Insurance Co. of the State of Pennsylvania v Consolidated Edison Co. of N.Y., Inc.
2018 NY Slip Op 31394(U)
February 2, 2018
Supreme Court, New York County
Docket Number: 102326/11
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA a/s/o 140 BW LLC, and CHARTIS EUROPE S.A. a/s/o UNION INVESTMENT REAL ESTATE,

Plaintiffs,

-against-

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Defendant.

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CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Third-Party Plaintiff,

-against-

140 BW LLC and HINES INTERESTS LIMITED PARTNERSHIP,

Third-Party Defendants.

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Index No. 102326/11
Motion Sequence 010

DECISION AND ORDER

SHERRY KLEIN HEITLER, J.S.C.

Plaintiffs The Insurance Company of the State of Pennsylvania, as subrogee of 140 BW LLC, and Chartis Europe, S.A, as subrogee of Union Investment Real Estate (Plaintiffs), move pursuant to CPLR 3124 for an order compelling defendant Consolidated Edison Company of New York, Inc. (Con Edison) to provide further responses to Plaintiffs' Third Request for Production dated August 26, 2016. Con Edison cross-moves pursuant to CPLR 3103 for a protective order declaring that's its September 15, 2016 and December 1, 2016 responses satisfy its disclosure obligations under New York law and that additional disclosure is unnecessary.

This case arises from a fire that erupted at a residential building located at 140 Broadway in Manhattan ("the Building") on March 13, 2010. The fire resulted in substantial physical

[1]

damage to the Building. Plaintiffs allege that the fire began after heavy rain inundated the Building's transformer vaults and made contact with electrical switchgear, ultimately causing an explosion and fire.

Relevant to this motion is Plaintiffs' claim that Con Edison was negligent by failing to properly respond to the situation as it unfolded. In support, Plaintiffs submit a Con Edison press release from the day before the fire, March 12, 2010, in which Con Edison advised that it was "preparing crews and extra personnel to respond quickly and efficiently in the event of any power outages" (Plaintiffs' exhibit A, p. 2). With respect to March 13, 2010, the date of the fire, Plaintiffs offer the following timeline of events:

- Appx. 4:00PM – Building personnel contacted Con Edison to report water pouring from Con Edison vaults into the electrical switchgear;
- Appx. 4:30PM – Building personnel again contacted Con Edison, this time to report smoke coming from the switchgears;
- 5:33PM – FDNY arrived at the scene;
- 5:54PM – FDNY contacted Con Edison;
- 6:13PM – Con Edison dispatched an I&A crew (electrical equipment repair crew) to the scene;
- Appx. 7:15PM – Con Edison's two-person I&A crew arrived at the scene;
- 8:27PM – A third Con Edison employee, an I&A supervisor, arrived at the scene;
- 8:36PM – Additional FDNY personnel arrived at the scene;
- Appx. 8:45PM – The I&A crew evacuated the area after hearing a loud noise coming from the floor below them;
- Appx. 9:50PM – One of the switchgears exploded, causing a fire;
- 10:45PM – Con Edison dispatched three "Emergency Crew" members to the scene.

Con Edison does not appear to dispute this timeline in opposition to Plaintiffs' motion.

On August 26, 2016 Plaintiff served their Third Notice to Produce on Con Edison seeking information about Con Edison's operations between 3:00PM on March 13, 2010 and 3:00PM on March 14, 2010. Specifically, Plaintiffs seek (exhibit I):

1. All Documents and Communications, including emails and attachments, concerning activities, operations, and actions of Con Edison's Manhattan Control Center and/or Manhattan Emergency Control Center between 3 p.m. on March 13, 2010 and 3 p.m. on March 14, 2010 . . .

3. All Documents and Communications, including emails and attachments, concerning any Emergency to which Con Edison responded between 3 p.m. on March 13, 2010 and 3 p.m. on March 14, 2010 (including the Loss)

4. All Documents and Communications, including emails and attachments, concerning: (1) any Outage(s) that occurred in Manhattan or Brooklyn between 3p.m. on March 13, 2010 and 3 p.m. on March 14, 2010; (2) Con Edison's response(s) thereto; and (3) the amount of time taken to respond thereto

5. All Documents and Communications, including emails and attachments, concerning the number of Emergency Response Crews, Number 9 Crews, and/or I&A Crews Con Edison had available to respond to Emergencies between 3 p.m. on March 13, 2010 and 3 p.m. on March 14, 2010. . . .

7. All Documents and Communications, including emails and attachments, concerning the location of any Con Edison Emergency Response Crews, Number 9 Crews, and/or I&A Crews Con Edison between 3 p.m. on March 13, 2010 and 3 p.m. on March 14, 2010, and the time of arrival and departure at such location.

The parties made several good-faith attempts to resolve this dispute before the court. Nevertheless, they have been unable to reach a resolution. Plaintiffs now move for an order compelling Con Edison to provide full and complete responses to the above inquiries. In opposition, Con Edison argues that Plaintiffs' request is overbroad and that the information it seeks is not relevant to this case.

CPLR 3101(a) mandates that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof . . . ." As the Court of Appeals has held, the words "material" and "necessary" should be "interpreted liberally to require disclosure . . . 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). The purpose of CPLR 3101 is to "advance the function of a trial to ascertain truth and to accelerate the disposition of suits." *Rios v Donovan*, 21 AD2d 409, 411 (1st Dept 1964). The statute's scope is "generous, broad, and is to be construed

liberally," (*Mann ex rel. Akst v Cooper Tire Co.*, 33 AD3d 24, 29 [1st Dept 2006]) and it has been interpreted "to give effect to the strong public policy favoring full disclosure to adequately prepare for trial. . . ." *New York State Elec. & Gas Corp. v Lexington Ins. Co.*, 160 AD2d 261, 261 (1st Dept 1990). Moreover, "'[p]retrial disclosure extends not only to admissible proof but also to testimony or documents which may lead to the disclosure of admissible proof,' including material which might be used in cross-examination." *Polygram Holding, Inc. v Cafaro*, 42 AD3d 339, 341 (1st Dept 2007) (quoting *Fell v Presbyterian Hosp. in City of N.Y. at Columbia-Presbyt. Med. Ctr.*, 98 AD2d 624, 625 [1983]). In determining whether disclosure is appropriate, "[t]he test is one of usefulness and reason." *Allen v Crowell-Collier Publ., Co.*, 21 NY2d at 406.

Notwithstanding the foregoing, "[t]he court may at any time . . . on motion of any party or of any person from whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device." CPLR 3103(a). A party seeking a protective order, however, must generally show that the discovery sought is unreasonable or improper. *See Response Personnel, Inc. v Aschenbrenner*, 77 AD3d 518, 519 (1st Dept 2010).

At the outset, the court agrees with Plaintiff that its request is not a fishing expedition. The information sought could arguably demonstrate whether or not Con Edison's response was sufficient under the circumstances by, among other things, shedding light on the availability of emergency personnel or lack thereof and show which incidents, if any, were given priority over the incident at 140 Broadway.

Con Edison asserts that the documents sought are irrelevant because it concedes that it had notice of the claimed water leak.[1] But this admission is not determinative of whether Con Edison negligently responded to the situation. This admission is also unavailing given Con Edison's

[1] Affirmation of Joseph Wilder, dated December 15, 2017, p. 6.

conclusory argument that its response to the situation was both timely and proper. Con Edison is free to maintain that it sent the correct response crew for the situation at hand, but in doing so Con Edison should also have to disclose documentation so that Plaintiff may present a contrary theory. Toward that end, Plaintiff has demonstrated its entitlement to further discovery.

However, the scope of Plaintiffs' request is overbroad in several respects. First, Plaintiffs allege that Con Edison failed to properly respond to the fire, but do not allege that Con Edison was negligent after the fire started other than that its emergency crew took too long to arrive on the scene. Once the crew arrived, there is no allegation that the crew itself was negligent or that Con Edison acted improperly in the hours and days after the emergency crew arrived. Accordingly, Plaintiffs have not shown their entitlement to Con Edison's communications and crew locations after its emergency crew entered the Building. Con Edison's responses shall therefore be limited to communications and crew movements on March 13, 2010 from 3:00PM to 11:00PM. Second, while Plaintiffs request for information concerning incidents, repairs, and crew locations outside of Manhattan may seem broad, Con Edison has not shown that its emergency crews are borough-specific, i.e., that its Manhattan-based emergency crews cannot be assigned to Brooklyn, or that its Brooklyn-based crews cannot be assigned to Manhattan. In this regard, Con Edison is directed to fully comply with Plaintiffs discovery demand, unless it can show that its emergency crews are in fact borough-specific. If that is the case, Con Edison shall provide an affidavit and any other proof to that effect, and may then tailor its discovery responses to its crew locations in Manhattan. Third, Plaintiffs cannot allege that an I&A crew was not the right type of crew to send to the Building and then request the location of all other Con Edison's I&A crews throughout New York City. If in fact an I&A was not sufficient for the situation, the location of the other I&A crews would be irrelevant. Similarly, Plaintiff has not shown the relevance of the location of Con

Edison's Number 9 crews, who work on "manhole and street-related Con Edison equipment."[2]

Accordingly, it is hereby

ORDERED that Plaintiffs' motion to compel is granted in part and denied in part as set forth herein; and it is further

ORDERED that Con Edison's cross-motion for a protective order is granted in part and denied in part as set forth herein; and it is further

ORDERED that Plaintiffs shall serve an amended Request for Production consistent with this decision and order within 20 days of the date of entry of this order; and it is further

ORDERED that Con Edison shall provide full and complete responses within 30 days of such service; and it is further

ORDERED that the compliance conference currently scheduled for February 5, 2018 is adjourned to March 5, 2018.

This constitutes the decision and order of the court.

DATED: 2-2-18

SHERRY KLEIN HEITLER, J.S.C.

[2] See Con Edison's memorandum of law, p. 5.