

Archstone v Tocci Bldg. Corp. of N.J., Inc.

2009 NY Slip Op 32977(U)

December 23, 2009

Supreme Court, Nassau County

Docket Number: 001018/2008

Judge: Ira B. Warshawsky

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publication.

SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

**HON. IRA B. WARSHAWSKY,
Justice.**

ARCHSTONE f/k/a ARCHSTONE-SMITH OPERATING
TRUST AND TISHMAN SPEYER ARCHSTONE-SMITH,
L.P. f/k/a ASN ROOSEVELT CENTER, LLC,

Plaintiff,

-against-

TOCCI BUILDING CORPORATION OF NEW JERSEY,
INC., LIBERTY MUTUAL INSURANCE COMPANY,
PERKINS EASTMAN ARCHITECTS, INC. and
ELDORADO STONE, LLC,

Defendants.

TOCCI BUILDING CORPORATION OF NEW JERSEY, INC.,

Third-Party Plaintiff,

-against-

ADJO CONTRACTING CORPORATION, AMERICAN
ENGINEERING SERVICES, P.C., APRO CONSTRUCTION
GROUP, ATLAS COMFORT SYSTEMS, USA, L.P.,
d/b/a ATLAS AIR CONDITIONING BUILDERS HARDWARD,
CLEM'S ORNAMENTAL IRON WORKS, DAVINCI
CONSTRUCTION OF NASSAU, INC. d/b/a DAVINCI
CONSTRUCTION, FOUR SEASONS INSULATION CORP.,
HAVANA CONSTRUCTION CORP., HOUSTON
STAFFORD ELECTRICAL CONTRACTORS, L.P., d/b/a
HOUSTON STAFFORD ELECTRIC, KLEET LUMBER
COMPANY, KNIGHT WATERPROOFING COMPANY, INC.,
MANNING PLUMBING AND HEATING CORP.,
METRO PAINTING, M.I. CONCRETE CORP., MID-ATLANTIC
STONE, INC., PATTI ROOFING, LLC, SIDNEY B. BROWNE &
SON, LLP, SIPALA LANDSCAPE SERVICES, INC., STAT FIRE

TRIAL/IAS PART 9

Main Party Action

INDEX NO.: 001018/2008

**ORDER OF REFERENCE
TO A SPECIAL REFEREE**

Third-Party Action

[* 2]
SUPPRESSION, INC., SUPERSEAL MANUFACTURING CO.,
THREE B'S PLUMBING HEATING AND AIR CONDITIONING
CORP. and UNIVERSAL FOREST PRODUCTS,

Third-Party Defendants.

FJR CONSTRUCTION, INC.,

Plaintiff,

Joined Lien Action # 1

-against-

INDEX NO.: 005292/2007

ARCHSTONE-SMITH COMMUNITIES, LLC,
TOCCI BUILDING CORPORATION OF NEW
JERSEY, INC., et al.,

Defendants.

DAVINCI CONSTRUCTION OF NASSAU, INC.,

Plaintiff,

Joined Lien Action # 2

-against-

INDEX NO.: 006064/2007

ARCHSTONE-SMITH COMMUNITIES, LLC,
TOCCI BUILDING CORPORATION OF NEW
JERSEY, INC., et al.,

Defendants.

TOCCI BUILDING CORPORATION OF NEW JERSEY,
INC.,

Second Third-Party Plaintiff,

Amended
Second Third-Party Action

- against -

INDEX NO.: 001018/2008

MG CONSULTING SERVICES, INC., RMS
ENGINEERING and ROBINSON, MULLER &
SCHIAVONE ENGINEERS, P.C.,

Second Third-Party Defendants.

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SIPALA LANDSCAPE SERVICES, INC.,

Fourth-Party Plaintiff/
Third-Party Defendant,

Fourth-Party Action

-against-

INDEX NO.: _____

THOMAS BALSLEY ASSOCIATES LANDSCAPE
ARCHITECTURE, PLLC, HINES & SAFFARESE
LANDSCAPING, INC., JD CONSTRUCTION &
LANDSCAPING, INC. and JOHN DIORIO
LANDSCAPING, INC.,

Fourth-Party Defendants.

ORDER OF REFERENCE TO A SPECIAL REFEREE

Pursuant to CPLR 4301, 4311 and 4317(b), the Court hereby enters this Order of Reference to a Special Referee for the purpose of assisting the Court and the parties in conducting and completing discovery in an orderly and efficient manner.

(1) Michael Cardello, III, Esq. is **HEREBY APPOINTED** Special Referee to assist in discovery matters and other matters as designated by the Court that may arise in this action.

(2) The Special Referee shall have the duty and the power to regulate all discovery of the parties and other designated matters as follows:

- a) The Special Referee shall have the duty and the power: (i) to resolve discovery disputes; (ii) to resolve disputes during depositions; (iii) to resolve discovery motions filed by the parties or non-parties as referred to him by the Court; and (iv) to rule on all issues relating to the privilege logs of all parties which cannot be resolved by the parties.
- b) The Special Referee shall have the power to take all measures which are necessary and proper for the performance of these duties.

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c) The Special Referee shall have the authority to assist the Court with case management, and to hear and decide such other matters as may be assigned by the Court in accordance with the Court's rules and applicable statutes.

(3) The Special Referee shall, after consulting with the parties, establish procedures for the handling of discovery disputes set forth in Section 2(a) above and other designated matters. The Special Referee shall have the duty and authority to require the submission of briefs, reports, call conferences, and hold hearings, including evidentiary hearings, to issue orders requiring the parties to adhere to discovery, and to issue Orders relating to other matters designated for his decision by the Court. He shall hear, resolve and make rulings on all disputes regarding discovery (Section 2(a) above) and other designated matters, and, when appropriate, enter orders setting forth his rulings.

(4) If the Special Referee or a party is of the view that a specific issue presented by the parties is of such fundamental importance to the progress or outcome of the case that effective case management would not be furthered by having the Special Referee render a decision in the first instance, the Special Referee may as a matter of discretion certify that issue to the Court for initial decision, or a party may request that the Court decide the issue. As the final arbiter of case management, the Court may, but need not, accept the certification. If the Court denies the certification, the Special Referee shall proceed to render a decision in accordance with the subject to the terms of this Order.

(5) The Special Referee shall be reasonably available to hear disputes, including without limitation disputes during depositions, promptly and at such times as may be convenient, at the discretion of the Special Referee. Argument shall be heard by the Special Referee either in person, by telephone conference or, if all parties and the Special Referee agree to the use of video conference, by video conference. Unless determined otherwise by the Special Referee, all arguments, including telephone conference arguments or video conference arguments, shall be recorded by a court reporter to be retained by the parties. In the event a telephone conference or video conference hearing is necessary, reasonable advance notice and an opportunity to participate

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in the conference shall be provided to the interested parties.

(6) All hearings before the Special Referee shall be held at such appropriate location as may be designated by the Special Referee, or by the parties with the Special Referee's approval. The moving party shall arrange for a court reporter at all hearings and shall provide to the Special Referee a copy of the transcript of the hearing promptly thereafter.

(7) All decisions of the Special Referee shall be in writing and shall be accompanied by supporting reasons, except that the Special Referee may state at a hearing that an oral ruling, as reflected in the transcript, shall constitute the decision. All written decisions shall be filed with the Court and simultaneously transmitted to counsel for the parties.

(8) Exceptions to any decision made by the Special Referee may be taken to the Court. A notice of exceptions and an Opening Brief in support thereof, not to exceed a total of four (4) pages, together with an appendix containing the record on which the Special Referee's decision was made (e.g., discovery requests, related motions and briefs, transcript of argument and the Special Referee's decision) must be filed and served within fifteen (15) business days after the written decision, which decision shall be delivered by electronic mail and by U.S. Mail to counsel. If a decision is reflected only in a transcript of a hearing, the time for filing of exceptions shall run from the date of the receipt of the transcript by the excepting party's counsel. An Answering Brief, which must not exceed four (4) pages, must be filed and served within five (5) business days after receipt of the Notice of Exception. The time for filing exceptions and briefs may be enlarged only by the Special Referee or the Court. Any party may request oral argument, which shall be held in the discretion of the Court.

(9) Review of any order of the Special Referee shall be de novo on the record unless otherwise provided by the Court's rules or by statute.

(10) The Special Referee may use other persons to provide clerical, secretarial and research assistance as may be necessary. Such persons shall be under the supervision and control of the Special Referee, who shall take appropriate action to insure that (where applicable) such persons preserve the confidentiality of matters submitted to the Special Referee for review

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including confidential, trade secret or proprietary information or information subject to a Court's protective order.

(11) The Special Referee shall be compensated as follows:

a) The Special Referee shall be compensated at the hourly rate of \$375.00. Other lawyers assisting the Special Referee shall be billed at their usual hourly rates, but no more than \$375.00 per hour. The Special Referee's fees shall be billed no more often than monthly, for services rendered, and he also shall be reimbursed for all reasonable and necessary expenses and costs.

(i) The Special Referee's compensation shall, as of now, be shared amongst the following parties as follows: Archstone (Plaintiff), one-fifth; Defendants Tocci and Liberty Mutual, one-fifth; Eldorado Stone, one-fifth; Perkins Eastman, one-fifth; and all Third-Party Defendants, one-fifth.¹ The aforementioned shall hereinafter be collectively called the "Obligated Parties."

(ii) A bookkeeper/clerk may be employed by the Special Referee to invoice and collect all contributions from the Obligated Parties for the Special Referee Fund as defined below. Tocci shall provide the Special Referee with a list of current Third-Party Defendants and their counsel including all contact information. Tocci shall also modify this list if a change to the list occurs. The expense of the

¹As of the date of this Order, Fourth-Party Defendants are not yet included nor are the Lien Action parties included, except as they may appear elsewhere as complainants or defendants.

As of the date of this Order, there are nineteen Third-Party Defendants who have appeared as per letter from Tocci's counsel, Landman Corsi Ballaine & Ford, P.C., by Rachel Welch, Esq., dated December 14, 2009, and is incorporated by reference herein.

bookkeeper/clerk shall be borne by the Obligated Parties and billed to them at an hourly rate of \$75.00.

- b) The compensation and reimbursement of fees and expenses shall be paid out of a Special Referee's Fund ("Fund") which shall be established by Mr. Cardello and kept under his custody and control from amounts contributed by the parties, with each "Party" of the "Obligated Parties" initially contributing the sum of \$5,000 towards an initial Fund amount of \$25,000 within twenty-one (21) days of the date of this Order.² The allocation of fees may hereafter be adjusted in the discretion of the Court. The Obligated Parties shall make additional payments to the Fund consistent with the above-referenced allocation in accordance with Section (11)(d) below or as otherwise directed by the Court. Any Obligated Party that does not pay the required amount within forty-five (45) days of billing by the Special Referee may be subject to an appropriate Order of Enforcement by this Court.
- c) The Special Referee shall submit itemized statements to the parties and copies to the Court for payment for fees, expenses and costs from the Fund, stating the total amount of time spent and the type of services and work performed during such time. Expenses and costs shall be itemized. Each payment to the Special Referee for services and expenses shall be approved by the Court prior to the Special Referee disbursing the approved amounts to himself or third parties, and this shall not occur prior to the expiration of fifteen (15) days from billing by the Special Referee such that any Obligated Party's objection to an invoice may be brought to the attention of the Court. (Each of the current nineteen Third-Party Defendants would

²For example, Archstone contributes \$5,000.00 and nineteen Third-Party Defendants share in contributing \$5,000.00 (approximately \$263.16 each).

have such a right.)

d) The Fund shall be replenished to Fifteen Thousand Dollars (\$15,000) by the Obligated Parties when the balance of the Fund reaches Five Thousand Dollars (\$5,000), or when the Special Referee estimates the Fund to be inadequate to cover the work in progress.

(12) Upon the final disposition of this action, the full amount paid for the services and expenses of the Special Referee may be reallocated amongst the Obligated Parties, as the Court in its discretion shall determine.

(13) On occasion the Court may refer discovery and/or non-dispositive motions to the Special Referee pursuant to this Order.

(14) This Order may be amended by the Court, or for good cause upon application by a party, may be amended to conform to any changes in the subject matter of this action, and may be expanded to include the case known as QBE, Index Number 601695/2009 (including any Third or Fourth-Party actions included therein), which has been consolidated by the Court for purposes of discovery with the instant action. If the Court so acts, it will reconsider the allocation of costs to include those parties who are part of the QBE action who are not already part of the Archstone action.

It is **SO ORDERED**.

Dated: December 23, 2009

Lu B Warskowsky
J.S.C.

ENTERED

DEC 23 2009

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**