

**Glasmair Steel Erectors, Inc. v Pecker**

2010 NY Slip Op 30395(U)

February 9, 2010

Supreme Court, Nassau County

Docket Number: 016414/08

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice

\_\_\_\_\_  
GLASMAR STEEL ERECTORS, INC.,

Plaintiff,

-against-

ELLIOT PECKER, ESQ., PECKER IRON  
WORKS, INC., PECKER IRON WORKS  
OF N.Y., INC., PECKER IRON WORKS  
OF WESTCHESTER INC. and PECKER  
IRON WORKS, LLC,

Defendants.

TRIAL/IAS, PART 2  
NASSAU COUNTY

INDEX No. 016414/08

MOTION DATE: Nov. 19, 2009  
Motion Sequence # 003

\_\_\_\_\_  
The following papers read on this motion:

- Notice of Motion..... X
- Affirmation in Opposition..... X
- Affidavit in Partial Opposition..... X
- Reply Affirmation ..... X
- Memorandum of Law..... X

This motion, by plaintiff, for

1. an Order pursuant to CPLR §2308(b) to compel the law firm of McDonough, Marcus, Cohn, Tretter, Heller & Kanca, LLP (hereinafter "McDonough") to comply with a subpoena demanding testimony and the production of documents;

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2. an Order pursuant to CPLR §2308(b) to compel the accounting firm of Castellano, Kornberg and Co. CPAs to comply with a subpoena demanding testimony and the production of documents;
3. an Order disqualifying the law firm of Quinn McCabe to act as counsel due to the conflict of interest in light of the fact that Quinn McCabe represented the plaintiff's interests in the underlying action which gave rise to this suit,

is determined as hereinafter set forth.

With respect to that portion of the motion that seeks an order compelling the accounting firm of Castellano, Kornberg and Company to comply with the subpoena as served, that request has been **withdrawn** by the moving party.

### **FACTS**

The present action arose out of a construction services contract between the Museum of Jewish Heritage and the defendant Pecker Iron Works, Inc. ("PIW"). Glasmar was a subcontractor hired by PIW to do steel work on the construction project. Glasmar completed its contractual obligations and was owed \$403,839.89 for its services, which PIW was liable for.

Upon completing its services, Glasmar entered into a Liquidating Agreement ("the Agreement") with PIW to address PIW's liability regarding the unpaid invoices. The Agreement freed PIW of any liability for Glasmar's invoices, and in exchange, PIW promised to commence an action against the property owner and assert Glasmar's claim. Paragraph 6 of the Agreement states Glasmar "shall be kept reasonably informed of the status of said litigation."

Pursuant to the Agreement, PIW retained McDonough as counsel and brought an action against the project owner for the unpaid invoices owed to PIW and Glasmar. During this litigation, PIW failed to pay attorney's fees to McDonough, which led McDonough to file a charging lien and withdraw from the case.

After McDonough withdrew from the litigation, PIW retained Quinn McCabe as

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counsel in the action. Glasmar was never advised of McDonough's withdrawal or the retention of Quinn McCabe. There was also never any communications made between Quinn McCabe and Glasmar.

Shortly after Quinn McCabe was retained by PIW, PIW and the project owner settled the claims brought by PIW and the counterclaims brought by the project owner. The project owner agreed to pay PIW \$50,000. This \$50,000 was used to satisfy McDonough's charging lien against PIW. Following settlement of the project owner litigation, PIW claims it was freed of any liability to Glasmar for its unpaid invoices pursuant to the terms of the Agreement.

Glasmar brought an action against PIW on the grounds that PIW breached the Agreement and did not represent Glasmar's interests in a diligent and non-negligent manner. Glasmar alleged it was never informed of the status of the case, the charging lien, the substitution of counsel, or the settlement; and that as a result of the breach of contract, PIW is liable for Glasmar's unpaid invoices.

### **PLAINTIFF'S CONTENTIONS**

#### **I. Glasmar's CPLR 2308(b) Motion**

Glasmar contends McDonough should comply with the subpoena to provide testimony and produce all information relating to its representation of PIW in the project owner litigation because McDonough also represented Glasmar's interests in that litigation.

Glasmar points to the Agreement to show that McDonough represented Glasmar's interests in the project owner litigation. Glasmar first points to paragraph 7 of the Agreement, which states,

“The parties agree that the firm of McDonough Marcus Cohn Tretter Heller & Kanca, L.L.P. (the “Firm”), shall represent Glasmar and/or Pecker in connection with the presentation of the Claims and in any action or proceeding brought to collect any monies that may be recoverable under the Claims.”

Glasmar further contends that paragraphs 5 and 6 of the Agreement show that

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McDonough represented Glasmar in the underlying project owner action. Paragraph 5 states PIW shall “initially advance all related fees and expense to represent Glasmar in the Contract Litigation.” Paragraph 6 states that “Glasmar shall be kept reasonably informed of the status of the Contract Litigation.”

## II. Glasmar’s Disqualification Motion

Glasmar contends Quinn McCabe should be disqualified from representing PIW in the instant action because Quinn McCabe represented Glasmar in the third party action against the project owner and Glasmar intends to call Christopher McCabe, an attorney at Quinn McCabe, as a witness in this action. Glasmar cites Rule 1.9 of New York’s Rules of Professional Conduct, which prevents an attorney from representing a client in the same or a substantially related matter in which the lawyer previously represented a client of materially adverse interest. Glasmar also points to Rule 3.7 of New York’s Rules of Professional Conduct, which prevents an attorney from advocating before a tribunal where the attorney is likely going to be a witness on a significant issue of fact.

Glasmar argues that a conflict of interest exists that would require Quinn McCabe to be disqualified from representing PIW in the instant action; that Quinn represented the interests of PIW and Glasmar in the third party action against the project owner. Further, this present action is directly related to the related action against the project owner; and that the interests of Glasmar and PIW are directly adverse.

Plaintiff avers that Christopher McCabe was the attorney directly involved in settling the third party claim, and Glasmar intends to show that the settlement was reached in bad faith and in violation of the terms of the Agreement.

## **DEFENDANT’S CONTENTIONS**

### I. Glasmar’s CPLR § 2308(b) Motion

PIW contends Glasmar’s motion should be denied to the extent that it seeks the disclosure of any privileged communications or attorney work product documents; and that some of the information requested in the subpoena is communications made between McDonough and its client PIW for the purpose of PIW obtaining legal advice, are privileged and not discoverable.

McDonough also submitted an affidavit in partial opposition to plaintiff's motion, that McDonough only represented PIW and certain requested information was privileged, by reason of the fact that it was retained by PIW for the project owner litigation, and the only retainer agreement was made with PIW. McDonough agrees to turn over the requested files except those that are confidential or attorney work product.

## II. Glasmar's Disqualification Motion

PIW contends Quinn McCabe should not be disqualified as counsel because an attorney-client relationship never existed between Glasmar and Quinn McCabe, and it is not necessary for Christopher McCabe to testify.

PIW argues that the actions of the plaintiff and Quinn McCabe demonstrate that an attorney client relationship never existed; that Glasmar never entered into a retainer agreement with Quinn McCabe, Quinn McCabe never billed Glasmar, Quinn McCabe never communicated to Glasmar that it was representing it, and Glasmar never had any communication with Quinn McCabe. Further, Quinn McCabe represented to Glasmar that it was PIW's new counsel; and that Quinn McCabe sent letters to Glasmar seeking information to respond to certain interrogatories in the third party claim, but Glasmar never responded. PIW asserts that when a liquidation agreement is made, counsel for the general contractor does not then become counsel for the subcontractor.

Additionally, PIW contends that Christopher McCabe's testimony is not necessary in the instant action, Mr. McCabe's information is protected by attorney-client privilege, and the information is unnecessary because the terms of the Settlement Agreement are not in dispute and Glasmar possesses a copy of the Settlement Agreement.

## DECISION

### I. Glasmar's CPLR § 2308(b) application

To determine if Glasmar is entitled to all of the testimony and information it requests in its subpoena to McDonough, it must be determined if an attorney-client relationship existed between Glasmar and McDonough in the underlying action. Such relationship is a necessary bedrock to obtaining such information (see **Jamaica Public Service Co., Ltd. v AIU Insurance Co.**, 92 NY2d 631, 684 NYS2d 459, 1998). (CPLR § 4503 ).

The focus is on whether an express or implied employment agreement existed between the two parties. (*Altkrug v. Horowitz*, 111 A.D. 420, 97 N.Y.S. 716, 1906). Here, the evidence demonstrates that an attorney-client relationship may have existed between McDonough and Glasmar. Under section 5 of the Agreement, PIW was obligated to assert Glasmar's claims for its unpaid invoices against the project owner "in claim or by litigation in [PIW's] or Glasmar's name". Further, section 7 of the Agreement provided McDonough "shall represent Glasmar and/or [PIW] in connection with the presentation of the Claims". Section 6 provides further evidence that the McDonough was representing Glasmar's interests, as it states "Glasmar shall be kept reasonably informed of the status of the Contract Litigation". The Agreement had the effect of creating an attorney-client relationship between McDonough and Glasmar, since McDonough was required to represent Glasmar's interests in connection with its representation of PIW. Additionally, the plaintiff is entitled to discovery that is directly related to the issue of the attorney-client relationship and how it is connected to the property owner litigation and the Glasmar claims. The defendants have failed to demonstrate an attorney-client relationship existed only between PIW and McDonough and not with Glasmar; however no retainer agreement was produced to support the contention that an exclusive attorney-client relationship existed between PIW and McDonough. Lacking such proof, the motion is **granted**, and McDonough must comply with the subpoena and disclose all requested information.

## II. Glasmar's Disqualification Motion

Glasmar's motion for disqualification of Quinn McCabe must be **granted** because Christopher McCabe of Quinn McCabe is likely to be called as a witness in this action.

An attorney should not act as an advocate before any tribunal if the attorney is likely to be called as a witness on a significant issue of fact. (New York Rules of Professional Conduct, Rule 3.7). The testimony must be necessary, and testimony that is just highly useful will not satisfy this burden. (*S & S Hotel Ventures Ltd. Partnership v. 777 S. H. Corp.*, 69 N.Y.2d 437, 515 N.Y.S.2d 735, 508 N.E.2d 647, 1987). The factors considered to determine necessity include the significance of the matters, weight of testimony, and availability of other evidence. *Id.*

Glasmar is seeking Christopher McCabe's testimony about all facts relevant to the settlement. Since Christopher McCabe represented PIW in the settlement, and, pursuant to the Liquidation Agreement, ostensibly represented Glasmar's interest, his testimony is necessary to help determine if the settlement was done in bad faith or in violation of the

Agreement. The settlement agreement and/or the defendants' testimony are not sufficient to determine these allegations. The facts surrounding the settlement agreement are at the heart of the litigation, so it is clear Christopher McCabe's testimony has high significance in this action.

Glasmar's motion seeking to disqualify Quinn as PIW's counsel is granted.

In sum, Glasmar's motion seeking a disqualification of Quinn as defendants' counsel is granted, and Glasmar's motion seeking an order to compel McDonough to provide all testimony and information regarding its representation of PIW in the third party action against the project owner is granted, and McDonough shall provide all relevant testimony and information requested.

The instant action is stayed for a period of 30 days from the date of this order, during which PIW is directed to retain new counsel, and new counsel will have an opportunity to obtain the file and communicate with the clients.

Counsel are reminded that the certification conference is scheduled for April 6, 2010 in Chambers of the undersigned.

Dated FEB 09 2010

Stephen J. Berardin  
J.S.C.

**ENTERED**  
FEB 23 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE