

**Naughton v City of New York**

2010 NY Slip Op 30367(U)

February 25, 2010

Supreme Court, New York County

Docket Number: 104026/05

Judge: Martin Shulman

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

PRESENT: **MARTIN SHULMAN**  
J.S.C.

PART 1

Index Number : 104026/2005

NAUGHTON, PATRICK, JR.

vs

PETROCELLI CONSTRUCTION

Sequence Number : 005

STRIKE ANSWER

INDEX NO. 104026/05

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 005

MOTION CAL. NO. \_\_\_\_\_

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

	PAPERS NUMBERED
Notice of Motion/ <del>Order to Show Cause</del> — Affidavits — Exhibits <u>A-F</u>	<u>12</u>
Answering Affidavits — Exhibits <u>A</u>	<u>3</u>
Replying Affidavits <u>-Exhs. A+B</u>	<u>4</u>

Cross-Motion: Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

**FILED**  
FEB 25 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: Feb. 25, 2010

MARTIN SHULMAN J.S.C.

Check one: FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 1

-----X  
PATRICK NAUGHTON, JR.,

Plaintiff,

Index No: 104026/05

-against-

**Decision and Order**

THE CITY OF NEW YORK and PETROCELLI  
CONSTRUCTION, INC.,

Defendants.

-----X  
THE CITY OF NEW YORK and PETROCELLI  
CONSTRUCTION, INC.,

Third Party Index No.  
591166/06

Third Party Plaintiffs,

-against-

W & W GLASS SYSTEMS, INC. and METAL  
SALES CO., INC.,

Third Party Defendants.

-----X  
HON. MARTIN SHULMAN, J.S.C.:

Defendants-Third Party Plaintiffs City of New York (the "City") and Petrocelli Construction, Inc. ("Petrocelli") move for an order pursuant to CPLR §3126 striking third-party defendant W & W Glass Systems, Inc.'s ("W&W") answer or, alternatively, for an order compelling W&W to appear for a further deposition by a date certain. W&W opposes the motion.

On July 23, 2009, W&W produced Scott Haber, its vice president, for a deposition. See Exh. A to Tosca Aff. in Opp. at p. 9. Thereafter, counsel for the parties appeared on August 18, 2009 for a status conference and entered into an order (the "conference order") providing *inter alia* for Petrocelli "to serve a demand for further

deposition of [W&W] of witness who negotiated the contract w/ Petrocelli w/in 30 days.” See Exh. C to motion at ¶7. In accordance with the foregoing, defendants served three (3) notices to depose W&W designating the following W&W employees as witnesses: George Houston, Kevin Forman and Michael Haber. See Motion at Exh. D. This motion ensued upon W&W's failure to produce these witnesses for depositions.

Defendants contend that W&W is in violation of the conference order. W&W responds that further depositions of three (3) more of its employees are unduly burdensome and the conference order does not require production of any further witnesses.<sup>1</sup> The court agrees with W&W's interpretation of the conference order, which merely sets a time frame for Petrocelli to serve demands for further depositions of W&W. It does not reflect any agreement by W&W to produce further witnesses, nor does it reflect any determination by the court as to the propriety of any such demand. As such, W&W is not in default of the conference order.

Turning to the propriety of defendants' demand to depose three (3) additional witnesses, the motion provides no explanation as to why further depositions of W&W's employees are required. The motion contains no specific allegation that the witness W&W previously produced lacked sufficient knowledge of the contract between Petrocelli and W&W. It appears from the language of paragraph 7 of the conference order that defendants seek to depose the W&W representative who negotiated the

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<sup>1</sup> Notwithstanding W&W's foregoing stance, prior to bringing this motion counsel for defendants and W&W attempted to resolve this issue among themselves. To that end, W&W offered to produce two (2) additional witnesses for deposition. See Tosca Aff. in Opp. at ¶3.

subject contract.<sup>2</sup> Defendants confirm the foregoing in their counsel's reply affirmation. See Lombardo Reply Aff. at ¶4. However, there is no convincing explanation as to why defendants seek to depose the witness who negotiated or prepared the contract.

Only in reply do defendants finally offer some hint as to the purpose for conducting a further deposition of W&W. Specifically, defendants state that "testimony of a witness with knowledge of the terms and conditions of the contract is necessary to determine the intent of the parties as to the insurance procurement and indemnification provisions contained therein."<sup>3</sup> *Id.* at ¶7.

This explanation is insufficient to warrant further delay of this five year old litigation. "The best evidence of what parties to a written agreement intend is what they say in their writing." *Slamow v Del Col*, 79 NY2d 1016, 1018 (1992). Here, the court agrees with W&W that the contract speaks for itself. Defendants do not contend that the contract's insurance procurement and indemnification provisions are vague or ambiguous, nor do they claim the parties' intent cannot be discerned from the contract itself. For the foregoing reasons, it is hereby

ORDERED that defendants' motion is denied in its entirety.


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<sup>2</sup> The witness W&W previously produced identified the contract but testified that Michael Haber negotiated it. Exh. A to Tosca Aff. in Opp. at pp. 12-13.

<sup>3</sup> Defendants' counsel explains that Rider A to the contract between Petrocelli and W&W required W&W's subcontractors to procure and maintain specific insurance coverage and name Petrocelli as an additional insured. However, the purchase order between W&W and its subcontractor, third-party defendant Metal Sales Co., Inc., contains no such requirements. See Lombardo Aff. in Opp. at ¶7 and Exhs. A and B thereto.

This constitutes this court's Decision and Order. Courtesy copies of same have been provided to counsel for the parties.

Dated: New York, New York  
February 25, 2010

  
\_\_\_\_\_  
HON. MARTIN SHULMAN, J.S.C.

**FILED**

FEB 25 2010

NEW YORK COUNTY