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

2010 NY Slip Op 32002(U)

July 22, 2010

Supreme Court, Nassau County

Docket Number: 001018/2008

Judge: Ira B. Warshawsky

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SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T :
HON. IRA B. WARSHAWSKY,
Justice,

TRIAL/IAS PART 8

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

Plaintiffs,

INDEX NO.: 001018/2008
MOTION DATE:05/17/2010
MOTION SEQUENCE: 015

-against-

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

MOTION TO COMPEL DISCOVERY

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 HARDWARE, CLEM'S ORNAMENTAL IRON WORKS, DAVINCI CONSTRUCTION OF NASSAU, INC. d/b/a DAVINCI CONSTUCTION, 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,

Third-Party Action

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M.I. CONCRETE CORP., MID-ATLANTIC STONE, INC., PATTI ROOFING, LLC, SIDNEY B. BROWNE & SON, LLP, SIPALA LANDSCAPE SERVICES, INC., STAT FIRE SUPPRESSION, INC., SUPERSEAL MANUFACTURING CO., THREE B'S PLUMBING HEATING and AIR CONDITIONING CORP., and UNIVERSAL FOREST PRODUCTS,

Third-Party Defendants.

FJR CONSTUCTION, INC.

Plaintiffs,

-against-

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

Defendants.

Joined Lien Action #1

INDEX NO.: 005292/2007

DAVINCI CONSTUCTION OF NASSAU, INC.,

Plaintiffs,

-against-

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

Defendants.

Joined Lien Action #2

INDEX NO.: 006064/2007

TOCCI BUILDING CORPORATION OF NEW JERSEY, INC.,

Second Third-Party Plaintiff,

-against-

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

Second Third-Party Defendants.

Amended Second Third-Party Action

INDEX NO.: 001018/2008

SIPALA LANDSCAPE SERVICES, INC.,

Fourth-Party Plaintiff/
Third-Party Defendant,

-against-

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

Fourth-Party Defendants.

Fourth-Party Action

INDEX NO.: ______________

The following papers read on this motion:

Notice of Motion, Affirmations & Exhibits Annexed	1
Amended Notice of Motion	2
Affidavit of Douglas J. Lutz in Opposition to Tocci Building Corporation's Motion to Compel Discovery of Archstone Reading Material & Exhibits Annexed	3
Memorandum of Law of Defendant Perkins Eastman Architects, P.C. Opposing Tocci Building Corporation's Motion	4
Plaintiffs' Response to Tocci Building Corporation of New Jersey, Inc.'s Motion to Compel	5

Superseal Manufacturing Co.'s Affirmation in Support of Tocci Building Corporation of New Jersey, Inc.'s Motion to Compel 6
Reply Affirmation of James Davies in Further Support of Tocci's Motion to Compel ... 7

Defendant, Tocci Building Corporation of New Jersey, Inc. ("Tocci"), has moved, pursuant to CPLR § 3124, to compel plaintiff, Archstone f/k/a Archstone-Smith Operating Trust ("Archstone"), to produce all documents, reports, communications and drawings concerning the investigations or findings of water leaks or water infiltration at the apartment complex located in Reading, Massachusetts (the "Reading material").

The instant matter is a two year old construction case brought by Archstone (owner) against Tocci, the general contractor, of a major housing project in Westbury, New York, after the discovery of serious water infiltration problems. The main defendants include Liberty Mutual Insurance Company (bonding company), Perkins Eastman Architects, Inc. (architect) and Eldorado Stone, LLC (manufacturer of stone siding material). Tocci then instituted third-party actions against twenty-three subcontractors. Other actions have been consolidated with these original actions over the last two years. A parallel action involving the insurance carriers of the contractors is also pending in this part.

There has been massive discovery in this case to date. Hundreds of discs of material have been turned over by plaintiff to defendant, along with large amounts of discovery going the other way from diverse defendants and third-party defendants, in total over one million pages of documents at a cost of hundreds of thousands of dollars, and we have not yet done the privilege challenges to the ESI production.

Movant argues that another project, in Reading, Massachusetts, has numerous similarities to the Westbury project. That it (Reading) has had similar water infiltration problems and was designed by the same architects, the defendant, Perkins Eastman. Therefore, they argue the requested information is material and necessary (CPLR 3101(a)) and could lead to admissible evidence on the instant case, i.e., relevant to the cause of water infiltration not related to <u>their</u> work or that of their subcontractors. The standard of materiality as defined by the Court of Appeals (*Allen v. Crowell-Collier*, 21 N.Y.2d 403) is one of usefulness and reason, with the

focus being placed on "sharpening the issues and reducing delay and prolixity." *NBT Bancorp, Inc. v. Fleet Norstar Financial Group, Inc.*, 192 A.D.2d 1032 (3d Dept. 1993). Competing interests are to be balanced and the need for discovery must be weighed against any special burden to be borne by the opposing party. *Kavanagh v. Oden Allied Maintenance Corp.*, 92 N.Y.2d 952 (1998) (personal injury case).

Prior to filing this motion, attempts were made by Tocci to obtain the above requested information from Archstone, but their requests were denied. After said denial, this request, amongst others, were submitted to the Court Appointed Discovery Referee/Special Master, Michael Cardello, III, Esq. Archstone requested that the Court decide the dispute rather than the Special Master. Archstone generally objected to the demanded discovery contending it was irrelevant to this case and that the demand, which appeared to reflect only "documents concerning the investigation of the leaks" at Reading, that said "request would essentially require the production of the entire project file . . . of Reading." Defendant Perkins Eastman also objected to the production calling it inadmissible "habit" evidence to support the claim of negligent design by defendant (Perkins Eastman). After an unsuccessful telephone conference, Tocci was given permission to make this motion.

Current document production shows that while Archstone developed and Perkins Eastman designed the apartment complex at issue in this litigation, Archstone Westbury, they were also collaborating on an apartment complex substantially similar called Archstone Reading. In addition to both properties being developed by Archstone and designed by Perkins Eastman, as of 2006, the same Archstone Production Officer, John Costello, was responsible for overseeing construction at both locations. Both properties experienced water leaks or water infiltration.

Tocci argues that the two projects progressed together, at least design wise. The "smoking gun" that movant argues provides entry into the Reading project file was the following:

There are documents in which Archstone's employees – as opposed to its lawyers – state that the designs for Reading and Westbury are similar and some even state that they are "the same." In 2007, Archstone took steps to determine the cause of the window leaks at Archstone Westbury. While investigating the water intrusion problems at Westbury, on May 2, 2007, Archstone's Senior Regional Service Manager, William Tarinelli, sent an e-mail to Archstone

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Vice-President David Lewis in which he stated "Archstone Reading is the same design as Westbury, so I called Reading and asked them if they are having window leaks. Surprise, they are dealing with some right now!" ". . . [T]hey have had some leaks at Reading but it took 2 years for them to develop out in Westbury and I want to make sure we don't develop the same issues there." On September 5, 2007, Archstone Senior Vice-President of Development, Chris Hughes, sent a lengthy internal memo to his supervisor Neil Brown regarding the leaks at Archstone Westbury and stated at the very end, "[i]t is also my understanding that Archstone Reading was designed by the same architect and may have similar issues."

Essentially, Tocci argues that these e-mails "suggest that the cause of the damage was faulty design and not the result of defects in construction."

Controlling Law

CPLR § 3101(a) requires full disclosure of all matter material and necessary to the prosecution or defense of an action, regardless of the burden of proof. The statute has been liberally construed to require disclosure of any information or material reasonably related to the issues, which will assist in the preparation for trial. See, *Hoenig v. Westphal*, 52 N.Y.2d 605, 439 N.Y.S.2d 831 (1981) (quoting *Allen v. Crowell-Collier Publishing Company*, 21 N.Y.2d 403, 288 N.Y.S.2d 449 (1968)) and holding that the provision has been construed so as to require any matter that will "assist preparation for trial by sharpening the issues and reducing delay and prolixity.").

CPLR § 3124 states that "[i]f a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article . . . the party seeking disclosure may move to compel compliance or a response." Where a notice for disclosure is ignored, a party seeking disclosure can proceed under CPLR § 3124 for an order to compel disclosure, or move under § 3126 for the imposition of penalties for willful failure to disclose. See, *Goldner v. Lendor Structures, Inc.*, 29 A.D.2d 979, 289 N.Y.S.2d 687 (2d Dept. 1968). "The party seeking to prevent disclosure has a heavy burden, especially where the materials sought are relevant." *Marten v. Eden Park Health Services, Inc.*, 250 A.D.2d 44, 46 (3d Dept. 1998).

In supporting its request, Tocci compares this case to product liability cases that sought discovery and inspection of other similar products, i.e., Jeep automobiles and riding lawnmowers

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(as examples) (similar design and operation). See, *Mestman v. Ariens Company*, 135 A.D.2d 516 (2d Dept. 1987) (snow blower case). They argue information regarding defective design in products or structures of a similar design is highly relevant. In *Mestman*, the court allowed discovery of predecessor snow blower models. In *VanHorn v. Thompson & Johnson Equipment Co., Inc.*, 291 A.D.2d 885 (4th Dept. 2002), the court ordered discovery of complaints and accident reports of Bobcat skid-steer loaders similar in design and operation to the Bobcat model in question.

Defendants argue that documents produced in discovery suggest that similar materials were used to construct Reading's exterior building envelope. Tocci seeks discovery of the Reading material as probative evidence that there was a flawed design in Westbury which caused the damage. If the design of Reading resulted in damage (water infiltration), and the design of Reading is the same as the design of Westbury, then, they argue, that the Reading materials would be probative to causation of the leaks in Westbury. This argument was modified in a "reply."

Archstone has argued that to meet Tocci's demand, they would have to produce the entire Reading project file which would be unduly burdensome (especially when the project is otherwise unrelated to the instant project).

Tocci counters that they do not seek the entire file, but rather, reports, documentation, drawings and communications related to the investigation of the leaks or water intrusion at Reading.

Perkins Eastman points out that installation of the windows was done under different building codes and that is "code" for different requirement for installation. Installation of windows at Westbury used different processes.

<u>The Key Words are "Substantially Similar"</u> — Courts have permitted discovery only where other products' purported defect (and alleged injury) was substantially similar to the product defect and injury as the matter before the Court.

Co-defendant Perkins Eastman argues that Tocci has failed to show any meaningful substantial similarity between the Reading and Westbury projects. Tocci does not make, or even attempt to make, this argument. They do argue that the projects are similar in design and they

stop there.

Perkins Eastman contends the common factor of similar siding (combination of stone, vinyl and cement), and the same design architects, are not sufficient.

Perkins Eastman points out the following dissimilarities:

1. Built under two building codes (Nassau County, New York and Reading, Massachusetts).

2. Different veneers manufactured by different companies. (Westbury – Eldorado Stone; Shop Drawing, Exhibit 14, p. 3, section 4 – Reading – Quality Stone Veneer). Tocci noted in its Exhibit M that Reading used Eldorado-style stone.

3. Area where installed on the buildings – first two stories of each building, terminating with horizontal belly bank versus thin vertical sections extending from roof to ground level (using less manufactured stone).

4. Windows – Perkins Eastman recommended Silver Line windows, Archstone used Super Seal windows on Westbury project. Reading used the Silver Line windows (see Exhibit 14, Reading Shop Drawing and Sample Record).

5. Construction completion – Westbury was completed (not yet stabilized) as of March 2006. Reading was "under construction" at this time.

6. Do the designs overlap? Neither "meeting minutes" nor other proffered indicia attempting to support design overlap support this theory.

7. Were the leaks of a similar nature? No showing there were leaks at Reading nor were they in similar location. No lawsuits from Reading.

8. E-mail Tarinelli – There were leaks in Reading. No indication there were window leaks, or, if so, they were design connected [but that is the inference].

9. Exhibit P, Chris Hughes memo – "Archstone Reading was designed by the same architect and may have similar problems." Rest of two page memo referred to Westbury, nothing further.

Perkins Eastman speaks to the "Means & Methods" argument which they argue precludes a finding of "substantial similarity" to Reading. In other words, without stating whether the design at Reading was the same design as Westbury, they point to numerous "differing means

and methods employed by trade contractors" which can "markedly modify the ultimate as built design of a project." For example, although Perkins Eastman specified that application of sealer to the exterior surface of the stone veneer (Exhibit 6: Project Specifications, Section 04700, § 2.2(E)) sealer was never applied. Exhibit 4: WJE Report, p. 3, Comment 1. Sealants were also omitted from joints between dissimilar exterior materials (Exhibit 4: WJE Report, p. 2, Comment 9 and p. 3, Comment 9, Exhibit 7: Letter from Archstone's attorney to Tocci's attorneys, dated November 21, 2007 ("November 2007 Letter")), contrary to design specifications. Exhibit 4: WJE Report, p. 3, Comment 9; Exhibit 6: Project Specifications, Section 4700; and Exhibit 8: Project Specifications, Section 07920, § 1.2A.b. Breaches and unsealed joints were left in the metal flashing. Exhibit 4: WJE Report, p. 2, Comment 4, p. 3, Comment 4; Exhibit 7: November 2007 Letter.

Perkins Eastman also cites in detail other inconsistencies between its design and what eventually was discovered to be "as built" (pages 19 and 20 of its Memorandum of Law), numerous ones related to water infiltration pursuant to the plaintiffs' expert report (the "Williams Report") due either to improper installation and/or the use of improper weather resistant barrier under the stone veneer.

Allegedly trade contractors failed to follow specification for installing stone veneer as set forth by Perkins and Eldorado Stone at Westbury.

Superseal's Position

Superseal points to the Williams Report (Exhibit 3 to Perkins Eastman) that defective flashing and window sequencing design are related to leaks (seemingly overlooking Williams' comment on the failure to seal the windows by installer).

They make reference to "poor design details" and wish to boot strap into Reading discovery. Superseal argues "all we did was manufacture. We did not install or control installation." That may be completely correct, but that is not a discovery issue. They blame DaVinci for installation problems (which also may be correct, but not relevant to our issue).

Paragraph 6 of Superseal's memo argues that they are entitled to discover if "these flashing and window sequencing designs dictated by Archstone and Perkins Eastman were the cause of the leaks at or around the windows at Archstone Westbury, and not due to inherent

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defects in Superseal's windows."

Superseal argues that a showing that "window leaks occurred at another substantially similar site due to intrinsic flaws in the design of the flashing and/or sequencing of the windows dictated by Archstone and Perkins Eastman is material and necessary and without a doubt germane to Superseal's defense.

They also go to Tarinelli's e-mail "Archstone Reading is the same design at Westbury" and that Reading "are dealing w/ some right now."

Superseal argues their windows were installed pursuant to Archstone and Perkins Eastman flashing and window sequencing design. That may be true, but, again, not related to a motion to compel, but may be relevant to a summary judgment motion in the future.

Archstone's Position

Archstone argues that under Tocci's theory of causation you must still look to admissibility. If the Court would not allow the Reading material into evidence, then the motion to compel should be denied. Four factors would have to be met by Tocci, at minimum, for its causal links to withstand scrutiny.

These would include (1) the sameness of design – a difficult enough task on its face, but when considering that an original design may be modified during construction by contractor and subcontractor requests, it is even more difficult; (2) negligence in design (we are speaking of the Reading design) – that the design was, in fact, done negligently; and (3) causation – that the design played a major role in causing damages to Archstone Reading.

Finally, if Tocci was able to accomplish this, they would face the relevancy and/or admissibility of this material to Archstone Westbury. Archstone argues that we would need a trial within a trial before, if ever, the Reading materials could come before the trier of fact.

Tocci Reply

Just as Archstone attempts to complicate this discovery request, Tocci tries to simplify it. Tocci argues in its reply memorandum that Archstone and Perkins Eastman misconstrue Tocci's argument regarding the Reading material. Tocci states:

> Tocci is NOT trying to prove fault for any problems at the Reading project and is NOT trying to establish that anyone's fault at the Reading project establishes fault at the Westbury project.

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The Court must then ask what is it really for? And then as though Tocci was listening to the Court's thoughts, Tocci continues:

> The purpose of the discovery sought is to discover what *actual physical construction and damage* was observed at the Reading project by the same Archstone employees and consultants who also diagnosed the water intrusion causes at the Westbury project.

The Court must then ask what does that matter? Who saw what and where? And Tocci continues:

> [A] fundamental question that a jury will have to decide is, what, in fact, and to what extent, caused the damage found at Westbury. [The Court agrees.] If the same waterproofing details are incorporated in both designs and construction, and if the same details failed at both properties, evidence of failed waterproofing details at Reading is highly probative of the cause of damage at Westbury – i.e. it is not a result of the means and methods of construction.

Now the Court must disagree. The "design details" (Perkins Eastman) as well as the "means and methods of construction" are all relevant to moisture infiltration at Westbury. However, the window manufacturer is different, and all the contractors are also different at Reading. Furthermore, we do not know if the "design details" at Westbury were the same or even similar to that at Reading, nor is that relevant. What is relevant is whether the design details are related to leaks at Westbury. That is the bottom line.

If Perkins Eastman would argue that its "design details" are not related to the leaks, then would it be relevant if those design details are linked to leaks at Reading? Again, the answer would still be no; no because the "means and methods of construction" differ from Westbury to Reading. But, again, the Court asks what is the relevancy? Tocci continues:

> Tocci's expert's preliminary report identified a lack of an appropriate water management system incorporated in the exterior wall at Westbury. This included, *inter alia*, the following issues: (1) the reverse lap flashing at the windows,[1] which was directed by Archstone and Perkins via Request For Information ("RFI") 55, attached as Exhibit A; (2) the lack of a specification for sealant at joints where dissimilar materials meet; (3) the inadequate flashing of the fiber cement trim at the balconies; and (4) the failure to incorporate the waterproof membrane into the

[1]All the expert reports submitted in this case that discuss this detail have opined that the reverse lap flashing design was improper.

> design of the balcony, as evidenced by the lack of a design plan for the termination of the membrane at the exterior corners of the balconies.

The Court fully agrees that Tocci's expert report and its findings could be relevant to the causation of damages at Archstone Westbury, but, once again, the Court asks what is the relevancy of these details, this report, to Reading? Tocci continues:

> The existence of these same details at Reading are relevant to this case to the the extent that Archstone's employees and consultants opine that these same details caused water damage at Reading.

It is the opinion of the Court that what Archstone's employees thought (Hughes comment at end of report) or opined as to what they thought there was a connection of the design of Westbury and the design of Reading is completely irrelevant to the cause of damage at Westbury. If there was identity of design, that still does not make it relevant to the cause of damages in Westbury.

Finally, Tocci closes its argument:

> If Archstone's consultants found that damage at Reading arose from design conditions that do not exist at Westbury, then the information is not admissible. On the other hand, if the same details exist at Reading, and Archstone's consultants found that those same existing details were the cause of damage at Reading, then the information is highly relevant to rebut claims that the manner by which Westbury was constructed has anything to do with the damage.

When all else is said and done, the final claim by Tocci is that they need the Reading material to rebut a claim that the manner in which Westbury was designed was not related to the damage claimed. Such a request is far too attenuated to open a discovery door on a completely separate construction project that may still require massive amounts of further discovery, when the proverbial pandora's box is opened, to make it useable to a party.

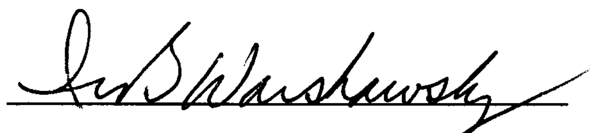
This case is about whether there is a defect at Westbury-Roosevelt that caused the leaks. Either Tocci built the buildings here correctly or it did not. Either Perkins Eastman's design was proper or it was not. Either Eldorado Stone's material was defective or not. Either Archstone altered the architect's plans or directed Tocci to make changes or it did not. The material elements of each party's claims or defenses are proven by what each party did at Westbury-Roosevelt. These are the issues for trial, not the barely connected water infiltration at Reading,

Massachusetts.

The Court finds the requested material is not "material and necessary" (CPLR 3101(a)) in that the possibility of it leading to admissible evidence is highly illusory. Further, that the production of said materials would not be of the nature that would sharpen the issue – rather they would become more complex – and said material would definitely not reduce delay or prolixity. See *NBT Bancorp, Inc. v. Fleet Norstar Financial Group, Inc.*, 192 A.D.2d 1032 (3d Dept. 1993). Balancing the need for discovery against the burden to be borne by multiple parties by enlarging the scope of discovery, the motion to compel must be denied.

It is **SO ORDERED.**

Dated: July 22, 2010



J.S.C.

ENTERED
JUL 28 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE