

**T.A. Ahern Contrs. Corp. v Dormitory Auth. of the
State of N.Y.**

2009 NY Slip Op 32909(U)

December 4, 2009

Supreme Court, New York County

Docket Number: 601307/07

Judge: Eileen A. Rakower

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

PRESENT: RAKOWER
Justice

PART 5

T.A. AHERN CONTRACTORS CORP.

INDEX NO. 601307/07

MOTION DATE _____

- v -
THE DORMITORY AUTHORITY OF
THE STATE OF NEW YORK

MOTION SEQ. NO. 03

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Repeating Affidavits _____

PAPERS NUMBERED

1, 2

3, 4, 5

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED
DEC 15 2009
NEW YORK
COUNTY CLERK'S OFFICE

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

Dated: 12/24/09


HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

-----X
T.A. AHERN CONTRACTORS CORP.,

- against -

THE DORMITORY AUTHORITY OF
THE STATE OF NEW YORK,

-----X
EILEEN A. RAKOWER, J.S.C.

Plaintiff,
FILED
DEC 15 2009
NEW YORK
COUNTY CLERK'S OFFICE
Defendant.

Index No.
601307/07

**DECISION
and ORDER**

Mot Seq.
003 & 004

Plaintiff, T.A. Ahern Contractors Corp. ("Ahern"), brings this action for breach of contract, quantum meruit, and unjust enrichment in connection with a public improvement construction project known as Jacobi Medical Center Modernization Program-Phase I ("the project"), located in the Bronx, New York. Ahern alleges that, pursuant to the parties' contract, Ahern was to construct a portion of the project over twenty-two months, beginning in April of 2002, and that various breaches of contract by defendant, the Dormitory Authority of the State of New York ("DASNY") delayed Ahern's completion of the project, causing Ahern to incur damages.

According to Ahern's complaint, DASNY was constructing the project on behalf of, and pursuant to an agreement with the New York City Health and Hospitals Corporation. To that end, DASNY retained Cannon as the project architect. Cannon's responsibilities included designing the project and coordinating and resolving any issues that arose with that design. Bovis was retained as construction manager for the project and, as such, was tasked with acting as DASNY's agent in administering the project and coordinating the work of the various contractors retained by DASNY. One of those contractors was Ahern, which contracted with DASNY on or around April 10, 2002 to provide certain labor, material and related services and equipment.

Presently before the court are motions by Ahern for orders pursuant to CPLR §2308, compelling non-parties Cannon Design, Inc. ("Cannon") and Bovis Lend Lease ("Bovis") to comply with Ahern's respective subpoenas and subpoenas duces tecum to each entity; or alternatively, for orders holding the entities in contempt for

their refusal to comply with said subpoenas. These subpoenas call from the production of a witness from each entity to provide deposition testimony, as well as documents in each entity's possession pertaining to the project.

Ahern provides affirmations in support of their motions. Annexed to these affirmations are copies of the pleadings; the subpoenas; and correspondence from Ahern to each entity seeking compliance with the subpoenas.

Bovis submits an affirmation in response to Ahern's motion dated October 30, 2009, wherein Bovis states that it is willing to comply with Ahern's subpoena, and that Bovis anticipates that responsive documents would be produced to Ahern by no later than November 23, 2009, and that Ahern has no objection to this timetable.

Cannon, however, submits an affirmation and a memorandum of law in opposition to Ahern's subpoenas. Cannon argues that Ahern's motion to compel must be denied because (1) Ahern fails to demonstrate that special circumstances justify disclosure from Cannon, a non-party; and (2) Ahern's requests are overbroad and unduly burdensome. As for the Cannon representative Ahern seeks to depose, George Santos, Cannon states that Mr. Santos is no longer in the employ of Cannon.

CPLR §3101(a) generally provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." The Court of Appeals has held that the term "material and necessary" is to be given a liberal interpretation in favor of the disclosure of "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity," and that "[t]he test is one of usefulness and reason" (*Allen v. Cromwell-Collier Publishing Co.*, 21 N.Y.2d 403, 406 [1968]).

Cannon cites a number of Second Department cases in support of the proposition that Ahern must demonstrate that "special circumstances" warrant disclosure from Cannon, since it is not a party to this action. However, in *Schroder v. Consolidated Edison Co. Of New York*, the First Department observed that

CPLR 3101(a)(4) provides that there 'shall be full disclosure of all matter material and necessary in the prosecution or defense of an action' by a non-party, 'upon notice stating the circumstances or reasons such disclosure is sought or required.' There is no longer any necessity for

'special circumstances' (see *BAll Banking Corp. v. Northville Indus.*, 204 AD2d 223, 224-225).

(249 A.D.2d 69, 70 [1st Dept. 1998]). Accordingly, the First Department found that

The Second Department cases cited by plaintiff in support of her argument that the 'special' circumstances' requirement survived the 1984 amendment of *CPLR 3101(a)(4)*... are in conflict with the Court's own decisions and are therefore not followed.

(*id.*; see also *Schlosser v. Schlosser*, 2005 NY Slip Op 50566U, *4 [Sup. Ct., New York Cty. 2005]; *Raynor v. Saint Vincent's Hosp. and Med. Ctr.*, 2005 NY Slip Op 50833U, *5 [Sup. Ct., New York Cty. 2005]). Accordingly, the burden is on Cannon to demonstrate that the items sought by Ahern are not discoverable.

While Cannon asserts that Ahern's document requests are overbroad and burdensome, Cannon offers little more than boilerplate and conclusory objections which are insufficient to overcome the presumption that Ahern is entitled to the discovery it seeks (see *Anonymous v. High School for Envtl. Studies*, 2006 NY Slip Op 6349, *3 [1st Dept. 2006]) (ordering disclosure where party's assertion of privilege was conclusory). Cannon further states that millions of pages of documents have been exchanged in discovery between Ahern and DASNY, and that Ahern can easily obtain the sought-after discovery from DASNY - if it has not done so already. However, Ahern states in its affirmation that the information it seeks "can only be obtained from Cannon," intimating it is not contained in the DASNY disclosure. Additionally, there is no requirement that Ahern demonstrate its inability to obtain the sought-after discovery from another source, as noted above.

Finally, as for Ahern's motion against Bovis, Ahern's motion is denied without prejudice to renew, since Bovis has agreed to provide the documentation requested in Ahern's subpoena and to supply a witness from Bovis.

Wherefore it is hereby

ORDERED that Cannon shall produce all requested documents to the extent

that they are in Cannon's possession within 60 days of receipt of a copy of this order with notice of entry; and it is further

ORDERED that Cannon shall produce a witness for deposition at a mutually agreeable date and time; or alternatively, at Ahern's option, Cannon shall provide Mr. Santos' last known address; and it is further

ORDERED that Ahern's motion against Bovis is denied without prejudice to renew; based upon Bovis' agreement with Ahern to provide the discovery sought by Ahern, and its apparent compliance therewith.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: December 4, 2009



EILEEN A. RAKOWER, J.S.C.

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