

Sharon Realty Corp. v Kookmin Best Ins. Co., Ltd.

2024 NY Slip Op 34401(U)

December 12, 2024

Supreme Court, New York County

Docket Number: Index No. 652350/2023

Judge: Lyle E. Frank

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

PRESENT: HON. LYLE E. FRANK **PART** **11M**

Justice

-----X

SHARON REALTY CORP., SRNY HOLDINGS LLC

Plaintiff,

- v -

KOOKMIN BEST INSURANCE CO., LTD,

Defendant.

-----X

INDEX NO. 652350/2023

MOTION DATE 08/30/2024

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33

were read on this motion to/for QUASH SUBPOENA, FIX CONDITIONS.

Upon the foregoing documents, defendant’s motion is denied.

Background and Relevant Procedural History

This action arises out of water damage that occurred at a commercial tenant building owned by plaintiff Sharon Realty Corp. (“Sharon Realty”). Sharon Realty had an insurance policy on the building, which also listed SRNY Holdings LLC (“SRNY”, collectively with Sharon Realty “Plaintiffs”) as an insured party. The policy was held with defendant Kookmin Best Insurance Co., LTD (“Defendant”). In late December of 2022, Sharon submitted a claim in connection with the water damage to Defendant. Defendant then retained an independent adjuster, Terrier Claims Services (“Terrier”), to investigate the damage. Terrier, along with Brennan Walsh, P.E. (“Walsh”) of Levine Fidellow Engineering Consulting, Inc. (“Fidellow”) examined the premises. They determined that damage was caused by a water leak from a hot water heater in a mechanical room and issued a report authored by Mr. Walsh (the “Fidellow Report”) setting forth their findings. The building had lost gas service due to a punctured gas

line, and the building's management had set up space heaters in tenant spaces as a result. Record breaking freezing temperatures had caused a pipe to freeze and led to the water damage.

Partly due to the Fidellow Report, Defendant denied coverage of the claim. Plaintiffs filed suit in May of 2023, alleging two counts of breach of contract and seeking a declaration that they are owed coverage under the insurance policy in question. Plaintiffs issued a subpoena to Mr. Walsh in July of 2024, seeking his file regarding the inspection and to depose Mr. Walsh because he has "knowledge and information concerning or relating to the damages that are the subject of this litigation." In August of 2024, Defendant then designated Mr. Walsh as an expert witness in the matter, stating that his opinions would be "grounded upon his training and expertise as a licensed engineer" and that he would be testifying to the "cause and origin of the purported water damage" to the building. Defendant has produced the file but objects to the testimony deposition of Mr. Walsh. Defendant then asked Plaintiffs to withdraw the subpoena, and when they declined to do so, Defendant brought the present motion to quash the subpoena.

Discussion

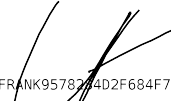
Plaintiffs oppose the motion to quash on the grounds that they are not seeking to elicit expert testimony from Mr. Walsh, only factual information related to his investigation. They also argue that even if Mr. Walsh was a valid expert in the litigation, there are special circumstances warranting his deposition. Generally, "[i]t is improper for a party to request the facts and opinions upon which another party's expert is expected to testify." *Tate-Mitros v. MTA N.Y. City Tr.*, 144 A.D.3d 454, 456 (1st Dept. 2016). But when there is a showing of special circumstances, a court may order disclosure related to such testimony. CPLR § 3101(d)(1)(iii).

There are Special Circumstances Here Warranting Deposition

The First Department has held that “when material physical evidence is inspected by an expert for one side, and then lost or destroyed before the other side has had an opportunity to conduct its own expert inspection, a special circumstance exists within the meaning of CPLR 3101(d)(1)(iii) that per se warrants disclosure directly from the expert concerning the facts surrounding his inspection.” *Rosario v. General Motors Corp.*, 148 A.D.2d 108, 109 (1st Dept. 1989). Likewise, the Third Department has held that the “unavailability of the physical evidence after its inspection by an expert for only one side has been held to be ‘special circumstances’ in every instance under the present statute.” *Tedesco v. Dry-Vac Sales*, 203 A.D.2d 873, 874 (3rd Dept. 1994). Even when a car was not destroyed, deposition of an expert witness was considered proper under the special circumstances exception when the car had been in a unique position at the time of inspection, and he was “the only witness with personal knowledge of its condition at the relevant time.” *Coello v. Progressive Ins. Co.*, 6 A.D.3d 282, 283 (1st Dept. 2004).

Here, it is not disputed that Plaintiffs did not have an inspection of the maintenance room done at the time by their own expert witness. Defendant argues that because the building is still intact, there are no special circumstances present that would justify deposition of Mr. Walsh. But the *circumstances* of the maintenance room at the relevant time are different, and it is not feasible to recreate them. When Mr. Walsh inspected the room, there had been a lack of heating in the building outside space heaters and there had been record cold temperature. The building in question has since had a new heating system put in. The conditions of the maintenance room here are analogous to those of the car in *Coello*, and therefore there are special circumstances as contemplated by the CPLR. Accordingly, it is hereby

ADJUDGED that the defendant’s motion to quash the Subpoenas Duces Tecum and Ad Testificandum, served by plaintiffs upon non-party Brennan Walsh, P.E. of Levine Fidellow Consulting, Inc., is denied.


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12/12/2024
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED			<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE