

**IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL
CIRCUIT IN AND FOR MIAMI DADE-COUNTY, FLORIDA**

CASE NO: 2021-015089-CA-01

SECTION: CA43

JUDGE: Michael Hanzman

In Re:

Champlain Towers South Collapse Litigation

CASE NO: 2021-015521-CA-01

SECTION: CA43

JUDGE: Michael Hanzman

STEVEN ROSENBERG, et al.,

Plaintiffs,

v.

CHAMPLAIN TOWERS SOUTH
CONDIMINIUM ASSOCIATION, INC.,
MORABITO CONSULTANTS, INC., and
SD ARCHITECTS, P.A.

Defendants

**EMERGENCY MOTION OF MORABITO CONSULTANTS, INC. TO
CLARIFY OR, IN THE ALTERNATIVE, TO EXPAND PRESERVATION ORDER**

Morabito Consultants, Inc. (“Morabito Consultants”), by its undersigned counsel, moves the Court to enter an Order clarifying or, alternatively, expanding the July 1, 2021 Order “that **all** Parties and **all** non- parties given actual notice of [the] Order preserve **all** evidence of any type that may be probative on the issue of what caused this catastrophic collapse ...” Order dated July 1,

2021 (Filing # 129956334) (the “Preservation Order”) (emphasis in original). In support of this Motion, Morabito Consultants states:

1. Morabito Consultants is named as a defendant in this and several other actions arising from the catastrophic collapse of the Champlain Towers South condominium (“the Property”). Morabito Consultants conducted inspections of the Property and provided findings and recommendations in both 2018 and 2020 to assist the Champlain Towers South Condominium Association (“the Association”) in the process of obtaining a 40-year recertification of the Property. Morabito Consultants performed its duties consistent with, and beyond, the applicable standard of care and identified extensive repairs that would be required for the recertification process. There was nothing in Morabito Consultants’ findings to indicate that the building itself was at risk of complete structural failure, that it was at imminent risk of collapse, or that it should have at any time been deemed unsafe for occupation.

2. Nonetheless, in alleging negligence on the part of Morabito Consultants, Plaintiffs, in this case and others, have attempted to make much of the fact that Morabito Consultants reported “major structural damage” and “abundant cracking and spalling” in the “pool deck area of the building” and the “building’s parking garage.” *See, e.g.*, Complaint, ¶¶ 49, 57-59. Plaintiffs allege that Morabito Consultants’ failure to take numerous actions that Plaintiffs would now, with the luxury of hindsight, impose upon them in response to those observations caused the Property to collapse. *Id.*, ¶¶ 137, 158, 159. For example, Plaintiffs assert that Morabito Consultants was negligent because it failed to inform the Association “that the structural repairs had to be made immediately otherwise a collapse could occur.” *Id.*, ¶ 159(1).

3. Notably, a significant portion of the pool deck and a portion of the garage areas - where Morabito Consultants reported deteriorated concrete - remain standing. That, of course, is

relevant evidence that those areas of deteriorated concrete - which uninformed observers now assert were reasons to have previously declared the building unsafe - did not, in fact, cause the building to have collapsed nor was it reason to have previously deemed the building “unsafe.” That evidence, in the form of the remaining pool deck and garage structures, should be preserved until Defendants, such as Morabito Consultants and others, have been afforded the opportunity to view, photograph and analyze those structures.

4. The Court’s Preservation Order imposed duty on “**all Parties and all non- parties** given actual notice of [the] Order [to] preserve **all** evidence of any type that may be probative on the issue of what caused this catastrophic collapse ...” Preservation Order (emphasis in original). Once such a duty arises, spoliation of evidence must not “impair a litigant's rights.” *Shamrock-Shamrock, Inc. v. Remark*, 271 So. 3d 1200, 1205 (Fla. 5th DCA 2019), review denied, No. SC19-1106, 2019 WL 5290225 (Fla. Oct. 17, 2019); *See also, e.g., DeLong v. A-Top Air Conditioning Co.*, 710 So. 2d 706, 707 (Fla. 3rd DCA 1998) (dismissal of action affirmed where defendants “demonstrated their inability to completely set forth their defense without having had the opportunity to examine and test the lost evidence”); *Nationwide Lift Trucks, Inc. v. Smith*, 832 So.2d 824, 825-26 (Fla. 4th DCA 2002) (Order striking defendant’s defenses affirmed where defendant failed “to preserve . . . braking mechanism alleged to have caused the accident” and plaintiffs were therefore “unable to proceed without the altered or lost evidence”).

5. In *Torres v. Matsushita Elec. Corp.*, 762 So. 2d 1014, 1019 (Fla. 4th DCA 2000), a concurring opinion cited a proposition that is as indisputable as it is relevant to this matter:

The state's system of civil litigation is founded in large part on a litigant's ability under the authority of the Supreme Court rules, to investigate and uncover evidence after filing suit. Destruction of

evidence known to be relevant to pending litigation violates the spirit of liberal discovery.

* * *

Spoliation of evidence creates enormous costs for both the victimized party and the judicial system, prevents fair and proper adjudication of the issues, and interferes with the administration of justice.

Id. (quoting *Callahan v. Stanley Works*, 306 N.J. Super. 488, 703 A.2d 1014, 1016–17 (Law Div.1997)).

6. Here, the Court already has ordered “**all** Parties and **all** non- parties given actual notice of [the] Order [to] preserve **all** evidence of any type that may be probative on the issue of what caused this catastrophic collapse ...” Preservation Order (emphasis in original). That Preservation Order should preclude any party or non-party with notice of the Preservation Order from destroying the remaining pool deck and garage structures. In a separate Order, however, the Court “order[ed], adjudge[d] and decree[d]” that Miami-Dade County “has the right and authority to enter upon the property and demolish the building of the Champlain Towers South condominium building, or to condemn all or any portion thereof ...” Order Denying Miami-Dade County's Emergency Motion To Authorize Receiver To Enter Into Right-Of-Entry For Debris Removal And Demolition Disaster Assistance And Indemnification Agreement At Champlain Towers South Condominium, dated July 2, 2021, Filing # 130030078. The latter Order may be read to permit destruction of the remaining pool deck and garage structures before the parties have the opportunity to view, photograph and analyze those structures. Such a result would substantially impair Defendants’ abilities, and due process rights, to defend against the claims asserted in these actions.

7. The primary demolition sought by the County, prior to an anticipated severe weather event, to ensure the integrity of the Property and the safety of those working upon it has been achieved. Indeed, upon information and belief, various structures of the Property remain in their existing state standing while workers conduct their activities on the Property free of danger from those structures. As such, the two Orders referenced herein may, and should, be harmonized by a further Order clarifying, or further ordering, that the remaining pool deck and garage structures, and all other existing structures, on the Property be preserved and maintained, and not destroyed, until all parties and their designated experts and representatives have been afforded the opportunity to view, photograph and analyze those structures in their presently existing state.

WHEREFORE, Defendant Morabito Consultants, Inc. requests that the Court enter the accompanying proposed Order clarifying, or further ordering, that the remaining pool deck and garage structures, and all other existing structures, on the Property be preserved and maintained, and not destroyed, until all parties and their designated experts and representatives have been afforded the opportunity to view, photograph and analyze those structures in their presently existing state.

Respectfully submitted,

GUNSTER, YOAKLEY & STEWART, P.A.

Dated: July 21, 2021

By /s/ Aron U. Raskas
Aron U. Raskas, Esq.
Florida Bar No.: 1022416
600 Brickell Ave., Suite 3500
Miami, Florida 33131
Telephone: (305) 376-6000
Fax: (305) 376-6010
Primary: araskas@gunster.com
Secondary: avalido@gunster.com
Secondary: eservice@gunster.com

David M. Wells, Esq.
Florida Bar No.: 0309291
1 Independent Drive, Suite 2300
Jacksonville, Florida 33202
Telephone: (904) 354-1980
Fax: (904) 354-2170
Primary: dwells@gunster.com
Secondary: dculmer@gunster.com

*Attorneys for Defendant Morabito Consultants,
Inc.*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of July, 2021, I electronically filed the foregoing with the Clerk of the Court through Florida Court's E-Filing Portal www.myflcouraccess.com, by using the E-Service Option, which will send a Notice of Electronic Filing, in compliance with Florida Rules of Judicial Administration Rule 2.516, to all counsel of record.

I FURTHER CERTIFY that on this 21st day of July, 2021, I served copies of the foregoing Motion and Proposed Order, by email, to:

Henry N. Wixon, Esquire
General Counsel
National Institute of Standards and Technology
100 Bureau Drive
Gaithersburg, MD 20899
henry.wixon@nist.gov

and

Lauren Morse, Esquire
Assistant County Attorney
Miami-Dade County Attorney's Office
111 N.W. 1st Street, Ste. 2810
Miami, Florida 33128
Lauren.morse@miamidade.gov

Laura Adams, Esquire
Office of the State Attorney
1350 NW 12th Ave
Miami, FL 33136-2102
lauraadams@miamisao.com

/s/ Aron U. Raskas

Attorney

PROPOSED ORDER

**IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL
CIRCUIT IN AND FOR MIAMI DADE-COUNTY, FLORIDA**

CASE NO: 2021-015089-CA-01

SECTION: CA43

JUDGE: Michael Hanzman

In Re:

Champlain Towers South Collapse Litigation

CASE NO: 2021-015521-CA-01

SECTION: CA43

JUDGE: Michael Hanzman

STEVEN ROSENBERG, et al.,

Plaintiffs,

v.

**CHAMPLAIN TOWERS SOUTH
CONDIMINIUM ASSOCIATION, INC.,
MORABITO CONSULTANTS, INC., and
SD ARCHITECTS, P.A.**

Defendants

ORDER

THIS CAUSE came before the Court on July __, 2021 upon the Emergency Motion Of Morabito Consultants, Inc. To Clarify Or, In The Alternative, To Expand Preservation Order. The Court having considered the Motion, argument of counsel and the record in these cases, for the reasons announced on the record which are incorporated as though fully set forth herein, hereby GRANTS the motion and hereby

ORDERS that the Court's Preservation Order dated July 1, 2021 (Filing # 129956334) is hereby clarified as follows: to the extent that the Preservation Order is deemed to be inconsistent with or superseded by the Court's Order Denying Miami-Dade County's Emergency Motion To Authorize Receiver To Enter Into Right-Of-Entry For Debris Removal And Demolition Disaster Assistance And Indemnification Agreement At Champlain Towers South Condominium, dated July 2, 2021, Filing # 130030078, which provided that Miami-Dade County (the "County") "has the right and authority to enter upon the property and demolish the building of the Champlain Towers South condominium building, or to condemn all or any portion thereof ...," the Court Orders that, absent an imminent danger to life or safety, the remaining pool deck and garage structures, and all other presently existing structures, on the Property be preserved and maintained in their existing state, and not destroyed, until all parties and their designated experts and representatives have been afforded the opportunity to view, photograph and analyze those structures in their presently existing state.

DONE and **ORDERED** in Chambers at Miami-Dade County, Florida on this ___ day of July, 2021.

Hon. Michael Hanzman

CIRCUIT COURT JUDGE