

**Casa Redimix Concrete Corp. v Cosner  
Constr. Corp.**

2008 NY Slip Op 30406(U)

February 4, 2008

Supreme Court, New York County

Docket Number: 0600672/2004

Judge: Richard B. Lowe

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

PRESENT: HON. RICHARD B. LOWE, III  
*Justice*

PART 56

Casa Redemix

INDEX NO. 600672/04

MOTION DATE 1/28/08

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

- v -

Cosner Construction

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

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

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

PAPERS NUMBERED

**FILED**  
FEB 13 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM DECISION

HON. RICHARD B. LOWE, III

Dated: 2/4/08

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION J.S.C.

Check if appropriate:  DO NOT POST

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

-----X  
CASA REDIMIX CONCRETE COPR.

Plaintiff,

Index No. 600672/04

-against-

COSNER CONSTRUCTION CORP., 501 WEST  
41<sup>ST</sup> STREET ASSOCIATES, LLC, GOTHAM  
CONSTRUCTION COMPANY, LLC AND  
LIBERTY MUTUAL INSURANCE COMPANY,

Defendants.  
-----X

**Hon. Richard B. Lowe, III:**

Plaintiff makes this motion in limine seeking an order precluding defendants from offering any evidence at trial concerning any claim for labor costs incurred from remedial work alleged as part of Defendants' set-off and counterclaim. The plaintiff asserts the evidence should be precluded based on the Best Evidence Rule and for spoliation.

The defendant seeks to admit Extra Work Orders (EWO's) in support of its set off claim. The plaintiff objects based upon the Best Evidence Rule because the EWO's were generated after referencing information transcribed from Daily Foreman Reports (DFR's). The DFR's have been testified to as being lost prior to the commencement of this proceeding. The defendant seeks to admit the EWO's as Business Records kept in the ordinary course of business.

It is true that the Best Evidence Rule applies to business records (See, *Richardson on Evidence*, § 570 [10th Ed]). However, the Best Evidence Rule does not place categorical limitations on types of secondary evidence that is admissible (*Schozer v William Penn Life Ins. Co.*, 84 NY2d 639 [1994]).

It is also generally the law that entries in a business record must be "original" entries and

not be merely transcribed records of copies. There is an exception, however, where it is customary business practice to prepare a summary from daily records, then the summary may be admissible (*See, Stevens v Kirby*, 86 AD2d 391 [4th Dept 1982]). The Second Department also adopted this rule when the court held that summaries or balances of accounts may be produced to prove aggregate profits or receipts without the need to produce those documents which set forth the underlying data (*R&I Electronics v Neuman*, 81 AD2d 832 [2<sup>nd</sup> Dept 1981]).

In *R&I*, the court found that business summaries are deemed to be independent from the writings or documents from which they are drawn (*R&I v Neuman* 81 AD2d at 834). However, it must be clear from the record that the documents have an independent business function and are separate and distinct from the corresponding underlying documents (*Id*). They also must be prepared in the regular course of business and their authenticity must be vouched for (*Id*).

Having reviewed the witness testimony in this matter, this court finds the defendant has established on the record the EWO's do serve an independent business function and were regularly prepared in the ordinary course of business. For this reason, the EWO's can be deemed independent of the DFR's and therefore are not precluded by the Best Evidence Rule .

The court also notes that because the EWO's serve an independent function from the DFR's, the claims of spoliation of the DFR's need not be considered with respect to this motion seeking to preclude the EWO's from being admitted.

The court also notes for the record, that overall, when considering these issues, it is called to look at the reliability of the documents in question. This court is satisfied that the EWO's are

reliable and accurate and therefore properly admitted into evidence.

So Ordered.

Dated: February 4, 2008

ENTER:



HON. RICHARD B. LOWE, III  
HON. HUGH W. ...

**FILED**  
FEB 13 2008  
NEW YORK  
COUNTY CLERK'S OFFICE