

Hampton Air E., Inc. v IDI Constr. Co., Inc.

2007 NY Slip Op 30683(U)

March 28, 2007

Supreme Court, Suffolk County

Docket Number: 0021557/2004

Judge: Emily Pines

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Supreme Court - State of New York
Commercial Division, Part 46, Suffolk County

Present:

Hon. Emily Pines
Justice Supreme Court

Motion Date: 12-19-2006 & 02-08-2007
Submit Date: 02-08-2007
Motion No.: 001 MOTD; 002 MG

_____ X
HAMPTON AIR EAST, INC.,
Plaintiffs,

-against-

IDI CONSTRUCTION COMPANY, INC.,
PAYTON LANE PROPERTIES, INC., PAYTON
LANE NURSING HOME, INC., LUMBERMENS
MUTUAL CASUALTY COMPANY,
AMERICAN INTERIORS, INC., STEVENSON
LUMBER COMPANY-NEWBURGH INC, L&W
SUPPLY CORPORATION, AMERICAN
MANUFACTURERS MUTUAL INSURANCE
COMPANY, AMERICAN MOTORISTS
INSURANCE COMPANY, JAMES STUMPF,
WILLIAM M. FLECK, SAM KLEIN, PFC
CORPORATION, ARCH INSURANCE
COMPANY, PIRAGIA CONTRACTING , INC.,
COASTAL ELECTRICAL CONSTRUCTION
CORP., NATIONSRENT USA, INC.,

Defendants.
_____ X

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In this commercial litigation arising out of the construction of the PAYTON LANE NURSING HOME, located in Southampton, New York, AMERICAN MANUFACTURERS MUTUAL INSURANCE COMPANY and AMERICAN MOTORISTS INSURANCE COMPANY ("THE SURETY") make two motions. THE SURETY issued both a payment and a performance bond, in December 2001, to the general contractor on the project, IDI CONSTRUCTION CO. INC. ("IDI"). As a result of the owner's termination of IDI in May, 2004, THE SURETY entered a Takeover Agreement with the owner and completed the project. The Plaintiff in this action, Hampton Air East, Inc. ("HAMPTON AIR"), the heating, ventilation, and air conditioning

("HVAC") subcontractor, sued IDI, the general contractor, and THE SURETY, *inter alia*, claiming that it did not receive payment for a portion of the work it allegedly completed. THE SURETY has counterclaimed against Hampton Air alleging that it misrepresented that it performed tens of thousands of dollars of work that was never performed; that HAMPTON AIR invoiced and received payment for 75 packaged terminal air conditioners, which were not delivered to or installed in the Project; and that HAMPTON AIR failed to pay its own subcontractors hundreds of thousands of dollars.

THE SURETY now moves for the following relief: 1) by Notice of Motion (motion sequence number 001) for an Order pursuant to *CPLR §3124*, compelling the Plaintiff's compliance with certain discovery requests made by THE SURETY's counsel during the deposition of Plaintiff's corporate representative and principal, Anthony Brennan; and 2) by Notice of Motion (motion sequence number 002) for an Order permitting THE SURETY to serve and file an Amended Answer with Counterclaims adding new causes of action and additional claims for damages.

MOTION TO COMPEL

THE SURETY argues that as a result of the deposition testimony of the Plaintiff's representative, it has requested documents and other information which are both relevant and which may lead to relevant evidence in this case. The documents sought on the record of the September 20, 2006 deposition were reiterated in a September 22, 2006 letter from THE SURETY's counsel to Plaintiff's attorney. Based upon the papers before the Court, the following information has not been provided by Plaintiff: 1) The names, phone numbers, and last known addresses of all HAMPTON AIR office staff employees that worked for HAMPTON AIR during the years 2002 and 2003; 2) the last known address and telephone number of Evelyn Gonzalez, the "project coordinator" for plaintiff during the subject project; 3) documents reflecting any licenses of HAMPTON AIR or Mr. Brennan by any governmental agency or licensing institution; 4) complete copies of Mr. Brennan's personal calendars for the years 2002 to 2004, as well as any other documents identifying Mr. Brennan's schedules, appointments or meetings during the years between 2002 and 2004; 5) the last known address and telephone number of Mr. Ahearn, Mr. Brennan's former partner at HAMPTON AIR; 6) all documents and bank statements reflecting payments HAMPTON AIR received from IDI relative to the project; 7) a copy of HAMPTON AIR's accounting information, relative to the PAYTON LANE project, in a Quick Books program format; 8) copies of documents, including accounting records and bank records, reflecting payments made by HAMPTON AIR to Mr. Juraid Ahmed relative to the Project and/or instant litigation; 9) all state tax returns that HAMPTON AIR filed in the State of Connecticut and New Jersey from the years 2002 to the present; and 10) a copy of all contracts between HAMPTON AIR and the Mario Drago School.

During the September 20, 2006 deposition¹, Mr. Brennan testified that Evelyn Gonzalez was the “project coordinator” for the PAYTON LANE project (**EBT at p. 30**) and that Mike Ahearn was his partner in HAMPTON AIR during the project and also worked on the project (**EBT at p. 87**). Mr. Brennan also testified that HAMPTON AIR hired Junaid Ahmed, a delays claim specialist, to prepare the delay claim that HAMPTON AIR is asserting in this action (**EBT at p. 124**) and that Mr. Ahmed was being paid a retainer and also a percentage of HAMPTON AIR’s recovery on the delay claim (**EBT at p. 181-182**).

Plaintiff opposes the motion to compel on the ground that the requests are in the nature of a “fishing expedition” and are designed to harass plaintiff and its employees. Plaintiff further alleges that the employee and financial records are confidential and that the requests are unduly broad and burdensome. Plaintiff alleges that the request for production of contracts for other jobs are irrelevant and that the request for records relating to payments to Junaid Ahmed are work product and irrelevant.

In reply papers, THE SURETY claims that the information regarding payment to Mr. Ahmed is not protected work product as he is an expert witness who is going to testify and that plaintiff’s has improperly agreed to pay him a contingent fee in violation of DR 7-109. THE SURETY claims that the accounting information and documentation regarding payment by the general contractor are relevant to plaintiff’s claims that it was underpaid for its work on the project.

It is well settled that parties to civil litigations are granted broad rights to disclosure of all relevant and material matters as well as documentation that might lead to the discovery of admissible proof. *See, Montgomery v. Taylor*, 275 A.D.2d 698, 713 N.Y.S.2d 188 (2d Dept. 2000); *Keenan v. Harbor View Health & Beauty Spa, Inc.*, 205 A.D.2d 589, 613 N.Y.S.2d 419 (2d Dept. 1994).

Based upon a careful review of the deposition of Anthony Brennan, principal of Plaintiff, HAMPTON AIR, it is clear to the Court that all items sought by THE SURETY, with two exceptions, both on the record of the September 20, 2006 deposition and reiterated in the letter of September 22, 2006 and again on November 16, 2006, are relevant to the prosecution and defense of unpaid work on the construction project at issue. In view of the testimony that Ms. Gonzales and Mr. Ahearn were the employees involved in this project on behalf of Plaintiff, disclosure of their last known addresses and telephone numbers is warranted. Clearly, the information regarding payments by the general contractor to Plaintiff and Plaintiff’s accounting records relative to the PAYTON LANE project fall within the scope of **CPLR §3101** and must be produced.

¹The Court notes that only excerpts from the Brennan deposition are annexed to the motion papers, the transcript has not been included in its entirety.

However, THE SURETY has not set forth to this Court's satisfaction the relevance or materiality of the copies of contracts between Plaintiff and the Mario Drago School. Additionally, with regard to the accounting records and bank records reflecting payments to Mr. Junaid Ahmed, the Court is referring this issue to a conference to more fully discuss same with counsel. Counsel should be prepared to discuss the nature of the work that Mr. Ahmed was retained to perform for the Plaintiff as well as the issue concerning the potential conflict between his method of payment and the rules of Professional Responsibility. With these noted exceptions, THE SURETY's motion to compel disclosure pursuant to *C.P.L.R. §3124* is granted and such information shall be provided to THE SURETY's counsel within thirty (30) days from the date of entry of this Order.

AMENDMENT OF THE PLEADINGS

THE SURETY also seeks to amend its Answer and Counterclaim pursuant to *CPLR §3025* to assert 1) claims against Plaintiff for unjust enrichment; 2) additional damages claims; 3) a negligence claim and 4) claims against Plaintiff based upon a recently discovery Partial Waiver of Lien executed by HAMPTON.

THE SURETY argues that the addition of a counterclaim for unjust enrichment merely seeks to hold Plaintiff responsible for its wrongful receipt of payment for work not performed or supplies not delivered. It claims that this is an alternate or separate theory of recovery under the same factual circumstances which it seeks relief for as breach of the subcontract. Thus, THE SURETY claims, no additional discovery will be required.

THE SURETY also seeks to add a counterclaim based upon breach of an Indemnification Agreement (the Partial Waiver of Lien) of which it was unaware until produced during discovery by Plaintiff. Finally, THE SURETY seeks to add a claim against Plaintiff that it performed defective work on the project. It claims that it has recently discovered that Plaintiff performed hundreds of thousands of dollars of faulty work.

In opposition to the motion, Plaintiff argues that proposed counterclaim regarding breach of the Indemnification Agreement lacks merit and that THE SURETY is estopped from claiming that Plaintiff's work is defective because Plaintiff subcontracted the work to Central Design and all claims by Central Design have been settled.

Leave to amend a pleading should be freely granted where the proposed amendment is neither palpably devoid of merit and will not result in surprise or prejudice to the opposing party. *Old World Custom Homes, Inc., v. Crane*, 33 A.D.3d 600, 822 N.Y.S.2d 155 (2d Dept. 2006).


At this stage of the litigation, while discovery is still ongoing, the Court cannot state as a matter of law that any of the proposed amendments to the pleadings, with one exception, are totally devoid of merit or cause unfair surprise. Therefore, the application to amend the pleadings as requested is granted, such amended pleadings to be served within thirty (30) days from the date of Entry of this Decision.

With regard to the Surety's proposed counterclaim against Hampton Air for negligence, a review of the pleading reveals that it is a statement that Plaintiff performed its work in less than a skillful manner. As set forth in *Gordon v. Teramo & Co.*, 308 A.D.2d 432, 764 N.Y.S.2d 144 (2d Dept. 2003), such assertions are "[m]erely a restatement ... of the ... contractual obligations in the asserted causes of action for breach of contract ...", and do not give rise to a cause of action for negligence. *Id.*

Accordingly, the Motion to Compel is granted in part as set forth and the Motion to Amend the Pleadings is granted to the extent indicated herein.

This constitutes the **DECISION** and **ORDER** fo the Court.

Dated: March 28, 2007
Riverhead, New York


Emily Pines
J. S. C.