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

PRESENT: CHARLES E. RAMOS PART 53
Justice

Oppenheim, et al

-v-

Mojo-Stivnen, et al

INDEX NO. 602408/2006

MOTION DATE

MOTION SEQ. NO. 24

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Motion is decided in accordance with accompanying Memorandum Decision

FILED
DEC 04 2013
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 11/25/13

CHARLES E. RAMOS J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 53

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AVIVITH OPPENHEIM and WILLIAM OPPENHEIM,

Plaintiffs, Index No. 602408/2006

-against-

MOJO-STUMER ASSOCIATES ARCHITECTS, P.C. d/b/a MOJO-STUMER ASSOCIATES, P.C., MARK STUMER, and JOSEPH VISCUSO,

Defendants.

Charles E. Ramos, J.S.C.

In motion sequence 024, defendants Mark Stumer ("Stumer") and Mojo-Stumer Associates Architects, P.C. ("MSA") (together, "Mojo Stumer") move this Court for an order *in limine* precluding the plaintiffs Avivith and William Oppenheim (together, the "Oppenheims") from submitting certain evidence at trial.

Background[1]

This case arises out of the renovation of a cooperative apartment (the "Apartment") located at 860 Fifth Avenue, New York, New York. Avivith Oppenheim is the tenant-shareholder and leases the Apartment from 860 Fifth Avenue Corporation.

On May 1, 2003, the Oppenheims entered into an agreement (the "Agreement") with Mojo Stumer to design a renovation of the Apartment (the "Project"). Defendant Mark Stumer is an architect

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[1]This section includes only background information relevant to the present motion. A full recitation of the extensive background of the case is available in this Court's decision and order dated July 23, 2012.

duly licenced by the State of New York and serves as the president and chief executive of MSA.

Subsequent to execution of the Agreement, various contractors submitted bids for the Project. On Mojo Stumer's recommendation, the Oppenheims selected V.I.S.T.A. of New York Inc. ("Vista") to complete the Project. Defendant Joseph Viscuso ("Viscuso") was Vista's principal. On February 11, 2004, the Oppenheims entered into a written agreement with Vista which provided that the Project would be substantially complete by July 16, 2004. Pursuant to the Vista Agreement, the Oppenheims would make periodic payments to Vista based on the percentage of work completed.

Work on the Apartment began in May 2004. As part of the scope of services provided for in the Agreement, Mojo Stumer reviewed Vista's applications for payment during the course of the Project and certified the percentage of work completed for the purposes of payment under the Vista Agreement.

Despite construction delays and issues with change orders, the Oppenheims paid Vista approximately $302,299 between May and October 2004. In fall 2004, the Oppenheims grew concerned about delays with the Project and retained legal counsel to communicate with Mojo Stumer and address their concerns with the Project.

At or around the same time, the Oppenheims retained a second architectural firm, FSI Architecture ("FSI"), to inspect and

report on the progress of the Project. In December 2004, FSI reviewed the Project plans and specifications, examined the Apartment, and issued a report finding that Mojo Stumer had certified applications for payment on account of work that had not been completed. FSI also reported that there were numerous problems with the work that had been completed.

After an attempt to meet and resolve their differences failed, the Oppenheims terminated Mojo Stumer and Viscuso and refused to allow them to return to the Project. Work on the Project was completed by another contractor or contractors.

On July 7, 2006, the Oppenheims initiated this action against MSA, Stumer, and Viscuso (together, the "defendants") by filing a summons and verified complaint. During the course of litigation, Stumer provided deposition testimony that between July 2003 and December 2004, Vista made several payments to Mojo Stumer totaling $8,000 to $10,000 as "thank you for introductions to projects." In August 2007, Viscuso pled guilty to misdemeanor commercial bribery in the second degree for a crime related to these payments.

In September 2008, the defendants made a motion for spoliation sanctions seeking an order from this Court precluding the Oppenheims from submitting expert testimony and to strike the complaint on the grounds that the Oppenheims had destroyed relevant evidence by completing the renovation without notice to

the defendants or affording their expert access to the Apartment.

On April 20, 2009, this Court issued an order that granted the defendants' motion to preclude the Oppenheims from presenting expert testimony at trial, but denied the motion to strike the complaint (2009 NY Slip Op 30939[U][Sup Ct, NY County 2009]["The defendants' motion to exclude testimony is granted, in part to the extent that the plaintiffs...shall be precluded from presenting expert testimony on the amount of work completed, the alleged deficiencies in the work performed, and the costs of completing the renovation"]). The Oppenheims appealed and the First Department affirmed this Court's decision, holding that the "[p]laintiffs spoliated evidence central to their claim that renovations on their apartment...were not complete when they invited a new contractor to perform substantial additional work without first permitting defendants to verify the need for such additions, warranting a sanction" (*Oppenheim v Mojo-Stumer Assoc. Architects, P.C.*, 69 AD3d 407 [1st Dept 2010]).

Mojo Stumer later filed a motion for partial summary judgment, seeking to dismiss all claims. On July 23, 2012, this Court executed an order that granted partial summary judgment in favor of Mojo Stumer and dismissed all claims except the claim for professional malpractice.

On October 15, 2012, the defendants filed the present motion *in limine*, seeking an order from this Court (1) precluding the

Oppenheims from submitting any evidence of claims that require expert proof, (2) precluding James Cicalo ("Cicalo") from testifying to any opinions such as percentages of completed work, (3) precluding the Oppenheims from submitting any evidence of damages, (4) precluding any evidence of any claims that the Oppenheims have not particularized, and (5) precluding any evidence of the "thank you" payments.

Discussion

"[T]he function of a motion *in limine* is to permit a party to obtain a preliminary order before or during trial excluding the introduction of anticipated inadmissible, immaterial, or prejudicial evidence or limiting its use" (*State of New York v Metz*, 241 AD2d 192 [1998]). Such motions are not governed by any particular formal requirements (*Drago v Tishman Const. Corp. of New York*, 4 Misc3d 2004 [Sup Ct, New York County, 2004]), citing *Wilkinson v British Airways*, 292 AD2d 263, 264 [1st Dept 2002]), but are limited to questions of admissibility of evidence and should not be used as a substitute for a motion for summary judgment (*Metz*, 241 AD2d at 198).

1. Expert Proof

"A claim of professional malpractice requires proof that there was a departure from accepted standards of practice and that the departure was the proximate cause of the injury" (*Talon Air Services LLC v CMA Design Studio, P.C.*, 86 AD3d 511 [1st Dept

2011]). "It is incumbent on the plaintiff to present expert testimony to support allegations of malpractice . . . except where the alleged act of malpractice falls within the competence of a lay jury to evaluate" (*530 E. 89 Corp. v Unger*, 43 NY2d 776 [1977]).

The Oppenheims allege a number of specific acts of negligence to support their claim for professional malpractice. As noted in this Court's July 23, 2012 order, some of the alleged acts of negligence are within the purview of a lay juror, but many are not and cannot be proven absent expert testimony. Because the Oppenheims cannot prove claims that require expert proof as a matter of law, evidence of these claims should not be presented to the jury at trial. Accordingly, Mojo Stumer seeks an order from this Court parsing which claims are within the competence of a lay jury and which should not be presented at trial because they must be proven by expert testimony.

Mojo Stumer contends that twenty-eight of the alleged acts of negligence asserted by the Oppenheims require expert proof and should not be presented to the jury (Nardiello Aff, Exhibit JJ).[2]

The varied acts include allegations such as poor designs, improper calculation of costs, failure to supervise, work

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[2]This excludes the allegation that failed to properly review applications for payment and improperly certified incomplete work as complete which this Court cited in its prior decision as within the purview of a lay juror.

improperly or poorly completed, and delays to construction.

This Court has performed a thorough review of the alleged acts of negligence in question and finds that, with the exception of "overcharges by Stumer ($50,000)" (Nardiello Aff, Exhibit JJ, item 28) and attorney's fees (Nardiello Aff, Exhibit JJ, item 29), the question of professional malpractice is not within the purview of a lay juror to determine. In each instance, expert testimony is required to establish what duty or standard of care Mojo Stumer owed to the Oppenheims with respect to that item and whether there was a breach of that duty.

For example, allegations of inadequate designs require expert testimony regarding what duty is owed with respect to design and whether Mojo Stumer breached the duty.[3] Laypersons do not have the requisite expertise to discern whether a particular design is so inadequate as to rise to the level of professional malpractice. Laypersons are similarly unqualified to determine whether and what duty an architect owes with respect to project construction and whether the architect has breached the duty where the plaintiff alleges that construction was inadequately or

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[3]*See* Nardiello Aff, Exhibit JJ, item 1 ("Kitchen had to be redesigned because Mojo's original design was not proper"), item 2 ("Master shoer/bath had to be re-designed"), item 3 ("HVAC redesign"), item 4 ("Lighting plan inadequate"), item 15 ("Bathroom floors iimproperly designed and build"), item 16 ("Toilets improperly located").

improperly completed.[4] In the case of the alleged delays to occupancy, the Oppenheims' interrogatory responses indicate that "[m]onthly market value will be supported by expert testimony" (Nardiello Aff, Exhibit F at 20).

Barring the exclusions noted above, each of the alleged acts of negligence require expert proof which the Oppenheims cannot provide. Accordingly, evidence of these alleged acts of negligence should not be presented to the jury at trial.

As described in the Oppenheims' answers to MSA's third set of interrogatories, the alleged malpractice described as "Overcharges by Stumer ($50,000)" is essentially a catch-all allegation of professional malpractice.[5] As such, to the extent

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[4] *See* Nardiello Aff, Exhibit JJ, item 12 ("Subfloor improperly laid"), item 13 ("Kitchen island improperly done"), item 14 ("Kitchen sink improperly vented"), item 15 ("Bathroom floors improperly designed and build"), item 16 ("Toilets improperly located"), item 17 ("Ceiling improper/not level (and) speaker frames not in place (see Vista's not's forcing ceiling put up)), item 18 ("Stone wall deficient/had to be rebuilt"), item 22 ("Failure to do maids room"), item 23 ("Failure to properly do steam piping").

[5] "[T]he nature of the overcharges is [sic] that because MSA did unprofessional, incompetent, negligent and fraudulent work, (I) the contract he made with plaintiff's can not be enforced, (ii) the contract price can not be enforced, (iii) the services were not of the values billed for them and were not worth the amounts plaintiffs' paid for them. More specifically, MSA's work in connection with the bidding process, the contractor's fee review and certification process, the construction administration process, the change order review process and the dispute resolution process were all fraudulent and tainted and worthless to plaintiffs because of the kickback arrangement between VISTA and MSA in the plaintiff's project and the similar kickback arrangements on at least ten other projects. All portions of

otherwise determined herein, the Oppenheims may present evidence of overcharges to the jury at trial. The defendants may make appropriate objections at trial, if so advised.

With respect to attorney's fees, the Oppenheims have not, as yet, established a contractual or other legal basis for the award of attorneys fees. Therefore, there are no questions of fact relating to attorneys fees for a jury to determine at this time. If so advised, the Oppenheims may submit relevant evidence to the trial court for a determination, as a matter of law, as to whether they are entitled to an award of attorneys fees, provided that such evidence was properly disclosed to the defendants in discovery prior to the filing of the note of issue and statement of readiness. The defendants may make appropriate objections at trial, if so advised.

2. Expert Testimony

Although the Oppenheims are precluded "from presenting expert testimony on the amount of work completed, the alleged deficiencies in the work performed, and the costs of completing the renovation," they nonetheless intend to present their prior expert witness, James Cicalo ("Cicalo") as a fact witness at trial. It is incumbent on this Court to instruct the parties as

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MSA's fees attributable to those processes and related matters were overcharges and should not have been billed to plaintiffs and should not have been paid by plaintiffs" (Nardiello Aff, Exhibit F at 6).

to what testimony is admissible as fact and what testimony is precluded expert opinion.

In an affidavit submitted to this Court, Cicalo indicates that he calculated various percentages of completed work based on site visits and examination of the Project plans and specifications (Nardiello Aff, ¶ 13). The defendants seek an order precluding, specifically, Cicalo from presenting these calculations to the jury and offering any opinion about percentages of work completed.

To the extent that Cicalo arrived at the calculation of percentages based on comparison between facts observed on site visits and an examination of the Project plans and specifications, this type of evaluation is outside the purview of a lay witness and constitutes an expert opinion. Because this Court's prior order specifically precludes the Oppenheims from "presenting expert testimony on the amount of work completed" and Cicalo reached his conclusions regarding percentages of work completed via an expert evaluation, he must therefore be precluded from presenting this testimony at trial. Nonetheless, where such facts could be easily observed by a lay person, as determined by the trial court, Cicalo may indicate whether work on a particular construction item had or had not begun.

Furthermore, in accordance with this Court's prior order, Cicalo is precluded, as a fact witness at trial, from giving his

opinions regarding "alleged deficiencies in the work performed" or "the costs of completing the renovation," and all expert reports prepared by Cicalo in connection with this action or in contemplation of litigation are excluded from trial.

3. Damages

Mojo Stumer seeks an order from this Court precluding the Oppenheims from submitting any evidence of damages at trial on the grounds that the Oppenheims failed to produce damages evidence during discovery and particularize or itemize their damages claim, instead seeking a lump sum of $1,142,775 for all alleged acts of malpractice (Nardiello Aff, Exhibit JJ).

Mojo Stumer affirms that they requested damages information and an itemized list of damages from the Oppenheims several times during discovery, in interrogatories, letter requests, and depositions (Nardiello Aff, ¶ 16-18). The Oppenheims assert that they "have itemized their damages in detail" (Saulitis Aff. ¶ 24) and that the damages sought "are not speculative, but actual expenses incurred" (*id.* at ¶ 25).[6]

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[6]The Oppenheims also contend that it is procedurally improper for the Court to make a determination regarding the sufficiency of damages evidence based on a motion *in limine* and that and that the defendants' motion is tantamount to a motion for summary judgment. Nonetheless, this Court did not address this issue in its prior decision on the motion for summary judgment, and "a motion *in limine* is the appropriate vehicle to determine what evidence may be presented at trial regarding damages" (*Wey v New York Stock Exchange*, 2007 NY Slip Op 50880[U], citing *State v Metz*, 241 AD2d 192 [1st Dept 1998]).

Mojo Stumer points specifically to twenty-nine alleged acts of negligence that the Oppenheims did not particularize. Pursuant to the determinations above, the Oppenheims are precluded for presenting twenty-seven of these allegations at trial. The remaining alleged acts of negligence include "Overcharges by Stumer ($50,000)" and the allegation that Mojo Stumer failed to properly review applications for payment and improperly certified incomplete work as complete.

To support their assertion that they have itemized their damages for the defendants, the Oppenheims point to a spreadsheet titled "new damages 6/9/11" that lists payments made to various contractors and supply companies on account of the Project. The spreadsheet lists the date on which each payment was made, the account (indicated as 860 FIFTH for all entries), a description for each entry that indicates to whom the payment was made, a memo that indicates generally what the payment was for (i.e., "Lighting #CA70732" or "Talco Construction Payment"), a category (i.e., electrical), and the amount of the payment made. The sheet does not indicate which payments correlate to which alleged acts of malpractice and this information is not readily discernable from a review of the spreadsheet.

The record indicates that the Oppenheims did not track the costs to repair damage allegedly caused by Mojo Stumer's malpractice (Nardiello Aff, ¶ 19), and the Oppenheims assert that

"defendants' attempt to serparate cost of completion damages from deficiency damages is objectionable in that to some large extent, it cannot be done" (Nardiello Aff, Exhibit F at 8).

Pursuant to CPLR 3101, a party is entitled to "full disclosure of all evidence material and necessary in the prosecution or defense of an action." New York courts have interpreted "material and necessary" to include all relevant evidence, stating that the phrase must be "interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity" *(Osowksi v AMEC Const. Management, Inc.*, 69 AD3d 99 [1st Dept 2009], citing *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403 [1968]). The test for what is "material and necessary" is "one of usefulness and reason" (*id.*).

There can be no question that evidence of alleged damages, including a break down of costs for each alleged negligent act, is material and necessary in a professional malpractice action, particularly where the alleged negligence arises from a complex design and construction project where costs are numerous and varied. The spreadsheet that the Oppenheims submitted as evidence of itemization is inadequate for this purpose because it does not identify which costs correlate to which alleged negligent acts asserted.

To prevent prejudice to the defendants, the Oppenheims must rely only on information that was properly disclosed in discovery prior to the filing of the note of issue and statement of readiness. Therefore, the Oppenheims are precluded from presenting evidence of damages on account of any alleged negligent act that they did not itemize in discovery and any evidence of damages that they did not properly disclose prior to the filing of the note of issue and statement of readiness.

4. Particularization

Mojo Stumer seeks an order pursuant to CPLR 3126 precluding the Oppenheims from presenting evidence at trial of sixteen (16) alleged acts of malpractice that are contained in the complaint, but were not "particularized" in the Oppenheims' interrogatory responses or depositions (Nardiello Aff, ¶ 54-57). The defendants also seek to preclude, on the grounds that the allegations were untimely made, evidence of twenty-eight (28) acts of alleged malpractice that were first raised in the Oppenheims' prior summary judgment motion, filed after the parties completed discovery and the note of issue and certificate of readiness were filed (Nardiello Aff, ¶ 56).

In response, the Oppenheims argue only that this is "a belated discovery matter, and affords no basis for preclusion of anything" (Sailitis Aff, ¶ 30).

CPLR 3126 provides, in relevant part, that if any party

"willfully fails to disclose information which the court finds ought to have been disclosed," the court may issue "an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony . . ."

With respect to the sixteen (16) alleged acts of negligence that the defendants argue were never particularized, this Court reiterates that the Oppenheims must rely only on information that was properly disclosed to the defendants in discovery prior to the filing of the note of issue and statement of readiness. At trial, they may not present any evidence that was not disclosed prior to the filing of the note of issue.

With respect to the twenty-eight (28) alleged acts of negligence that were first raised in the Oppenheims' prior summary judgment motion, there can be no doubt that these allegations were untimely raised and may not be presented at trial. Because the allegations were first raised after the filing of the note of issue, the defendants were not afforded an opportunity to seek discovery related to these allegations and would be unfairly prejudiced if forced to defend against the allegations at trial.

5. "Thank you" Payments

The defendants argue that the Oppenheims should be precluded from presenting evidence of the so called "thank you" payments

that VISTA paid to Mojo Stumer on account of the Project because any probative value of the evidence is outweighed by the danger of unfair prejudice to the defendants. The Oppenheims argue that evidence of these payments is probative of Mojo Stumer's alleged dishonesty and self-interest and is admissible for the purpose of impugning Stumer's credibility or for the purposes of impeachment.

"In New York, the general rule is that evidence is admissible unless its admission violates some exclusionary rule" (*People v Scarola*, 71 NY2d 769, 777 [1988]). "Evidence is relevant if it has any tendency in reason to prove the existence of any material fact, i.e., it makes determination of the action more probable or less probable than it would be without the evidence" (*id.*).

Relevant evidence may be excluded from trial if "its probative value is outweighed by the danger that its admission would prolong the trial to an unreasonable extent without any corresponding advantage; or would confuse the main issue and mislead the jury; or unfairly surprise a party; or create substantial danger of undue prejudice to one of the parties" (*People v Davis*, 43 NY2d 17, 27 [1977]). Whether to permit such evidence is a question of judicial discretion (*id.*).

Evidence of the so called "thank you" payments is relevant to the issue of whether Mojo Stumer failed to properly review

applications for payment and improperly certified incomplete work. It is the determination of this Court that the probative value of this evidence is not outweighed by the danger of undue prejudice to the defendants. The Oppenheims may, therefore, present evidence of the "thank you" payments at trial for the purposes noted above. Nonetheless, evidence of Viscuso's guilty plea, incorrectly described by the Oppenheims as a conviction (Plaintiff's memo at 6), carries a much greater risk of undue prejudice to the defendants that outweighs the probative value of this evidence. This evidence is therefore inadmissible at trial.

All parties to this action shall, of course, limit remarks in jury selection and in opening statements so as to comply with the above. In order to avoid prejudice to either side, counsel are hereby ordered to submit proposed remarks to be made in jury selection and in opening statements, to this Court for an *in camera* review at least two days prior to jury selection.

Accordingly, it is

ORDERED that the plaintiffs are precluded from presenting evidence of alleged acts of malpractice that require expert proof as cited herein; and it is further

ORDERED that non-witness James Cicalo is precluded, as a fact witness at trial, from testifying about percentages of work completed; and it is further

ORDERED that the plaintiffs are precluded from presenting

evidence of damages on account of any alleged negligent act that they did not itemize in discovery; and it is further

ORDERED that the plaintiffs are precluded from presenting any evidence that they did not properly disclose prior to the filing of the note of issue and statement of readiness; and it is further

ORDERED that the plaintiffs are precluded from presenting any evidence of any claim that was not alleged prior to the filing of the note of issue and statement of readiness; and it is further

ORDERED that the plaintiffs are precluded from presenting any evidence of defendant Joseph Viscuso's prior plea to commercial bribery at trial but may present evidence of the "thank you" payments.

Dated: November 25, 2013

ENTER:

J.S.C.