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INDEX NO. 29912-2005

SUPREME COURT - STATE OF NEW YORK
SPECIAL TERM, PART 19 SUFFOLK COUNTY

Mot Seq: ***005 MotD***
006 MotD

Adj'd Date: 9-10-09
Return Date: 7-9-09

Mot Seq: ***007 MotD***

Adj'd Date: 9-10-09
Return Date: 8-20-09

Present:
Hon. SANDRA L. SGROI

ANGELO CAPOBIANCO, INC.,

Plaintiff,

-against-

BRENTWOOD UNION FREE SCHOOL DISTRICT,

Defendant.

AGOVINO & ASSELTA, L.L.P.
Attorney for the Plaintiff
170 Old Country Road, Suite 608
Mineola, New York 11501

INGERMAN SMITH, LLP
Attorney for Defendant
150 Motor Parkway, Suite 400
Hauppauge, New York 11788

L'ABBATE BALKAN COLAVITA & CONTINI, LLP
Attorneys for non-party Ken Montross
1001 Franklin Avenue
Garden City, New York 11530

Upon the following papers numbered 1 to 36 read on these motions: Notice of Motion and supporting papers (005) 1-9; Notice of Cross Motion and supporting papers (006) 9-15;

Notice of Motion and supporting papers (007) 16-22; Affirmation in opposition and supporting papers 23-29; Affirmation in opposition to cross motion and supporting papers 30-34; Affirmation in reply and supporting papers 35-36;it is,

ORDERED that this motion by the by the Defendant, the Brentwood Union Free School District, to quash a subpoena served upon Ken Montross, a non-party witness, by the Plaintiff, Angelo Capobianca, Inc.,(motion sequence # 005) is denied and, it is further

ORDERED that the motion by the Defendant for sanctions for failure to comply with a preliminary conference order (motion sequence #005) is granted only to the extent that examinations before trial of the Plaintiff are scheduled by the Court herein; and it is further

ORDERED that if the attorneys cannot agree on a time and place for the deposition of Ken Montross, the Court directs that the non-party witness Ken Montross shall appear for a deposition on December 18, 2009 at 9:30 a.m. at the offices of Agovino & Asselta, LLP., the attorney for the Plaintiff , located at 170 Old Country Road, Suite 608, Mineola, New York 11501; and it is further

ORDERED that the attorney for the Plaintiff is directed to serve a copy of this order on the attorney for Ken Montross and the attorney for the Defendant at least twenty (20) days prior to the deposition; and it is further

ORDERED that this cross motion by the Plaintiff to compel disclosure (motion sequence #006)is granted only to the extent that the attorney for the Defendant is directed to serve complete responses to the Plaintiff's Demands for Discovery and the Plaintiff's Interrogatories within forty-five (45) days of service of a copy of this order; and it is further

ORDERED that the motion by the Defendant to compel the Plaintiff to furnish responses to the Defendant's Interrogatories and the Defendant's Demand for Discovery and Inspection of Documents (motion sequence #007) is granted only to the extent that the attorney for the Plaintiff is directed to serve a response to the Defendant's Interrogatories and the Defendant's Demand for Discovery from 2007, within forty-five (45) days of service of a copy of this order; and it is further

ORDERED that the depositions of the Plaintiff and the Defendant in this matter shall be held forty-five (45) days after the responses to the Interrogatories and the Demands for discovery are served and the Plaintiff shall be deposed first at the office of the attorney for the Plaintiff followed by the Defendant at the office of the attorney for the Defendant; and it is further

ORDERED that the parties are directed to discuss the scheduling of all additional depositions with the Court at a conference after the depositions directed to be held herein are conducted, if the parties are unable to schedule those further depositions by agreement; and it is further

ORDERED that all of other relief requested in the motions of the Plaintiff and Defendant are referred to the next conference; and it is further

ORDERED that the parties may move for such sanctions that are permitted by the ***CPLR***, including the striking of a pleading, if the directives in this order are not followed.

In order to understand the circumstances involved in this litigation and the need for complete discovery, a review of the history of the construction project out of which this matter arose is necessary. On or about November 14, 2001, the Plaintiff entered into a contract with the Defendant School District wherein Angelo Capobianco, Inc., the Plaintiff herein, agreed to act as the general contractor for a large construction project to renovate various buildings used by the Defendant Brentwood Union Free School District. The cost of the construction project, according to the agreement, was $11,654,025.00. The Plaintiff placed a separate value on each of ten different construction items involved in the project, including the job of replacing and repairing the roofs above the Boys' and Girls' locker rooms at each of the school buildings covered by the contract. Work continued on this construction project over the course of several years.

During the course of the construction, the Defendant gave notice to the Plaintiff that it intended to delete certain roofing work from the construction project. Therefore, the Defendant subtracted out the cost of the roofing work on three separate roofs that were originally included as part of the contract price. It is undisputed that the Defendant was entitled to reduce the scope of the work on the project and that following the reduction of work, the Defendant would be entitled to a credit reducing the contract price. While neither the Architect nor the Defendant ever issued a document entitled a "construction change directive," the Architect issued a "Proposal Request No. G-17" wherein the Plaintiff was asked "to submit an itemized proposal for changes in the contract sum and contract time" in the form of a Change Order for the deleted and/or changed work to be performed by the Plaintiff. According to the Defendant's previous motion papers, the Plaintiff failed to provide the Defendant with a accurate calculation of the credit the Plaintiff was entitled to subtract from the multi million dollar contract. It is undisputed that the contract work was deleted from the construction contract and that the Plaintiff did not perform that roofing work.

The Plaintiff prepared a proposed change order in October of 2002 that indicated that it was entitled to a credit of $50,382.00 against the contract price, but the Defendant never agreed to this reduction in the contract price proposed by the Plaintiff allegedly because there was no substantiation provided to justify the figures in the proposed credit to the price that was prepared by the Plaintiff. In April of 2003, the Architect rejected the proposal of the Plaintiff and determined that the total credit due and owing the Defendant for the deleted roof work was $131,445.00. It appears that in that same month, April of 2003, the Plaintiff revised and lowered its calculation of the roof credit from $50,382.00 to $47,095.00.

Despite the Architect's rejection of the Plaintiff's proposed credit to the contract price, the Plaintiff and the Defendant continued negotiating the disputed amounts owed under the construction contract. On or about August 24, 2005, the Plaintiff served a Notice of Claim upon the School District when, after a Demand for Payment was made, the Plaintiff was not paid the amount of money that it claimed was owed to it by the Defendant under the construction contract. The Plaintiff commenced this action against the School District on December 21, 2005. A review of these facts crystallizes the issues involved herein and this litigation centers upon the calculation of the credit owed to the Defendant for

the roofing work not performed by the Plaintiff.

The attorneys for the Plaintiff and the Defendant have commenced discovery in this matter with said discovery actually commencing after the Appellate Division, Second Department affirmed an order of this Court on July 29, 2008 denying the Plaintiff's motion for summary judgment and the Defendant's cross motion to dismiss. The Plaintiff's and Defendant's attorneys entered into a preliminary conference stipulation and order scheduling disclosure on January 8, 2009.

Pursuant to that order, the deposition of the Plaintiff was scheduled to be held on or before March 30, 2009 and the deposition of the Defendant was directed to be conducted on or before April 10, 2009. All Demands for Discovery were directed to be served on or before February 28, 2009, and, taking into account the complex nature of construction litigation, the order did not provide a date for the parties to serve responses to those Demands. The order did, however, state that all such disclosure must be completed by April 30, 2009.

In the first motion herein, the Defendant moves to quash a subpoena served upon Ken Montross, who is employed by The Thomas Group of Companies, Inc., the architect for the construction project, on the grounds that the Plaintiff has failed and refused to produce its own witness for a deposition first. The motion to quash was made by service on the attorney for the Plaintiff on June 23, 2009, and by service on L'Abbate Valkan Colavita & Contini, LLP, the attorney for The Thomas Group of Companies, Inc. and Ken Montross on June 29, 2009. The subpoena served by the Plaintiff on the non-party was returnable on June 19, 2009.

A motion to quash or vacate a subpoena must be made promptly and, according to the cases, "promptly" means that the motion must be served before the return date of the subpoena (see, ***Brunswick Hosp. Center, Inc. v. Hynes***, 52 N.Y.2d 333, 438 N.Y.S.2d 253, 420 N.E.2d 51; ***Santangello v. People***, 38 N.Y.2d 536, 381 N.Y.S.2d 472, 344 N.E.2d 404). The motion to quash was not served prior to the return date of the subpoena and, therefore, it was not made "promptly."

In any event, the Defendant does not argue that the attorney for the Plaintiff did not have the authority to issue the subpoena, that the subpoena was jurisdictionally defective or that the subpoena was groundless (see, ***CPLR*** § 2304; Practice Commentaries C 2304:1). Furthermore, the attorney for Ken Montross has not opposed the production of his client for a deposition. The previous review of the facts involved in this litigation indicate the importance of deposing the an employee of the Architect for the construction project. Therefore, the motion to quash the subpoena of Ken Montross is denied.

If the attorneys cannot agree on a date, time and place to conduct the deposition of Ken Montross prior to December 4, 2009, the Court orders that his deposition be held at the offices of the attorneys for the Plaintiff at 9:30 a.m. on December 4, 2009.

The Defendant has also requested in the motion that the Court direct the Plaintiff produce a witness for a deposition because the time period to produce a witness in the preliminary conference order has not been complied with by the Plaintiff. In opposition to the Defendant's motion, the Plaintiff alleges that

the Defendant has also failed to comply with the terms of the preliminary conference order because the Defendant has not responded to the Plaintiff's Interrogatories dated February 10, 2009, and the Plaintiff's Demand for Discovery and Disclosure dated February 9, 2009. In opposition, the attorney for the Defendant states that to the extent there are any documents or responses outstanding to the Plaintiff's Interrogatories or the Plaintiff's Demand for Disclosure, responses will be served in an expedited manner. Since the Defendant has conceded that some additional responses should be served to the Plaintiff's Interrogatories and Demands, the Court directs that the attorney for the Plaintiff serve complete responses to the Interrogatories and the Demands within forty-five (45) days of service of a copy of this order.

The Defendant has also alleged that the Plaintiff has failed to respond to the Defendant's Interrogatories dated May 21, 2009 and the Notice for Discovery and Inspection dated May 21, 2009. The Plaintiff's attorney has alleged that the Defendant is already in possession of all the information sought in the Interrogatories and Demands for discovery. In support of this allegation, the Plaintiff's attorney has referred to an affidavit of Carl Caruso, the Vice President of the Plaintiff, submitted on the motion for summary judgment.

The Plaintiff challenges those portions of the Defendant's Interrogatories and the Defendant's Document Demands that request information concerning a details involved in estimating the Plaintiff's expenses called, in the trade, a "take off" process. According to the attorney for the Plaintiff, the term "take off *** is usually a process by which a contractor uses measurements to estimate what materials it may need to construct a particular project." The Plaintiff's attorney further states that his client never created a "take off" for the construction project and that the sub-contractors of the Plaintiff provided proposals for various work. In addition, the attorney for the Plaintiff states that the "take off" or estimation, if one was completed, is not relevant to this action because credit for deleted work is determined by the actual net cost of the work initially included in the contract price but then subtracted out of the agreement by the Defendant and not performed by the Plaintiff.

CPLR § 3101(a) entitles parties to "full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." The construction of the term "material and necessary" in ***CPLR*** § 3101 is left to the sound discretion of the lower courts and includes "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (***Andon v. 302-304 Mott Street***, 94 N.Y.2d 740, 746, 709 N.Y.S.2d 873). The "take off" figures sought by the Defendant are not irrelevant and the Court directs that if that information exists, that it be disclosed.

The Defendant's Interrogatories and the Demand for Discovery were served on the attorney for the Plaintiff in 2007, which according to Exhibits "C" and "D" were the first set of Interrogatories and the first Demand for Discovery served by the Defendant (see, Motion Sequence # 007). Although these requests for Discovery are described as the first Demands served by the Defendant, the attorney for the Plaintiff served a response to what appears to be a prior Demand for Discovery on November 6, 2006. In any event, it does not appear that the attorney for the Plaintiff has provided specific responses to the Defendant's Demand for Discovery and the Interrogatories served in 2007, and the Plaintiff did not

move to vacate those requests for information or object to them prior to these motions. Under these circumstances, the attorney for the Plaintiff is directed to serve a response to the 2007 Interrogatories and the Demand for Discovery served by the attorney for the Defendant within forty-five (45) days of service of a copy of this order.

The parties are directed to complete discovery and serve responses to all demands for discovery

Dated: 10/8/09

SANDRA L. SGROI, J. S. C.