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September 11, 2015

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VIA FAX 973-424-6804 & LAWYERS SERVICE
The Honorable Ned M. Rosenberg, J.S.C.
Essex County Superior Court
Hall of Records
465 Dr. Martin Luther King, Jr. Blvd., Chambers 224
Newark, New Jersey 07102

Re: Feliciano Tenezaca v. Toll Brothers, et al.
Docket No.: ESX-L-1262-11
Our File: 10-48

Plaintiffs' Response to Timothy Carlsen's Objection to the Release of Records Obtained From Safety Organizations

Gerald H. Clark*
Certified By the Supreme Court of New Jersey as a Civil Trial Attorney

William S. Peck
Cynthia P. Liebling
Mark W. Morris
Stephanie Tolnai
**New Jersey and New York Bars*

Of Counsel
John J. Bruno, Jr.
Joseph T. Duchak
Robert A. Ferraro

Dear Judge Rosenberg:

We represent Plaintiff Feliciano Tenezaca in the above matter. The Court by Order dated April 21, 2015 granted Plaintiff's motion to compel Timothy Carlsen to sign authorizations to enable plaintiff to obtain the release of records from various professional organizations from which Mr. Carlsen is a member. These records have been received by Your Honor and reviewed *in camera* by the Court and counsel for Mr. Carlsen for claims of confidentiality and privilege. Please allow the following to serve as a response to additional comments made in the August 27, 2015 letter by counsel for Timothy Carlsen.[1]

Mr. Carlsen's current primary objection to the release of the records at issue is that the discovery is "overbroad, unnecessary and harassing". This is the same argument that Mr. Carlsen has raised time and time again in support of his opposition to signing the requested releases. However this tenuous, unsupported argument was already addressed and considered by Your Honor when the ruling was made on April 10, 2015. The court did not find Plaintiff's request for records overbroad, unnecessary or harassing and instead ordered Mr. Carlsen to sign the requested authorizations.*(Exhibit A, April 10, 2015 Order).* For Mr. Carlsen to currently allege *again* that the records are overbroad etc. is just rearguing a point that has already been ruled on. The 30 or so pages of documents have already been received by the court and reviewed in camera by the court and defense. This overbroad etc. argument may have been relevant before the records were released but in reality have no applicability as of today's date since the authorizations have

[1] Although counsel for Mr. Carlsen refers to Mr. Carlsen as an "Intervenor" that title is improper and will not be used herein as said status was denied to Mr. Carlsen by Your Honor at the April 10, 2015 oral argument. (See transcript, attached as Exhibit B to Carlsen's August 27, 2015 letter; p.35:lines 17-21).

been signed and records already released by the Safety Societies. Furthermore the records are not overbroad but are quite particularized and not harassing in any way, shape of form.

Mr. Carlsen still does not allege, and certainly does not show in these or any prior submissions to the Court, that the requested discovery is either "confidential" or "privileged." *See Hammock v. Hoffman-LaRoche, Inc.*, 142 N.J. 356, 376, 662 A.2d 546, 556 (1995)("Documents containing trade secrets, confidential business information and privileged information may be protected from disclosure." (emphasis added)) In *Hammock* the New Jersey Supreme Court held that the person who seeks to overcome the strong presumption of access must establish by a preponderance of the evidence that the interest in secrecy outweighs the presumption. *Id.* They further held that the need for secrecy must be demonstrated with specificity as to each document. Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, are insufficient. *Id.* It is the party seeking to block the requested information, in this case Mr. Carlsen, who has the burden to show step by step why each document should be exempt from disclosure. Mr. Carlsen has never even addressed, let alone satisfied, his burden of proof.

There is absolutely no confidential or privileged information contained in the records at issue. Whatever "sensitive personal information pertaining to Mr. Carlsen or his family" is alleged by Mr. Carlsen to be in these records is not even sought by Plaintiff. Plaintiff has no interest in Mr. Carlsen's credit card information or his Social Security number or address, if this is the type of thing Mr. Carlsen is referring to. (Although it should be noted that much of this information was obtained at Mr. Carlsen's deposition). It is hard to determine what Mr. Carlsen is claiming is "sensitive personal information" as, once again, he offers no specific examples to support his allegations. However the bottom line is that alleged "personal sensitive information" does not, without a showing by Mr. Carlsen, rise to the level of "confidential" or "privileged" and therefore there is no protection afforded to this information under *Hammock* nor *Rules* 1:2-1 and 4:10-3 *Id.* at 380.

Mr. Carlsen is the expert of Defendant Toll Brothers and as such it is proper and appropriate to investigate the purported qualifications of an expert. *Lawlor v. Kolarsick,* 92 *N.J.Super.* 309, 312-13 (App.Div.), *certif. denied,* 48 *N.J.* 356 (1966) (cross examination of a purported expert witness may include evidence that the witness's purported qualifications to comment on the issues presented "was less than he claimed, and that such deficiency affected his credibility.") When pretrial discovery is sought to be restricted, the principle generally applied permits the widest latitude in the use of discovery tools, *Berrie, supra* at 278, *citing Blumberg v. Dornbusch,* 139 *N.J.Super.* 433, 354 A.2d 351 (App.Div.1976) where the information sought will aid in the preparation of the case or otherwise facilitate proof of progress at trial. *Bzozowski v.Penn.-Reading Seashore Lines,* 107 N.J.Super. 467, 473, 259 A.2d 231 (Law Div.1969). Parties may obtain discovery regarding any matter not privileged. which is relevant to the pending action. *R.* 4:102(a). The relevance standard does not refer only to matters which would necessarily be admissible in evidence but also includes information reasonably calculated to lead to admissible evidence. *Berrie, supra* at 278. When impeaching an expert, "the test of relevancy is not whether the answer sought will elucidate any of the main issues, but whether it will to a useful extent aid the court or jury in appraising the credibility of the witness."*Id.* at 314 (quoting *Mc-Cormick, Evidence,* § 29, 54-55 (1954).

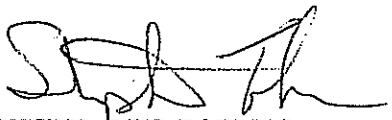
If a party wants to block relevant discovery they are supposed to meet the burden of proof for a protective order. An *in camera* review is supposed to be for purposes of addressing claims of

privilege, confidentiality and trade secrets, not to determine issues of relevance. "If a claim of privilege is disputed, an *in camera* review by the court of the allegedly privileged material is ordinarily the first step in determining the issue." Pressler & Verniero, Current N.J. Court Rules, Comment 6 to R. 4:10-2 (2011) (*citing Loigman v. Kimmelman*, 102 N.J. 98 (1986)). Critically, "[t]he trial court must examine each document individually, and explain as to each document deemed privileged why it has so ruled." *Seacoast Builders Corp. v. Rutgers*, 358 N.J. Super. 524, 542 (App. Div. 2003); *see also Hartz Mountain Indus., Inc. v. N.J. Sports & Exposition Auth.*, 369 N.J. Super. 175, 183 (App. Div.)

There is no dispute that Mr. Carlsen has been designated as a "Certified Safety Professional" (CSP) or has been accepted into various professional organizations. The issue is what Mr. Carlsen represented to the Board of Safety Professionals and other organizations to obtain these certifications. If he was dishonest or inaccurate as to the information he represented to these organizations then Plaintiffs should be able to uncover his duplicity. Plaintiffs have thoroughly enunciated the relevance of these application records, and why Mr. Carlsen should not be permitted to hide what he submitted to obtain his safety credentials, in Plaintiff's motions and briefs dated January 4, 2015, February 11, 2014, April 15, 2015, April 21, 2015. *(Attached hereto as Exhibit B, Exhibit C, Exhibit D and Exhibit E respectively)*. These reasons, including but not limited to the fact that, the requirements to be declared a CSP do not match up with Mr. Carlsen's prior and current qualifications listed on his CV and do not comport with his prior deposition testimony, along with the fact that there is a glaring inconsistency as to his opinion on the root cause of work accidents, makes these application records a proper area of discovery, cross-examination and impeachment. The Court, counsel and jury are entitled to know what this purported expert told the various professional organizations to obtain the kinds of credentials he relies upon to give expert testimony in this case.

Mr. Carlsen has made no showing that the documents are privileged, confidential or a trade secret of any kind. Mr. Carlsen just unconvincingly and subjectively argues the documents are "overbroad, unnecessary and harassing" and "contain personal, sensitive information". However that is simply not the standard for discovery under any measure and certainly is no justification for blocking relevant, non-privileged discovery that plaintiff is clearly entitled to.

Respectfully submitted,



STEPHANIE TOLNAI
For the firm

ST:tr
Enclosures
cc: Bonnie Hanlon, Esq. (Via Fax 609-986-1301 & Lawyers Service)
Patrick J. Perrone, Esq. (Via Fax 973-848-4001 & Lawyers Service)
Timothy Freeman, Esq. (Via Fax 973 242-8099 & Lawyers Service)

Rosenburg-after in camera review.wpd

EXHIBIT A

William S. Peck, Esq. – Attorney ID #020821999
Gerald H. Clark, Esq. – Attorney ID #048281997
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(732) 443-0333
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Attorneys for Plaintiffs

FELICIANO TENEZACA; JOSE ZUNA;

Plaintiffs,

vs.

TOLL BROTHERS, INC.; BIG RIDGE DEVELOPERS, LP; COUNTRY CLUB OF THE POCONOS; COUNTRY CLUB OF THE POCONOS COMMUNITY ASSOCIATION, INC.; COUNTRY CLUB OF THE POCONOS CONDO ASSOCIATION, INC. ANCHOR FRAMING CORP; ANCHOR FRAMING INC.; TOLL PA IV, LP; TOLL PA IX, LP; TOLL BROS., INC.; ABC BUSINESS ENTITIES 4-20; JOHN DOES 1-20

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: ESSEX COUNTY

DOCKET NO.: ESX-L-1262-11

Civil Action

ORDER

THIS MATTER being opened to the Court by Gerald H. Clark, Esq., of the Clark Law Firm, PC, attorneys for plaintiffs, to compel production of signed authorization; and good cause having been shown;

IT IS on this 21st day of April, 2015;

ORDERED that plaintiffs' Motion to Compel Production of Signed Authorizations be and is hereby granted, and it is further;

ORDERED that within 10 days Timothy J. Carlsen, P.E., be and hereby is

compelled to produce to counsel for plaintiffs fully executed authorizations with respect to the Board of Certified Safety Professionals, International Code Counsel (ICC), American Society of Civil Engineers, National Society of Professional Engineers, New Jersey Society of Professional Engineers and American Society of Safety Engineers, which were attached as "Exhibit G" to the moving papers; it is further;

ORDERED that upon receipt of the documents obtained from said authorizations, plaintiffs' counsel shall ~~not review same and instead shall~~ direct the respective society to submit them to the Court for an in camera review, together with a statement as to why the documents are relevant or likely to lead to the discovery of relevant evidence, and the Court shall review same to address claims of "privilege" and/or "confidentiality"; it is further; first w/review by the Court w/counsel for Timothy Carlsen, who if necessary any objection will be dealt with at

ORDERED that if Timothy J. Carlsen, P.E., fails to comply with this Order, plaintiffs may file an application with the Court for appropriate relief including any relief provided for under *Rule* 4:23-2; it is further;

ORDERED that a copy of this Order be served on all parties within seven (7) days of the date hereof.

J.S.C.

Hon. M. Rosenberg, JSC

___Opposed

___Unopposed

any
the record prior to distribution to the parties

For those known as set forth on the record at approx 4:15 P.M.

EXHIBIT B

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January 4, 2015

VIA LAWYERS SERVICE
Essex County Courthouse
Hall of Records
465 Dr. Martin Luther King Jr., Blvd. – Chambers 224 HOR
Newark, New Jersey 07102
Attn: Hon. Ned MeRosenberg, J&Ce

Re: Tenezaca & Zuna veToll Brother's Ince *et al*
Docket Noe ESX-L-e262-ee
Our File Noe 33-50

Plaintiff's Motion to Compel Production of Signed Authorizations
Currently Returnable: January 23, 20e5

Dear Judge Rosenberg:

Please accept the following letter brief on behalf of Plaintiffs Feliciano Tenezaca and Jose Zuna in support of the above-referenced motion.

Ie Case Background

This is a construction project safety rules violation injury case. The project in question is the construction of a large luxury townhouse community with resort style amenities including an 18 hole golf course. The project is named the "Country Club of the Poconos" and is located in Marshalls Creek, Pennsylvania, which is just over the border from New Jersey.

The general contractor and developer of the project is the Toll Brothers defendants. Toll Brothers in turn hired defendant Anchor Framing Corporation as a subcontractor to perform framing and sheathing work on the project. Plaintiffs Feliciano Tenezaca and Jose Zuna were both direct employees of Anchor Framing at the time of their respective fall down incidents. The fall down injuries occurred because defendants failed to follow basic work safety rules established by OSHA and other industry authorities. Defendants specifically chose to not follow OSHA general health and safety regulations and they also failed to enforce OSHA's specific fall

protection and scaffolding safety rules. They also failed to follow the pertinent safety industry standards for the prevention of fall injury and death on work sites. (*Exhibit A- Gallagher Report*)

Under well-settled construction law in New Jersey and under OSHA, general contractors like Toll Brothers have a non-delegable duty to maintain a safe workplace that includes "ensur[ing] 'prospective and continuing compliance' with the legislatively imposed non-delegable obligation to all employees on the job site, without regard to contractual or employer obligations." *Alloway v. Bradlees Inc.*, 157 N.J. at 237-38 (1999); *Kane*, 278 N.J.Super. at 142-43; 29 *C.F.R.* §1926.16. As such, the general contractor is required to actively manage safety on this job site and see to it the subcontractors comply with the federal safety regulations and other safety standards in the construction industry. *Id.*

OSHA and industry safety standards are supposed to be enforced from the top down. (*Exhibit A- Gallagher Report*) It is undisputed that the Toll Brothers defendants were the general contractors and developers of the jobsite. As such, they had a non-delegable duty to ensure that OSHA regulations were enforced on the jobsite. Despite this the Toll Brothers defendants did nothing to ensure that OSHA was followed, particularly concerning fall protection for the workers. As such, it is clearly foreseeable that untrained laborers like Jose Zuna and Feliciano Tenezaca, being directed to work on an OSHA non-compliant major construction project on a scaffold and roof some 20 and 40 feet high, respectively, with no harness, lanyard, toe boards, nets or other fall protection can foreseeably result in a fall injury of the type plaintiffs sustained. (*Exhibit A- Gallagher Report*) (*Exhibit B- Selected Portions of OSHA Investigation File*)

Plaintiffs allege there was an ongoing practice on this project to disregard the safety rules, including non-compliance with OSHA fall protection and scaffolding safety standards. As a result, both plaintiffs Tenezaca and Zuna, employees of Anchor Framing, suffered serious fall injuries within 7 working days of each other. (*Exhibit A- Gallagher Reports*) (*Exhibit B- Selected Portions of OSHA Investigation File*)

This is how Feliciano Tenezaca was injured. On February 23, 2009 he was directed to work on a three story high roof of a townhouse completing certain framing work. He was not provided with nor directed to utilize any fall protection. He was also not trained in fall protection safety. As he was working at the height, he fell to the ground and sustained serious head and other injuries. Toll Brothers had direct knowledge of the ongoing failure to follow the fall protection rules. After Tenezaca's fall, defendants did nothing to correct the ongoing failure to follow the safety rules on this project. As such, only nine days later another Anchor Framing worker, Jose Zuna, suffered a similar fall down incident and serious injuries. (*Exhibit A, Gallagher Report*) (*Exhibit B- Selected Portions of OSHA Investigation File*)

On March 4, 2009 Jose Zuna was directed to replace a framed in window on another townhouse on the same worksite. He was directed by the his foreman, who was working along side him, to climb a scaffold and remove and reset the window. The scaffold was built so they could access the height required and be able to remove the window without lowering it to the ground. Anchor was receiving pressure from Toll Brothers to get the work done as fast as possible, without

regard for safety. OSHA and industry standard fall protection and scaffolding safety rules were neither enforced nor followed. As a result, the worker was caused to fall about 20 feet to the ground and also sustain serious injuries. (*Exhibit A- Gallagher Report*) (*Exhibit B- Selected Portions of OSHA Investigation File*)

The second incident- Zuna- occurred about seven working days after the first one- Tenezaca- and involved the same defendants and actors, even with actual knowledge of the previous catastrophe, defendants chose to continue to disregard safe working practices. Given their similar and linked nature, OSHA conducted a joint investigation into both incidents and issued citations. (*Exhibit B- Selected Portions of OSHA Investigation File*)

Both workers continue to suffer from the resulting severe injuries.

II. Legal Discussion

The Toll Brothers defendants have served an expert report from Timothy Carlsen, PE of Affiliated Engineering.[1] In typical fashion, Carlsen concludes Toll Brothers has no fault for the incidents at issue. (*Exhibit C, Carlsen Report*)

Among the qualifications Carlsen offers in support of his expert testimony is his membership in and/or titles from several professional organizations including the Board of Certified Safety Professionals, International Code Counsel (ICC), American Society of Civil Engineers, National Society of Professional Engineers, New Jersey Society of Professional Engineers and American Society of Safety Engineers. (*Exhibit D, Carlsen CV*). Plaintiff is entitled to explore the legitimacy of these proffered credentials.

In a litigation case like this it is proper and appropriate to investigate the purported qualifications of an expert. *Lawlor v. Kolarsick*, 92 *N.J.Super.* 309, 312-13 (App.Div.), *certif. denied*, 48 *N.J.* 356 (1966) (cross examination of a purported expert witness may include evidence that the witness's purported qualifications to comment on the issues presented "was less than he claimed, and that such deficiency affected his credibility.") When impeaching an expert in this regard, "the test of relevancy" "is not whether the answer sought will elucidate any of the main issues, but whether it will to a useful extent aid the court or jury in appraising the credibility of the witness."*Id.* at 314 (quoting *Mc-Cormick, Evidence*, § 29, 54-55 (1954)).

Cases like this are, in essence, a battle of the experts. *Das v. Thani*, 171 *N.J.* 518, 524 (2002). It is entirely proper to explore the purported qualifications of the experts. *See, e.g. Maccarone v. Edison Metuchen Orthopedic Group*, 2008 WL 4763026 (App.Div. 2008) ("Plaintiff's expert had obvious credibility issues and there were substantial, legitimate questions respecting his credentials.") Credibility of an expert is uniquely within the province of the jury. *State v. Vandeweaghe*, 177 *N.J.*229, 239 (2003). The jury is never bound to accept the testimony of an expert

[1]The Court may take judicial notice that Affiliated Engineering is primarily retained by defendants/insurance carriers in construction injury litigation.

witness. *State v. M.J.K,* 369 *N.J.Super.* 532, 549 (App.Div.), *certif. granted,* 181 *N.J.* 549 (2004), *appeal dismissed,* 187 *N.J.* 74 (2005). And with respect to purported qualifications specifically, the Supreme Court has observed that potential weaknesses in credentials should be the subject of "searching cross-examination" to guide the jury in the weight it ascribes to the expert's testimony. *State v. Jenewicz,* 193 N.J. 440, 455 (2008).

Furthermore, the scope of discovery as set forth in the New Jersey Court Rules must be "construed liberally, for the search for truth in aid of justice is paramount." *Myers v. St. Francis Hospital*, 91 N.J.Super. 377, 385 (App.Div.1966). In fact *Rule* 4:17-4 (e) requires expert's to disclose their purported qualifications. Our courts have consistently held that pretrial discovery should be liberally construed and accorded the broadest possible latitude because we adhere to the belief that justice is more likely to be achieved when there has been full disclosure and all parties are conversant with all available facts. *Payton v. New Jersey Turnpike Auth.*, 148 N.J. 524, 535 (1997); *Jenkins v. Rainner*, 69 N.J. 50, 56 (1976); *In re Selser*, 15 N.J. 393 (1954); *Blumberg v. Dornbusch*, 139 N.J.Super. 433, 437 (App.Div.1976); *Rogotzki v. Schept*, 91 N.J.Super. 135, 146 (App.Div.1966); *Martin v. Educational Testing Serv., Inc.*, 179 N.J.Super. 317, 327 (Ch.Div.1981). Such liberal construction allows the court to compel a party to produce all unprivileged information which is relevant or may lead to the discovery of relevant evidence concerning the respective positions of both plaintiff and defendant. *Shanley & Fisher, P.C. v. Sisselman*, 215 N.J.Super. 200, 216 (App.Div.1987); *Huie v. Newcomb Hospital*, 112 N.J.Super. 429 (App.Div.1970); *Rogotzki v. Schept*, 91 N.J.Super. 135, 146 (App.Div.1966)

As stated, plaintiff seeks to look into these purported qualifications of this expert. For example, among the qualifications Carlsen relies upon is his being designated a "Certified Safety Professional" by the Board of Certified Safety Professionals. Although he holds himself out as a "Safety Professional," since at least 2002 Carlsen by all accounts has been exclusively testifying for contractors seeking to avoid safety responsibility for safety violations. Putting aside this unsettling reality, there is reason to question the accuracy of what Carlsen represented to the Board in receiving this "Certified Safety Professional" title.

A safety professional is one who has a legitimate dedication to safety. In order to become a "Certified Safety Professional" ("CSP") by the by Board of Certified Safety Professionals specifically, the candidate must have four years of professional safety experience where professional safety is the primary function of the position. Collateral duties in safety are not counted. Whereas for the last 13 years Carlsen has devoted his career to protecting contractors whose safety violations needlessly endanger the public after injury has already resulted, to become a CSP the candidate's "primary responsibility must be the prevention of harm to people..., rather than responsibility for responding to harmful events." Furthermore, these "professional safety functions must be at least 50% of the position duties." (*Exhibit E, CSP Application at 3*)

Despite this clearly a proper area of discovery, cross-examination and impeachment, Carlsen was highly resistant to disclosing the information supporting these qualifications. He recently testified at his deposition:

Q. ...When you took the test to be a Certified Safety Professional – By the way, did you take a test?
A. Yes, I did.

Q. ...Did you fill out an application?
A. Yes.

Q. ...And are you in fact a Certified Safety Professional by the Board of Certified Safety Professionals?
A. I am.

...

Q. And all the information you submitted to the Board of Certified Safety Professionals in your written application, was it all correct and accurate?
A. Of course.

Q. And you did not misrepresent anything in there?
A. Correct.

Q. Would you have any problem with us getting a copy of your application from the Board of Safety Professionals?
A. I would.

Q. Why?
A. You're not entitled to it.

Q. Well, but why as you sit here would you have a problem with us getting that?
A. I don't see any need for me to present that for any purpose.

Q. Okay.
A. The Board of Certified Safety Professionals found my application, my test scores, my experience to be suitable.
Q. And you stand behind everything you put in that application?
A. Absolutely.

Q. Okay. And everything you put in that application is true and correct?
A. I think I just answered that. Absolutely.

Q. Okay. But you don't want us to see the application. Is that what you're telling us?
A. You do not need to get a copy of any application for any of my societies, my licenses, my memberships, anything. You do not.

Q. Well, you say I don't need to. That's a different question. The question very simply is you don't want us to get it. Right? You don't want us to see that?

A. I do not feel obligated to give you the permission to obtain that application. That's correct.

Q. Okay. And that's because you're concerned about what might be in there in relation to what you've testified to here or previously?
MR. PERRONE: Objection.
THE WITNESS: No.

MR. CLARK:
Q. Okay.
A. I don't think I need to give you any further explanation.

Q. And is that because you don't have any further explanation?
A. There's no need for a further explanation.

Q. Well, there is if I ask you in a deposition.
A. I've given you the most complete answer I can give you. No. I will not give you permission to acquire my application to the Board of Certified Safety Professionals.

Q. Okay.
A. I won't give you authority to obtain any of my applications for anything that I've done.

Q. And one might say that's because there might be a question about what's in there as an explanation. Do you have any other explanation as to why you don't want that other than you just don't want it?
MR. PERRONE: Objection.
THE WITNESS: It's not a publicly available document. It's between the board and me. And there's no reason for you or anyone else to acquire it.

(*Exhibit F, Carlsen Deposition at 60-64*)

Despite the above, Carlsen believes no one should find out what the Board was told in connection with his receiving that Certification:

Q. ...If expert X holds herself out as an expert in the field of construction-site safety and part of that holding herself out as an expert is that they have a certification from the Board of Safety Professionals, don't you think the judge or jury should be entitled to know what information was provided to the board to get that certification?
MR. PERRONE: Objection
THE WITNESS: No.

(*Exhibit F, Carlsen Deposition at 68-69*) He refused to sign any authorizations to enable us to obtain this information. (*Exhibit F, Carlsen Deposition at 71-74*)

We even offered a proposition to end the inquiry:

Q. Do you want to stipulate today that you will not, moving forward in this case, tell anyone, including a judge or a jury, or -- hold yourself out as a Certified Safety Professional? Do you want to stipulate that that's going to be removed from your CV in the case and that would end the inquiry?
MR. SULLIVAN: Objection.

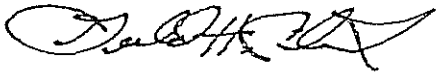
BY MR. CLARK:
Q. Do you want to do that?
MR. PERRONE: Objection.
THE WITNESS: Of course not.

(*Exhibit F, Carlsen Deposition at 70-71*)

This is clearly the proper subject of discovery, cross-examination and impeachment. The Court, counsel and jury are entitled to know what this purported expert told the various professional organizations to obtain the kinds of credentials he relies upon to give expert testimony in this case. The law is clear on this issue.

Accordingly, it is respectfully requested the Court grant the within Motion to Compel the defense liability expert to produce of signed authorizations with respect to the Board of Certified Safety Professionals, International Code Counsel (ICC), American Society of Civil Engineers, National Society of Professional Engineers, New Jersey Society of Professional Engineers and American Society of Safety Engineers, which are attached hereto as Exhibit G.

Respectfully submitted,



GERALD H. CLARK

cc: Bonnie Hanlon, Esq. (Via Electronic and Lawyers Service)
Patrick Perrone, Esq. (Via Electronic and Lawyers Service)
John Sullivan, Esq. (Via Electronic and Lawyers Service)

Compel Authorizations- letter brief.wpd

EXHIBIT C

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February 11, 2015

VIA LAWYERS SERVICE
Honorable Ned M. Rosenberg, J.S.C.
Essex County Superior Court
Hall of Records
465 Dr. Martin Luther King, Jr. Blvd., Chambers 224
Newark, New Jersey 07102

Re: **Feliciano Tenezaca and Jose Zuna v. Toll Brothers, Inc.**
Docket No.: ESX-L-1262-11
Our File: 335-0

1) **Plaintiffs' Motion to Compel Production of Signed Authorizations**
2) **Motion on Short Notice to Intervene by Timothy J. Carlsen**

Returnable February 20, 2015

Dear Judge Rosenberg:

Please accept the following letter brief on behalf of plaintiffs Feliciano Tenezaca and Jose Zuna in support of plaintiffs' Motion to Compel Production of Signed Authorization as well as serve as an Opposition to the Motion on Short Notice filed by Timothy J. Carlson to Intervene For the Purpose of Opposing Plaintiffs' Motion. These motions are currently returnable before Your Honor on February 20, 2015.

I. Mr. Carlsen's Motion to Intervene is Procedurally and Legally Deficient and Should be Denied

The motion filed by Timothy J. Carlson proposing to intervene in this litigation "solely for the purpose of opposing plaintiffs' motion to compel production of signed authorization" is procedurally flawed and is not supported by the relevant legal authority. The proper procedure for intervention in state court is clearly set forth in *Rule* 4:33-3. Under this *Rule*, upon motion, a party can seek to intervene either as a plaintiff or a defendant. In addition to serving a motion to intervene on all parties, the person desiring to intervene must also attach to the motion a pleading setting forth the claim or defense for which the intervention is sought, along with a case information statement. If the motion is granted an intervener becomes a party to the litigation and that is why a form of a Complaint or Answer is required to be submitted.

The current motion to intervene filed by Timothy J. Carlsen does not comply with *R.* 4:33-3 in that no pleading or case information statement are attached to the unsubstantiated motion papers. Mr. Carlsen's motion is further flawed as he proposes to intervene only for the limited purpose of responding to plaintiffs' motion to compel production of signed authorizations. This intervention for only a small period of time has absolutely no support in the New Jersey court rules or case law. One is either in the case as a party or they are not. Mr. Carlsen cannot have it both ways and attempt to intervene in this case but only for a limited time and limited purpose. The rules of intervention do not work that way.

There are two types of intervention, intervention as of right under *R.* 4:33-1 and permissive intervention under *R.* 4:33-2. Mr. Carlsen is seeking to intervene under *R.* 4:33-1, intervention as of right, and as such he bears the burden of establishing all of the necessary factors and requirements to enable him to intervene. *R.* 4:33-1 provides in part:

> Upon timely application anyone shall be permitted to intervene in an action if the applicant claims an interest relating to the property or transaction which is the subject of the action and if so situated that the disposition of the action may, as a practical matter, impair or impede the ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The courts have clearly articulated the four criteria for intervention as of right under *R.* 4:33-1. To intervene as of right, the movant must establish the following: 1) claim "an interest relating to the property or transaction which is the subject of the transaction"; 2) show that the movant is "so situated that the disposition of the action may as a practical matter, impair or impede its ability to protect that interest"; 3) demonstrate that the movant's interest is not "adequately represented by existing parties"; and 4) make a "timely application to intervene". *See Sutter v. Horizon Blue Cross and Blue Shield of New Jersey*, 406 N.J. Super 86, 106 (App. Div. 2009): *Builders League of South Jersey, Inc. v. Gloucester County Utilities Authority*, 386 N.J. Super 462, 468 (App. Div 2006). Although Mr. Carlsen cites these four criteria in his moving papers, he fails to specifically address how he has satisfied each of the criteria. This failure is most likely due to the fact that Mr. Carlsen cannot possibly satisfy any of the above requirements and is therefore not entitled to intervene as of right.

In the case *sub judice*, Mr. Carlsen cannot possibly satisfy the first requirement, "an interest relating to the property or transaction which is the subject of the transaction," as he has absolutely no interest in the construction site on which both plaintiffs were injured (the property) nor does he have interest in any of the companies, whether it be the general contractor, Toll Brother, or any of the subcontractors (the transaction). In fact if the proposed expert did have such a biased interest it would not appropriate for him to be an expert in the litigation. Experts by definition are supposed to be dis-interested. Expert testimony is subject to the other rules of evidence, and cannot create a danger of undue prejudice or result from bias on the part of the expert. *Id.* at 209. In determining admissibility of that expert's opinion, the court must make sure that the expert's qualifications are legitimate and that there is no bias affecting the testimony of that expert. *Rubanick v. Witco Chem. Corp.*, 125 N.J. 421, 453 (1991).

Mr. Carlsen is not a partner, shareholder or any person who has any interest in the subject of this litigation. This not a situation where a tenant or a landowner has a direct financial interest in the litigation or who is an indispensable party with a stake in the litigation. *See NVE Bank v. Ber-Loew Partnership*, 2012 WL 5381697 (N.J. Super A.D.)(attached hereto) wherein the court found that a partner in a Partnership had not satisfied the first required element of intervention under *R.* 4:33-1, that he had an interest relating to the property that was the subject of plaintiff's action. The Court held the properties at issue were owned solely by the Partnership and the Partnership had sole interest in defending any actions relating to the properties. *Id.* at 5. Furthermore in *Sutter v. Horizon Blue Cross Blue Shield*, 406 N.J. Super 86 (App. Div. 2009) the court denied a medical society's motion to intervene as the societies did not have an interest in the subject matter of the action. *Id.* at 107. The *Sutter* court found that since the societies had nothing to lose or gain based on the outcome of the settlement/resolution of case, they could not make the required showing of intervention as of right. *Id.*

In the case at hand Mr. Carlsen has absolutely no interest in this personal injury lawsuit filed by two severely injured plaintiffs against Toll Brothers, the developer, and the other contractors on the job site. Mr. Carlsen is merely an expert hired by Toll Brothers to support Toll Brother's incorrect assertion that they did not commit any safety violations. He, in no stretch of the imagination, has any "interest in the subject matter of the lawsuit." Mr. Carlsen might have an interest in not signing the requested certifications as he apparently does not want the plaintiff to see what he represented to become a "Safety Expert," but this is no way equates to an "interest in the subject matter of this lawsuit." Furthermore, Mr. Carlsen has nothing to gain or lose from the outcome of this personal injury action, as he merely gets paid by the hour to offer his opinion. Therefore, it is quite clear that Mr. Carlsen fails to satisfy the first prong of the intervention analysis as he has no, "interest in the subject matter of the lawsuit."

Mr. Carlsen also fails to satisfy the second criteria under the intervention analysis, that he is "so situated that the disposition of the litigation may impair or impede his ability to protect that interest." *See Builders League of South Jersey, Inc. v. Gloucester County Utilities Authority*, 386 N.J. Super 462, 468 (App. Div 2006). The disposition of this litigation does not impair or impede Mr. Carlsen's interest in the litigation as, was noted above, he has no interest or stake in this personal injury litigation. It is the ligation itself, not a rather routine discovery issue of the litigation such as signed certifications, that a potential intervener must have a stake in. Having Mr. Carlsen sign the required Safety certifications does not "impair or impede" Mr. Carlsen's ability to protect his interest in the litigation, as he has absolutely no interest in this litigation to begin with.

The third criteria Mr. Carlsen must satisfy before he can intervene is to "demonstrate that the applicant's interest is not adequately represented by existing parties". *See Builders League of South Jersey, Inc. v. Gloucester County Utilities Authority*, 386 N.J. Super 462, 468 (App. Div 2006). Mr. Carlsen was hired by defendant Toll Brothers to act as its "Safety Expert". The attorney for Toll Brothers defended the deposition of Mr. Carlsen and interposed any and all objections he felt were necessary. Therefore it is quite clear that the discovery dispute involving this expert is "adequately represented by existing parties," namely Toll Brothers. Any objections or issues that Mr. Carsen has regarding signing certifications to enable plaintiff to explore the legitimacy of Mr. Carlsen's safety

credentials can be adequately defended by counsel for Toll Brothers. As a result, Mr. Carlsen fails to satisfy the third intervener criteria and as such his motion must be denied.

The fourth criteria for intervention, "a timely application to intervene" is also not satisfied as any request at any time by Mr. Carlsen to intervene would be inappropriate. One cannot intervene just for a small portion of the case and then exit out of the case. Once a motion to intervene is granted that person becomes a party to the case. Whether the intervener is joining as a plaintiff or defendant they are joining the actual, ongoing litigation. It is irrelevant when Mr. Carlsen filed his motion to intervene as the timing would always be improper since his actual motion is procedurally improper and legally deficient.

Based upon the above analysis it is clear that a Motion to Intervene is not the proper procedural tool for Mr. Carlsen to enter this personal injury litigation and even if it were, he clearly fails to satisfy the four criteria necessary to intervene as of right under *R.* 4:33-1. Furthermore Mr. Carlsen fails to accompany his current motion with the proposed pleading he would file if the motion were granted as required under *R.* 4:33-3. Therefore, Mr. Carlsen's Motion to Intervene should be denied in it's entirety.

II. Plaintiff's Motion to Compel Authorizations

Plaintiff's Motion to Compel Mr. Carlsen to Sign Authorizations on the other hand is supported by the relevant legal authority and should be granted in its entirety. It must be noted that plaintiffs' motion should be treated as unopposed since Mr. Carlsen has not provided the requisite basis to become an intervener as of right and in fact Mr. Carslen has no standing to assert any claims or opposition in this litigation. Standing refers to the plaintiff's "ability or entitlement to maintain an action before the court," and courts will not entertain matters where legal standing is lacking. *New Jersey State Chamber of Commerce v. New Jersey Election Law Enforcement Comm'n*, 82 *N.J.* 57, 67, 411 A.2d 168 (1980); *In re Quinlan*, 70 *N.J.* 10, 34, 355 A.2d 647, cert. denied, 429 U.S. 922, 97 S. Ct. 319, 50 L. Ed. 2d 289 (1976). Standing is present where the plaintiff has a sufficient stake in the outcome of the litigation and there is a substantial likelihood that plaintiff will suffer harm in the event of an unfavorable decision. *New Jersey State Chamber of Commerce*, 82 *N.J.* at 67. The purpose of standing is to "assure that the invocation and exercise of judicial power in a given case are appropriate." *Id.* at 69. Further, the doctrine "serves to fulfill the paramount judicial responsibility of a court to seek just and expeditious determinations on the ultimate merits." *Ibid.*

Mr. Carlsen, although lacking standing to assert any claims or opposition, attempts to assert that the plaintiffs' request for signed authorizations is merely a "fishing expedition". This accusation could not be further from the truth. The requested authorizations are clearly relevant and permitted by New Jersey's discovery rules. Further, the argument against disclosure based on the allegation of a "fishing expedition" was dismissed by the Supreme Court over fifty years ago. *See Hickman v. Taylor*, 329 U.S. 495, 507 (1947)("no longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case."); *Westinghouse Electric Corporation v. Local No. 449 of International Union of Electrical and Radio, Machine Workers, C.I.O., et al*, 39 N.J.Super. 438, 445, (Chancery Div. 1956); *See also Olson Transportation*

v. Socony-Vacuum, 8 Fed.Rules Serv. 34.41 (E.D.Wis. 1944) ("[T]he [federal discovery] rules ... permit 'fishing' for evidence as they should."

It must also be noted that Mr. Carlsen's Motion does not claim that the requested discovery is either "confidential" or "privileged." *R.* 4:10-3 provides that the Court may make any Order limiting discovery in the interest of justice upon a good cause being shown. State and federal courts agree that trade secret and/or confidential information sought in the discovery process is entitled to protection. For example, the United States Supreme Court found:

> Liberal discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes. Because of the liberality of pretrial discovery permitted by Rule 26(b)(1), it is necessary for the trial court to have the authority to issue protective orders conferred by Rule 26(c).

Seattle Times Co. v. Rhinehart, 467 U.S. 20, 34, (1984). The New Jersey Court Rules governing protective orders expressly extends protection to a "trade secret or other confidential research, development, or commercial information...." *R.* 4:10-3(g)(emphasis added). *See also Hammock v. Hoffman-LaRoche, Inc.*, 142 N.J. 356, 376, 662 A.2d 546, 556 (1995) ("Documents containing trade secrets, confidential business information and privileged information may be protected from disclosure." (emphasis added)). As Supreme Court wrote in Lamorte, "information not technically meeting the strict requirements of trade secrets may be protected as 'confidential information.'" 167 N.J. at 300-01, 770 A. 2d at 1166-67 (citing *Roboserve, Ltd. v. Tom's Foods, Inc.* 940 F.2d 1141, 1456 (11th Cir. 1991))("A confidential relationship is distinguished by the expectations of the parties involved, while a trade secret is identified through rigorous examination of the information sought to be protected.").

Under New Jersey Law, "confidential commercial information" includes data that, while not meeting the technical definition of a trade secret, is nevertheless confidential and commercially useful, such as business methods used, records compiled and customer contacts. *A. Hollander & Son, Inc., v. Imperial Fur Blending Corp.*, 2 N.J. 235, 249, 66 A.2d 319, 325 (1949); Platinum, 285 N.J. Super at 295, 666 A.2d at 1036 (stating that the key to determining the misuse of confidential business information is the intended use of the information and the relationship of the parties at the time of the misuse).

In the case at hand Mr. Carlsen does not offer any "good cause" to support a claim of confidentiality or the need for a protective order. However even if he does make such an argument, a brief review of the information necessary for the application to be a Certified Safety Professional would negate any such position. The Application Instructions require the candidate to submit: 1) Contact information; 2) a Qualifying credential; 3) Experience information; 4) Education information; 5) Application agreement and validation (acknowledging the information is truthful); and 6) Payment. *(Exhibit E to Plaintiffs' Motion p.8 entitled CSP Chapter 3 Application Instructions)*. There is absolutely no confidential or privileged information in the application materials. As such Mr. Carlsen has no basis for his secrecy and attempt to hide the applications that he submitted to obtain his credentials.

It is Mr. Carlsen who holds himself out as a "Certified Safety Professional" and cites in his deposition and CV his membership in and/or titles from several professional organizations including the Board of Certified Safety Professionals, International Code Counsel (ICC), American Society of Civil Engineers, National Society of Professional Engineers, New Jersey Society of Professional Engineers and American Society of Safety Engineers. (*Exhibit D to Plaintiffs' Motion, Carlsen CV*). Plaintiff is certainly entitled to basic due diligence as to these purported qualifications of Mr. Carlsen and determine what Mr. Carlsen proffered when he was applying for these various titles and certifications. This is exactly the type of discovery that is proper and appropriate when investigating the purported qualifications of an expert. *See Lawlor v. Kolarsick*, 92 *N.J.Super.* 309, 312-13 (App.Div:), *certif. denied*, 48 *N.J.* 356 (1966) (cross examination of a purported expert witness may include evidence that the witness's purported qualifications to comment on the issues presented "was less than he claimed, and that such deficiency affected his credibility.")

Furthermore, the case of *Gensollen v. Pareja*, 416 N.J. Super 585 (App. Div. 2010), cited by Mr. Carlsen, is completely distinguishable from the case at hand. In *Gensollen* the expert was asked to "compile and produce nonexistent documents" that the court found would be unduly burdensome and expensive for the expert. In the case at hand Mr. Carlsen is not asked to compile or produce any documents. In fact, he is not asked to do any work at all. He is merely asked to sign authorizations, which are not privileged or confidential, which would allow plaintiff to review Mr. Carlsen's applications with the various safety boards and professional organizations. These applications and membership requests have already been completed by Mr. Carlsen and would not require any extra work or money to be expended by Mr. Carlsen or Toll Brothers. A signature, with no other effort to be expended by Mr. Carlsen, would not harass or burden defendant's expert and is certainly within the scope of relevant and pertinent discovery to impeach an expert witness.

Accordingly, it is respectfully requested the Court grant the within Motion to Compel Mr. Carlsen, the defense liability expert, to produce signed authorizations with respect to the Board of Certified Safety Professionals, International Code Counsel (ICC), American Society of Civil Engineers, National Society of Professional Engineers, New Jersey Society of Professional Engineers and American Society of Safety Engineers, which are attached to plaintiffs' motion papers as Exhibit G.

Respectfully submitted,

Stephe Tolna

STEPHANIE TOLNAI
For the firm

ST:cf

cc: Civil Motions Clerk- Essex County Superior Court (Via Lawyers Service)
Bonnie H. Hanlon, Esq. (Via Electronic & Regular Mail)
Patrick J. Perrone, Esq. (Via Electronic & Regular Mail)
John T. Sullivan, Esq. (Via Electronic & Regular Mail)

Ltr to Judge Rosenberg.wpd

Tania Roque

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Subject:	Tenezaca/Zuna v. Toll Brothers, et als.
Attachments:	doc20150211132619

Counsel,

Please see attached. Thank you.

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2012 WL 5381697
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.

NVE BANK, Plaintiff–Respondent,
v.
BER–LOEW PARTNERSHIP and Christopher Durso, Defendants–Respondents.
Richard Berlowe, Appellant.

Submitted Sept. 24, 2012. | Decided Nov. 5, 2012.

On appeal from the Superior Court of New Jersey, Chancery Division, Hudson County, Docket No. F–18303–10.

Attorneys and Law Firms

Romanowsky Law, attorneys for appellant (Brian D. Romanowsky, of counsel and on the brief).

Riker, Danzig, Scherer, Hyland & Perretti, L.L.P., attorneys for respondent NVE Bank (Anthony J. Sylvester, of counsel; Mr. Sylvester and Craig L. Steinfeld, on the brief).
Before Judges ESPINOSA and GUADAGNO.

Opinion

PER CURIAM.

*1 Appellant Richard Berlowe appeals from the denial of his motion to intervene in a foreclosure action brought by plaintiff NVE Bank against defendants Ber–Loew Partnership and Christopher Durso. On appeal, Richard Berlowe also raises issues regarding the merits of the underlying foreclosure action. We affirm.

On June 10, 1985, Richard Berlowe, Harold Berlowe, Barbara Berko, and Warren Loewenstein[1] formed Ber–Loew Partnership (the Partnership) to invest in real estate. Pursuant to the partnership agreement, capital was "contributed in equal amounts by each partner," the "capital gains and losses of the [P]artnership" were "shared equally among the partners," and each partner had an "equal voice in the conduct of the affairs of the business."

An amendment to the partnership agreement, dated June 13, 2000, named Harold Berlowe "the General Partner with the authority to bind the Partnership." Warren Loewenstein died in 1998 and Barbara Berko inherited his Partnership interest. The amendment was signed by the three remaining partners.

A partnership resolution dated March 8, 2006, and signed by all three partners, granted Harold Berlowe and Barbara Berko the power to:

> [e]ndorse, assign, transfer, mortgage or pledge bills receivable, warehouse receipts, bills of lading, stocks, bonds, real estate or other property now owned or hereafter owned or acquired by the Partnership as security for sums borrowed, and to discount the same, unconditionally guarantee payment of all bills received, negotiated or discounted and to waive demand, presentment, protest, notice of protest and notice of non-payment.

The resolution indicated that the signatures of both Harold Berlowe and Barbara Berko were required to exercise these powers. Also on March 8, 2006, a commercial loan agreement for an $830,000 loan was signed between plaintiff, as lender, and 700 Bangs Avenue, LLC (700 Bangs), as borrower. Harold Berlowe, Barbara Berko, Christopher Durso, and Raul Menares signed the loan agreement on behalf of 700 Bangs. 700 Bangs also executed a promissory note in conjunction with the loan agreement.

To secure the 700 Bangs loan, the Partnership executed a guaranty signed by Harold Berlowe and Barbara Berko. On March 8, 2006, the Partnership also executed a mortgage in favor of plaintiff on property located at 255–257 Fourth Street in Hoboken. That mortgage was signed by Harold Berlowe and Barbara Berko on behalf of the Partnership. The mortgage was registered in the Hudson County Register of Deeds on March 27, 2006. A commercial debt modification agreement dated March 20, 2007, extended the maturity date of

the $830,000 loan to March 10, 2008.

A partnership resolution of authority, dated December 12, 2007, authorized Harold Berlowe to "[b]orrow money on behalf and in the name of the Partnership, sign, execute and deliver promissory notes or other evidence of indebtedness."This resolution was signed by Harold Berlowe, Richard Berlowe, and Barbara Berko.

*2 On December 12, 2007, plaintiff made a commercial loan of $1.2 million to 707 Bangs Avenue, LLC (707 Bangs). The loan agreement was executed by Harold Berlowe as the "Managing Member" of 707 Bangs Devco LLC, which, in turn, was the managing member of 707 Bangs. On that same date, 707 Bangs also signed a commercial promissory note.

To secure the repayment of this loan from plaintiff to 707 Bangs, Harold Berlowe, as the "Managing Partner" of the Partnership, executed a guaranty dated December 12, 2007. To secure this obligation, Harold Berlowe, on behalf of the Partnership, executed a mortgage in favor of plaintiff on property located at 907 Park Avenue in Hoboken. A second commercial debt modification agreement, dated April 17, 2008, extended the maturity date of the $830,000 loan to October 13, 2008.

In April 2009, plaintiff stopped receiving payments on both the $1.2 million loan and the $830,000 loan. On March 23, 2010, plaintiff filed a complaint in foreclosure against the Partnership and Christopher Durso, seeking to foreclose on both of the Partnership's properties pursuant to the mortgages. The Partnership filed an answer on July 25, 2010. The Partnership's counsel was forced to withdraw on February 18, 2011, because of a conflict of interest.

Richard Berlowe filed a notice of motion to intervene individually as a partner in the Partnership on April 27, 2011. Plaintiff filed a certification in opposition to Richard Berlowe's motion to intervene on May 3, 2011. Plaintiff filed a supplemental certification on May 11, 2011.

On May 13, 2011, the court heard oral argument on Richard Berlowe's motion to intervene. At the hearing, each individual partner was represented by counsel, however, no one appeared on behalf of the Partnership. The court stated that if no one appeared on behalf of the Partnership at the proof hearing, scheduled for May 18, 2011, a default would be entered against the Partnership and the matter would be sent to the foreclosure unit for an entry of judgment.

In denying Richard Berlowe's motion to intervene, the court recognized that because "the individual partners [were] not named defendants," it did not have jurisdiction over them:

I don't have jurisdiction over any one entity or one person as a defendant, other than Ber–Loew Partnership and Christopher Durso, they are the named defendants in this matter.

As I mentioned before, no defendant, no party has chosen to bring in, amend, to name the individual partners in this case, so I can't start having jurisdiction, if you will, over your client, let's say, if I did not permit him to intervene or any other partner, unless they're a party to this case.

... I think the concerns your client has vis-à-vis his other partners are really separate claims in a Law Division action.

The court emphasized that because the Partnership was "the entity that guaranteed these loans" and "a defendant in this action," it, therefore, "must raise the defenses, such as they are, to this foreclosure action."The court further stated that Richard Berlowe's complaint "should be against his other partners," and that his remedy was to bring an action in the Law Division to address issues regarding the "rights and responsibilities" of the partners and "breach of fiduciary responsibilities among the partners."

*3 On May 18, 2011, the court held a proof hearing on plaintiff's foreclosure action. The court introduced and explained the nature and scope of the proof hearing by stating:

I now have three attorneys representing three partners of Ber–Loew Partnership. And notwithstanding the fact that the [P]artnership is not represented here, and I have denied [Richard Berlowe]'s motion to intervene, I will permit each one of the attorneys representing each one of the partners to cross-examine whatever witness the plaintiff is going to put on the stand in this proof hearing.

And the proof hearing today is not going to be in the nature of how much is owed; it's going to be in the nature of whether or not [plaintiff has] the right to foreclose.... [I]f I accept the proofs, and I, in fact, strike and suppress the [P]artnership's responsive pleading after hearing the proofs, I will then send this back to the foreclosure unit and it will proceed as an uncontested matter as to the [P]artnership.

As its first and only witness, plaintiff called Alice Vetrone–Layne, Executive Vice President and Chief Lending Officer for NVE Bank. Vetrone–Layne testified that she was "familiar with the loans" at issue in plaintiff's foreclosure action and that her "dealings were directly with Harold Berlowe."Harold represented to her "[t]hat he was authorized ... to sign and bind and borrow for Ber–Loew Partnership," and plaintiff "rel[ied] on the oral statements made by [Harold] Berlowe."

On August 24, 2011, the court issued its oral decision on plaintiff's foreclosure action. As to the $1.2 million debt the court found it was "uncontradicted" that the Partnership "executed and delivered" to plaintiff the guaranty and mortgage; plaintiff "relied on" the guaranty and the mortgage; the mortgage "was supported by adequate consideration;" before signing the guaranty and the mortgage on behalf of the Partnership when securing the $1.2 million loan, Harold Berlowe "represented to [plaintiff] that he was authorized to sign that mortgage on behalf of the [P]artnership;" plaintiff received and relied on the June 13, 2000 amendment to the partnership agreement, which had "provided that [Harold Berlowe,] as the general partner[,] had the authority to bind the [P]artnership;" plaintiff was also provided with the December 12, 2007 resolution of authority, "which authorized the [P]artnership to execute documents with the signature of [Harold] Berlowe only;" and Harold Berlowe's oral representations to plaintiff, the amendment, and the resolution "certainly reflected that [Harold] Berlowe not only had apparent authority, but actual authority to act on behalf of the [P]artnership."

The court also determined that the $830,000 mortgage was valid. With regard to that loan, the court made the following findings:

The documents were executed and delivered, a mortgage was executed that secured the obligation and [plaintiff] relied on those documents and made the loan. That mortgage was signed ... on behalf of the [P]artnership by [Harold] Berlowe and [Barbara] Berko[. Harold] Berlowe represented to [plaintiff] that he was authorized to sign that mortgage on behalf of the [P]artnership and there was reliance on those representations.

*4 [Plaintiff] was also provided with a copy of the first amendment to the partnership agreement, signed by all the partners of the [P]artnership, which provided that [Harold] Berlowe[,] as general partner[,] had the authority to bind the partnership. There is no obligation for [plaintiff] to examine the relationship among the partners, and that is somewhat axiomatic and is reflected in the case that is oftentimes cited, *Great Falls Bank v. Pardo*, 273 *N.J.Super.* 542 (App.Div.1994)].

The court concluded that plaintiff demonstrated a "prima facie right to foreclose" on the two properties, and that the defenses asserted did not "rise to the level of a valid defense to this foreclosure action."

On August 30, 2011, the court issued a formal order striking the Partnership's answer to plaintiff's complaint and referring the matter to the foreclosure unit as an uncontested matter. On December 7, 2011, the court entered a final judgment of foreclosure. Richard Berlowe filed a notice of appeal on January 19, 2012.

On appeal, Richard Berlowe makes two arguments: (1) the Chancery Division erred when it found that

the Partnership's guaranties and mortgages were enforceable, and (2) the Chancery Division erred when it denied his motion to intervene.

Because we find that the Chancery Division properly denied Richard Berlowe's motion to intervene, we will not consider the issues regarding the merits of plaintiff's foreclosure action.

Richard Berlowe claims that, as a member of the Partnership, he has "a direct interest in the assets and profitability of the Partnership" because the value of his interest in the Partnership is reduced if assets of the Partnership are lost. Richard also argues that because Harold Berlowe and Barbara Berko executed personal guaranties of the loans, it was in their interests for plaintiff to foreclose on the Partnership's property. Thus, his interests "were not being adequately protected by any other party to this action."Richard also claims that "no prejudice would have befallen the original parties were [he] allowed to intervene."

Plaintiff maintains that the Chancery Division correctly denied Richard Berlowe's motion to intervene and that he is a "non-party to this case" and, therefore, "cannot pursue an appeal of [the orders] entered in this case."We agree.

Rule 4:33–1 establishes the four criteria for determining intervention as of right:

The applicant must (1) claim "an interest relating to the property or transaction which is the subject of the action," (2) show he is "so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest," (3) demonstrate that the "applicant's interest" is not "adequately represented by existing parties," and (4) make a "timely" application to intervene.

[*Chesterbrooke Ltd. P'ship v. Planning Bd.*, 237 *N.J. Super.* 118, 124 (App.Div.), *certif. denied*, 118 *N.J.* 234 (1989).]

*5 We have construed this rule liberally and stated that "[t]he test is whether the granting of the motion will unduly delay or prejudice the rights of the original parties."*Atl. Emp'rs Ins. Co. v. Tots & Toddlers Pre–School Day Care Ctr.*, 239 *N.J.Super.* 276, 280 (App.Div.), *certif. denied*, 122 *N.J.* 147 (1990). As the rule is not discretionary, a court must approve an application for intervention as of right if the four criteria are satisfied.*Chesterbrooke, supra*, 237 *N.J.Super.* at 124.

Applying the principles that we enunciated in *Chesterbrooke*, Richard Berlowe failed to satisfy the first required element—that he had an interest relating to the property that was the subject of plaintiff's action. As both properties were owned solely by the Partnership, the Partnership has the sole interest in defending any actions relating to those properties.

Even under permissive intervention, governed by *Rule* 4:33–2, the move to intervene was not timely. *Rule* 4:33–2 provides in pertinent part:

> Upon timely application anyone may be permitted to intervene in an action if the claim or defense and the main action have a question of law or fact in common.... In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Here, the trial court noted that Richard Berlowe was moving to intervene five days before trial "at the 11th hour...." The judge also found, "as a matter of fact," that Richard's intervention would delay the foreclosure and the judge was not inclined to "take this foreclosure action and turn it into, if you will, a free-for-all among the partners, who don't even have enough ability to get together to preserve the partnership and to defend it against this foreclosure action."The Chancery Division judge did permit counsel for each of the individual partners to participate in the proof hearing with the opportunity to cross-examine plaintiff's witness and submit proposed findings of fact. We are satisfied that the Chancery Division judge correctly denied the intervention motion and we affirm this decision substantially for the reasons stated by the judge on the record of May 13, 2011.

Because the court properly denied Richard Berlowe's motion to intervene, he is not a party to the underlying foreclosure action and, therefore, he may not raise issues on appeal relating to the merits of that action.

Affirmed.

Footnotes

1 Richard Berlowe is Harold Berlowe's father. Barbara Berko and Warren Loewenstein were married.

EXHIBIT D

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April 15, 2015

VIA FAX 973-424-6804 & LAWYERS SERVICE
The Honorable Ned M. Rosenberg, J.S.C.
Essex County Superior Court
Hall of Records
465 Dr. Martin Luther King, Jr. Blvd., Chambers 224
Newark, New Jersey 07102

Re: Feliciano Tenezaca v. Toll Brothers, et al.
Docket No.: ESX-L-1262-11
Our File: 335-0

Plaintiffs' Motion to Compel Production of Signed Authorizations- Proposed Form of Order Issue

Supplemental Phone Conference Pending

Dear Judge Rosenberg:

We represent Plaintiff Feliciano Tenezaca in the above matter.[1] On Friday, April 10, 2015 Your Honor heard argument and granted the above motion. Your Honor then directed our office to confer with counsel for intervenor Timothy Carlsen and submit a proposed form of order by Monday afternoon, April 13. On Friday we sent the proposed Order to Carlsen's counsel for any comments or changes and advised we would send it to the court by noon Monday. Instead of conferring back to us, intervenor counsel without notice sent their own proposed order to the Court yesterday. Apparently it was faxed to the Court in the morning but not sent to us until late in the afternoon.

In any event, here is why intervenor's proposed Order is wrong and plaintiff's should be entered.

The basic rule is that discovery is proper of materials that are relevant or likely to lead to the discovery of relevant evidence. *Rule* 4:10-2 "Scope of Discovery" ("Parties may obtain discovery regarding any matter, not privileged, which is relevant...[or]if the information sought appears reasonably calculated to lead to the discovery of admissible evidence..."; *Shanley & Fisher, P.C. v. Sisselman*, 215 N.J.Super. 200, 216 (App.Div.1987) (New Jersey discovery rules are liberally constructed and allow the court to compel production of all unprivileged information which is relevant or may lead to the discovery of relevant

[1]As the Court is aware the companion case, *Zuna v. Toll Brothers*, has settled.

evidence). Thus, if the materials are relevant and not priviledged, the default is they should be produced.

If however the party (Carlsen is now a "party," having been granted intervenor status) from whom the discovery is sought feels the materials are "confidential," "trade secret" or otherwise should not be produced, it is incumbent upon that party to file an affirmative motion for a protective Order under *Rule* 4:10-2 and meet the high standard of "good cause" under *Hammock v. Hoffman-LaRoche, Inc.*, 142 N.J. 356, 376 (1995) and make a particularized demonstration on a document by document basis that secrecy should overcome the "profound public interest" in favor of access. *Hammock* at 378 ("[I]n litigation that comes before our courts, there is a profound public interest when matters of health, safety, and consumer fraud are involved.")

Plaintiff's Order is proper and consistent with the law and Your Honor's rulings because it allows plaintiff to make an additional proffer as to why the documents at issue are "relevant...[or] ...reasonably calculated to lead to the discovery of [relevant] evidence..." while the Court conducts its *in camera* review to address Carlsen's specious claims of "confidentiality." *R.* 4:10-2. Carlsen does not claim the documents are by any stretch of the imagination privileged.

Aside from the fact that Carlsen has never moved for a protective order, Carlsen's proposed Order is inconsistent with the law and Your Honor's ruling for two main reasons.

First, it presupposes the only possible "relevance" of the documents at issue is whether or not Carlsen misrepresented his credentials to get the Certified Safety Professional ("CSP") designation. It is true we want to know what he told the CSP and other Boards about his credentials because his CV and relevant deposition testimony does not meet the requirements to obtain the CSP designation. But the documents potentially go far beyond that as we discussed previously. Among other things, Carlsen has issued a report in this case (as he has done in the dozens of prior cases we have had with him) that the "root cause" of the injuries here were the actions of the worker. But this is contrary to basic safety principles as CSP candidates are tested on. We want to know how he answered these kinds of questions because the correct answers directly contradict the kinds of opinions he has given in this case (and dozens or hundreds of others).

The second reason Carlsen's proposed form of Order is wrong is because it improperly attempts to shift the burden to the plaintiff to demonstrate a protective order is not appropriate. This is specifically contrary to *Rule* 4:10-2 and Supreme Court precedent on the issue of blocking non-privileged discovery. As discussed and cited above, under the law the party claiming "confidentiality" has the burden of overcoming the "profound public interest" presumption in favor of access. The opponent has the burden of demonstrating with specificity on a document by document basis with competent proof of the actual harm that would result. Carlsen's proposed order improperly flips that burden to the plaintiff.

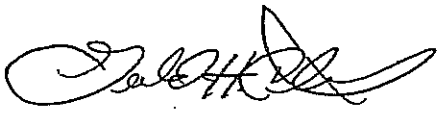
Beyond that, plaintiff does not have the documents to be able to delineate with specificity "how the documents will demonstrate misrepresentations(s)...by Carlsen..." (Carlsen proposed order) and such is simply not the standard under the law. On the other hand, presumably Carlsen kept copies of his applications and related documents and knows exactly what is in those files. In fact

he could use his CSP login information to obtain same as Exhibit E to the moving papers shows.

Calsen's proposed Order also specifically contradicts what was discussed at the hearing and ordered by Your Honor with respect to Carlsen turning over executed authorizations. Plaintiff moved and Your Honor ruled Carlsen is to produce the signed authorizations. But now Carlsen's counsel has after the fact submitted an Order which does not provide for that relief and instead provides for Carlsen's counsel with no time frame to "submit the authorizations to the organizations." This is not what the Court ordered, is unworkable in practice, has no safeguards to ensure the documents will actually be promptly, completely and timely obtained, or obtained at all, and diligently followed up on as is usually necessary when obtaining documents via authorization. This is not what Your Honor ordered. It will result in more delay. It will result in more motion practice.

The fact that Carlsen's order is so far removed from what Your Honor ruled explains why Carlsen's counsel did not respond to our overtures to confer on the proposed Order as Your Honor directed. It is respectfully requested Your Honor enter Plaintiff's proposed form of Order.

Respectfully submitted,



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For the firm

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Patrick J. Perrone, Esq. (Via Fax 973-848-4001 & Regular Mail)
Timothy Freeman, Esq. (Via Fax 973 242-8099 & Regular Mail)

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Send Result Report

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EXHIBIT E

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April 21, 2015

VIA FAX 973-424-6804
The Honorable Ned M. Rosenberg, J.S.C.
Essex County Superior Court
Hall of Records
465 Dr. Martin Luther King, Jr. Blvd., Chambers 224
Newark, New Jersey 07102

Re: Feliciano Tenezaca v. Toll Brothers, et al.
Docket No.: ESX-L-1262-11
Our File: 335-0

Plaintiffs' Motion to Compel Production of Signed Authorizations- Proposed Form of Order Issue

Phone Conference Scheduled for 4/21/15

Dear Judge Rosenberg:

We represent Plaintiff Feliciano Tenezaca in the above matter. We would like to briefly respond to additional comments made in the April 17, 2015 letter by counsel for intervenor Timothy Carlsen.

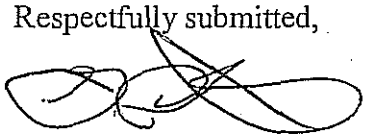
The court granted Plaintiff's motion to compel Timothy Carlsen to sign the authorizations at issue to enable plaintiff to obtain the documents and send them to the Court for in camera review to address claims of confidentiality. Counsel for Carlsen now attempts to circumvent that ruling by sending in a proposed form of Order that bucks this ruling with the aim of preventing plaintiff from actually receiving the documents. This is why counsel's recent letters make the same arguments that were previously rejected in the underlying motion that the discovery should be blocked.

If the documents are relevant or likely to lead to relevant evidence, they are discoverable. If a party wants to block relevant discovery they are supposed to meet the burden of proof for a protective order. An in camera review is supposed to be for purposes of addressing claims of privilege, confidentiality and trade secrets, not to determine issues of relevance. "If a claim of privilege is disputed, an in camera review by the court of the allegedly privileged material is ordinarily the first step in determining the issue." Pressler & Verniero, Current N.J. Court Rules, Comment 6 to R. 4:10-2 (2011) (*citing Loigman v. Kimmelman*, 102 N.J. 98 (1986)). "When a New Jersey trial court reviews documents in

camera, it must make specific determinations regarding plaintiff's access to them, including an expression of reasons for the court's rulings." *Seacoast Builders Corp. v. Rutgers*, 358 N.J. Super. 524, 542 (App. Div. 2003); *see also Hartz Mountain Indus., Inc. v. N.J. Sports & Exposition Auth.*, 369 N.J. Super. 175, 183 (App. Div.) (stating that in camera proceedings "impl[y] the necessity of recorded fact-finding by the trial judge"), certif. denied, 182 N.J. 147 (2004). Critically, "[t]he trial court must examine each document individually, and explain as to each document deemed privileged why it has so ruled." *Seacoast, supra*, 358 N.J. Super. at 542.

Carlsen has made no showing that the documents are privileged, confidential or any kind of trade secret. Carlsen just unconvincingly and subjectively argues the documents are "not necessary:" But that is simply not the standard for discovery under any measure and no justification for blocking relevant discovery that has already been ruled on and ordered. This is particularly so where all Carlsen has to do is sign some authorizations.

Respectfully submitted,



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