

4 Misc.3d 1019(A)

**(Table, Text in WESTLAW), Unreported Disposition
(Cite as: 4 Misc.3d 1019(A))****C**

This opinion is uncorrected and will not be published in the printed Official Reports.

LIPCO ELECTRICAL CORP. AND ACTION
ELECTRICAL CONTRACTING CO., INC., J.V.
Plaintiffs,

v.

ASG CONSULTING CORPORATION, ANTHONY
CARDILLO, TAP ELECTRICAL CONTRACTING
SERVICE, INC. AND PHILIP P. GULIZIO,
Defendants. ACTION # 2 ASG CONSULTING
CORP., TAP ELECTRICAL CONTRACTING
SERVICE, INC., ANTHONY CARDILLO AND
PHILIP P. GULIZIO, Plaintiffs,

v.

ACTION ELECTRICAL CONT. CO. INC. a/k/a
ACTION ELECTRICAL CONTRACTING LIPCO
ELECTRICAL CORP., LIPCO ELECTRICAL
CORP. AND ACTION ELECTRICAL
CONTRACTING CO. INC., J.V. GASPARE "SAL"
LIPARI AND ANTHONY SPINA, Defendants.
ASG CONSULTING CORP., TAP ELECTRICAL
CONTRACTING SERVICE, INC., ANTHONY
CARDILLO AND PHILIP P. GULIZIO, Plaintiffs,

v.

ACTION ELECTRICAL CONT. CO. INC. a/k/a
ACTION ELECTRICAL CONTRACTING
COMPANY, INC., LIPCO ELECTRICAL CORP.,
LIPCO ELECTRICAL CORP. AND ACTION
ELECTRICAL CONTRACTING CO. INC., J.V.
GASPARE "SAL" LIPARI AND ANTHONY
SPINA,
8775/01

Supreme Court, Nassau County

Decided on August 18, 2004

CITE TITLE AS: Lipco Elec. Corp. v ASG
Consulting Corp.

ABSTRACT

Disclosure
Protective Order

Lipco Elec. Corp. v ASG Consulting Corp., 2004 NY Slip Op 50967(U). Disclosure-Protective Order. [Civil Practice Law and Rules-§ 3103](#) (a) (Protective orders). [Civil Practice Law and Rules-§ 3101](#) (a) (Scope of disclosure). (Sup Ct, Nassau County, Aug. 18, 2004, Austin, J.)

APPEARANCES OF COUNSEL

Counsel for Plaintiff in Action # 1 and Defendant in Action # 2 Levy, Tolman & Costello, LLP 630 Third Avenue New York, New York 10017 Counsel for Defendant in Action # 2 and Plaintiff in Action No. 1 Robinson, Brog, Leinwand, Greene, Genovese & Glucks, P.C. 1345 Avenue of the Americas New York, New York 10105-0143

OPINION OF THE COURT

Leonard B. Austin, J.

BACKGROUND

Defendant in Action No. 2 Lipco Electrical Corp. ("Lipco"), is an electrical contractor. Defendant in Action No. 1, Action Electrical Contracting Co., Inc. ("Action"), is also an electrical contractor. Lipco and Action entered into a joint venture relationship to bid on various public works projects. Lipco and Action's joint venture relationship was formalized in a written agreement dated December 9, 1991, which designated the name of the joint venture as Lipco Electrical Corporation and Action Electrical Contracting Co., Inc., A Joint Venture ("Lipco/Action") which is the Plaintiff in Action No. 1. Under the terms of the joint venture agreement, Lipco and Action were to share equally in the expenses, profits and losses of the joint venture.

Lipco/Action Defendant in Action No. 1 and Plaintiff in Action No. 2 retained ASG Consulting Corp. ("ASG") as a consultant to prepare estimates and bids for the public works projects on which Lipco/Action bid.

Lipco/Action was the successful bidder on four projects between August 1990 and March 1992; three

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for the New York City Transit Authority and one for the Metro-North Commuter Railroad. (“Lipco/Action Projects”)

Lipco/Action retained ASG as consultant for each of the Lipco/Action Projects. The consulting agreements set forth the specific services that ASG was to provide as a consultant. ASG was to be paid for its consulting services on an hourly basis. The hourly charges were based upon the classification of the person performing the work; i.e. principal, technician, computer operator, professional engineer, etc. ASG was to be reimbursed for certain expenses incurred in connection with the consulting agreement. ASG was also to be paid for the use of its computer and other equipment in accordance with the terms of the consulting contracts. ASG was to bill Lipco/Action monthly for its services and expenses.

ASG asserts that in May 1993, the Lipco/Action and ASG changed the manner in which ASG would be paid for its services. Rather than paying ASG on an hourly basis, ASG would be paid at a flat or “bucket rate” for its services.

This bucket rate agreement was never reduced to writing. The parties now dispute the terms of the bucket rate agreement. The bucket rate that was charged was an average of ASG's monthly prior monthly billings in connection with the Lipco/Action Projects.*2

ASG claims that rather than billing Lipco/Action on a hourly basis, the parties agreed that Lipco/Action would be billed on a flat monthly rate that was not dependent upon the hours expended on the Lipco/Action Projects.

Lipco/Action asserts that this was not the agreement. Lipco/Action claims that it agreed to bucket rate billing to simplify the monthly billing process. However, at the end of the projects, ASG would calculate its actual monthly charges and the parties would adjust with each other to reflect the actual moneys due and owing.

At some point during the projects, ASG became part of the Lipco/Action joint venture. The date on which this occurred is in dispute. The complaint in Action No. 1 asserts that ASG became part of the joint

venture in November 1994; retroactive to the inception of each project. ASG asserts that it did not become part of the joint venture until 1995.

The Modification Agreement by which ASG became a member of the joint venture is undated and simply indicates that the parties will each bear one-third (1/3) of the loss or be entitled to one-third (1/3) of the profit earned on each project. If the joint venture was not going to bid on any future projects, the equipment owned by the joint venture would be divided into thirds. The principals of the joint venture further agreed that, if the corporations did not have adequate funds to cover any losses incurred by the joint venture, the principals of the corporations would be personally responsible for such losses.

Defendant in Action No. 1/Plaintiff in Action No. 2, TAP Electrical Contracting Services, Inc. (“TAP), is also an electrical contractor. TAP is alleged to have been prohibited from bidding and working on public works projects through November 1994. The modification of the Lipco/Action joint venture agreement to include ASG as a joint venturer is alleged to have been contingent upon TAP being permitted to bid and work on the Lipco/Action Projects. In November 1994, TAP was again permitted to bid and work on public works projects.

In 1994, Action was the successful bidder on two projects for the New York City Transit Authority (“A & W Contracts”). Action retained ASG as a consultant in connection with the A & W Contracts. ASG was to be paid for its services as a consultant on an hourly basis. The hourly rates depended upon the person performing the work. ASG was also to be reimbursed for the expenses incurred in connection with the consulting agreement. ASG was to be reimbursed for its computer expenses and other expenses involved in the use of its office equipment.

The relationship between Action and ASG also changed during the course of the work. In February 1995, Action and ASG entered into a written Modification Agreement by which Action and ASG became equal partners in the A & W Contract projects.

The relationship between Lipco/Action and ASG and Action and ASG give rise to the two actions before

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this Court which are to be tried jointly. This is not the first round of litigation between these parties. The parties were previously involved in litigation regarding the Lipco/Action Projects and the A & W Contracts in New York County. The New York County litigation was discontinued.

Action No. 1 herein involves the Lipco/Action Projects. Lipco/Action alleges that ASG falsified its hourly rates, charged or overcharged for useless equipment and equipment not used on the projects, charged for employees who were not performing work on the Lipco/Action Projects, charged for material not used on the Lipco/Action Projects, charged for automobile use not related to the projects and charged to insurance premiums unrelated to the projects during the period of time that it was acting as a consultant on these projects. Lipco/Action seeks to recover for these alleged overcharges.*3

Lipco/Action further alleges that the bucket rate was based upon these overcharges. Lipco/Action claims that it is entitled to a refund of the bucket rate based upon the alleged overcharges or, alternatively, adjustments of the bucket rate to reflect the actual hours spent by ASG employees and expenses incurred by ASG in connection with the Lipco/Action Projects.

Lipco/Action further avers that the overbilling practices continued after the relationship between Lipco/Action and ASG changed to joint venturers. Lipco/Action alleges that ASG breached its fiduciary duty to them and the joint venture by overcharging and improperly charging the joint venture for these items. While not necessarily pled as such, Lipco/Action seeks an accounting from ASG for the period of time in which they were joint venturers on the project.

In Action No. 2, ASG seeks to recover damages from Lipco/Action and Action alleging violations of the terms of the consulting agreements and breaches of Lipco/Action's fiduciary duties. ASG also claims that Action kept the books and records for the partnership and has failed and refused to permit ASG to review those books and records. ASG seeks damages and an accounting.

Lipco/Action served a letter dated February 12, 2004

which contained 36 separate discovery items ("Discovery Demand"). Some of the demands contained multiple subsections. ASG has partially responded and partially objected to the Discovery Demand. In this decision, the Court will address the issues that involve the production of payroll records and time sheets of ASG regarding the Lipco/Action Projects and A & W Contracts, production of ASG and Action income tax returns and issues involving electronic discovery. All other discovery issues raised in these motions as well as all other discovery issues generally are otherwise respectfully referred to Special Referee Frank Schellace who is hereby designated, pursuant to [CPLR 3104](#), to hear and determine all discovery issues in these actions consistent herewith.

DISCUSSION

A. Standard

[CPLR 3101\(a\)](#) provides for full disclosure by a party to an action of "... all matter material and necessary in the prosecution of the action...regardless of the burden of proof." [CPLR 3101\(b\)](#) provides that privileged material shall not be subject to discovery.

In determining whether the material sought through discovery is "material and necessary", the court must determine if the demanded material has any bearing on the issues raised in the case and whether the demanded documents will "... sharpen the issues and reduce delay and prolixity." The test is one of usefulness and reason. [Allen v. Crowell-Collier Publishing Co.](#), 21 N.Y2d 403, 406 (1968). Material demanded through discovery that can possibly be used as evidence in chief, for rebuttal or for cross-examination must be produced. [Allen v. Crowell-Collier Publishing Co.](#), *supra*; and [Wind v. Eli Lilly & Co.](#), 164 A.D.2d 885 (2nd Dept., 1990).

Discovery of documents is permitted even if they are not admissible in evidence provided that the production of such documents should lead to the disclosure of admissible evidence. [Southampton Taxpayers Against Reassessment v. Assessor of the Vill. of Southampton](#), 176 A.D.2d 795 (2nd Dept., 1991); and [Fell v. Presbyterian Hosp. in the City of New York](#), 98 A.D.2d 624 (1st Dept., 1983).

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A party does not have to respond to a discovery demand that is palpably improper. A discovery demand is palpably improper if it seeks discovery of material that is not relevant to the issues involved in the action or which is confidential in nature.

*4 [Saratoga Harness Racing, Inc. v. Roemer](#), 274 A.D.2d 887 (3rd Dept., 2000); and [Titleserv, Inc. v. Zenobio](#), 210 A.D.2d 314 (2nd Dept., 2000). See also, [Grossman v. Lacoff](#), 168 A.D.2d 484 (2nd Dept., 1990); and [Spancrete Northeast, Inc. v. Elite Associates, Inc.](#), 148 A.D.2d 694 (2nd Dept., 1989).

The party seeking the production of documents has the burden of establishing that the production of the demanded material will lead to the discovery of evidence relevant to the case while the party opposing discovery has the burden of establishing that the material is irrelevant, privileged and/or confidential. [Crazytown Furniture, Inc. v. Brooklyn Union Gas Co.](#), 150 A.D.2d 420 (2nd Dept., 1989); and [Carp v. Marcus](#), 116 A.D.2d 854 (3rd Dept., 1986); and [Herbst v. Bruhn](#), 106 A.D.2d 546 (2nd Dept., 1984).

B. Time Records

ASG does not object to the production of time records relating to ASG and TAP employees and principals who worked on the Lipco/Action Projects of the A & W Contracts.

In Items 1 and 20 of the Discovery Demand, Lipco/Action and Action seek time and payroll records for all employees and principals of ASG and TAP for all projects in which ASG and TAP were involved during the time period of the Lipco/Action and A & W Contracts.

Lipco/Action and Action argue that this is "material and necessary" in connection with their claim that ASG overcharged for labor on Lipco/Action Projects and the A & W Contracts.

Lipco/Action and Action assert that ASG was billing them for time that ASG and TAP employees and principals were working on other projects. Lipco/Action and Action further assert that the time and payroll records will establish that ASG was billing its employees for more hours per week than

the employees actually worked.

ASG counters by asserting that this information relating to employees and principals of ASG and/or TAP who did not work on the Lipco/Action Projects and the A & W Contracts is irrelevant and, therefore, palpably improper and not subject to discovery.

ASG was working on the other projects at the same time that it was working on the Lipco/Action Projects and the A & W Contracts.

Item 1 is clearly overbroad. The names and hours worked and salary paid to employees of ASG and TAP who did not work on the Lipco/Action and A & W Contracts is irrelevant to this action.

Lipco/Action and Action could be overbilled for labor charges only in regard to those ASG and TAP employees who worked on the Lipco/Action projects or the A & W Contracts. Lipco/Action and Action should be able to identify those employees and demand specific records relating to those employees.

Discovery demands which are overbroad are palpably improper. The party upon whom they were served need not respond. The court should not prune palpably improper discovery demands but should vacate them. [Lerner v. 300 West 17th Street Housing Development Fund Corp.](#), 232 A.D.2d 249 (1st Dept., 1996); and [Swiskey v. LaMotta](#), 170 A.D.2d 416 (1st Dept., 1991). In view of this, Item 1 of the Discovery Demand is vacated.

The same is true for Item 20 of the Discovery Demand. The consulting agreements permit ASG to charge Lipco/Action or Action on an hourly basis for principal's time. Thus, the only time records that are relevant to the overcharge claim are those records that relate to the principals of ASG and/or TAP who worked on and who billed for the Lipco/Action projects or the A & W contracts. Since Demand 20 seeks information regarding all principals of ASG and/or TAP, the demand is over- broad and, thus, vacated.*5

C. Tax Returns

ASG seeks copies of Action's tax returns for the years relevant to the A & W Contracts.

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Disclosure of tax returns is disfavored due to the fact that tax returns contain confidential and private information. [Walter Karl, Inc. v. Wood, 161 A.D.2d 704 \(2nd Dept., 1990\)](#); and [Briton v. Knott Hotels Corp., 111 A.D.2d 62 \(1st Dept., 1985\)](#). The party seeking production of income tax returns in discovery must make a strong showing of necessity and an inability to obtain the information contained in the income tax return from any other source. [Abbene v. Griffin, 208 A.D.2d 483 \(2nd Dept., 1994\)](#).

Tax returns are not subject to discovery if the information may be obtained from any

other source. [Samide v. Roman Catholic Diocese of Brooklyn, 5 A.D.3d 463 \(2nd Dept., 2004\)](#).

One of the key allegations in ASG's causes of action is that it has been denied access to the partnership books and records regarding the A & W Contracts that were maintained by Action. Financial information regarding the A & W Contracts can be obtained from these records. ASG has failed to establish that it has demanded, obtained and reviewed the partnership records or those records are unavailable or inadequate. ASG has not made a showing that the information it seeks is not available from any other source. Since ASG has not shown that it has exhausted these other sources for obtaining this information or that information provided is inadequate, ASG cannot obtain copies of Action's income tax returns at this time.

ASG's reliance upon [Gould v. Sullivan, 54 N.Y.S.2d 430 \(Sup.Ct. NY Co.\), affd., 269 App.Div. 736 \(1st Dept., 1945\)](#) is misplaced. In *Gould*, the defendant was required to produce his tax returns in a partnership accounting action as proof of the existence of the partnership. The production of the tax returns was ordered only after the defendant testified that he had no knowledge of the information contained in the return. In this matter, the existence of the partnership between Action and ASG in regards to the A & W Contracts is conceded.

D. Electronic Discovery

Discovery Demands 3, 4, 5 and 7 seek electronic discovery.

Demand Item 3 seeks the electronic files (computer data) comprising the Lipco/Action cash disbursement book for the period January 1993 through December 1997 reproduced on disk or hard drive with identification of the software needed to run the data.

Item 4 seeks the electronic files of the Lipco/Action projects relating to records of costs, expenses, income, payments receipts and all journals, ledgers, accounting records and timekeeping records.

Item 5 seeks the tape or other back-up of the electronic files for the Lipco/Action

projects and the A & W Contracts.

Item 7 seeks electronic data regarding projects performed by ASG and TAP concurrently with the Lipco/Action projects and A & W Contracts Cash Disbursements sorted by (a) date; (b) vendor and date; (c) cost code, vendor and date; (d) job code, vendor and date; (e) job code, cost code, vendor and date, as well as the Payroll Register sorted by (a) date; (b) by employee and date; (c) by cost code, employee and date; (d) by job code, employee and date; and (e) by job code, cost code, employee and date.

ASG objects to the production of the records sought by Items 3, 4, 5 and 7.*6

ASG was responsible for the bookkeeping for the Lipco/Action Projects. Lipco/Action has been provided with a hard copy print out of the records sought in Items 3, 4 and 5. Lipco/Action asserts that the only way that it can confirm that the hard copy data is true and accurate is by obtaining the raw data in computerized form.

Electronic discovery raises a series of issues that were never envisioned by the drafters of the CPLR. Neither the parties nor the Court have been able to find any cases decided by New York State Courts dealing with the issue of electronic discovery.

With traditional paper discovery, the issue is generally whether the demanded material exists and whether such material is subject to discovery; i.e.,

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whether the document is material and necessary to the prosecution or defense of the action and not subject to any legally recognized privileges. Once these issues are resolved, the party in possession of the documents is required to produce the demanded material. Customarily, if the volume of documents demanded is small, the party upon whom the demand is made copies the documents and serves them upon the party demanding discovery. If the demanded documents are voluminous, the party responding to the demand advises the party demanding the documents that the documents are available for review, identification and copying at the demander's expense.

With electronic discovery, totally different issues arise. Some of the questions presented include: are the documents still on the hard drive or are they on some form of back-up; have the documents been deleted, what software was used to create and store the documents; and is that software commercially available or was the software created and/or licensed specifically for the user.

Whether the court is dealing with traditional paper discovery or electronic discovery, the first issue the court must determine is whether the material sought is subject to disclosure as "material and necessary" in the prosecution or defense of the action. In this case, the material sought in Items 3, 4 and 5 is "material and necessary". ASG does not contest that this material is discoverable. ASG asserts to the production of the material demanded in Items 3, 4 and 5 primarily on the grounds that ASG provided Lipco/Action with a print out or "hard" copy of this material and that extracting this information from its computer hard drive or back-up tapes would be extremely difficult, time consuming and expensive.

ASG uses what it describes as customized, non-commercial billing software known as "Emque". ASG asserts that it cannot retrieve the information from its computers or back-up tapes in a transferable form because the demanded data relates to the period 1993 through 1997. ASG's current software allegedly cannot run or extract this data from either the hard drive or back-up without retaining the services of a computer consultant.

ASG claims to have consulted with the designer of

Emque who has advised that this program used to store the demanded data does not store data in "electronic files". Each journal, report or other document created by this software is comprised of hundreds or thousands of tables of raw and uncollected data. The raw data is allegedly not stored in any easily extractable manner.

In order to provide the data sought by Lipco/Action and Action, a separate program would have to be devised to search for and extract each individual table of data which would allegedly require the services of a computer consultant. A relational data base would then have to be created to store the extracted data and a program devised to transfer the data on to a disc or hard drive.

Once this is done, a compatible version of Emque would have to be acquired and *7 installed in order to read and collate the data. Then, the attorneys for ASG would have to review the data to determine whether it is subject to discovery. ASG asserts that this process would take hundreds of man hours to perform.

Lipco/Action counters that Emque has been in business for 25 year and has developed and licensed software that is commercially available. Emque's programs were designed for use in the construction industry and permits contractors to monitor job progress and store all information relating to a job in one place. Action licenses and uses Emque software.

Lipco/Action further asserts that if the data it demanded is no longer stored by ASG on a hard drive that ASG must store this data on back-up tapes.

Lipco/Action asserts that there is a family relationship between the principals of Emque and the principals of ASG and that these objections are nothing more than a smoke screen to avoid the obligation to provide discoverable material which will support its claim that it was overcharged for labor, equipment and material.

[CPLR 3103\(a\)](#) permits the court either *sua sponte* or on motion of a party to issue protective orders "...denying limiting, conditioning or regulating the use of any disclosure devise." A protective order "...shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage or

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other prejudice to any person or the court.”

Raw computer data or electronic documents are discoverable. See, [Zubulake v. UBS Warburg LLC](#), 217 F.R.D. 309 (S.D.N.Y. 2003); and [Playboy Enterprises, Inc., v. Welles](#), 60 F.Supp.2d 1050 (S.D.Cal., 1999); and [Anti-Monopoly, Inc. v. Hasbro, Inc.](#), 1995WL649934 (S.D.N.Y.).

Once the court has determined that the electronic data is subject to discovery, the issue becomes who should bear the cost of discovery. The cost of providing computer records can be rather substantial.

With traditional paper records, the documents are generally stored in a usable and obtainable form, such as job folders. Furthermore, documents and records that are retained generally have a value since the company is willing to pay the cost involved in storing such documents. This is not true with computer or electronic documents. Records are kept not because they are necessary but because the cost of storage is nominal. Furthermore, electronic records are not stored for the purposes of being able to retrieve an individual document. Rather, they are retained for emergency uploading into a computer system to permit recovery from catastrophic computer failure. See, [RoweEntertainment, Inc. v. The William Morris Agency, Inc.](#), 205 F.R.D. 421 (S.D.N.Y. 2002); and [McPeck v. Ashcroft](#), 202 F.R.D. 31 (D.D.C., 2001). Retrieving computer based records or data is not the equivalent of getting the file from a file cabinet or archives.

Further, computer discovery presents issues that are not faced in traditional paper discovery. Once a paper document has been destroyed, it cannot be produced. ”Deleted“ material is not expunged from a computer's hard drive. ” Deleted“ material can be retrieved by a person with sufficient computer savvy. See, [Antioch Co. v. Scrapbook Borders, Inc.](#), 210 F.R.D. 645 (D.Minn., 2002); and [Simon Properties Group, L.P. v. mySIMON, Inc.](#), 194 F.R.D. 639 (S.D.Ind., 2000); and all of which hold that deleted e-mails are discoverable. Furthermore, computer experts can allegedly determine if data has been altered and reconstruct the originally entered data.

Having concluded that the material is discoverable, the Court must now determine the procedure for its

production and who will bear the cost of the discovery.*8

The federal courts have developed and are developing procedures and analyses for determining who should bear the cost of electronic discovery. See, [Zubulake v. USB Warburg LLC](#), *supra*; and The party from who electronic discovery is sought should be required to produce material stored on a computer so long as the party being asked to produce the material is protected from undue burden and expense and privileged material is protected.

The federal court's analysis of who should bear the cost of electronic discovery starts from presumption that, under the Federal Rules of Civil Procedure, the party responding to the discovery demand bears the cost of complying with discovery demands. [Oppenheimer Fund, Inc. v. Sanders](#), 437 U.S. 340 (1978). See also, Thus, federal courts discuss factors to be considered in regard to cost shifting in connection with electronic discovery; to wit, what factors should the court consider when determining if the party seeking discovery of electronic records should bear all or some of the costs involved in the production of electronic records. See, (applying a seven point analysis); and

However, cost shifting of electronic discovery is not an issue in New York since the courts have held that, under the CPLR, the party seeking discovery should incur the costs incurred in the production of discovery material. [Schroeder v. Centro Pariso Tropical](#), 233 A.D.2d 314 (2nd Dept., 1996); and [Rubin v. Alamo Rent-a-Car](#), 190 A.D.2d 661 (2nd Dept., 1993). CPLR 3103(a) specifically grants the court authority to issue a protective order to prevent a party from incurring unreasonable expenses in complying with discovery demands. Therefore, the analysis of whether electronic discovery should be permitted in New York is much simpler than it is in the federal courts. The court need only determine whether the material is discoverable and whether the party seeking the discovery is willing to bear the cost of production of the electronic material. This is especially true in this case where Lipco/Action has been provided with hard copies of the electronically stored data.

In this case, the cost factor for extracting the

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demanded information is unknown. ASG asserts that the cost of obtaining the information would be substantial. Lipco/Action asserts that the software program is available commercially and that extraction of the demanded information should be relatively simple.

Under the present posture of this case, the Court is unable to determine if the material demanded in Items 3, 4, and 5 should be produced since the parties have failed to establish the costs to be incurred in the production of this material and the willingness of Lipco/Action and Action to bear the cost of production. The parties must provide the Court with an appropriate and detailed analysis indicating whether the material is on the hard drive or back up tape, the actual procedures involved in extracting this material and the costs that will be incurred. At the present time, the Court has before it nothing more than a hearsay statement outlining the procedures

involved in extracting and collating this data while suggesting that the cost of accomplishing that will be substantial.

Lipco/Action and Action wants ASG to bear the cost incurred for extracting and *9 providing this material. However, under New York law, the party seeking discovery must bear the cost of production of the items for which discovery is sought. Until such time as Lipco/Action and Action express a willingness to pay the costs to be incurred for the production of this data, the Court will not direct its production.

The material demanded in Item 7 requires the basic analysis of whether the demanded material is subject to discovery. Item 7 demands the Cash Disbursements and Payroll Records of ASG and TAP for all jobs being performed by ASG and/or TAP concurrently with the Lipco/Action projects and the A & W Contracts.

The payroll records of employees of ASG or TAP who did not work on the Lipco/Action or A & W contracts is irrelevant to this action. This Discovery demand seeks irrelevant material. Thus, it is overbroad and palpably improper.

Cash disbursements made on other projects are also irrelevant to this action. Indeed, no basis is shown as

to how it would lead to admissible evidence. Lipco/Action allegations, in this regard, are that ASG overcharged for material and equipment. Lipco/Action should be able to establish from the records relating to the Lipco/Action projects and the A & W Contracts the material and equipment which for it

was charged and received and those items for which it was charged and did not receive. Item 7 of the Discovery Demand is therefore vacated.

D. Appointment of a Special Referee

These actions have been pending for over three years. The parties herein have previously litigated some of the same or similar issues in an action that was brought in New York County. Discovery has been proceeding at a snails pace, if at all. The issues raised in this motion and the failure of the parties to make significant headway with discovery demonstrate to the Court the need for a Special Referee to supervise, schedule and regularly monitor the progress of discovery. [CPLR 3104\(a\)](#) grants the court authority to appoint a Referee to supervise discovery on its own motion. Therefore, the Court is referring all issues raised in this motion other than those specifically disposed of by this order and all other discovery issues which might arise to Special Referee Frank Schellace to hear and determine.

Accordingly, it is,

ORDERED, the joint motion to compel discovery and for a protective order is decided as follows:

(a)ASG's motion for a protective order relating to Lipco/Action's demand for the time records of the employees and principals of ASG and TAP (Discovery Demand Item 1), is granted;

(b)Action's motion for a protective order relating to ASG's demand for the production of Action's income tax returns is granted;

(c)Lipco/Action and Action's motion to compel production of the Items 3, 4 and 5 in its Discovery Demand is denied with leave to renew upon presentation of information regarding the actual cost for extracting this information and a statement that

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Lipco/Action and Action are willing to bear the initial cost involved for the extraction and production of such material subject to later *10 apportionment on proper application; and

(d)Lipco/Action's motion to compel production of the electronic data relating to Item 7 of its letter of February 12, 2004 is denied; and it is further,

ORDERED, that all other discovery issues not addressed in this Order are respectfully referred to Special Referee Frank Schellace who is hereby designated, pursuant to [CPLR 3104](#), as Special Referee to supervise all further discovery in this action; and it is further,

ORDERED, that counsel for the parties are directed to appear for a conference before Special Referee Schellace on September 14, 2004 at 9:30 a.m. for the purpose of scheduling discovery in these actions; and it is further,

ORDERED, that all discovery in this matter shall be completed not later than March 4, 2005; and it is further,

ORDERED, that counsel shall appear to certify this matter for trial on March 11, 2005 at 9:30 a.m.

This constitutes the decision and Order of the Court.

Copr. (c) 2008, Secretary of State, State of New York
N.Y.Sup. 2004.

Lipco Elec. Corp. v Asg Consulting Corp.

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