13.

9

To commence the statutory time period
of appeals as of right (CPLR 5513[a]),
you are advised to serve a copy of this order,
with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF PUTNAM

----------X

DREW F. FREDER and KAREN J. FREDER,

Plaintiffs,

-against-

DECISION AND ORDER
Motion Seq. 10, 13-14, 17

COSTELLO INDUSTRIES, INC., OCON INC., JOHN J. MURPHY and JEAN B. SIMEUS,

INDEX NO. 1010/12

Defendants.

----------X

DIBELLA, J.

The following papers were considered in connection with this motion (sequence 10) by plaintiff for an order granting leave to amend the complaint; and the separate motion (sequence 13) by plaintiff for an order compelling defendant Costello Industries, Inc. (hereafter, "Costello") to produce certain outstanding discovery or, in the alternative, to strike the answer of Costello; and the cross motion (sequence 14) of defendant Costello for a protective order; and the cross motion (sequence 17) of defendants Ocon Termite & Pet Control (hereafter, "Ocon") and John Murphy (hereafter, "Murphy") (collectively, the "Ocon Defendants") for an order directing the issuance of an Open Commission and the issuance of a so-ordered subpoena on a nonparty:

PAPERS:
Motion Sequence 10
Notice of Motion for leave to amend complaint
Rice Affirmation and Memo of Law
Exhibits A - L
Loyd Affirmation in Opposition
Exhibits A - B
Rice Reply Affirmation
Exhibits A - G

Motion Sequences 13 and 14
Notice of Motion to compel discovery or to strike answer
Rice Affirmation
Exhibits A - U

FREDER v. COSTELLO INDUSTRIES, INC.
INDEX NO. 1010/12

Rice Good Faith Affirmation
Notice of Cross Motion for a protective order
Dvorkin Affirmation in support of cross motion and in opposition to motion
Exhibits A - D
Dvorkin Good Faith Affirmation
Rice Reply Affirmation and opposition to cross motion
Exhibits A - D

Motion Sequence 17
Notice of Cross Motion for nonparty discovery
Fino Affirmation in Support
Exhibits A - C
Rice Affirmation in Opposition
Exhibits A - H
Calabrese Affidavit in Opposition
Fino Reply Affirmation

Background

This negligence action arises out of a motor vehicle accident which occurred on Interstate I-84 in the Town of Southeast, County of Putnam, State of New York. In the early morning of September 10, 2009 at about 6:15 a.m., plaintiff, a New York State trooper, while on-duty, received a call from a Connecticut dispatcher about an unrelated hit and run accident with "possible injuries" on Interstate I-84. The hit and run occurred in New York, and the driver who had been hit crossed the Connecticut border, pulled into a rest stop, and called 911. Initially, believing that the accident occurred in Connecticut, Law Enforcement from both states were called to the scene.

Plaintiff responded to the call in his marked police vehicle with lights and sirens activated. Plaintiff was speeding in the left lane of I-84, while defendant Jean B. Simeus was traveling east in the right lane. Simeus encountered a construction sign in the roadway and drove around it to avoid striking it. Defendant Murphy, operating a vehicle

owned by defendant Ocon, was traveling behind Simeus and encountered the same sign. To avoid striking the sign, Murphy moved to the left lane. Plaintiff was behind Murphy in the left lane and tried unsuccessfully to avoid hitting Murphy's car. Plaintiff rear-ended Murphy, who rear-ended Simeus.

Defendant Costello's primary line of work is milling roadways.[1] On the day of the accident, Costello was involved in a milling project on I-84 in Connecticut. As part of the job, Costello erected a traffic control pattern on the New York side of I-84. Randy Judd, who at the time of the accident was the contract manager and insurance manager for Costello, testified at his deposition in April 2016 "I can tell you we never took out a permit" to change the traffic pattern in New York State (motion for leave to amend the complaint, Rice Affirmation at Ex J, p 126). David D'Addio, hired by Costello as a general superintendent, testified at his deposition in April 2016 that Costello was responsible for traffic control on its projects (*id.* at Ex K, pp 29-30, 49). However, he averred that "it doesn't look like there's a permit here" (*id.* at pp 152-153; *see also* p 162 [to the best of D'Addio's knowledge, Costello never obtained a permit to do any work in New York State]). D'Addio also testified that he was not aware that Costello had hired any other individual or company to erect or break down the traffic pattern associated with this milling project. In addition, he was not aware that anyone other than a Costello employee had placed the sign in the roadway (*id.* at pp 185-186).

---

[1] Pavement milling is a process that removes part of a paved surface, such as a parking lot or road. Milling can remove just the surface of the pavement or anywhere up to the entire depth. Pavement milling is used to level a paved surface or repair pavement damage.

James Cook, Costello's foreman, testified at his deposition that Costello provided traffic control on the day of the accident. Temporary cones and signs were placed by Costello employees (Rice Affirmation in Opposition to Cross Motion of defendants Ocon and Murphy at Ex G pp 45-47, 71). At the beginning of his shift, Larry Chamberland, employed by Costello as a laborer, set the traffic pattern (*id.* at Ex H pp 23-24). He placed the signs on the left shoulder of the roadway. At about 1 a.m., they switched to the other side of the road, and Ahmed Durrant, who was also part of the traffic control, moved the signs and cones to the other side of the road (*id.* at pp 59, 90-91).[2] The signs were supposed to be placed on the shoulder of the roadway, not in the road (*id.* at p 66). The signs were placed and removed only by Costello employees (*id.* at pp 140-141). At about 5:45 a.m.,Chamberland began picking up signs. At about 6:15 a.m., he saw the accident, and the last sign was never picked up (*id.* at p 85).

Plaintiff commenced a negligence action in 2010 ("the first action") (Index no. 3467/2010). Thereafter, plaintiff moved for leave to amend the complaint to allege a cause of action pursuant to General Municipal Law § 205-e. The court denied the motion by order dated April 12, 2012 (Lubell, J.). Consequently, on May 14, 2012, plaintiff commenced this action ("the second action) (index no. 1010/2012) alleging serious injury

[2] Plaintiff has not deposed Durrant. Plaintiff's investigator located Durrant who said he would not agree to be deposed unless he was first able to read the statement he made after the accident because he did not want to give inconsistent deposition testimony. Costello has not produced Durrant's statement. Regardless, there is nothing to prevent plaintiff from issuing a subpoena to take the testimony of this now nonparty witness.

and negligence under General Municipal Law § 205-e.[3] The statutory cause of action was predicated on allegations of numerous Vehicle & Traffic Law violations; Highway Law violations; Federal Law violations; and a violation of the Manual on Uniform Traffic Control Devices (motion for leave to amend the complaint, Rice Affirmation at Ex A). Defendants answered and asserted cross claims. The first action was dismissed by stipulation on consent of all parties. The stipulation also stated that all parties agreed that discovery demands and responses served in the first action shall remain valid and in full force and effect and deemed to have been served in the second action.

Since 2011, plaintiff has served multiple discovery demands on, as relevant to the instant motions, Costello. Plaintiff alleges that Costello has engaged in a pattern of deception, delay and obfuscation in complying with discovery demands. Plaintiff also maintains that Costello has belatedly produced certain records after first claiming they did not exist, resulting in prejudice. In addition, in response to more recent discovery demands, Costello has asserted numerous general objections and has not produced any of the requested documents. Now, almost eight years after the accident, and seven years after the first action was commenced, the parties are still arguing over discovery. Against this backdrop, the parties now move and cross-move for various forms of relief relating to the pleadings and discovery.

---

[3] Plaintiff's wife also asserted a derivative cause of action which is not relevant to the instant motions.

FREDER v. COSTELLO INDUSTRIES, INC.
INDEX NO. 1010/12

Motion Sequence 10

After learning at the depositions of Costello employees Judd and D'Addio that Costello did not obtain a permit to place signage and erect new traffic patterns in New York, plaintiff amended the bill of particulars as of right in May 2016 (*see* CPLR 3402[b]). With respect to Costello only, plaintiff added additional violations of the Vehicle and Traffic Law; the Highway Law; the New York Code of Rules and Regulations; and the Putnam County Code relating to permits, traffic flow, and highway obstruction (Rice Affirmation at Ex C). Shortly thereafter, plaintiff moved for leave to amend the complaint pursuant to CPLR 3025(b) to assert a new cause of action for public nuisance against Costello. Underlying the new cause of action were the exact same additional violations as alleged in the Amended Bill of Particulars (*id.* at Ex M).

In support of the motion, plaintiff maintains that no new facts are alleged which were not known to Costello. In addition, plaintiff has already amended the Bill of Particulars as of right and moving for leave to amend the complaint "is a mere formality." Therefore, no prejudice will inure to Costello. Moreover, plaintiff argues that the new theory of liability is meritorious.

As a procedural matter, Costello claims that the motion was not served in accordance with the CPLR. On the merits, Costello argues that plaintiff failed to establish a reasonable excuse for the delay in moving to amend the complaint, that plaintiff failed to establish that Costello would not be prejudiced by the amendment, and that the new alleged cause of action is "patently devoid of merit."

In reply, plaintiff maintains that the motion papers were properly served and requests that the court not consider Costello's opposition papers as they were served six days late.

Plaintiff served the motion papers on March 25, 2016, by overnight mail with a return date of June 3, 2016. Thus, the return date was properly set (*see* CPLR 2214; 2103[b][6] [where service is by overnight delivery, one business day shall be added to the prescribed period]; *see also* Rice Reply at Ex A). According to Costello, a court conference was held on June 3rd, and the motion to amend was not mentioned. After the conference, believing the return date was improper, counsel for Costello contacted the court clerk to obtain a new date. The clerk instructed counsel to enter into a stipulation with plaintiff's counsel adjourning the return date three weeks. On June 6, plaintiff's counsel sent an email stating that there was "no way" he would consent to an adjournment. Opposition papers were mailed the next day (*see* Affirmation in Opposition ¶¶ 14 and 15 and Ex B). The opposition papers were served six days late.

It is well-settled that there is a strong public policy in this State that matters be decided on the merits (*see e.g. Ingvarskottir v Gains, Gruner, Ponzini & Novick, LLP*, 144 AD3d 1097 [2d Dept 2016]; *Fried v Jacob Holding, Inc.*, 110 AD3d 56 [2d Dept 2013]). Moreover, plaintiff has not been prejudiced by Costello's failure to timely serve opposing papers. The delay was minimal, and plaintiff submitted reply papers which have been read and considered by the court (*see Kaplow v Katz*, 120 AD2d 569 [2d Dept 1986] *see also Guzetti v City of New York*, 32 AD3d 234 [1st Dept 2006]; *Wells Fargo v Barrett*, 33 Misc3d

1207(A) [Sup Ct Queens Co, 2011]). Moreover, under the particular circumstances of this case, where delay has been prevalent throughout the entirety of the case for the last seven years, the court is not inclined to disregard papers on a procedural objection.

A motion for leave to amend the complaint is committed to the sound discretion of the trial court (*see Edenwald Contr. Co., Inc. v City of New York*, 60 NY2d 957 [1983]). Leave shall be freely granted upon such terms as may be just absent prejudice or surprise to an opposing party (*see* CPLR 3025[b]; *Glaser v County of Orange*, 20 AD3d 506 [2d Dept 2005]). In addition, the amendment must not be patently lacking in merit (*see Hilltop Nyack Corp. v Trimi Holdings, Inc.*, 275 AD2d 440 [2d Dept 2000]; *see also Pike v New York Life Ins. Co.*, 72 AD3d 1043 [2d Dept 2010] [motion for leave to amend should be granted where no prejudice or surprise to opposing party and where documentary evidence submitted in support of motion indicates that proposed amendment may have merit]).

Counsel for Costello completely misapprehends the nature of plaintiff's motion. Counsel is "alarm[ed]" that plaintiff would move for leave to amend the complaint to add a cause of action pursuant to General Municipal Law § 205-e over 4 years after Justice Lubell denied plaintiff's motion to amend the complaint in the first action to add that same cause of action. Here, however, plaintiff does not seek to add a claim pursuant to the General Municipal Law as this cause of action **has already been pleaded in the complaint in the second action** (Index No. 1010/2012). Rather, plaintiff now seeks to add a cause of action for public nuisance based on newly acquired information that Costello did not acquire a permit to work in New York. Thus, contrary to Costello's

contention, plaintiff did submit an excuse for the delay in moving to amend the complaint. It was only at the April 2016 depositions of Costello employees that plaintiff learned that Costello did not have a permit to place signs or alter the flow of traffic in New York. Plaintiff promptly moved to amend the Bill of Particulars after learning this new key piece of information and, thereafter, promptly moved for leave to amend the complaint. In any event, delay alone is not sufficient to bar an amendment (*see Northbay Constr. Co., Inc. v Bauco Constr. Corp.*, 275 AD2d 310 [2d Dept 2000]). The matter of *Wagner v Variano* (253 AD2d 427 [2d Dept 1998]), relied on by Costello, does not warrant a different result. There, the plaintiff "failed to give a reasonable excuse for the delay, until the eve of trial, in asserting a fact which was known to her from the inception of the action" (*id.* at 428). Here, the lack of a permit was not known to plaintiff from the inception of the action but was known to Costello.

Not only has plaintiff asserted a reason for the delay, but Costello has not demonstrated how it will be prejudiced by the amendment. Plaintiff has not set forth any new alleged fact that was unknown to Costello. Plaintiff submits the deposition testimony of two employees who stated under oath that Costello did not obtain a permit to place signage and re-route traffic in New York, and no such permit was turned over to plaintiff in discovery. In any event, such information would be solely in Costello's possession, and, therefore, it would not come as a surprise to Costello that it did not obtain the necessary permit to work in New York. Costello's conclusory assertions of prejudice are insufficient to defeat plaintiff's motion. Indeed, Costello's assertions of prejudice are based on the

inexplicable misconception on the part of Costello's counsel as to the relief plaintiff seeks.

Costello's reliance on *Felix v Lettre* (204 AD2d 679 [2d Dept 2004]) is misplaced. There, the Second Department held that "delay alone will not be sufficient cause to deny a party's motion to amend." Rather, "delay coupled with significant prejudice to the nonmoving party should mandate the denial of the belated motion to amend the pleading (*id.* at 680). Costello has not articulated any tangible prejudice that it will suffer. In addition, Costello will not be prejudiced by having to conduct additional depositions as no discovery is warranted on this amendment. The proposed cause of action is based on admissions by Costello's employees, and the new theory of liability does not involve any additional facts.

Costello also maintains that the amended theory of liability is "patently devoid of merit." Contrary to counsel's contention, plaintiff has offered factual merit to the proposed amendment. Indeed, sworn deposition testimony is competent evidence (*see Ayala v V & O Press Co.*, 126 AD2d 229 [2d Dept 1987]). Further, counsel claims that plaintiff has attached a copy of the permit at Exhibit L to the motion. However, the attachments at Exhibit L demonstrate that Costello was aware that a New York permit was needed and, at best, evince that the process was started. There is no evidence in the record that the process was ever completed.

In addition, the proposed new theory of liability does not plainly lack merit on its face. Indeed, "[i]f there is some injury peculiar to a plaintiff, a private action premised on a public nuisance may be maintained" (*Leo v General Elec. Co.*, 145 AD2d 291, 294 [2d

Dept 1989]; *cf. 532 Madison Ave. Gourmet Foods, Inc. v Finlandia Center, Inc.*, 96 NY2d 280 [2001]). Here, plaintiff may be able to establish that his injuries were "special and different" in kind and "not common to the general public" (*id.* at 293, quoting Restatement [Second] of Torts § 821C, comment *h*). Indeed, "[w]hen the public nuisance causes personal injury to the plaintiff ... the harm is normally different in kind from that suffered by other members of the public and the tort action may be maintained" (Restatement [Second] of Torts § 821C, comment *d*, Illustration 2).

Based on the foregoing, plaintiff's motion for leave to amend the complaint is granted.

Motion Sequences 13 and 14

Plaintiff separately moves for an order compelling discovery or, in the alternative, for a conditional order, an order precluding certain discovery, or an order striking the answer of defendant Costello.[4] Costello cross-moves for a protective order pursuant to CPLR 3013.

As a threshold matter, plaintiff again seeks to reject Costello's submission as untimely. Plaintiff's motion, served on July 1, 2016, required that answering papers be served at least seven days in advance of the return date, was adjourned by the Court to August 1, 2016 (*see* CPLR 2214[b]). Costello cross-moved, which required that its papers

[4] Plaintiff also moves for an order compelling Costello's insurance carriers to produce records in response to subpoenas served upon them (Rice Affirmation at Ex J). However, these insurance carriers are not parties to the action, and this motion to produce was not served on them. Accordingly, this court has no jurisdiction over them.

be served at least ten days before the return date if served by mail (*see* CPLR 2251[a]). Costello's attempt to timely serve its cross motion by email on July 25, 2016 (seven days before the return date) is unavailing as plaintiff did not consent to such service (*see* 22 NYCRR 202.5-b). Plaintiff correctly argues that Costello's cross motion was untimely served by mail on July 25, 2017 (*see* CPLR 2214[b]; 2215[a]). However, here, again, the delay was minimal, and plaintiff has submitted reply papers which have been read and considered by the court (*see* discussion, *supra*), and thus the cross motion will also be considered on the merits.

As to the merits, plaintiff maintains that Costello has for years engaged in a pattern of bad faith in complying with discovery requests. Indeed, Costello initially responded that it did not possess certain records only to produce them years later after it became apparent during other disclosure that they were in Costello's possession. In addition, in response to more recent discovery requests, Costello answered with boilerplate language that the requested documents are overly broad, burdensome, privileged or not in its possession. Upon review, the record demonstrates a complete inability on Costello's and plaintiff's part to work out these discovery issues among themselves. This is because Costello has repeatedly engaged in dilatory and obstructionist practices in providing discovery, resulting in far more discovery requests than are warranted in what is simply a garden variety motor vehicle accident. There is absolutely no good reason why, seven years after the action was commenced, discovery is not complete.

Plaintiff's first notice to produce is dated June 13, 2011 (*see* Rice Affirmation in

Support at Ex C). Costello never asserted any specific objections or moved for an order of protection regarding this request for discovery (*id.* at Ex I). To date, plaintiff maintains that there are still outstanding responses to this six year old discovery request. Plaintiff served additional discovery requests on December 3, 2013; June 16, 2014; June 17, 2014; June 1, 2015; February 9, 2016; February 17, 2016; March 30, 2016, and June 2, 2016. Costello answered these requests by separate responses all dated June 2, 2016. The overwhelming majority of these responses claimed that the requests were "cumulative, overbroad, unduly burdensome and oppressive." In addition, Costello claimed that it did not possess responsive records and asserted various claims of privilege (*id.* at Exs G and I). Plaintiff also requested documents by letters dated April 6 and May 2, 2016. These requests were made as a direct result of information being obtained at Randy Judd's deposition and Costello's failure to comply with certain other discovery requests (*id.* at Ex G).

As best as the court can discern from plaintiff's motion is that Costello has to date still not answered questions 11; 14; 15; 16; 17; 23; 26; 32; 33; 36; and 46 set forth in plaintiff's first notice to produce dated June 13, 2011. In addition, plaintiff seeks, as set forth in the letters of April 6 and May 2, 2016, copies of all investigative reports or any insurance carrier, investigator or claims adjuster's copy of claimant's diary detailing all event concerning investigation of the subject accident (duplicative of question 11); copies of all witness statements obtained by any person working for or on behalf of Costello (duplicative of question 16), including its insurance carrier; a copy of Costello's primary and

excessive insurance policies with a copy of the declaration page and all endorsements; and attachments to the emails produced at the deposition of Randy Judd on April 6, 2016 (*id.* at Ex G).

Notably, Costello responded to plaintiff's February 9, 2016 notice to produce documents relating to the milling project and transmittals to relevant agencies regarding permit applications for New York and Connecticut with the answer "No records responsive to this demand exist, apart from those previously exchanged" (Rice Affirmation, Ex I). However, Costello produced responsive emails for the first time at the deposition of Randy Judd on April 6, 2016 (*id.* at Ex D). In addition, Costello responded to plaintiff's request in its first notice to produce dated June 11, 2011, for "all statements taken of Costello Industries, Inc. employees relating to the incident within 90 days of the incident" that it was not in possession of any such documents (*id.* at Exs C and I). However, Costello's belatedly produced privilege log refers to numerous employee statements taken within 90 day of the accident (*see* Dvorkin Affirmation, Ex C). Clearly, Costello has not been forthcoming with honest responses from the inception of discovery resulting in unnecessary delay, motion practice, and imposing a strain on judicial resources. Moreover, defendant Costello's conduct of delay and its unwillingness to timely produce the discoverable documents requested has undoubtedly hampered plaintiff's ability to adequately prepare for trial.

A trial court has broad discretion to oversee the discovery process (*see Maiorino v City of New York*, 39 AD3d 601 [2d Dept 2007]). While actions should be resolved on the

merits wherever possible (*see supra*), "the striking of a pleading may be an appropriate sanction where there is a clear showing that the failure to comply with discovery demands is willful or contumacious" (*Espinal v New York City Health and Hosps. Corp.*, 115 AD3d 641, 641 [2d Dept 2014]). "The willful or contumacious character of a party's conduct can be inferred from the party's repeated failure to respond to demands or to comply with discovery orders" (*id.*). Here, not only has Costello refused to comply with certain discovery demands numerous times[5], it has also given blatantly false responses. Costello[6] has engaged in willful and contumacious conduct sufficient to warrant the imposition of sanctions. However, the plaintiff has not been blameless. Plaintiff's contributions to the delay include serving numerous blunderbust discovery demands, failing to prepare and present to the court a proposed order consistent with the court's clear discovery directives, and being unyielding and petty towards defendants' counsel in refusing even minor extensions to serve motion papers or other accommodations while he himself has required several accommodations to adjust conference or submission dates to avoid conflicts in his schedule. Due to the failure of all parties in cooperating with each other, this relatively straightforward personal injury action has spanned two lawsuits in this court and it has required the intervention of two different Supreme Court justices over the course of 7

---

[5] At a minimum, this Court has ordered, *inter alia*, the discovery in dispute at its first conference on February 10, 2016 after being transferred this case and also by written Order dated May 17, 2017.

[6] The Court notes that it is only addressing the conduct of defendant Costello and not co-defendants, as plaintiff's motion for sanctions was brought only against Costello.

years, approximately 24 motions and 24 conferences in total.

Therefore, in light of both parties' inappropriate conduct in their dealings in this matter, the Court exercises its discretion and declines to impose sanctions against defendant at this time, in order to allow defendant Costello one final opportunity to provide the requested discovery so that this matter may be resolved on its merits. Failure to timely comply will, however, result in automatic dismissal of Costello's answer. Thus, the Court is issuing an order to conditionally strike defendant Costello's answer if the below-ordered discovery is not completed as provided. Discovery in this action has been ongoing for seven years and must come to an end, so that the parties may be afforded justice by allowing a fact-finder to determine the merits of their claim or defense.

CPLR 3101(a) provides that "[t]here shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof." While discovery requests are to be interpreted liberally, a party "does not have the right to 'uncontrolled and unfettered disclosure'" (*Foster v Herbert Slepoy Corp.*, 74 AD3d 1139, 1140 [2d Dept 2010], quoting *Gilman & Ciocia, Inc v Walsh*, 45 AD3d 531, 531 [2d Dept 2007]). "[S]upervision of discovery is generally left to the trial court's broad discretion" (*Geffner v Mercy Med. Ctr.*, 83 AD3d 998, 998 [2d Dept 2011]; *see also Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968] [courts have wide discretion to decide whether information sought is material and necessary to prosecution or defense of action]).

Plaintiff maintains that responses to the following demands are still outstanding:

FIRST NOTICE TO PRODUCE DATED JUNE 13, 2011 (Rice Affirmation at Ex C)

FREDER v. COSTELLO INDUSTRIES, INC.
INDEX NO. 1010/12

Question 11: "All documents and results of any accident investigation performed by COSTELLO INDUSTRIES, INC. its agents, servants or employees at any time relating to the incident."

Plaintiff argues that there has been no disclosure of the "massive joint investigation" by Costello's lawyers and its insurance carriers. Costello adamantly maintains that there is no evidence of any "massive" investigation. Semantics aside, there must have been an accident investigation by Costello and/or its insurance carriers. Costello did turn over what is referred to as "Ex C" (also referred to as the Costello Accident Report) in response to this demand. However, this particular exhibit has not been made part of this motion record so the court does not know what exactly was turned over. In any event, any internal accident investigation by Costello is subject to disclosure.

Here, after initially and apparently falsely claiming that Costello was not in possession of any statements taken of any Costello employees relating to the accident within 90 days of the accident, Costello has produced a privilege log which was transmitted to plaintiff's attorney on or about May 16, 2016, referencing the exact same statements that were demanded six years ago. There are also statements taken after 90 days following the accident, which were also demanded six years ago. Costello claims that all the statements were prepared in anticipation of litigation and two statements were prepared in anticipation of litigation and are attorney work product (*see* Dvorkin Affirmation at Ex C). "But records or reports and statements of defendants' employees pertaining to an accident made in the regular course of their employment are not privileged communications"

(*Zdonczik v Pennsylvania & S. Gas Co.*, 35 Misc 2d 735, 737 [Sup Ct, Tioga County], *aff'd* 18 AD2d 749 [3d Dept 1962]; *see also Agovino v Taco Bell*, 225 AD2d 569 [2d Dept 1996]; CPLR 3101[g]). Accordingly, some of these statements may be discoverable.

With respect to the investigation by Costello's insurance companies, after initially ignoring these discovery demands, Costello now argues that these materials were prepared for litigation and are therefore privileged (*see* Dvorkin Affirmation ¶ 9). However, in order for the privilege to apply "the communication from attorney to client must be made 'for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship'" (*Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 377-78 [1991], quoting *Rossi v Blue Cross & Blue Shield*, 73 NY2d 588, 593 [1989]). "The payment or rejection of claims is a part of the regular business of an insurance company [internal quotations and citations omitted]" (*Donohue v Fokas*, 112 AD3d 665, 666 [2d Dept 2013]). Therefore, with regard to any investigation by Costello's insurance companies, "[r]eports prepared by insurance investigators, adjusters, or attorneys before the decision is made to pay or reject a claim are thus not privileged and are discoverable, even when those reports are mixed/multi purpose reports, motivated in part by the potential for litigation with the insured [internal quotations and citations omitted]" (*id.* at 667). Thus, some of the insurance investigative files may well be subject to disclosure.

"The burden of proving that a statement is privileged as material prepared solely in anticipation of litigation or trial is on the party opposing discovery" (*Agovino*, *supra* 225 AD2d at 571). Here, as in *Agovino*, Costello has only submitted an attorney's affirmation

"containing conclusory assertions that the reports were conditionally immune from discovery ... as material prepared in anticipation of litigation." However, "[t]his affirmation, without more, is insufficient to sustain [an opponent's] burden of demonstrating that the interviews and reports were prepared exclusively for litigation" (*id.*). Accordingly, the material is not exempt from disclosure (*id.*).

Costello must provide any accident reports, other than the accident report annexed as Exhibit C to its initial response dated September 28, 2011, prepared by it or its insurance companies responsive to this request, and if no others exist, must provide an affidavit/affirmation sworn under penalty of perjury that a search has been made and no other accident reports exist.

Question 14: "All statements taken of COSTELLO INDUSTRIES, INC, employees relating to the incident within 90 days of the incident."

Initially, in 2011, Costello responded that it was not in possession of any such statements. However, in its privilege log prepared in May 2016, numerous statements of Costello employees taken within 90 days of the accident are referenced. This withholding of evidence evinces a deliberate effort on Costello's part to hinder and delay this litigation. Moreover, "[t]he failure of a party to challenge the propriety of a notice for discovery and inspection pursuant to CPLR 3120 within the time prescribed by CPLR 3122 forecloses inquiry into the propriety of the information sought except with regard to material that is privileged pursuant to CPLR 3101 or requests that are palpably improper" (*Garcia v Jomber Realty, Inc.*, 264 AD2d 809, 810 [2d Dept 1999]; *accord Hunt v Odd Job Trading*,

44 AD3d 714 [2d Dept 2007]). In any event, the conclusory assertions by Costello's counsel, without more, is insufficient to sustain its burden as the party opposing discovery that the statements were prepared exclusively for litigation (*see Agovino v Taco Bell*, 225 AD2d 569 [2d Dept 1996]). Accordingly, the material is not exempt from disclosure (*id.*). Therefore, Costello must turn over all statements referenced in its privilege log taken within 90 days of the accident. In addition, Costello must provide a sworn affidavit/affirmation under penalty of perjury that a search has been made and there are no other statements which fall into this category.

Question 15: "All statements taken of COSTELLO INDUSTRIES, INC, employees relating to the incident after 90 days of the incident."

Costello initially replied in 2011 that these statements were not discoverable. However, it did not provide what discovery exception applied. Now, Costello alleges that these statements were prepared in anticipation of litigation. Again, the conclusory assertions by Costello's counsel, without more, is insufficient to sustain its burden as the party opposing discovery. Accordingly, the material is not exempt from disclosure (*id.*). Therefore, Costello must turn over all statements referenced in its privilege log taken after within 90 days of the accident. In addition, Costello must provide a sworn affidavit/affirmation under penalty of perjury that a search has been made and there are no other statements which fall into this category.

Question 16: "List of all COSTELLO INDUSTRIES, INC. employees who provided witness statements:

a. of an exculpatory nature.

b. of an inculpatory nature.

c. in which the witness claimed to have knowledge of the position of the "Men Working Sign" within 2 hours of the occurrence.

d. in which the witness claimed to have knowledge of the position of the "Men Working Sign" within 10 hours of the occurrence."

Costello initially responded, without specificity, that the names of these witnesses are not discoverable. Costello is directed to provide witness names, other than those stated in the privilege log, to plaintiff. In addition, Costello must provide a sworn affidavit/affirmation under penalty of perjury that a search has been made and there are no other statements which fall into this category.

Question 17: "Records of the construction work including blueprints or other designs for work that was being performed on I-84 in the vicinity of the accident."

In 2011, Costello replied that it was not in possession of any responsive material to this request. The court finds it hard to believe that Costello is not in possession of any such documents for one of its milling projects. If this is still Costello's position, Costello must provide a sworn affidavit/affirmation under penalty of perjury that a search has been made and there are no other documents which fall into this category.

Question 23: "All reports of the incident prepared by or on behalf of any person in the employ of COSTELLO INDUSTRIES, INC. or their agents, servants or employees."

See response to Question 11.

FREDER v. COSTELLO INDUSTRIES, INC.
INDEX NO. 1010/12

Question 26: "All documents that any party defendant will seek to introduce into evidence at the time of trial."

Costello objected without specificity to this motion. This discovery demand is overbroad (*see New York Cent. Mut. Fire Ins. Co. v Librizzi*, 106 AD3d 921 [2d Dept 2013] [discovery demands that are overly broad and lacking in specificity are improper]). "The burden of serving a proper demand is upon counsel, and it is not for the courts to correct a palpably bad one" (*Lopez v Huntington Autohaus Ltd.*, 150 AD2d 351, 352 [2d Dept 1989]; *accord Cobble Hill Health Ctr.*, 22 AD3d 620, 622 [2d Dept 2005]). Accordingly, Costello is entitled to a protective order regarding Question 26.

Question 32: "Name and address of person responsible for supervision of the I-84 project:

a. in the State of New York

b. in the State of Connecticut."

Costello responded that James Cook was the supervisor. However, plaintiff points out that David D'Addio testified at his deposition that he was employed by Costello as a general superintendent. It is not clear what relief plaintiff is seeking with regard to this question. In any event, Costello's discovery response to this question is deemed amended to include the name of David D'Addio.

Question 33: "All communications by defendants with any State or local government agency or office with regard to the incident"

Costello initially replied that it was not in possession of any such communications.

Costello must provide a sworn affidavit/affirmation under penalty of perjury that a search has been made for these documents, and there are no communications which fall into this category.

Question 36: "Emails of all persons employed by any defendant relating to the accident."

Costello's initial response was that this calls for communications with counsel and is material prepared for in anticipation of litigation.

See response to Question 26. Accordingly, Costello is entitled to a protective order as to Question 36.

Question 46: "Copies of any notes, records, videos or other documents containing information relating to the incident."

This request would appear to include plaintiff's request for accident reports. Costello initially responded that it did not possess any such documents. To the extent plaintiff is requesting notes, records, videos or other documents which are not part of any accident reports, Costello is entitled to a protective order.

Attachments to Judd's emails (Letter dated May 2, 2016)

Costello has not offered any reason why it has not produced attachments to the emails which were produced at Judd's deposition taken on April 6, 2016. Accordingly, the material is not exempt from disclosure (*cf. Agovino, supra*).

Insurance Policies (Letter dated April 6, 2016)

In a negligence action for personal injuries, "permitting discovery and inspection of

the [liability insurance] policy would contravene the provisions of CPLR 3101, since the policy is not evidence material and necessary in the prosecution or defense of the action" (*Mosca v Pensky*, 42 AD2d 708, 708 [2d Dept 1973], *aff'd* 35NY2d 764 [1974]; *Fierman v Cirillo*, 40 AD2d 976 [2d Dept 1972]; *see also Washburn v A. W. Lawrence & Co., Inc.*, 222 AD2d 878 [3d Dept 1995]). Accordingly, Costello is entitled to a protective order regarding its insurance policies.

Copies of all investigation reports of any insurance carrier, invesigator, or claims adjuster (Letter dated April 6, 2016)

See response to Question 11.

Motion Sequence 17

The Ocon Defendants cross-move pursuant to CPLR 3108 and 3111 for an order directing the issuance of an Open Commission and so-ordered subpoena on nonparty witness Michael Downs, Trooper First Class, Connecticut State Police.

Trooper Downs responded to the unrelated hit and run accident which was originally thought to have occurred in Connecticut. Plaintiff was dispatched to meet with Trooper Downs and the driver involved in the hit and run at the rest stop in Connecticut and take down a report. Plaintiff claims that the dispatch call stated there were "possible injuries." Plaintiff opposes the motion on the ground that, as a matter of law, he did not act with reckless disregard to the safety of others.

Plaintiff correctly argues that the Court of Appeals in *Criscione v City of New York* (97 NY2d 152 [2001]) held that a police officer who responds to a dispatch to investigate

a 911 call is engaged in an emergency operation within the meaning of Vehicle & Traffic Law §1104. Therefore, he is entitled to be held to the reckless disregard standard for the safety of others and not the ordinary negligence standard. However, this statutory privilege is not absolute. Rather, the Court of Appeals also stated that this was a "qualified privilege" and, while the statute allows a police officer responding to a police call to disregard certain rules of the road (*see* VTL § 1104[b]), the driver is not relieved "from the duty to drive with due regard for the safety of all persons, nor shall [it] protect the driver from the consequences of his [or her] reckless disregard for the safety of others" (*id.* at 156-57, quoting V TL § 1104[e]).

Plaintiff's claim that he was not driving recklessly is a question of fact to be decided by the fact-finder and not by plaintiff's counsel or plaintiff's expert (*see* Calabrese Affidavit in Opposition). Indeed, plaintiff testified at his deposition that he was driving his police car at approximately 85 to 90 miles per hour (*see* Fino Affirmation, Ex C).[7] It is also uncontested that there were no personal injuries resulting from the hit and run. Thus, what was told to plaintiff in the dispatch call is relevant to whether he is entitled to the reckless disregard standard. Thus, it cannot be said at this juncture that a jury could not find that plaintiff acted with reckless disregard of the safety of others (*see e.g. Elnakib v County of Suffolk*, 90 AD3d 596 [2d Dept 2011]). In any event, this determination should not be made in the context of a motion for discovery.

---

[7] Cross-moving defendants also claim that plaintiff admitted at the hospital that he was driving in excess of 100 miles per hour. In support, defendants refer to plaintiff's hospital record annexed as Exhibit D. However, the hospital record is not annexed to the moving papers.

FREDER v. COSTELLO INDUSTRIES, INC.
INDEX NO. 1010/12

Both sides speculate as to what information Trooper Downs knew or did not know regarding the dispatch call that was made to plaintiff. The only way to ascertain whether Trooper Downs can shed any light on the subject is to conduct a deposition and request documentary discovery. New York had adopted a policy of broad discovery. Indeed, CPLR 3101(a) is to be liberally construed "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" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]; *Ferolit v Arizona Beverages USA, LLC*, 119 AD3d 642 [2d Dept 2014]). With respect to disclosure from a nonparty (*see* CPLR 3101[a][4]), the Court of Appeals had held that "so long as the disclosure sought is relevant to the prosecution or defense of an action, it must be provided by the nonparty" (*Kapon v Koch*, 23 NY3d 32, 38 [2014]). If the nonparty seeks to quash the subpoena, he must demonstrate that the information sought is "utterly irrelevant to any proper inquiry" and "the futility of the process to uncover anything legitimate is inevitable or obvious" [internal quotations and citations omitted] (*id.*). Although plaintiff is not the party on whom the subpoena is sought to be served, plaintiff has not met the burden imposed upon a nonparty seeking to quash a subpoena.

Accordingly, the motion of the Ocon Defendants is granted and the subpoena and commission annexed to the moving papers at Ex A are executed by the court and issued simultaneously with this decision and order.

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion (sequence 10) to amend the complaint is granted;

and it is further

ORDERED that the amended complaint annexed to the moving papers is deemed served; and it if further

ORDERED that answering papers are to be served in accordance with the CPLR; and it is further

ORDERED that there will be no discovery on the amended pleadings; and it is further

ORDERED that plaintiff's motion (sequence 13) to, *inter alia*, compel discovery or, in the alternative, for a conditional order or to strike Costello's answer is granted to the extent that Costello's answer is conditionally stricken unless Costello responds to plaintiff's discovery demands as set forth in this decision and order within 45 days of service of a copy of this order with notice of entry; and it is further

ORDERED that Costello's discovery response to plaintiff's notice to produce dated June 13, 2011 is deemed amended to include the name of David D'Addio; and it is further

ORDERED that Costello's cross motion (sequence 14) is granted to the extent that it does not have to respond to Questions 26, 36, and 46 of plaintiff's June 13, 2011 discovery request or provide copies of its insurance policies; and it is further

ORDERED that the cross motion (sequence 17) of defendants Ocon Termite & Pest Control, Inc. and John J. Murphy to serve a subpoena and commission to conduct a deposition and to obtain documentary discovery of a nonparty witness is granted; and it is further

FREDER v. COSTELLO INDUSTRIES, INC.
INDEX NO. 1010/12

ORDERED that the Ocon Defendants serve a copy of the so-ordered subpoena and commission on the nonparty witness within 20 days of receipt of this order; and it is further

ORDERED that the deposition of the nonparty witness take place within 45 days of service of the so-ordered subpoena and commission; and it is further

ORDERED that all remaining discovery is limited to that which is addressed in this decision and order; and it is further

ORDERED that all discovery be completed by November 10, 2017; and it is further

ORDERED that the previously scheduled compliance conference is adjourned to **November 13, 2017** at 9:30 AM for all counsel to appear; and it is further

ORDERED that plaintiff shall bring to the conference, and be prepared to file, a note of issue on November 13, 2017; and it is further

ORDERED that plaintiff is directed to serve a copy of this decision and order with notice of entry within 20 days

Subpoena so-ordered and Commission signed simultaneously herewith.

This constitutes the decision and order of the court.

Dated: August 16, 2017
Carmel, New York

Hon. Robert DiBella
Justice of Supreme Court