

City of New York v Barney Skanska Constr. Co.

2010 NY Slip Op 30344(U)

February 16, 2010

Supreme Court, New York County

Docket Number: 403612/04

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. JUDITH J. GISCHE

PRESENT: _____ J.S.C.

PART 10

Index Number : 403612/2004

CITY OF NEW YORK

vs
BARNEY SKANSKA CONSTRUCTION

Sequence Number : 006

COMPEL DISCLOSURE

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 006

MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.


NEW YORK
COUNTY CLERK'S OFFICE

FEB 22 2010

FILED

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

Dated: 2/16/10


HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

Supreme Court of the State of New York
County of New York: IAS 10

-----X

The City of New York,

Plaintiff,

Decision/Order
Index #: 403612/04
Seq No.: 006, 007

-against-

Barney Skanska Construction Co.,
Skanska USA Building, Inc., Maspeth
Welding, Inc., Miller Druck Specialty
Contracting Inc.,

Defendants.

Present:
Hon. Judith J. Gische, JSC

-----X

Maspeth Welding, Inc.,

Third-Party Plaintiff,

Third-Party
Index # 590606/06

-against-

Mymarl Contracting Co., Inc. and
BASF Construction Chemicals, LLC,

Third-Party Defendants.

-----X

Pursuant to CPLR 2219(A) the following numbered papers were considered by the court in connection with these motions:

PAPERS	NUMBERED
<u>Motion Seq. # 006</u>	
Notice of Motion, RWK affirm. dated 10/15/09, exhibits.....	1
DFB affirm in opp dated 11/12/09, exhibits.....	2
RWK reply affirm. dated 11/19/09, exhibit.....	3
<u>Motion Seq. # 007</u>	
Notice of Motion, MJM good faith affirm. dated 10/15/09; MJM affirm. dated 10/15/09, exhibits.....	4
MJM reply affirm. dated 11/19/09, exhibits.....	5

Upon the foregoing papers, the decision and order of the Court is as follows:

Defendants Barney Skanska Construction Co. and Skanska USA Building Inc.

(collectively "Skanska") move to compel plaintiff, the City of New York ("City"), to provide certain demanded discovery (motion sequence number 006). Defendant Maspeth Welding, Inc. ("Maspeth") has separately moved to compel the City to provide similar discovery (motion sequence number 007) ("Skanska" and "Maspeth" are collectively referred to as "defendants"). The City has provided a single response to both motions. Since both motions raise similar issues, they are consolidated for consideration and determination in this single decision and order.

The City brought this action against the defendants alleging that as a result of their defective installation of the perimeter fence at City Hall Park, the fence's granite base cracked and crumbled along its entire length. This action was originally commenced in 2004 and there has already been extensive discovery.

On June 29, 2009 Skanska served the City with both a Notice to Produce ("Skanska Notice") and Demand for Answers to Interrogatories ("Skanska Interrogatories"). The City's response contained objections to the Skanska Notice and Skanska Interrogatories, without providing any of the requested information. In general, the Skanska Notice and Skanska Interrogatories sought information about fencing and resultant cracks in three other parks in the City identified as Minetta Green, Minetta Triangle and Sir Winston Churchill Square. They also sought information about fencing and curbing in a fourth park identified as Washington Square Park.

Maspeth is seeking discovery of information regarding fencing installed at thirteen public parks where Maspeth claims there is confirmed evidence of cracking in the stone bases in which the fences were set. The thirteen parks include the four parks identified by Skanska, as well as City Hall Park, Canal Park, Jackson Square, Jefferson

Market Garden; Golden Swan Garden, James Bogardus Triangle, Duane Park, Abingdon Square Park and Dag Hammarskjold Plaza. Maspeth sought this information in a July 30, 2009 Third Demand for Documents ("Maspeth Demand"). The City objected to and did not produce the requested documents.

Both defendants give the same rationale in justification of the need for the requested discovery. They claim that these other parks have cracks in the bases in which the fencing was installed. The defendants further claim that they were not involved in the construction of these fences. They argue that the discovery they seek is material and necessary for them to develop their defense, that the cracking in the granite at City Hall Park was a design flaw and not due to any failures by them in the fence installation.

Skanska's motion is supported by: [1] the deposition testimony of the City's witnesses, who identify similar cracking at other park locations which are similarly designed, [2] photographs of the other locations and [3] the affidavit of an engineer, who states that the information sought would assist his analysis of whether the cracking at City Hall Park was the result of some design failure. Maspeth's motion in chief is only supported by the deposition testimony of the City's witnesses. The City witnesses, however, do not identify all of the parks for which Maspeth is now seeking discovery. In reply, Maspeth, offers for the first time, photographs of eleven parks. Two are parks identified by Skanska. Five of the parks were identified in Maspeth's Demand. Four of the parks, however, are entirely "new" parks in that they were never identified in Maspeth's Demand.

The City argues that both motions should be denied because: the information

sought is remote (not relevant) to the issues in this action, the demands were untimely and compliance would unduly delay this action. The City also claims that some of the information sought is publicly available, some of the information is unlikely to exist and some of the information has already been produced.

Discussion

CPLR § 3101 (a) broadly defines the scope of disclosure as "all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof . . ." Allen v. Crowell-Collier Pub. Co., 21 NY2d 403 (1968). The words, "material and necessary," are interpreted liberally so as to require disclosure of "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. . ." Allen v. Crowell-Collier Pub. Co., supra at 407. The test is one of "usefulness and reason." Id. The burden of showing that the disclosure sought is improper is upon the party seeking protection. Roman Catholic Church of the Good Shepherd v. Tempco Systems, 202 A.D.2d 257, 258 (1st Dept 1994).

The information sought by the defendants in this case is, in general, material and necessary to their defense in this action. It seeks information that will allow the defendants to develop an alternative theory on the cause of the cracks in the curbing attendant to the City Hall fencing. The City's arguments on relevancy are primarily that the defendant's theory has not been more fully developed at this point in the litigation. It criticizes Skanska's engineer as not definitively stating the relevancy of the information. Since the defendants have not seen the information yet, and the information would still need expert analysis to test the current hypothesis, that it is a

design flaw which caused the cracks, the City's criticism is unwarranted. The defendants have demonstrated generally that the information they seek is discoverable. In addition, the City's position that the photographs at the other parks obviously show cracking that is completely different than the cracking at City Hall Park, is rejected by the court. Based on the pictures alone, this court is not willing, at this time, to find that the curb cracking at the other parks is quantitatively or qualitatively different than the cracking in this particular case.

Notwithstanding that the information sought is generally material and necessary to the underlying litigation, certain, specific, requests by defendants are not so. Thus, defendant's request for information on Washington Square Park is based upon the claim that the park fencing/curbing design had changed and that there was not the same cracking problem at this park. The court is not persuaded that this information is material or necessary for defendants to develop their claim that design of City Hall Park and parks like it, are prone to cracking. The request for information on Washington Square Park is, therefore, denied.

Maspeth's July 2009 demand includes a request for information about City Hall Park, which is the park directly involved in this litigation. Maspeth has already received this information. Additionally, Maspeth's belated efforts to include additional parks in its reply papers is rejected outright. It was not in the original Maspeth Demand and there is no basis to include it now.

The City also argues that the request for information is belated and that the requested discovery will unduly delay this action from being tried soon.

This action has been pending for years. There has already been substantial

discovery. Skanska first made these requests in June 2009. Maspeth previously requested this information at least twice before, the first time in August 2006. The City has always objected to these demands. Notwithstanding the City's objections, Maspeth has sat back on its rights to compel production of the information. The Court agrees that the defendants could have pursued the right to this information in a more diligent fashion.

We are now at the end of discovery and this action should expeditiously proceed to trial. The court believes that the City's appropriate concerns about delay should and can be balanced with defendants' rights to discovery by sharply tailoring the information that the City will need to be produce.

In this regard, Skanska's Interrogatories include broad based requests that exceeds information about particularly identified parks. To the extent the Skanska Interrogatories are tailored to particular identified parks, they largely duplicate the information that is sought in Skanska's Notice. The court, therefore, will not compel the City to respond to Skanska's Interrogatories.

In addition, although there appear to be many parks all over the city of similar design, Maspeth's request for 13 parks is excessive. The court has considered Skanska's engineer's affidavit that the reason the information is needed is to obtain "the performance history of the same or similar details in different installations" because it "provides the opportunity to gain information on how the detail performed when constructed at different times, by different contractors, and possibly with some different materials." The engineer indicates that such information from three parks of similar design would allow such comparison. Based upon such affidavit, the court limits the

information to be provided to a sampling of three parks. Those three parks are Minetta Green, Minetta Triangle and Sir Winston Churchill Square, which the motions reveal as being the most comparable to the City Hall Park for these purposes.

The City further argues that some of the defendants' requests are for documents from the Park Inspection Program ("PIP") which are publically available on the PIP website, but in any event, there is "no reason to believe that [PIP] maintains documents or information concerning cracked curbs." To the extent that the City argues that there is "no reason to believe" that PIP maintains the requested documents, that objection is rejected. Either PIP maintain such documents or it does not. This fact is objectively verifiable. The City should investigate and find out one way or the other. If the documents do not exist, then the City should affirmatively make that representation, under oath.

If, however, the requested documents do exist and they are available on PIP's website, then the defendants should obtain them from such easy public access and they need not be produced by the City. On the other hand, to the extent such documents exist, but they are not available on the PIP website, the documents must be produced by the City. The City needs to identify which requested documents are available on the web site, produce those that are not or confirm that they do not exist and cannot be produced.

The City's argument that the requested documents have already been provided to defendants is not specific enough for the court to further address in this decision beyond that which has already been stated.

Skanska's Notice and Maspeth's Demands which concern the production for

documents are substantially the same, except that Maspeth's Demand requests information for more parks. The court, therefore, will only require that the City answer one demand, Skanska's Notice, as otherwise limited by this decision. The response will be provided to all defendants.

In accordance herewith, the court grants the motion only to the following extent:

The Court orders and directs that City respond to items 1, 2 and 3 in Skanska's June 2009 Notice to Produce, but only with respect to the three parks identified as Minetta Green, Minetta Triangle and Sir Winston Churchill Square and

The Court further orders and directs City to respond to items 4 and 5 in Skanska's June 2009 Notice to Produce, but only with respect to the three parks identified as Minetta Green, Minetta Triangle and Sir Winston Churchill Square, by first stating, under oath, whether such documents exist and if they do either directing defendants to the PIP website, if obtainable therefrom, or if they cannot be obtained from the web site, by producing such documents,

The court further orders and directs that the aforementioned discovery shall be produced no later than forty five (45) days form the date of this decision.

To the extent any requested relief is not expressly granted herein, it is denied.

This constitutes the decision and order of the Court.

Dated: New York, NY
February 16, 2010

NEW YORK
COUNTY CLERKS OFFICE

FEB 22 2010

FILED

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SO ORDERED:

J.G. J.S.C.