

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

2010 NY Slip Op 33576(U)

December 20, 2010

Sup Ct, 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**

**PRESENT:**

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

**TRIAL/IAS PART 8**

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

Plaintiff,

-against-

Main Party Action

INDEX NO.: 001018/2008

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-

Third-Party Action

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  
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  
SUPPRESSION, INC., SUPERSEAL MANUFACTURING CO.,

THREE B'S PLUMBING HEATING AND AIR CONDITIONING  
CORP. and UNIVERSAL FOREST PRODUCTS,

Third Party Defendants.

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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.

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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.

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TOCCI BUILDING CORPORATION OF NEW JERSEY,  
INC.,

Second Third-Party Plaintiff,

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.

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***De Novo Review of Referee’s Decision on Clawback of Documents  
and Redaction of Privileged Material***

Pursuant to the Order<sup>1</sup> appointing Michael Cardello III, Esq. as a Special Referee, a party dissatisfied with a decision of the Referee could appeal to the Court for a *de novo* review.

In a decision dated November 1, 2010, Mr. Cardello found two documents, inadvertently produced by plaintiffs, were not protected either by attorney-client or attorney work product rules. One document is called the “Hughes Memorandum” and the other “Simon Notes.” Plaintiff does not appeal the Referee’s ruling on the Hughes Memorandum and only portions of Simon Notes.

More specifically, Archstone contends that ARCH00800024723, lines 5–25, ARCH00800024724, lines 3–12, and ARCH00800024724, lines 22–27, are protected as attorney work product and the attorney-client privilege and, therefore, must be redacted. [The references are to Bates Stamp numbering.]

No one contends that these documents were not inadvertently turned over so that there has

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<sup>1</sup>Order dated November 29, 2009.

been no argument on that issue. In fact, the “Simon Notes” are literally handwritten notes of John Simon, an Archstone employee, from three meetings that took place on the property in Westbury on December 18, 2007. Lines 1–27 of ARCH00800024722 and lines 1–3 on ARCH00800024723 (line numbers added for easy identification of the subject areas) relate to the 11:00 A.M. meeting attended by a third-party contractor and Archstone employees. It is agreed that that meeting was to discuss construction issues related to corrective work. There is no claim for redaction on these notes.

Archstone argues, that on line 5 of ARCH00800024723, a shift occurs, which is supported by an affidavit from Mark F. Williams (architect of record on the reconstruction). This shift now allegedly involves discussion of protocols developed to investigate and forensically evaluate damage at the project (see Williams affidavit, ¶ 6, and Simon Notes labeled “Meeting w/ Mark Williams” at line 5). Essentially, plaintiff argues that these protocols were developed with and at the direction of counsel for Archstone, and that this meeting was held at the direction of Archstone’s counsel.

At line 1 of ARCH00800024724, a third meeting (December 18, 2007) is apparently logged by Mr. Simon involving Chris Schuler, Michael Creighton, John Simon and John Mannix. Plaintiff argues this meeting was to discuss, in part, the implementation of testing strategy developed by Mark Williams and counsel. The names of the participants are provided by plaintiff’s counsel. The notes only give first names or initials.

Plaintiff also argues that these notes reflect attorney-client communications, i.e. how to handle evictions. Page 724, line 6 “April 2d - Dev-Group - vacated by 3/31/08”; a direction on how information should be communicated so as to keep counsel informed of important events. (Lines 7, 8 and 25).

“Al Neely → John Mannix → JCS, line 7 [Brian Schly/Carrie Brower], line 8 Pat Rafferty, Mark Williams”; line 25 “Always Copy Robert Crutzen [sic] and Christine Jones”; and further the importance of developing written protocols to document construction activities for the purposes of the litigation, line 26 “need written protocol for all aspects.”

Mr. Cardello in a detailed nineteen page decision found that none of the notes referenced by the plaintiff related to attorney work product or attorney-client privilege.

There is really no issue that corporate counsel can relay instruction/legal advice to a corporate employee who may then transfer it to other corporate employees without it losing what is originally the privilege protection (attorney-client/work product) (see, *Charter One Bank v. Midtown Rochester, LLC*, 191 Misc.2d 154 [Supreme Court, Monroe County, 2002]), but only if the privilege originally existed.

Archstone argues that Mr. Simon and Mr. Mannix served as conduits for Archstone's counsel, dissemination of advice from counsel to lower-level employees. Counsel further argues that "an objective interpretation of the plain language of Mr. Simon's notes that reference reports to counsel, protocols for documenting activities, and the preservation of evidence reveal that the notes in question are of a legal character and should be redacted [from the balance of Simon's notes]." It is quite clear that that which are privileged communication in the eyes of some are not so in the eyes of others.

Mr. Cardello determined, and this Court agrees, that the "communication" found within Simon's notes do not amount to the giving of legal advice or services. Neither the alleged reference to tenants, ARCH00800024724, line 7; a chain of communication, line 8-9; nor what they should be (the team) "noticing" as they enter each building as to remediation or construction, amount to legal advice. The direction to "always copy Crutzen [sic] & Christine Jones [attorney for Archstone]" does not make any part of these notes protected by the attorney-client privilege.

Counsel also asks the Court to redact that portion of Simon's Notes that relate to a meeting with Mark Williams on December 18, 2007 as found on ARCH00800024723, lines 5-25. Mr. Williams submitted an affidavit to the Special Referee which was considered along with all other party submissions on these issues. It states in part:

3. I was retained by Robert Crewdson, Esq., counsel for Archstone, in September of 2007 to investigate and assist in the evaluation of conditions present at the apartment complex formerly known as the Archstone Westbury located in Westbury, New York (the "Project").
4. In connection with my engagement, I frequently consulted with Mr. Crewdson about forensic work at the Project, including appropriate methodologies and how to gather, analyze, and present data collected at the Project.
5. The direction I received from Mr. Crewdson and the substance of our

conferences was commonly relayed to Archstone personnel at the Project that were, in part, charged with assisting in the implementation of the discussed strategy.

Plaintiff's counsel argues this is attorney work product and protected by CPLR 3101(c), and is afforded absolute immunity from disclosure.

The expert hired by the plaintiff's counsel was to help counsel better understand the client's issues (in this case the problem involved with water infiltration at Archstone Westbury). Plaintiff argues that "Mr. Williams' expertise was necessary for Archstone's counsel to comprehend the complex, and highly specialized, field of waterproofing and to perform forensic investigation of water damage and its sources." Counsel for Archstone then argues:

Enlightened by Mr. Williams' expertise, counsel for Archstone and Mr. Williams collaborated to determine forensic testing methodologies for use in the litigation, and to determine how Archstone employees like Mr. Simon would assist counsel and Mr. Williams in that regard. The undisputed testimony of Mark Williams supports, without contradiction, that the portions of the Simon Notes designated for redaction are the result of that collaboration and reflect counsel's impressions and interpretations of what is important at the Project.

It is clear that counsel has chosen his words carefully, using "impressions and interpretations" [of counsel] in his argument to bolster the argument that Williams and then all others, are his adjunct in representing his client.

He further contends (once again using the buzz words of case law) that the directions given to Archstone personnel on site whose job was to assist with the "forensic testing shed light into the mental impressions and strategic evaluations of counsel..." He concluded that the "revelation of the qualitative judgments of counsel is simply impermissible under New York Law."

Plaintiff's counsel further argues that the Special Referee "substituted his own judgment" for that of the attorney's thought processes. Rather, Cardello addressed the role of Mr. Williams as an architect of record and not as the litigation consultant.

What do the notes say? What do they reveal of counsel's strategy for the prosecution of their claim? Let's look at the notes:

Line 6: need insp. done ASAP

Line 7: moisture meter – need to purchase  
 Line 8: will ship meter to site  
 Line 9: WME 17% (wood moist. equivalent) MAX  
 Line 10: [18-2 wire w/ metal screws keep leads out] place ≈ 1" spacing  
 Line 11: over 30 is beyond hope  
 Line 13: location, photo #, moisture reading, observations, visible problems  
         Tactil resist. hard, med., soft  
 Line 14: B — C — D need 2x2 piece of felt  
         |                   |                   ASTM 226  
         A — F — [?] (Rick Herbert)  
                                 Environ. Stone Works – did orig.  
 Line 21: fusion – drainable system       stone removal  
 Line 23: IDEA – membrane on outside wall all around  
 Line 24: need to find out fire rating @ breezeway if enclosed  
 Line 25: [could louver & PV]

The entire above quoted section of Simon's Notes (line 5 – line 25) of ARCH 00800024723) was found not to be work product by Mr. Cardello.

Though Mr. Williams' affidavit does not say so directly, counsel asks the Court to infer that the meeting was held at request of counsel. Assuming that is true, and the Court does not necessarily accept that, the notes themselves do not reflect such. Rather, they are what one would expect as discussions on how best to do what has to be done in the de-construction and reconstruction, from what materials would have to be completely discarded, and what could be saved pursuant to a moisture meter reading (Water Moisture Equivalent reading).

How many of these ideas or suggestions emanated from Mark Williams (reconstruction architect) and how much came from Archstone's counsel, if any, cannot be determined. Any claim that, even if they came from Williams alone, but since he is an adjunct to counsel, cannot be allowed to bootstrap this entire meeting under the umbrella of "attorney work product." Mr. Williams was and is the architect of record for remediation and, though he may be working closely with Mr. Crewdson (counsel to Archstone), that does not make him a litigation consultant and cloak him and everything he touches with "attorney work product" protection.

Archstone states, contrary to the position taken by Tocci, that "Mark Williams was retained as a consultant to assist Archstone's counsel in performing forensic investigations. . . ." Mr. Williams, as previously noted from his affidavit, was "retained . . . to investigate and assist in

the evaluation of conditions present at the apartment complex. . .”

Mr. Williams was not at that time a litigation consultant and not acting as one at the meeting in December of 2007. We may be walking a fine line here, but neither his statement of his retainer agreement, nor that of counsel, morphs Mr. Williams into a litigation consultant nor cloaks him and his work product with attorney work product protection as this Court granted in *Delta Financial Corp. v. Morrison*, 14 Misc.3d 428 [Supreme Court, Nassau County 2006].

The Court, upon *de novo* review, affirms the findings and conclusions of Mr. Cardello and incorporates by reference his decision of November 1, 2010 into that of the Court

It is **SO ORDERED**.

Dated: December 20, 2010

  
J.S.C.

**ENTERED**  
**DEC 22 2010**  
**NASSAU COUNTY**  
**COUNTY CLERK'S OFFICE**