

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

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IN RE 91ST STREET CRANE COLLAPSE LITIGATION:

Index No. 771000/2010E
Date: 9/13/2010

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THIS DOCUMENT RELATES TO: ALL CASES
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CASE MANAGEMENT ORDER NO. 2

PAUL G. FEINMAN, J.:

On April 5, 2010 this court issued Case Management Order No. 1 (“CMO 1”) which, among other things, set forth the general procedures to be followed for discovery in this matter. CMO 1 contemplated that objections to discovery demands would be ruled upon at a compliance conference on June 23, 2010. However, the “prolix” nature of the ensuing objections to the discovery demands “were quantitatively and qualitatively unforeseen” (Doc. 104). Consequently, with a view toward preserving the schedule set forth by CMO 1, this court issued an order of reference appointing a referee to address the merits of the unresolved demands and objections. The order of reference directed the liaison counselors to confer and draft a single Master Discovery Demand List clearly identifying, in a very specific manner, the demands and responses which were to be addressed. That order directed the referee “to issue a decision, either by ruling on a record made with a court reporter, or in a written decision, as the referee deems appropriate, specifically and clearly detailing the referee’s rulings on every portion of every document on the Master Discovery Demand List.” This was to be done on or before July 19, 2010.

Since then, however, additional discovery demands have been propounded and a number

of motions were made which either sought review of the referee's rulings or removal of the referee altogether. Judicial Hearing Officer Bradley, the appointed referee, was unavailable during the last week of July and into August and this court held multiple conferences in an attempt to expedite the resolution of the discovery issues. At one such conference on July 30, 2010, the court suggested that in J.H.O. Bradley's absence the parties withdraw all motions which had been filed regarding the J.H.O.'s rulings and put before the court that which all agreed was still outstanding (Doc. 369, at 67). The parties seemed to agree and a number of conferences ensued.

The first such conference was held on August 12, 2010. At that conference, the court clarified the scope of authority delegated to the referee, explaining that CPLR 3104 (d) entitles "[a]ny party or witness [to] apply for review of an order made under [CPLR 3104 (b)] by a referee" (8/12/10 Transcript, at 52-53). In other words, to the extent that the court had indicated in its order of reference and at prior conferences that it was giving the J.H.O. the power to hear and determine discovery disputes, it had erred. The referee does not have the power to hear and determine unless the parties so stipulate. The parties are entitled to have this court review those determinations.

The wrongful death plaintiffs then suggested that individual conferences be held between themselves and various groups of defendants, during which particular items in dispute could be resolved by the court. The Lomma defendants agreed first (8/12/10 Transcript, at 57-58). Counsel for the City of New York also seemed to agree, stating, "We can meet after, on the 20th, the same day or after you are done here or before Lomma" (8/12/10 Transcript, at 59); City counsel later said, "I will call or contact [p]laintiffs today with my calendar for an available date" (8/12/10 Transcript, at 61).

On August 20, 2010, the court conducted a productive conference between the wrongful death plaintiffs and the Lomma defendants. That conference continued on August 25, 2010 and although the court was unavailable, the wrongful death plaintiffs and the Lomma defendants were able to resolve nearly all of their outstanding document discovery disputes.

On August 20, 2010, the court also conducted a conference between the wrongful death plaintiffs and the City of New York defendants. The court issued rulings on items 1 through 14 of the wrongful death plaintiffs' first notice of discovery and inspection on the City of New York defendants (Doc. 48). The City objected to item number 9, which sought "the personnel records including applications, qualifications, C.V.'s, certifications, performance reviews/evaluations and letters of resignation, if applicable," for certain employees (Doc. 48). The court agreed to conduct an in camera inspection of the documents which shall be addressed in a forthcoming decision and order.

As to items 15 through 36, the court directed the parties "to pick a day next week when you can meet with [my law clerk] in my absence and see if you can narrow or rephrase as the case may be" (Doc. 48, at 98-99). On August 25, 2010, the conference continued with one of the court's law clerks. The City defendants asserted a number of reasons for declining to meaningfully participate in the conference without the court present. Among those reasons was the preservation of an appealable record and objections to cost allocation for any electronic searches. The City defendants also inquired as to whether or not the court intended to "so order" the transcript of the court's rulings on items 1 through 14. Ultimately, the City defendants agreed to furnish a formal response to items 15 through 36 by September 10, 2010. The court's rulings as to those items will be addressed in a forthcoming decision and order. Since then, counsel for the Testing defendants and Sorbara have also declined to partake in an informal

conference to resolve outstanding discovery disputes indicating that they would prefer to address the issues, if at all, with written submissions.

Certainly all counselors are entitled to zealously protect their clients' interests, but in the Supreme Court discovery disputes are routinely resolved during compliance conferences held with either the court, the court's law clerks, volunteer special masters, or court attorneys from the law department. Doing so promotes expeditious resolution of discovery disputes, the preservation of judicial resources, and benefits the parties and their counsel by avoiding the costs associated with unnecessary motion practice. Accordingly, until further notice to the contrary, compliance conferences will be held every Monday at 2:15 PM, the first of which will be held on September 27, 2010, to expedite paper discovery. The scope of the compliance conferences will primarily be to: (1) serve as the means to review any of J.H.O. Bradley's orders which are subject to review pursuant to CPLR 3104 [b]; and (2) address all disputes arising out of all discovery demands propounded after June 23, 2010 ("Post-reference disputes").¹ Henceforth, J.H.O. Bradley shall only continue to issue rulings on those items on the Master Discovery Demand List which he has not yet addressed (Doc. 104, Point A, ¶¶ 3-4). The liaison counsel shall confer amongst each other and, on or before September 21, 2010, shall upload onto the E-filing System, under the Master Index Number: (1) the original Master Discovery Demand List; and (2) an updated version of the Master Discovery Demand List. The updated version shall only list the items which were listed on the original Master Discovery Demand List and which

¹ If they so choose, the parties are, of course, entitled to engage in motion practice, such as to compel or for protective orders, as they deem fit. However, the compliance conferences are intended to avoid this if possible. Counsel are reminded efforts to resolve disclosure motions must be made in good faith (*see* 22 NYCRR 202.7 [a]). Failure to demonstrate such good faith efforts shall result in the imposition of sanctions and/or costs.

have not yet been ruled upon by J.H.O. Bradley; the updated Master Discovery Demand List shall not include post-reference disputes as those will now be addressed directly at the Monday compliance conferences.²

Before every conference, all steering committee members shall confer with each other for the purposes of drafting a *single* agenda for the conference. The agenda shall clearly and specifically indicate the matters to be addressed at each conference – whether they are post-reference disputes or reviews of rulings made by J.H.O. Bradley. If the steering committees cannot agree upon a single agenda, each steering committee shall submit a proposed agenda listing the items sought to be addressed at each conference. The agenda, or proposed agenda, shall be electronically filed at least five business days before each conference is scheduled. The steering committee members shall confer amongst each other to decide which plaintiffs, defendants, and/or groups of either plaintiffs or defendants will be attending each conference – this shall be reflected on each agenda or proposed agenda. If the steering committee members cannot agree as to which parties and/or groups will be attending each conference, then all parties and groups shall attend every conference.

This constitutes the order of the court.

Dated: September 13, 2010
New York, New York



J.S.C.

(91st St. Crane Litigation_CMO 2.wpd)

² The format of the updated Master Discovery Demand List shall comport with the requirements specified in section A, ¶ 3 (1)-(9) of the order of reference (Doc. 104).