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

PRESENT: HON. CAROL EDMEAD PART 35

Index Number : 601596/2008

STOREY CONSTRUCTION

VS

M & I MARBLE WORKS

Sequence Number : 002

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

	PAPERS NUMBERED
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

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the branch of the motion of defendant M&I Marble Works Ltd., d/b/a Marble Solutions for an order dismissing the Complaint of Storey Construction Co., Inc. for failing to join an indispensable party, and limiting plaintiff's damages to $58,150, is denied; and it is further

ORDERED that the branch of defendant's motion for an order and disqualifying Miles Stanislaw from continued representation of plaintiff is denied at this juncture; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

That constitutes the decision and order of the Court.

FILED
JUL 01 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6/26/09

HON. CAROL EDMEAD J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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STOREY CONSTRUCTION CO., INC,

Index No. 601596/08

Plaintiff,

-against-

DECISION/ORDER

M&I MARBLE WORKS LTD., d/b/a
MARBLE SOLUTIONS,

Defendant.

----------x

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action, plaintiff Storey Construction Co., Inc ("plaintiff"), a general contractor based in Idaho, seeks damages against defendant M&I Marble Works Ltd., d/b/a Marble Solutions ("defendant"), a New York corporation, for breach of contract.

Defendant now moves to dismiss plaintiff's Complaint for failing to join an indispensable party or limit plaintiff's damages to $58,150, and to disqualify Miles Stanislaw ("Mr. Stanislaw") from continued representation of plaintiff on the ground that Mr. Stanislaw is a witness in this action.

Plaintiff's Complaint

Plaintiff and defendant entered into an agreement in Idaho, whereby plaintiff agreed to buy and defendant agreed to sell fixed quantities of Jerusalem Stone (the "stone") in various agreed-upon sizes (the "Contract"). After extended negotiations, the parties also agreed on the appearance of the stone and delivery dates. Plaintiff further alleges that defendant was made aware that the stone was intended for use in a custom residence in Idaho and that a delay in delivery of the stone would cause a delay in the construction process, which would cause

financial loss. Because defendant would not extend any credit, plaintiff paid defendant in full at the time the stone was ordered.

Plaintiff alleges that defendant breached the Contract, by *inter alia*, delivering the stone late, delivering stone that did not conform to the agreed appearance, and delivering stone that was not the proper size, resulting in actual and consequential damages. Immediately after defendant's tender of the non-conforming goods, plaintiff rejected the stone and provided defendant with a written notice of rejection. Plaintiff tendered the stone back to defendant, and defendant refused it.

Defendant's Motion[1]

Defendant contends that the stone was actually purchased by plaintiff's clients, Mr. Stanislaw and his wife (collectively, "the Stanislaws"). Israel Cohen ("Mr. Cohen"), president of defendant, attests that he "first had contact with the Stanislaws on or about July 12, 2005, when they came into our showroom [in New York City] and told us they wished to purchase stone for a (second) home they were building in Ketchum, Idaho." In the summer of 2006, the Stanislaws returned to defendant's showroom, again indicating they wished to purchase some stone for their house in Idaho. On or about October 23, 2006, defendant invoiced the stone for $58,150, which was paid for by Mr. Stanislaw's credit card (see the "Invoice"). Mr. Cohen attests that both the Stanislaws and plaintiff "apparently were not satisfied with [the stone], as indicated in the April 10, 2007 letter to us from the Plaintiff who rejected same" (Cohen Aff., ¶ 6).

First, citing CPLR §1001(a), defendant argues that plaintiff is not the real party in interest

[1]Defendant's motion comprises an affidavit by Israel Cohen ("Mr. Cohen"), president of defendant, ("Cohen Aff.") and a memorandum of law by Michael J. Siris, Esq., attorney for defendant ("motion").

in this action. Defendant also argues that none of the factors considered in excusing the nonjoinder of an indispensable party, pursuant to CPLR §1001(b), militate in favor of the non-joinder of Mr. Stanislaw. While defendant "does not dispute that it had contact with Plaintiff's principal Gary Storey, apparently the contractor the Stanislaws had retained," defendant contends that it dealt almost exclusively with the Stanislaws. In any event, plaintiff cannot dispute that Mr. Stanislaw paid defendant $58,150 for the stone.

Defendant contends that "essentially all of its dealings, at least with respect to the alleged contract Defendant supposedly breached, were with the Stanislaws." Clearly, Mr. Stanislaw needs to be bound by the decision herein, defendant argues. "For example, what if Defendant prevails only to find that [Mr. Stanislaw] . . . intends to bring his own claim against Defendant for the very same alleged breach. Accordingly, absent his joinder, the action should be dismissed" (motion, p. 3).

Second, defendant argues that plaintiff's damages, if any, should be limited, as a matter of law, to $58,150, the amount Mr. Stanislaw paid to defendant for the allegedly defective goods. Mr. Cohen attests that neither the Stanislaws nor plaintiff ever indicated to him that the stone needed to arrive in Idaho by a certain time. "Indeed, given the fact that the stone was being shipped from Israel to California by ocean vessel, and then by truck from there to Idaho, it is inconceivable that either the Stanislaws or the Plaintiff could have reasonably expected delivery by a certain date, what with the vagaries of international shipping, the problems interfacing ocean and motor transportation, clearance through customs, and the like," Mr. Cohen contends. Mr. Cohen further attests that "while the stone was being shipped (as indicated on the invoice) from Israel to California/Idaho, Defendant communicated with [Mr. Stanislaw's] wife Jean, who not

once mentioned the possibility of the literally astronomical delay damages Plaintiff apparently thinks is recoverable herein."[2]

Defendant contends that the damages for which a party may recover for a breach of contract are such as ordinarily flow from the non-performance or mis-performance, as in this case. Such damages must be proximate and certain, or capable of certain ascertainment, and not remote, speculative or contingent. In a garden variety breach of contract action by a buyer against a seller, as here, the measure of damages for goods repudiated is controlled by Uniform Commercial Code ("UCC") 2-713, defendant argues. Defendant further argues that UCC §2-715 defines "special" damages, or damages above and beyond the normal market measure of damages defined in either §2-713 or §2-714, to include either "incidental"or "consequential." Here, there are no such "incidental" or "consequential" damages, defendant contends. Plaintiff, or more accurately, the Stanislaws, paid defendant only $58,150. Hence, even assuming either that the goods were not delivered (which was not the case) or that the goods were totally worthless when delivered (which was also not the case), the very most that plaintiff/Stanislaws could recover, absent "special circumstances" not present here would be $58,150, defendant argues. Defendant points out that in the prior federal action, plaintiff "promised a federal judge that documentation supporting its damages would be forthcoming but then after realizing that his complaint could not possibly meet the federal jurisdictional minimum of $75,000.00, simply advised the court that it was voluntarily discontinuing."

Third, citing 22 NYCRR 1200.21 [DR 5-102], defendant argues that Mr. Stanislaw should be disqualified because he is a witness. Mr. Stanislaw "has appeared herein as 'trial

[2]As examples, Mr.Cohen cites e-mail communications with Mrs. Stanislaw (Cohen Aff., Exh. E).

counsel.'" In a letter to defendant's attorney, Mr. Stanislaw offered to be deposed in Idaho (the "February 9, 2009 letter"). In the letter, Mr. Stanislaw claims that "[he] will not be called as a witness by" plaintiff and that he, therefore, should continue as "trial counsel" for plaintiff. Defendant argues that even if true, plaintiff's refusal to call Mr. Stanislaw as a witness has no bearing on whether defendant intends to call Mr. Stanislaw as a witness, and indeed defendant plans to call Mr. Stanislaw as a witness. The Stanislaws are the ones who negotiated the alleged contract; Mr. Stanislaw, principally, communicated with defendant regarding the performance of the alleged contract; the stone was purchased for the Stanislaws' house; and Mr. Stanislaw himself paid for the stone. Accordingly, Mr. Stanislaw should be disqualified.

Plaintiff's Opposition[3]

Plaintiff alleges that it was the general contractor on the Stanislaws' residence during the years 2006 through 2008. Gary Storey ("Mr. Storey"), the owner and president of plaintiff, contacted Mr. Cohen and was assured that defendant was willing, able, and eager to do business in Idaho, plaintiff alleges. As a result of Mr. Cohen's assurance and because plaintiff – and not the Stanislaws – was going to purchase the stone, Mr. Storey insisted on going to New York City to meet Mr. Cohen at defendant's showroom on June 6, 2006. During that meeting, defendant promised Mr. Storey that if he purchased the stone from defendant, it could be delivered to Idaho in eight to ten weeks, plaintiff alleges. In his affidavit, Mr. Storey contends:

While meeting with Mr. Cohen in New York City, the construction drawings/blueprints

[3]Plaintiff's opposition comprises a memorandum in opposition by plaintiff's attorney Diane K. Kanca ("Ms. Kanca"), which lists Mr. Stanislaw as an attorney *pro hac vice* ("opp."); an affidavit by Mr. Stanislaw ("Miles Stanislaw Aff."); an affidavit by Mr. Stanislaw's wife, Jean Stanislaw ("Mrs. Stanislaw"), ("Jean Stanislaw Aff."); an affidavit by Gary Storey ("Mr. Storey"), owner and president of plaintiff ("Storey Aff."); a Ratification by the Stanislaws that plaintiff is the real party in interest in the case ("Stanislaw Ratification"); and an affidavit adding as an exhibit a letter Mr. Storey refers to in his affidavit.

> for the residence were reviewed by me and Mr. Cohen. . . . Both from reviewing the drawings and from what I specifically told Mr. Cohen, he knew that the M&I Jerusalem stone being considered for purchase was the stone needed to construct the floors throughout the entire house on all three levels. Floors are a critical item of work in a residential construction project. Floor installation must be completed before other critical items of work, such as baseboard, wallboard, and door frames can be installed and completed. I discussed with Mr. Cohen how critical the floors were.
> (Storey, Aff., ¶ 8)

Mr. Storey further attests that during that June 6, 2006 meeting and in numerous subsequent conversations, he "expressly stated to Mr. Cohen how critical timely delivery of the Jerusalem stone flooring was and that the consequences of late delivery of the stone flooring would be a delay to the construction schedule and disruption or halting of other construction activities" (Storey Aff., ¶ 9). Mr. Cohen responded that he was an architect, that he knew both the importance of timely delivery of stone flooring and the costly problems that late delivery of the stone would cause, defendant alleges. Mr. Cohen also told Mr. Storey that delivery would occur within eight to ten weeks of the date when an order was placed (Storey Aff., ¶ 9).

Plaintiff contends that after Mr. Storey's visit to New York, he and Mr. Cohen made the following agreements:

a) On July 3, 2006, plaintiff and defendant agreed that if defendant could furnish 24 X 24 X 3/4 Jerusalem stone flooring that was honed and chiseled and matched a color sample previously furnished by defendant and approved by Mr. Storey, then plaintiff would likely purchase up to 6,000 square feet for use in the Stanislaws' residence.

b) In August 2006, defendant agreed to ascertain whether defendant could obtain a sufficient quantity of the stone approved by Mr. Storey. If that stone was available, defendant would arrange to have the stone cut to specified sizes in order to achieve a "module C" pattern. "Because of the need to quarry the stone, plaintiff again requested and received assurance from

Mr. Cohen that the stone would be delivered eight to ten weeks after Storey placed an order."

c) In October 2006, defendant agreed to sell the stone to plaintiff.

d) On October 23, 2006, plaintiff and defendant agreed for the first time to all of the essential contract terms for the quantity, size, type, cost, and delivery date of the stone. The terms of the agreement were consistent with plaintiff's and defendant's prior agreements as to color, pattern, size, type, and eight- to ten-week delivery schedule.

e) On or about October 23, 2006, plaintiff and defendant agreed that because defendant insisted on being paid in full immediately and refused to extend any form of credit to plaintiff or accept a check from plaintiff and because plaintiff's credit card could not carry the full purchase price, Mr. Storey would pay defendant using Storey's clients' credit card.

Plaintiff contends that Mr. Storey independently negotiated, without instruction or direction from the owners, all of the terms and conditions of plaintiff's contract with defendant. Mrs. Stanislaw was involved in color and pattern selection, but she did not negotiate any contract terms, defendant contends. Mr. Stanislaw "was not involved at all in this process, except as an observer." All of the other materials for the residence, *e.g.*, lumber, windows, plumbing, fixtures, doors, granite, and marble counters and vanities, etc., were purchased by plaintiff, and not the owners, plaintiff contends.

Plaintiff further alleges that "some weeks after contracting," defendant proposed a revised delivery date, which plaintiff found unacceptable. Mr. Storey reminded Mr. Cohen of the impact delayed delivery would have on the construction schedule. Nevertheless, defendant unilaterally changed its earlier promised delivery date and promised to deliver by the revised date. The stone finally arrived many weeks after the revised delivery date.

Plaintiff's dealings with defendant continued from May 2006 to April 2007. During that time, plaintiff contends, Mr. Storey personally had more than 100 telephone calls and exchanged many e-mails and faxes with defendant for the purpose of negotiating the terms and conditions of the purchase order and attempting to obtain performance of those terms and conditions (opp., p. 6, citing Storey Aff., ¶ 11).

When the stone finally arrived in Idaho in April 2007, (1) it was the wrong size, making it impossible to lay in the "module C" pattern; (2) more than 50% of the stone did not match any of the previously approved color samples; and (3) the surface of the stone contained unsightly particles not present in any of the previous samples. By letter dated April 10, 2007 (the "Notification letter"), plaintiff notified defendant that the stone was "unusable." In response, Mr. Cohen told Mr. Storey that a module C pattern could be achieved, and he traveled to Idaho to show Mr. Storey how it could be done. After inspecting the stone, Mr. Cohen agreed that (1) the stone was not cut to the proper size to achieve the module C pattern; (2) at least 50% of the stone material did not come within an acceptable range of the previously agreed-upon color sample; (3) the stone contained irregularities not seen in any of the prior samples furnished by defendant; (4) defendant would use its best efforts to sell the rejected stone to local sources in Idaho; and (5) the only way that the stone could be laid was by cutting it into different-sized pieces, and defendant would investigate resources to accomplish cutting the wrong-sized stone.

Immediately after Mr. Cohen left Idaho, Mr. Storey formally rejected the stone by letter dated April 19, 2007 (the "Rejection letter"). Defendant never identified any potential local source to sell or to cut the stone.

Since then Mr. Storey has tried to sell the stone in order to mitigate plaintiff's damages.

Plaintiff took the time to investigate and research an alternate supplier in New Jersey, from which plaintiff purchased 6,000 square feet of replacement stone. The construction schedule was delayed five to six months. Several trades stopped work altogether, while others re-sequenced their work, which disrupted construction and increased costs.

First, plaintiff argues that according to UCC §1-305, remedies are to be liberally administered. Plaintiff argues that in addition to recovering the $58,150 paid to defendant to purchase the non-conforming goods, pursuant UCC §2-711, plaintiff is entitled to recover $20,275 for delivering, moving, shipping, inspecting, storing, clearing customs, and protecting defendant's stone. After plaintiff rejected the non-conforming goods, plaintiff promptly purchased 6,000 square feet of Jerusalem stone from a different supplier.

Because this is a case of a rejection of non-conforming goods, UCC §2-712 applies, plaintiff agues.[4] Plaintiff's cost to replace the goods was slightly less than the price paid to defendant. By obtaining replacement goods at a slightly lower price than charged by defendant, defendant has avoided being charged any increased costs for replacement goods, plaintiff argues. However, pursuant to UCC §2-712, defendant is liable for the incidental and consequential damages incurred by plaintiff. Plaintiff's incidental damages, computed in accordance with UCC §2-715(1), are $20,275, plaintiff contends.[5]

Plaintiff also argues that it is entitled to recover $100,000 in costs caused by defendant's

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[4] Plaintiff notes that UCC §2-713, mentioned by defendant, applies in the case of "non-delivery or repudiation by the seller," which is not this case.

[5] Mr. Storey provides an itemized breakdown of the $20,275: (1) Customs Charges, $510; (2) Trucking, $2,450; (3) Time and Travel Expense to Port of Entry, $1,750; (4) Move Stone From Residence to Bellevue, Idaho Storage Facility, (a) Labor, $1,470, (b) Equipment, $1,600; (5) Labor to Locate and Secure Alternate Stone, $12,495 (see Storey Aff., ¶ 20).

delayed delivery and subsequent non-conforming tender. Plaintiff and defendant agreed that the stone flooring would be delivered by January 5, 2007, eight to ten weeks after the October 23, 2006 purchase date. The overall construction schedule was delayed five to six months, and the cost of construction increased as a result of the delay caused defendant, plaintiff argues. Defendant was fully aware of the effect on the construction schedule and the financial consequences of delay if plaintiff failed to obtain timely delivery of the stone. Plaintiff further contends that on October 23, 2006, the date of contracting, defendant "knew and expressly admitted" that timely receipt of the 6,000 square feet of stone was critical to the construction schedule, that construction would be delayed if delivery was delayed, and that costs would increase. According to UCC §2-715, these increased costs caused by delay are classic textbook consequential damages caused by defendant's breach of contract, and UCC §2-712 entitles plaintiff to recover such damages, plaintiff argues. But even if plaintiff's delay damages are not considered consequential, the damages also constitute incidental damages, pursuant to UCC §2-715(1), plaintiff argues.

Second, plaintiff argues that it is the real party in interest, and Mr. Stanislaw is not an indispensable party. Plaintiff independently negotiated, without instruction or direction from the Stanislaws, the terms and conditions of the Contract. Plaintiff had extensive communication with defendant by phone, fax and e-mail. Plaintiff took delivery of the stone, arranged for its transportation, inspected it, rejected it, and tried to sell it. Plaintiff purchased the other materials used in building the house. The only thing plaintiff did not do was directly pay for the stone. Plaintiff further contends that defendant always dealt with plaintiff as if plaintiff was the party with whom defendant contracted. Defendant wrote a letter acknowledging that its contract was

with plaintiff, plaintiff contends (the "April 24, 2007 letter").

If the Court ordered the joinder of Mr. Stanislaw as an indispensable party, Mr. Stanislaw could represent himself *pro se*, plaintiff contends. That result would defeat the purpose of defendant's motion to disqualify Mr. Stanislaw. In addition, at trial defendant would have to contend with Mr. Stanislaw representing himself and Ms. Kanca representing plaintiff.

Plaintiff further contends that defendant's concern that Mr. Stanislaw may bring a later action against defendant is completely eliminated by the Stanislaw Ratification attached to the affidavits of Mr. and Mrs. Stanislaw. The Stanislaws agree to be bound by the outcome of this action brought by plaintiff. In any event, dismissal is not the proper remedy for failure to join an indispensable party, plaintiff argues, and defendant has cited no contrary authority. An order directing joinder is the proper remedy if Mr. Stanislaw is deemed indispensable, plaintiff contends.

Plaintiff further argues that defendant has failed to show why Mr. Stanislaw should be disqualified. Under NYCRR §1200.21, attorneys may not act as counsel at trials where they will be called as witnesses "on behalf of the client," plaintiff contends. Here plaintiff, the client, has agreed it will not call Mr. Stanislaw as a witness in its case in chief or rebuttal. Plaintiff further argues that Mr. Stanislaw was an infrequent observer, who played no role in the contract negotiations. Mr. Stanislaw was not even in Idaho when Mr. Cohen met with plaintiff to try to resolve the issues with the non-conforming stone.

Plaintiff argues that defendant has failed to demonstrate any compelling circumstances justifying Mr. Stanislaw's disqualification. Defendant failed to show that plaintiff ought to call Mr. Stanislaw as a witness. Plaintiff further argues that defendant made no attempt to show how

defendant would be prejudiced by any testimony from Mr. Stanislaw. To the contrary, plaintiff would be prejudiced by the loss of its long-time and preferred counsel, plaintiff argues.

Defendant's Reply

Defendant argues that it is clear that Mr. Stanislaw is the real party in interest here, and that this action cannot proceed without his joinder. Defendant contends that Mr. Stanislaw "*paid for the shipment* on his own personal credit card," "*signed* the purchase order (in his individual capacity) that effectively constitutes the contract between the parties" and "essentially negotiated, along with his wife, the essential terms of the contract" before plaintiff became involved. Plaintiff and Mr. Stanislaw have adduced no cogent explanation of why plaintiff (and not Mr. Stanislaw) is the real party in interest, defendant contends.

Defendant also argues that for plaintiff to recover "consequential" or "special" damages, it must establish that these damages were within the reasonable contemplation of both parties when the Contract was made. The effective purchase order between the parties (the Invoice) states that the stone was being shipped and delivered from Israel, thus, as plaintiff /Stanislaw *knew* the stone was coming from Israel, it was unreasonable to assume that the Contract "contemplated a 'tight' delivery schedule so as to entitle the Defendant in excess of $100,000.00 in 'delay' damages," defendant argues.

Moreover, Mr. Storey contends that "a plethora" of e-mails and faxes substantiate not only his own involvement with the negotiation of the purported contract, but also his expressed concern that the shipment be delivered in a timely fashion. However, so far, the only e- mails in the record (or faxes) are ones from the Stanislaws (not Mr. Storey) and, if anything, they merely indicate the Stanislaws' eagerness to receive the shipment, defendant contends. For example, on

January 30, 2007, Mr. Stanislaw wrote to the following to defendant's principals: "Just wondering if you have any news on *our* wonderful stone . . . Miles is planning on another trip to NYC in May" (*emphasis added*) (the "January 30, 2007 e-mail"). Thus, plaintiff has provided absolutely no evidence whatsoever to substantiate its claim that the supposedly dire consequences of any delay, assuming there was one, were known to defendant, defendant contends. By the same token, defendant argues, the various other components of the additional $20,275 were clearly beyond the scope of contemplation of the parties when the purported contract was made.

Further, plaintiff failed to provide any invoice, name of any supplier or the date plaintiff purchased the replacement order. Such information is relevant because a party is entitled to recover the difference in price less any expenses saved, defendant argues. Without this information, not only are plaintiff's damages totally unreasonable as a matter of law, but they also are also unquantifiable, defendant argues. The most plaintiff should be entitled to recover, assuming the shipment was totally worthless on arrival, which is not the case, is $58,150 (the agreed price less the value of the goods upon arrival), minus savings due to any less-expensive replacement goods, minus any salvage proceeds.

It is undisputed that the Stanislaws initially visited defendant's New York City showroom in 2005, ordered certain items for their home and paid for them with Mr. Stanislaw's own checking account.[6] It is also undisputed that on or about October 23, 2006, Mr. Stanislaw, in his individual capacity, signed the Invoice (which also contained the relevant terms of the shipment),

[6]Although this instance occurred before this dispute arose, defendant argues that it is relevant to the extent that it shows a course of conduct inconsistent with plaintiff's version of events and totally consistent with defendant's: that Defendant, at all times, thought they were dealing with the Stanislaws, whose general contractor (plaintiff) apparently got into the act after the fact, defendant argues.

and paid for the stone on his own personal credit card. All of the e-mails and letters in the record demonstrate that, with one exception, it was strictly the Stanislaws who were communicating with defendant regarding the shipment in question, at least until it arrived in Idaho. At this point, Mr. Storey "stepped into the breach," defendant argues, "first writing to the Defendant that he had 'encountered two problems' and then rejecting the shipment outright." Mr. Stanislaw was not just some "bystander."

Defendant intends to call Mr. Stanislaw as a witness as part of its case, because Mr. Stanislaw possesses knowledge germane to the defense. Among other things, defendant intends to call Mr. Stanislaw to prove that there were no written communications from him to defendant regarding the consequences of any delay. Defendant also intends to call Mr. Stanislaw to establish that Mr. Stanislaw, and only he, paid for the subject shipment and that he signed the effective purchase order (or Invoice). Thus, Mr. Stanislaw's testimony is not only relevant, but also necessary to defendant's defense. Accordingly, Mr. Stanislaw must be disqualified.

Analysis

Indispensable Parties

CPLR §1001(a) describes indispensable parties as "[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so he may be made a defendant." In *Eclair Advisor Ltd. v Jindo America, Inc.* (39 AD3d 240, 244-245 [1st Dept 2007]), the First Department explains the purpose behind the statute:

> . . . "[j]oinder rules serve an important policy interest in guaranteeing that absent parties at risk of prejudice will not be 'embarrassed by judgments purporting to bind their rights

> or interests where they have had no opportunity to be heard,'" and they "also protect against multiple lawsuits and inconsistent judgments" . . . see also Saratoga County Chamber of Commerce, Inc. v. Pataki, 100 N.Y.2d 801, 820, 766 N.Y.S.2d 654, 798 N.E.2d 1047 [2003] ["[t]here are two principal purposes of requiring dismissal owing to the absence of an indispensable party. First, mandatory joinder prevents multiple, inoonsistent judgments relating to the same controversy. Second, joinder protects the otherwise absent parties who would be 'embarrassed by judgments purporting to bind their rights or interests where they have had no opportunity to be heard'"]).
> (*Eclair Advisor Ltd. v Jindo America, Inc.* at 244-245)

The movant must demonstrate that a party's joinder is "necessary to accord full relief to the parties presently joined," or the absent party will be "inequitably affected by any judgment by any judgment that may result in this action" (*CBS Corp. v Dumsday*, 268 AD2d 350, 353 [1st Dept 2000]; *see also TK Marketing, Ltd. v National Ben. Life Ins. Co.*, 160 AD2d 665, 666 [1st Dept 1990] ["We find that the trial court properly exercised its discretion in denying the motion based on its finding that plaintiffs can obtain complete relief without the joinder of NCA, and thereby NCA is not an "indispensible party" . . . . In any event, defendant is not prejudiced since the trial court also granted defendant leave to implead NCA"]).

Here, defendant has failed to demonstrate that Mr. Stanislaw is an indispensable party.

The contract to provide the stone, upon which this action is based, is the Invoice bearing the name of defendant, M&I Marble Works Ltd., and billed to plaintiff, Storey Construction, Inc. It is uncontested that Mr. Stanislaw paid for the stone at issue, as indicated on the Invoice.

However, defendant fails to demonstrate that complete relief cannot be accorded between the parties, or that Mr. Stanislaw will be inequitably affected by a judgment in this action without the joinder of Mr. Stanislaw.

That Mr. Stanislaw signed the Invoice and paid for the shipment using his own personal credit card does not render him an indispensible party to material issues of fact in this action.

Mr. Stanislaw payment of the stone is not at issue, and thus, his testimony in this regard is unnecessary, as it is a conceded fact.

Nor is the Invoice conclusive evidence that the agreement at issue was solely between defendant and Mr. Stanislaw. When considering documentary evidence, such as a contract, the Court looks to see whether the document "unambiguously contradicts the allegations supporting a litigant's cause of action" (*150 Broadway NY Assocs., L.P. v Bodner*, 14 AD3d 1, 5-6 [1st Dept 2004]). The test for ambiguity in a written agreement is well settled: "A contract is ambiguous 'if the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings'" (*Feldman v National Westminster Bank*, 303 AD2D 271 [2003], *lv denied* 100 NY2d 505 [2003]). In the case of ambiguity, the Court can examine evidence outside the document to determine the intent between the parties (*Sound Distributing Corporation. v Richmond*, 213 AD2D 178, 179 [1st Dept1995] ["The court properly found that the guarantee, which named the corporation as guarantor but was signed by appellants in their individual capacities, was ambiguous, and admitted parol evidence to establish the intent of the parties"]).

It is undisputed that defendant insisted on being paid in full for the stone immediately and defendant refused to extend credit to or accept a check from plaintiff (opp., p. 5; Storey Aff., ¶ 10[e]). While the Invoice is signed by Mr. Stanislaw under the area providing cardholder billing information, the Invoice bears the letterhead of defendant, M&I Marble Works, and states at the top: "Bill to: Storey Construction Inc., 323 Lewis Street, P.O. Box 1877, Ketchum, Idaho 83340." Thus, the Invoice is susceptible of different interpretations: (1) defendant contracted with plaintiff, (2) defendant contracted with Mr. Stanislaw, or (3) defendant contracted with both

plaintiff and Stanislaw.

The correspondence between plaintiff and defendant indicates that the parties were contractually bound to each other. In the April 10, 2007 letter to defendant, plaintiff informed defendant of the problems with the stone. In the April 19, 2007 letter to defendant, plaintiff informed defendant it was rejecting the stone. Most telling is the April 24, 2007 letter *defendant wrote to plaintiff* acknowledging a contractual relationship with plaintiff: the April 24 letter from Mr. Cohen states in relevant part: "I am writing you this letter to put fact on record (*sic*) . . . Please note that all the signed contract (*sic*) and signed documents and approved samples are the only agreement between us. Please note again the contract the stone is yours property and feel free to do with it as you wish (*sic*)." Here, defendant not only acknowledges a signed contract with plaintiff, it also makes clear to plaintiff that pursuant to the Contract, the stone belongs to plaintiff.

Further, the submissions indicate that testimony concerning the nature, size and delivery dates of the stone to which the parties agreed may be elicited by plaintiff. Mr. Storey attests that following his visit to defendant's New York showroom on June 6, 2006, he and Mr. Cohen agreed that if defendant could furnish Jerusalem stone flooring that was "honed and chiseled and matched a color sample previously furnished by defendant and previously approved by Mr. Storey," then plaintiff would likely purchase up to 6,000 square for use in the Stanislaws' residence (Storey Aff., ¶ 10[a]). Mr. Storey further attests:

> On October 23, 2006, [plaintiff] and [defendant] agreed for the first time to all of the essential contract terms for the quantity, size, type, cost, and delivery date of the Jerusalem stone flooring material. The terms of the agreement were consistent with Storey and M&I's prior negotiation as to color, pattern, size, type, and eight- to ten-week week delivery schedule.
> (Storey Aff., ¶ 10[b]).

Mr. Cohen also attests that after plaintiff and defendant entered the Contract, he reminded Mr. Cohen of the impact that delayed delivery would have on the construction schedule (Storey Aff., ¶ 10[g]). Defendant does not deny that Mr. Storey visited its New York showroom or that Mr. Cohen and Mr. Storey engaged in several discussions about the stone. In fact, Mr. Cohen attests: "Defendant does not dispute that it had contact with the Plaintiffs principal Gary Storey" (motion, ¶ 6).

The submissions also indicate that the Stanislaws executed a Ratification, wherein they agreed to be bound by the outcome of this action. Thus, defendant's concern that Mr. Stanislaw be bound by the decision herein, and that Mr. Stanislaw may bring his own claim against defendant for the very same alleged breach lacks merit.

Accordingly, defendant's arguments that plaintiff is not the real party in interest in this action and that Mr. Stanislaw is an indispensable party are meritless.

Damages

Under the UCC, which governs the sale of goods, in the case of a breach by the seller (such as the delivery of non-conforming goods), a buyer has several options. If a buyer rejects the goods, then, pursuant to UCC §2-711(3), the buyer "has a security interest in goods in his possession or control *for any payments made on their price* and *any expenses reasonably incurred in their inspection, receipt, transportation, care and custody* and may hold such goods and resell them in like manner as an aggrieved seller" (*emphasis added*). The buyer is also entitled to "cover damages," pursuant to UCC §2-712 and "incidental and consequential damages," pursuant to UCC §2-715 (*Saboundjian v Bank Audi (USA)*, 157 AD2D 278, 284-285 [1st Dept 1990]). The First Department also points out that consequential damages are limited

by UCC 2-715(2) to those that the seller, at the time of contracting, had reason to know and that could not reasonably be prevented by cover or otherwise (*Saboundjian v Bank Audi (USA)*; *Weiss v Karch,* 93 AD2d 774, 775 [1st Dept 1983]).

Here, it is alleged that defendant tendered non-conforming goods to plaintiff, thus breaching the contract and that plaintiff timely rejected the non-conforming goods. It is uncontested that plaintiff is entitled to damages, if any, in the amount of $58,150 paid to defendant to purchase the stone, pursuant to UCC §2-711(3). However, contrary to defendant's arguments, plaintiff is not limited to such damages. As discussed above, if plaintiff proves at trial that he suffered the incidental and consequential damages that he alleges in his Complaint and details in his opposition (which total more than $120,275), then plaintiff is entitled to those damages, as well.

Disqualification of Attorney as a Necessary Witness

The First Department in *Brooks v Lewin* (48 AD3d 289 [1st Dept 2008]) explains the burden on the movant seeking to disqualify an attorney:

> Disciplinary Rule 5-102(A) (22 NYCRR 1200.21[a]) prohibits a lawyer from acting as an advocate on issues of fact before any tribunal *if the lawyer knows or ought to know that he will be called as a witness on a significant issue on behalf of the client*. Under New York law, the mere fact that an attorney was involved in the transaction at issue, or that his proposed testimony would be relevant or highly useful, is insufficient to warrant disqualification; rather, the crucial inquiry is whether the subject testimony is necessary, taking into account such factors as the significance of the matter, the availability of other evidence and the weight of the testimony.
> (*Id.* at 291-292) (*emphasis added*)

A "finding of necessity takes into account such factors as the significance of the matters, weight of the testimony, and availability of other evidence" (*S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corporation.* at 446). For example, in *Galluccio v Fochios* (303 AD2D 190, 2003 NY

Slip Op 11755 [1st Dept 2003]), the First Department held: "Although respondent's counsel represented him in negotiations resulting in the agreement that is the subject of the underlying arbitration, petitioner has not established that counsel's testimony is necessary, since the same testimony that petitioner cites as necessary can be obtained from other witnesses, such as respondent himself or petitioner's own former counsel." Alternatively, the movant seeking to disqualify a plaintiff's attorney must show that the failure to disqualify they attorney would be prejudicial to plaintiff (*Iannazzo v Stanson*, 8 AD3d 113, 114 [1st Dept 2004], *citing* (*Ansonia Assoc. Ltd. Partnership v Public Serv. Mut. Ins. Co.*, 277 AD2D 98, 99 [1st Dept 2000] *lv denied* 96 NY2d 715 [2001]). In addition, the First Department has held that the Court properly denied defendant's motion to disqualify plaintiff's counsel because "plaintiff had no intention of calling counsel to testify and [defendant] failed to demonstrate that the attorney's testimony was necessary" (*Ansonia Assoc. Ltd. Partnership* at 99).

Here, defendant fails to demonstrate that Mr. Stanislaw, an attorney for plaintiff, should be disqualified at this juncture. First, plaintiff does not intend to call Mr. Stanislaw as a witness. Second, defendant has not established that any testimony from Mr. Stanislaw is necessary. Defendant contends that it intends to call Mr. Stanislaw to prove that there were no written communications from Mr. Stanislaw to defendant regarding the consequences of any delay in the shipment of the stone, and to establish that Mr. Stanislaw paid for the stone and signed the Invoice. However, defendant can testify as to whether Mr. Stanislaw informed defendant of the consequences of any delay, and testimony that Mr. Stanislaw paid for the shipment and signed the invoice is unnecessary, as such facts are undisputed. Further, defendant fails to demonstrate that it cannot obtain relevant testimony from witnesses other than Mr. Stanislaw, such as plaintiff

or Mr. Storey (*Galluccio v Fochios*). Finally, defendant fails to provide any evidence that allowing Mr. Stanislaw to continue representing plaintiff would be prejudicial to plaintiff *(Iannazzo v Stanson)*.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of the motion of defendant M&I Marble Works Ltd., d/b/a Marble Solutions for an order dismissing the Complaint of Storey Construction Co., Inc. for failing to join an indispensable party, and limiting plaintiff's damages to $58,150, is denied; and it is further

ORDERED that the branch of defendant's motion for an order and disqualifying Miles Stanislaw from continued representation of plaintiff is denied at this juncture; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

That constitutes the decision and order of the Court.

Dated: June 26, 2009

Hon. Carol R. Edmead, J.S.C.

HON. CAROL EDMEAD