

**Board of Educ. of Sachem Cent. School
Dist. v Sammel Architecture, PLLC**

2008 NY Slip Op 32121(U)

June 10, 2008

Supreme Court, Suffolk County

Docket Number: 0022586/2004

Judge: Gary J. Weber

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

**DECISION AND
SCHEDULING ORDER**

P R E S E N T:

Hon. Gary J. Weber
Acting Justice of the Supreme Court

MOTION DATE April 9, 2008; May 22, 2008
Motion Seq. # 016-MG
017-MG

Action 1, Suffolk County Index 022586-2004

ATTORNEYS FOR PLAINTIFF
167 MAIN STREET
NORTHPORT, NY 11768

BOARD OF EDUCATION OF THE SACHEM
CENTRAL SCHOOL DISTRICT,

Plaintiff,

-against-

L'ABBATE, BALKAN, COLAVITA & CONTINI, LLP
BY: SARA WELLS, ESQ.
ATTORNEYS FOR: SAMMEL ARCHITECTURE,
PLLC; and DAMIAN BARILE ENGINEERS, PC

SAMMEL ARCHITECTURE, PLLC; DAMIAN
BARILE ENGINEERS, PC; EINHORN YAFFEE
PRESCOTT ARCHITECTURE AND ENGINEERING,
PC; HEFLIN ASSOCIATES, PLLC; NACHMAN
ENGINEERING, PC; J KENNETH FRASER &
ASSOCIATES, PC; FELLEZNER ENGINEERING,
LLP; SCHOOL CONSTRUCTION CONSULTANTS,
INC.; and URS CORPORATION /O'BRIEN
KREITZBERG

Defendants

GOGICK, BYRNE & O'NEILL, LLP
ATTORNEYS FOR DEFENDANT-EINHORN
YAFFEE PRESCOTT ARCHITECTURE AND
ENGINEERING, PC and
NACHMAN ENGINEERING, PC
11 BROADWAY
NEW YORK, NY 10004-1314

NEWMAN, FITCH, ALTHEIM, MYERS, PC
BY: ANTHONY D. LUIS, ESQ.
ATTORNEYS FOR DEFENDANT- HEFLIN
ASSOCIATES, PLLC
14 WALL STREET
NEW YORK, NY 10005

Action 2, New York County Index 603327/2006
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

CRAIG ASSOCIATES, PC
ATTORNEYS FOR DEFENDANT- J KENNETH
FRASER & ASSOCIATES, PC
5 HEATHER COURT
DIX HILLS, NY 11746

EINHORN YAFFEE PRESCOTT ARCHITECTURE
AND ENGINEERING, PC,

Plaintiff

-against-

MILBER, MAKRIS, PLOUSADIS & SEIDEN, LLP
ATTORNEYS FOR DEFENDANT- FELLEZNER
ENGINEERING, LLP
1000 WOODBURY ROAD, SUITE 402
WOODBURY, NY 11797

SAMMEL ARCHITECTURE, PLLC and DAVID
SAMMEL, individually,

Defendants

CHARLES R. PIERCE, JR., PC
ATTORNEY FOR DEFENDANT- SCHOOL
CONSTRUCTION CONSULTANTS, INC.
32 WOODBURY ROAD
HUNTINGTON, NY 11743

INGERMAN SMITH, LLP
BY: CARRIE ANNE TONDO, ESQ.

WINSTON & STRAWN, LLP
 ATTORNEY FOR DEFENDANT-URS
 CORPORATION /O'BRIEN KREITZBERG
 200 PARK AVENUE
 NEW YORK, NY 10166

The Defendant-SAMMEL ARCHITECTURE, PLLC, and DAVID SAMMEL, individually, by Notice of Motion dated March 11, 2008, have moved (Mot. #016) this Court for an Order transferring a related action pending in Supreme Court, New York County and consolidating that action with this action. Defendants EINHORN, YAFFEE, PRESCOTT ARCHITECTURE AND ENGINEERING, PC and NACHMAN ENGINEERING, PC have submitted an Affirmation in Opposition dated April 2, 2008. The Plaintiff has submitted an Affirmation in Opposition dated April 1, 2008. The Defendant-SAMMEL ARCHITECTURE, PLLC, and DAVID SAMMEL have submitted a Reply Affirmation dated April 21, 2008. Defendants EINHORN, YAFFEE, PRESCOTT ARCHITECTURE AND ENGINEERING, PC and NACHMAN ENGINEERING, PC have submitted a letter dated April 24, 2008 which they have described as a SUR-REPLY, and have also requested that the Court grant oral argument on the application. Defendant-SAMMEL ARCHITECTURE, PLLC, and DAVID SAMMEL have submitted a letter dated May 1, 2008. On June 4, 2008, the Court heard oral argument on the record as made by counsel for the movant, The Defendant-SAMMEL ARCHITECTURE, PLLC, and DAVID SAMMEL, and the opposing party, EINHORN, YAFFEE, PRESCOTT ARCHITECTURE AND ENGINEERING, PC.

The Defendant-FELLENZER ENGINEERING, LLP, by Notice of Motion dated April 24, 2008, has moved (Mot. #017) this Court for discovery sanctions pursuant to CPLR 3126. The Plaintiff has submitted an Affirmation in Opposition dated May 21, 2008. Defendant-FELLENZER ENGINEERING, LLP has submitted a Reply Affirmation dated May 27, 2008.

DECISION

Motion to Consolidate

This action was commenced on September 17, 2004 by the Plaintiff when it filed a summons and verified complaint with the Suffolk County Clerk. More than two years later on September 21, 2006, EINHORN, YAFFEE, PRESCOTT ARCHITECTURE AND ENGINEERING, PC (Hereafter referred to as "EYP") commenced a separate action in New York County under Index Number 603327/2006 by filing a complaint. EYP's complaint pending in NY County is for an alleged breach of contract by SAMMEL ARCHITECTURE, PLLC (Hereinafter referred to as "SAMMEL") with respect to a contract which called for work to be performed by EYP in furtherance of SAMMEL's obligations to perform on the prime contract with the Plaintiff, BOARD OF EDUCATION OF THE SACHEM CENTRAL SCHOOL DISTRICT (Hereinafter referred to as "SACHEM"), in this action.

In this action SACHEM contends that the work by SAMMEL and its subcontractors, including EYP, was negligently performed, and that it was thereby damaged by the failings of SAMMEL, and its subcontractors, including EYP. The complaint drafted by EYP against SAMMEL, in its NY County action specifically alleges that EYP's work on that contract was performed in a "good, professional, and workmanlike manner in accordance with all appropriate standards of architectural care then and there obtaining." *See EYP Complaint at par. 6, attached as Exhibit D to the Motion.* Moreover, the contract between EYP and SAMMEL specifically provides that no payment is due and owing to EYP until EYP has been paid by SACHEM. *See Contract at par. 10.5, attached as Exhibit G to the Motion.* It is the payment by SACHEM that is at issue in the case pending in Suffolk County. To the extent that SACHEM has paid for work that was faulty, it contends it should recoup such payments, and to the extent payment has been withheld it contends such payment is not due and owing for work poorly performed. In essence, it appears based upon the submissions on this motion, that no financial obligation to EYP shall accrue without a resolution of the case that has been brought by SACHEM. Upon oral argument EYP argued that it should be able to advance its cause independently on the New York County Action without being impeded by this Suffolk County action which EYP claims has been unnecessarily protracted. All parties to this action have a right to a fair and expeditious resolution of this case, and thus EYP has a contractual right to the diligent and reasonable efforts by SAMMEL to advance this end. *See Contract at par. 10.4, attached as Exhibit G to the Motion.* The Court notes that it was EYP that has argued in

conference that it still needs to conduct depositions on the Suffolk County action, and has agreed with the other litigants in this action to a schedule that has now been proposed to the Court which provides for depositions to be concluded on the last day of April in the year 2009.

SACHEM takes two rather incredible positions in opposition upon this motion for consolidation. First, it contends that the work performed by EYP for SAMMEL on SACHEM's prime contract with SAMMEL was done negligently, and at the same time urges that this has no bearing upon the EYP action in NY County against SAMMEL. Second, Plaintiff asserts that the parties to the action pending in Suffolk have agreed to mediation, and that consolidation of the claims by EYP against SAMMEL in its action in NY County with the Suffolk County action will impair mediation of this case in which both EYP and SAMMEL are parties¹. Plaintiff elected not to make oral argument, although counsel for Plaintiff was present. If this Court were to fail to consolidate these two actions, separate resolutions of the very same factual questions would be required. The doctrines of collateral estoppel could not be employed against litigants in the Suffolk County action that were not parties to the New York County action. To advance these cases separately would constitute a waste of both public and private resources, and would risk inconsistent results that could give rise to inconsistent findings on the question of liability and otherwise. Accordingly, the motion (Mot. #016) to consolidate Action 1 and Action 2 is granted and a separate transfer and consolidation order is signed this day.

Motion for Discovery Sanctions

Defendant-FELLENZER ENGINEERING, LLP (Hereinafter referred to as "FELLENZER") has moved for the imposition of discovery sanctions against SACHEM for its repeated and protracted delays in providing discovery in this action. There is no question that SACHEM has been less than diligent in prosecuting this action. However, this is a delinquency in which all parties have been complicit. SACHEM contends that it has already provided the material demanded by FELLENZER in the October 31, 2007 discovery demand. Nowhere in SACHEM's responsive papers to this motion is there any evidence that a timely communication of this contention was made to FELLENZER. SACHEM must provide a response to each separately enumerated demand made by FELLENZER indicating what documents previously disclosed are responsive, whether a diligent search was made and such documents can not be located, or that such documents never existed. The assertions in such a response by SACHEM may, under the appropriate circumstances, be admissible upon the trial of the action. Accordingly, FELLENZER's motion is granted to the extent provided in this Court's Order *infra*.

Discovery Schedule

The parties appeared before the Court on June 4, 2008 and proposed a discovery schedule that would be completed on April 30, 2009. As previously noted, September 17th will mark the fourth anniversary of commencement of this action, and, as proposed by the parties, the action wouldn't be tried until the fifth anniversary. No reason has been advanced for such continued delays. Accordingly, pursuant to **22 NYCRR § 202.12** the parties will proceed in accordance with the following schedule.

All documentary discovery shall be concluded no later than August 1, 2008, and all motions to compel discovery of documents shall be returnable no later than August 13, 2008 and the Court will consider the imposition of monetary sanctions pursuant to **22 NYCRR Part 130** in connection with any relief afforded any party where the opposing party is in non-compliance.

Plaintiff's will serve its expert disclosure in accordance with **CPLR 3101(d)** no later than September 12, 2008, as it has stated it is prepared to do, and all other parties will serve their respective expert disclosures no later than November 11, 2008. In preparing this disclosure, Plaintiff should be certain that the disclosure provides the specific departures from the standard of care and the specific damages it contends were caused by the departure from the standard of care. These departures must be specifically related and referenced to the bill of particulars previously

¹The parties appeared before this Court in September of 2007 and advised the Court that they were seeking to mediate this case. However, on June 4, 2008 the parties advised the Court that to date they have not been able to agree upon a mediator.

served by Plaintiff in this action. *See Navarette v. Alexiades*, __AD3d__ (2nd Dept., April 15, 2008); and *530 East 89 Corp. v. Unger*, 43 NY2d 776. The Court will give serious consideration to the preclusion of expert testimony proffered by any party that exceeds the bounds of their respective expert disclosures. *See McGlaufflin v. Wadhwa*, 265 AD2d 534. The Court is acutely aware of the risks presented by proposed expert testimony that has not been fairly disclosed in advance of trial so that counsel can be properly prepared to meet such evidence.

The schedule proposed by the parties provided that depositions should be concluded no later than April 30, 2009. There is no reason for discovery continue into 2009. All depositions on this matter must be concluded no later than October 8, 2008. The Plaintiff is further directed to file a note of issue and certificate of readiness on or before November 19, 2008. All motions for summary judgment must be returnable no later than 30 days after the note of issue is filed. *See CPLR 3212(a)*, *Rahman v. Domber*, 45 AD3d 497, and generally *Grupo v. London*, 25 AD3d 486; *QB. LLC v. A/R Architects, LLP*, 19 AD3d 675.

ORDERED

ORDERED that the Defendant-SAMMEL ARCHITECTURE, PLLC's motion (Mot. #016) to transfer and consolidate Action 2 with Action 1 is granted and a separate order of transfer and consolidation has been signed this day; and it is further

ORDERED that the Defendant-FELLENZER ENGINEERING, LLP's motion (Mot. #017) for the imposition of discovery sanctions is granted only to the extent that, no later than 15 days after service of this decision and order together with notice of entry, Plaintiff shall provide a written answer to the discovery demand and address each demand specifically and comprehensively; and it is further

ORDERED that all **documentary discovery** shall be concluded no later than **August 1, 2008**; and it is further

ORDERED that all **motions to compel discovery of documents** shall be **returnable no later than August 20, 2008**; and it is further

ORDERED that Plaintiff's will serve its expert disclosure in accordance with **CPLR 3101(d)** no later than **September 12, 2008**; and all other parties will serve their respective expert disclosures no later than **November 11, 2008**; and it is further

ORDERED that all depositions on this matter must be concluded no later than **October 8, 2008**; and it is further

ORDERED that all parties are directed to appear at the compliance conference before this Court on **November 19, 2008** as agreed by counsel on June 4, 2008; and it is further

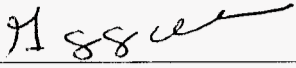
ORDERED that the Plaintiff is further directed to file a note of issue and certificate of readiness on or before **November 19, 2008**; and it is further

ORDERED that all motions for summary judgment must be made no later than **30 days after the note of issue is filed**; and it is further

ORDERED that Defendant-SAMMEL ARCHITECTURE, PLLC must promptly (and any other party may) serve upon all parties to this action a copy of: this decision and order, the order of transfer and consolidation, and a notice of entry.

The foregoing shall constitute the decision and order of the Court together with the Order of Transfer and Consolidation signed as a separate order of even date.

Dated June 10, 2008



Gary J. Weber, Acting J.S.C.

Non-Final Disposition
Scan