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Managing Meddlesome Houseguests: Tips for Preparing Against Abusive Property Inspection Practices

Protecting the premises at issue in a construction claim from unwelcomed, prying eyes and ears throughout the duration of litigation is of great importance. Preventing abuses of the authority to inspect property vested by Illinois Supreme Court Rule 214 typically falls on the shoulders of defense counsel. That obligation has become increasingly difficult in the digital age, where a lack of foresight could result in the unintentional release of proprietary information, the creation and wide dissemination of damaging visuals, or even exposure to further litigation through unrelated claims. This article identifies a few of the many issues practitioners may consider when attempting to protect jobsites from oppressive, unreasonable, or unauthorized property inspections.

Limitations on Unauthorized and Unannounced Property Inspections

Pursuant to Illinois Supreme Court Rule 214, the plaintiffs may request permission to access any real estate that is "relevant to the subject matter of the action." When that real estate involves a construction site, different concerns arise depending upon whether all related work has been completed by the time of the commencement of the claim. A plot of land hosting an up-and-running worksite with ongoing construction presents one set of issues, where a completed project site hosting ongoing business activities has its own unique concerns—especially for the defendant construction company working to maintain a positive business relationship with the owner of the property. Either way, consideration must be given to how to preclude the plaintiffs, their attorneys, and their investigators from running rampant on the property for the purposes of strengthening their case.

First, counsel must determine whether the plaintiff is entitled to access the property. Under Rule 214, Illinois law permits litigants to gain access to real estate for the purpose of inspections, surveys, or the taking of samples or photographs whenever the real estate is relevant to the subject matter of the action. Ill. S. Ct. R. 214. The discovery rules were intended to provide a party engaged in ongoing litigation the means to discover relevant matter from other parties by motion or upon written request, and from third persons, through the use of subpoenas. Pre-suit, there is no authority requiring a property owner to open its door to inspection on demand and without appropriate notice, and a property owner owes no legal duty to allow an inspection of the site of an individual's injury prior to the institution of a lawsuit with accompanying discovery proceedings. *Rhodes v. Uniroyal, Inc.*, 101 Ill. App. 3d 328, 330 (3d Dist. 1981).

Even once in suit, the permission to inspect property provided by Rule 214 is not an unfettered right. Rule 201(c) makes it clear that the bounds of discovery should not exceed reasonable limits when it causes unreasonable annoyance, expense, embarrassment, disadvantage, or oppression. Ill. S. Ct. R. 201(c). Pursuant to Rule 201(c)(2), the court is obligated to hear and consider any such objection upon motion of either party. *Id.* Nonetheless, the protections afforded under Rule 201 are somewhat nebulous as there are very few cases directly addressing limits on the appropriate bounds and scope of property inspections afforded in the context of a construction claim. As such, general contractors and property owners are

understandably reticent to invite hoards of attorneys with expert consultants beyond their doorsteps, especially in light of the fact that each person may be inclined to retain visual souvenirs of the tour, which could then be widely disseminated through social media.

One clear limitation on the plaintiff's ability to inspect the property at issue is that appropriate notice must be given. That is, the plaintiffs have no right to an unauthorized or unannounced inspection. This is true even where the court enters an order permitting the plaintiff to inspect the property within a certain period. In *Fitzpatrick v. ACF Properties Group*, the court granted the plaintiff's motion for leave to inspect an apartment. *Fitzpatrick v. ACF Props. Grp.*, 231 Ill. App. 3d 690, 699 (2d Dist. 1992). Five months later, the plaintiff's counsel contacted defense counsel and demanded access to the apartment within four days. *Fitzpatrick*, 231 Ill. App. 3d at 699. Defense counsel declined to accommodate the plaintiff's request on such short notice, citing various reasons such as personal commitments and the poor health of the building manager. *Id*. The plaintiff subsequently filed a petition for rule to show cause, which was denied by the court. *Id*. The rationale provided by the court was that Rule 214 provides that requests to inspections must specify a reasonable time, which cannot be less than 28 days absent a court order or agreement amongst the parties to limit that period. *Id.*

In addition, practitioners may protect their clients from having to deal with the inconvenience of multiple inspections in most cases. The plaintiffs are typically not to be given two bites at the apple in light of case law prohibiting duplicative discovery. *See Marriage of Zummo*, 167 Ill. App. 3d 566, 577 (4th Dist. 1988). There are, of course, exceptions, similar to those exceptions for newly created documents, where a subsequently requested inspection involves new property or a new condition at the property. *See generally Campen v. Exec. House Hotel, Inc.*, 105 Ill. App. 3d 576, 594 (1st Dist. 1982). In such exceptional circumstances, a second, third, or fourth inspection may be permitted. But, Rules 201(c)(1) and 219(c) protect against abusive discovery requests. The defendants may move to exclude evidence pursuant to Rule 219(d) should the plaintiff attempt to offer evidence at trial that the plaintiff obtained through deceit or without regard to Rule 214.

Certainly, where the inspection involves a property in which construction work has ceased and the unrelated business activities of the property owner will be disrupted, the likelihood that the inspection may run afoul of the protections afforded by Rule 201 increases. In addition, in such circumstances, landowners may avail themselves of certain protections provided under federal law. There are no provisions in Article II of the Illinois Supreme Court Rules that provide a party or the court the authority to require a litigant to violate federal statutory law. This provides a level of protection where the property at issue is currently being used for certain purposes. For example, the plaintiffs may be precluded from conducting an inspection of a property that is being utilized by the government for classified operations, or where a property provides ongoing medical services and the disruption caused by the inspection would inherently jeopardize the privacy rights of those patients as set forth in the Health Information Portability and Accountability Act (HIPAA). In such circumstances the plaintiff will likely be unable to identify any reasonable basis for overriding the protections afforded to others under federal law just to provide an opportunity to inspect the building. That is true regardless of whether the plaintiff is a construction worker claiming to have sustained an injury during work performed inside the building and that the condition of the inside of the building is therefore relevant to his litigation.

Preparing an Exhaustive Protective Order for Court-Ordered Inspections

In the event that the plaintiff is granted leave to conduct an inspection, practitioners should ensure that reasonable parameters are agreed upon before anyone sets foot on the property. Those parameters may be explicitly detailed in a

protective order. Pursuant to Rule 201(c), the court has authority to enter any protective order that justice requires, whether the order denies access to certain areas, limits the inspection, or conditions and regulates the discovery to be completed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or oppression. Ill. S. Ct. R. 201(c)(1). That is true regardless of whether the entity seeking the protective order is a party named in the case where the inspection was court ordered. In fact, even if the property is generally open to the public, the Illinois Supreme Court Rules governing discovery in a pending lawsuit dictate that the plaintiff who desires to inspect property must issue notice so that the court may dictate guidelines for the inspection. *See Klick v. R. D. Werner Co.*, 38 Ill. App. 3d 575, 578 (1st Dist. 1976).

Be Cognizant of your Client's Business

The maxim that "a man's home is his castle" holds true in the context of a property inspection. Practitioners should consult their clients prior to drafting a pre-inspection protective order to learn the particular concerns inherent to the property at issue and the business activities conducted on the premises. When drafting a protective order, one of the property owner's attorney's overarching goals should be to facilitate an inspection that will not force the owner to jeopardize its sales or business goals. For example, should the plaintiff request an inspection of a condominium building, one may include time limits in the protective order to avoid the peak days and times that the condominium hosts prospective renters and buyers so that unit sales are not deterred. Additionally, if the premises at issue provide medical services, protective orders should prohibit attorneys and experts from photographing patients, going into patients' rooms, loitering in the area of patients, or speaking to any persons in the facility. If the case involves an inspection in an industrial setting, strictly delineate the limited area at issue and strictly limit the time that the plaintiff and his agents will be permitted within that area to avoid unnecessary disruption to production. Further, if the property hosts the property owner's trade secrets, an assessment must be made regarding whether additional steps should be taken to protect those trade secrets. One such step could be to require anyone who seeks access to the premises to sign a confidentiality agreement.

Additionally, even with the most extensive safeguards and preparations, accidents can occur during a property inspection. Attorneys should have liability waivers executed by all inspection participants before they are permitted to set foot on the premises. While an exculpatory agreement need not contemplate the precise occurrence that resulted in the injury, the danger which caused the injury must be one which ordinarily accompanies the activity covered by the release. *Johnson v. Salvation Army*, 2011 IL App (1st) 103323, ¶ 36. Therefore, the exculpatory clause must give the participants notice of the range of dangers of which she assumes the risk, and the scope of a release is often defined by the foreseeability of a particular danger. *Oelze v. Score Sports Venture, LLC*, 401 Ill. App. 3d 110, 120 (2010). In addition, individuals may be required to obtain and produce Certificates of Insurance prior to the inspection date when deemed necessary under the circumstances.

Limit the Spectators

Practitioners may also choose to set parameters specifying the persons permitted to enter the property. Are experts and consultants allowed? If so, should both sides be given notice of the names and specialties of each? Will photographers and videographers be permitted? What about the plaintiff, the plaintiff's spouse, or the plaintiff's business associates?

Must counsel for each party appear or may a non-attorney representative, such as a law clerk, paralegal, or intern appear instead? These questions are best addressed *before* the plaintiff's trial counsel arrives at the door with a film crew and three associate attorneys so that any disputes regarding the propriety of permitting a specific individual on the premises may be addressed by the court in advance.

Define what Evidence may be Created, Taken, Produced and/or Used

Defense counsel may want to consider setting parameters for the use, purpose, and method of obtaining evidence during the inspection. That may even involve the inclusion of a clause expressly requiring all counsel to turn over any photographs, videos, or audio recorded during the inspection regardless of whether said media will ever be utilized at a trial.

Along those lines, consideration should be paid to each inspection participant's use of their own personal electronic devices. In today's world, privacy is a thing of the past. Millions of people are constantly uploading, publishing, and disseminating photographs and videos of their surroundings to Facebook, Twitter, YouTube, Instagram, Vine, blogs, or the like. This practice has become so prevalent that it permeates into property inspections conducted pursuant to Rule 214. Any condition or event on a jobsite can quickly be publicized to industry competitors and the entire world, and cast in a negative light regardless of the fact that the condition or event may be completely mundane and appropriate. Practitioners are cautioned to be aware of this phenomenon when facilitating inspections and to consider whether to include a provision in a protective order to ban onsite social networking and any other internet activity by inspection participants during the course of the inspection or pertaining to anything observed or obtained as a result of the inspection. Such a precaution would be consistent with the court's ability under Rule 201 to limit oppression or embarrassment that could result from an inspection.

Conclusion

Defense counsel can advise their clients that they have no duty to allow an inspection of their property without the institution of a lawsuit with accompanying discovery proceedings. Through enforcing the requirement of notice under Rule 214, practitioners can protect their clients from the hazards associated with facilitating property inspections in the digital age. In light of the technological advances that are being utilized in discovery and demonstratively at trial, a detailed plan must be devised and concerns must be addressed long before the plaintiff and the plaintiff's agents cross the threshold of your client's construction site for an inspection.

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