 (1st Dep't 2011); Reyes v. Riverside Park Community (Stage I), Inc., 47 A.D.3d 599, 599-600 (1st Dep't 2008). Second, defendants' motion for summary judgment, even if granted, will not affect their ongoing counterclaims and plaintiffs' defenses to those claims.

VI. ADDITIONAL DOCUMENTS SOUGHT FROM NONPARTY BOARD OF MANAGERS

Plaintiffs have not identified any part of defendants' June 2007 settlement agreement with the Board of Managers of the 145 Hudson Street Condominium or correspondence between defendants and the Board leading up to that settlement in the Board's, but not defendants', possession, custody, or control. Plaintiffs point out, however, that when this correspondence was generated, defendants were under no obligation to preserve the correspondence, so that the Board may have maintained copies that defendants did not maintain. Since the court orders defendants to disclose those documents to plaintiffs, C.P.L.R. § 3124, the Board's cross-motion to quash and for a protective order against plaintiffs' subpoena seeking those documents from the Board, C.P.L.R. §§ 2304, 3103(a), is moot except insofar as the Board has maintained copies that defendants did not maintain.

Insofar as plaintiffs seek documents from the Board of Managers of the Condominium in the same categories as sought from RMA, the documents in these categories in the Board's possession, custody, or control are equally material as such documents in RMA's possession, custody, or control and not necessarily duplicative. These documents concern (1) plaintiffs' compliance with the 2007 and 2012 alteration agreements between plaintiffs and the Board and (2) efforts to obtain a CO for the 145 Hudson Street building, including why a CO was not obtained.

The Board of Managers' only further ground for its cross-motion is that plaintiffs' subpoena fails to satisfy the threshold showing specified by C.P.L.R. § 3101(a)(4), of "circumstances or reasons such disclosure is sought or required." Kapon v. Koch, 23 N.Y.3d at 39. The nonparty is entitled to know the parties' claims or defenses to which the nonparty's disclosure may be relevant. Id. at 37, 39; Ledonne v. Orsid Realty Corp., 83 A.D.3d at 599; Reyes v. Riverside Park Community (Stage I), Inc., 47 A.D.3d at 599-600; Velez v. Hunts Point Multi-Serv. Ctr., Inc., 29 A.D.3d 104, 110 (1st Dep't 2006). Plaintiffs' subpoena specifies only that the documents sought are "relevant to the resolution of the claims" in this action, without specifying those claims even in the barest terms. Aff. of Rishi Bhandari Ex. C, at 1. Plaintiffs did specify in support of their motion to compel the documents, however, those claims and defenses to which the documents sought from the Board are relevant and how they are relevant, as set forth above. Velez v.

Hunts Point Multi-Serv. Ctr., Inc., 29 A.D.3d at 111.

Moreover, although RMA has not produced any documents concerning plaintiffs' compliance with the alteration agreements, efforts to obtain a CO, and why it was not obtained, as also set forth above, the Board of Managers has produced such documents. Therefore the Board's cross-motion to quash and for a protective order against plaintiffs' subpoena seeking these documents is also moot, except insofar as the Board has not identified and produced all such documents as plaintiffs contend.

Since the Board of Managers never notified plaintiffs that it required articulation of why the documents sought were relevant to the claims or defenses in this action, has shown no prejudice from plaintiffs' belated articulation of the relevance, and proceeded with the disclosure nonetheless, the Board has waived C.P.L.R. § 3101(a)(4)'s extra requirement applicable to nonparties. Velez v. Hunts Point Multi-Serv. Ctr., Inc., 29 A.D.3d at 112. Therefore the Board shall disclose these remaining documents to plaintiffs for the same reasons RMA is to disclose such documents: most importantly, because they bear directly on defendants' counterclaims and are not necessarily duplicative of such documents in RMA's possession, custody, and control. C.P.L.R. § 3124; Kapon v. Koch, 23 N.Y.3d at 37; Velez v. Hunts Point Multi-Serv. Ctr., Inc., 29 A.D.3d at 112-13.

If the Board of Managers maintains that no such documents remain in its possession, custody, or control that it has not produced, it shall produce an affidavit or affidavits attesting

on personal knowledge to the details of a search for those documents. The details to be provided include where the documents are likely to be kept, whether they were destroyed, where the search for them was conducted, the extent and thoroughness of the search, and the time spent conducting the search. Vazquez v. Lambert Houses Redevelopment Co., 110 A.D.3d 450, 451-52 (1st Dep't 2013); Henderson-Jones v. City of New York, 87 A.D.3d 498, 505 (1st Dep't 2011).

VII. CONCLUSION

Since each category of disclosure sought potentially bears in large part on defendants' counterclaims that are not the subject of their motion for summary judgment and that will remain to be adjudicated even if the court grants that motion, the court lifts the stay on disclosure as follows. C.P.L.R. § 3214(b). In sum, the court grants plaintiffs' cross-motion to the extent of compelling defendants to disclose to plaintiffs defendants' settlement agreement with the Board of Managers of the 145 Hudson Street Condominium entered June 8, 2011, and correspondence between defendants and the Board from December 18, 2007, through June 8, 2011. C.P.L.R. § 3124. The correspondence shall be limited to documents regarding (1) the mechanical space requirements imposed on 145 Hudson Street's units and (2) elements of the building's construction or alteration that prevented the building from obtaining a CO. Nevertheless, the documents include all such correspondence within defendants' control, even if retained only by their attorney or received

electronically and never reviewed.

The court grants defendants' motion for a protective order to that extent and to the following further extent. C.P.L.R. § 3103(a). The settlement agreement and correspondence that discloses the settlement agreement's terms shall be subject to the same stipulation providing for confidentiality as covers the term of the agreement already disclosed, unless plaintiffs, defendants, and the Board agree otherwise. Defendants also may redact the names of unit owners other than plaintiffs and the numbers of units other than plaintiffs' unit in the agreement or correspondence.

The court denies plaintiffs' separate motion insofar as it seeks to compel the Board to produce the same documents as moot. Defendants shall serve copies of the correspondence disclosed on the Board, however, as well as on plaintiffs. Within 20 days after service of this correspondence, the Board shall review the correspondence and produce to plaintiffs any other correspondence in the two categories ordered above. C.P.L.R. § 3120(1)(i) and (2).

The court grants plaintiffs' motion insofar as it seeks to compel Rogers Marvel Architects, PLLC, to produce all documents concerning (1) plaintiffs' compliance with alteration agreements entered in 2007 and 2012 between plaintiffs and the Board and (2) efforts to obtain a CO for 145 Hudson Street and why a CO was not obtained. C.P.L.R. §§ 2308(b), 3124. The court also grants plaintiffs' motion to compel the Board to produce documents in

the same two categories insofar as it has not done so. Id. The court denies the Board's cross-motion insofar as it seeks to quash the subpoena served on the Board to produce those documents, C.P.L.R. § 2304, and for a protective order against that production, C.P.L.R. § 3103(a), and denies the remainder of the Board's cross-motion as moot. Finally, the court grants plaintiffs' motion to compel Rogers Marvel Architects to produce all documents concerning its work or proposals for plaintiffs' unit since 2007 and to compel Matthew Peckham's deposition. C.P.L.R. §§ 2308(b), 3124.

Within 20 days after service of this order with notice of entry, defendants and the Board shall produce the documents ordered above, unless plaintiffs agree otherwise. C.P.L.R. § 3120(1)(i) and (2). Plaintiffs may re-serve a subpoena for Peckham's deposition pursuant to C.P.L.R. § 3106(b), at which Peckham shall appear. Plaintiffs agree that, no later than 10 days before the deposition date, Rogers Marvel Architects may notify plaintiffs that it substitutes another witness more knowledgeable concerning compliance with plaintiffs' alteration agreements, efforts to obtain a CO for 145 Hudson Street and why a CO was not obtained, and the architects' work or proposals for plaintiffs' unit since 2007.

DATED: August 14, 2015

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
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