

**Ohi Asset (NY) 93rd St., LLC v Consigli Constr. Co.,
Inc.**

2022 NY Slip Op 32908(U)

August 25, 2022

Supreme Court, New York County

Docket Number: Index No. 654936/2020

Judge: Margaret Chan

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MARGARET CHAN PART 49M

Justice

-----X

OHI ASSET (NY) 93RD STREET, LLC,

Plaintiff,

INDEX NO. 654936/2020

MOTION DATE 05/06/2022

MOTION SEQ. NO. 004

- v -

CONSIGLI CONSTRUCTION CO., INC., CONSIGLI &
ASSOCIATES, LLC, CONSIGLI CONSTRUCTION NY, LLC

Defendants.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107

were read on this motion to/for

QUASH / PROTECTIVE ORDER

In this property damage action relating to a construction project (the Project), defendants Consigli Construction Co., Inc., Consigli & Associates, LLC, and Consigli Construction NY, LLC (collectively, Consigli) move to quash two identical subpoenas served upon non-party insurance broker, Alliant Insurance Services, Inc. – Construction Services Group (Alliant). Alternatively, the motion seeks a protective order precluding plaintiff from obtaining such disclosure. Plaintiff opposes the motion.

Background

The subpoenas¹ request the following documents:

1. Any and all documents relating to the actual costs of the Bonds.^[2]
2. Any and all documents relating to the actual costs of the Contractor Controlled Insurance Program (“CCIP”) on the Project.
3. Any and all documents relating to the actual costs of the Subguard insurance policy issued on the Project.
4. All communications by and between You and Consigli relating

¹ Per defendants, the subpoenas are “identical with the exception of the dates” (NYSCEF # 92, ¶ 6).

² The subpoenas define Bonds to refer to a certain payment bond and performance bond that had been issued in favor of plaintiff and another entity.

to the actual costs of the Bonds, actual costs of the CCIP on the Project, and/or actual costs of the Subguard insurance policy issued on the Project.

(NYSCEF # 97 at 4, 8) and add that: “[t]he Plaintiff requires this disclosure because Alliant Insurance Services, Inc. was Consigli’s insurance broker on the Project ... and is in possession of information and documentation that cannot otherwise be obtained from other entities or in the files of the Plaintiff” (*id.* at 1, 5).

The arguments between the parties on these non-party subpoenas concern standing, which plaintiff asserts that defendants lack for this challenge, and facial insufficiency, which defendants argue that absent reasons for requesting these documents renders plaintiff’s subpoenas defective.

On the facial deficiency point, plaintiff notes that there is no prejudice to Alliant and that any non-compliance can be cured with later-submitted explanations. Plaintiff also notes that the subpoenas seek documents that Consigli can obtain which are documents on the insurance policy and costs. Plaintiff explains that “[i]nformation surrounding which of the Consigli entities are actually insured under that policy, which of the Consigli entities actually paid the premium and which of the Consigli entities have been paying the millions of dollars in deductibles may provide facts and evidence supporting the alter ego claims” (NYSCEF # 103 – Opp, ¶’s 8 and 9).

Defendants had attempted to preclude plaintiff from conducting alter ego discovery regarding the relationship among the three defendants. Defendants’ attempt was thwarted by this court’s order dated May 30, 2022 (NYSCEF # 89 – Decision and Order dated May 30, 2022). Defendants nonetheless assert that plaintiff’s claim for alter ego discovery at this time is “bald and unsupported” (NYSCEF # 104 – Reply, ¶ 12).³

Plaintiff also argues that the information sought by the subpoenas is discoverable under CPLR 3101 (f) and that the information “is material and necessary to whether [plaintiff] may be made whole if a judgment is rendered in its favor” (NYSCEF # 103, ¶ 38). Defendants deny this information may be so obtained, asserting that while some insurance coverage information is obtainable under recent amendment, the costs of the coverage is not (NYSCEF # 104, ¶ 7).

Discussion

As to the threshold standing issue, “[a] person other than one to whom a subpoena is directed has standing to move to quash the subpoena where he or she has a proprietary interest in the subject documents or where they involve privileged communications (*Hyatt v State Franchise Tax Bd.*, 105 AD3d 186, 194-195 [2d Dept 2013] [citations and quotation marks omitted]). Defendants have standing to challenge the subpoenas because they have a sufficient interest in the records

³ Plaintiff asks that the court reject defendants’ Reply for being filed one day late (NSYCEF # 106). The court exercises its discretion to deny plaintiff’s request.

sought as these records are related to defendants' financial insurance purchase transactions (*see e.g. State Comm'n on Governmental Operations of City of N.Y. v Manhattan Water Works, Inc.*, 10 AD2d 306, 308 [1st Dept 1960] [finding a sufficient interest of a corporation to challenge a subpoena which sought documents constituting the corporate and financial records of the corporation in the possession of a non-party, the corporation's accountant]).

The cases plaintiff cites are unavailing. Defendants' interest is not based on contracts in which defendants are party (*38-14 Realty Corp. v New York City Dep't of Consumer Affs.*, 103 AD2d 804, 804 [1984] [finding no proprietary interest and contrasting to the situation in *State Comm'n on Governmental Operations of City of N.Y.*). Defendants' standing is based on their sufficient interest in the materials sought, not "the mere fact that the subpoenaed non-party (Alliant) may supply adverse information regarding Consigli" (NYSCEF # 103, ¶ 20, *citing New York Republican State Committee v Temporary State Com'n of Investigation*, 129 AD2d 840 [3d Dept 1987] and *Oncor Commc'ns, Inc. v State*, 165 Misc 2d 262 [Sup Ct, NY County 1995], *affd* 218 AD2d 60 [3d Dept 1996]).

As to the facial insufficiency of the subpoenas, CPLR 3101 (a) states: "There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by: "any other person, upon notice stating the circumstances or reasons such disclosure is sought or required." (CPLR 3101 (a) (4)). The information required "is meant to apprise a stranger to the litigation the 'circumstances or reasons' why the requested disclosure was sought or required" in order to give "sufficient information to challenge the subpoenas on a motion to quash" (*Kapon v Koch*, 23 NY3d 32, 39 [2014]). Where the requisite information is initially not provided, a court has the discretion to deny quashing the subpoena where a respondent's response to a motion to quash has provided the requisite information (*see Hauzinger v Hauzinger*, 43 AD3d 1289, 1290 [4th Dept 2007], *affd* 10 NY3d 923 [2008]).

The subpoenas at issue are facially deficient – the mere statement that the disclosure "cannot otherwise be obtained" is insufficient to apprise the non-party of information sufficient to challenge the subpoenas (NYSCEF # 97 at 1; 5). Plaintiff cites no support for its theory that there was no facial deficiency. Nonetheless, in its discretion, the court finds that plaintiff's response has provided the requisite information to the extent that plaintiff is seeking evidence to support its alter ego claims, as discussed below (*Hauzinger* at 1290).

Turning now to the discoverability of the information sought, CPLR 3101 (f) entitles a plaintiff to receive "proof of the existence and contents of any insurance agreement in the form of a copy of the insurance policy in place at the time of the loss" as well as certain primary, excess and umbrella policies, including "declarations, insuring agreements, conditions, exclusions, endorsements, and similar provisions," certain contact information, and limits under the policy. Plaintiff fails to identify what in the text of the statute forms the basis for the

disclosure sought.⁴ Plaintiff's attempt to resort to the legislative history of the recent amendment to the statute is unavailing (*see e.g. Lloyd v Grella*, 83 NY2d 537, 545–46 [1994] ["When the language of a statute is clear, effect should be given to the plain meaning of the words used. In such instances, the court should look no further than unambiguous words and need not delve into legislative history"] [citations omitted]).

Regarding the discoverability of the information sought under plaintiff's alter ego claim, "[t]he words 'material and necessary' as used in CPLR 3101 must be 'interpreted liberally 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'" (*Kapon v Koch*, 23 NY3d 32, 38 [2014] [interpreting CPLR 3101 (a) (4) and quoting *Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 406 [1968]). "A party seeking discovery must satisfy the threshold requirement that the request is reasonably calculated to yield information that is 'material and necessary'—i.e., relevant" (*Forman v Henkin*, 30 NY3d 656, 661 [2018] [quoting CPLR 3101 [a]]). "An application to quash a subpoena should be granted [o]nly where the futility of the process to uncover anything legitimate is inevitable or obvious . . . or where the information sought is utterly irrelevant to any proper inquiry" (*Kapon* at 38 [quotation marks omitted]).

Here, to the extent plaintiff seeks "information surrounding which of the Consigli entities are actually insured under that policy, which of the Consigli entities actually paid the premium and which of the Consigli entities have been paying the millions of dollars in deductibles," documents responsive to such request may provide information supporting plaintiff's alter ego claims (NYSCEF # 103, ¶ 9). Defendants' argument that such claim is unsupported is without merit. Defendants have previously stated by letter of April 26, 2022, that plaintiff has pled such claim (NYSCEF # 87 at 1). That letter also indicated that a motion to dismiss would be made in connection with defendants' opposition to plaintiff seeking discovery regarding the relationship among the Consigli entities; no such motion was made (*id.* at 2). Thus, defendants have failed to oppose the alter ego basis for the discovery.

Nonetheless, defendants' motion for a protective order is granted to a limited extent as follows. Plaintiff's conclusory explanation that the information it seeks may support its alter ego claims is sufficient for the first three categories of documents sought by the subpoenas, given that discovery standards are liberally construed to favor disclosure. But it is insufficient to justify compelling disclosure at this time of the fourth category respecting "[a]ll communications" between Alliant and Consigli relating to the actual costs of the various Project-policies (NYSCEF #

⁴ It is undisputed that plaintiff is already in possession of defendants' insurance policy and Straight Excess Liability Policy, copies of which defendants filed with their opposition (NYSCEF #s 98-99). To the extent plaintiff seeks information pursuant to CPLR 3101 (f) but which was not requested by the subpoenas, the court has no present opportunity to adjudicate the discoverability of such information.

103, ¶ 9). “[L]itigants are not without protection against [unnecessarily onerous applications for discovery.] Under our discovery statutes and case law, competing interests must always be balanced; the need for discovery must be weighed against any special burden to be borne by the opposing party” (*Andon ex rel. Andon v 302-304 Mott St. Assocs.*, 94 NY2d 740, 747 [2000] [quotation marks omitted]). Given the sensitive nature of such communications between the defendant-insured parties and their insurance broker, and plaintiff’s tangential, scantily supported explanation for the justification for such disclosure, the court exercises its discretion to grant defendants’ request for a protective order precluding such disclosure at this time (*see e.g. id.* [affirming the denial of compelling certain disclosure for which the relevancy basis was only speculatively supported and the nature of which was private; *see also* Preamble to Rule 11 of the Commercial Division [“It is important that counsel’s discovery requests... are both proportional and reasonable in light of the complexity of the case and the amount of proof that is required for the cause of action”]). Finally, given the sensitive nature of the documents involved, the disclosure is subject to the limitations set forth in the decretal paragraphs below.

Conclusion

Thus, it is ORDERED that defendants’ motion for a protective order precluding plaintiff from obtaining the documentation sought by the subpoenas to Alliant Insurance Services, Inc. – Construction Services Group dated April 19, 2022 and April 22, 2022, is granted to the extent that, as to the first three categories of the subpoenas, Alliant is to produce documents demonstrating which of the Consigli entities (i) are actually insured under the Subguard insurance policy issued on the Project; (ii) actually paid the premium; and (iii) have been paying the deductibles – after redaction of information therein that is not relevant to plaintiff’s alter-ego claim; it is further

ORDERED that the branch of defendants’ motion for a protective order is granted at this time as to the fourth category in the subpoena; and it is further

ORDERED that the parties shall sign a confidentiality stipulation (pursuant to the Commercial Division model with a redline version to show any changes to the form) to be so-ordered by the court in advance of plaintiff’s receipt of any of the subpoenaed documents.

Either party may contact the court’s law clerk Tai Aliya to schedule a conference to discuss the confidentiality stipulation or a further subpoena post review of the documents produced under the first three categories of the subpoena at issue.

08/25/2022
DATE


MARGARET CHAN, J.S.C.

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| CHECK ONE: | <input type="checkbox"/> | CASE DISPOSED | <input checked="" type="checkbox"/> | NON-FINAL DISPOSITION | |
| | <input type="checkbox"/> | GRANTED | <input type="checkbox"/> | DENIED | <input type="checkbox"/> |
| APPLICATION: | <input type="checkbox"/> | SETTLE ORDER | <input checked="" type="checkbox"/> | GRANTED IN PART | <input type="checkbox"/> |
| | <input type="checkbox"/> | | <input type="checkbox"/> | SUBMIT ORDER | <input type="checkbox"/> |
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