

Cheung v City of New York

2014 NY Slip Op 31430(U)

May 30, 2014

Sup Ct, New York County

Docket Number: 157328/2012

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 5

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YICK TAK CHEUNG, HAO DONG ZHANG, and
YEUNG SUN POULTRY MARKET, INC.,

Plaintiffs,

-against-

DECISION/ORDER
Index No. 157328/2012
Seq. No. 003

THE CITY OF NEW YORK, NEW YORK CITY
DEPARTMENT OF ENVIRONMENTAL PROTECTION,
NORTHEAST REMSCO CONSTRUCTION, INC.,
NICHOLSON CONSTRUCTION COMPANY,
CORPORATIONS XYZ NOS. 1-5 and JOHN DOES
NOS. 1-10,

Defendants.

-----X
REMSCO CONSTRUCTION, INC.,

Third-Party Plaintiff,

-against-

Third-Party
Index No. 590208/2013

BRIERLY ASSOCIATES, LLC,

Third-Party Defendant.

-----X
HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF
THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....	1,2(Exs. A-C)
ANSWERING AFFIDAVITS.....	..3...(Exs. 1-7)
REPLYING AFFIDAVITS.....	...4.(Ex. A)...
EXHIBITS.....
OTHER...(In Camera Submission).....5.(Ex. A)....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

In this action arising from damage to plaintiffs' premises as a result of excavation and construction work, defendants The City of New York ("the City") and The New York City Department of Environmental Protection ("DEP") move, pursuant to CPLR 2304, to quash a subpoena served by plaintiffs on nonparty Hatch Mott MacDonald ("HMM"). After hearing oral argument and considering the parties' motion papers and the relevant statutes and case law, this Court **denies** the motion to quash.

Factual Background:

In or about February of 2010, the City's DEP began work on a project to upgrade the Gowanus Canal Wastewater Pumping Station ("the WPS") in Brooklyn as part of a combined sewer overflow ("CSO") abatement project. During the CSO abatement project, excavation and subsurface construction, including micro-tunneling, were performed in connection with the project adjacent to 183 and 185 Columbia Street, which were owned by plaintiff Hao Dong Zheng and plaintiff Yick Tak Cheung, respectively, and leased to plaintiff Yeung Sun Poultry Market, Inc. ("YSPM"). Defendant Northeast Remsco Construction, Inc. was the general contractor on the project and defendant Nicholson Construction Company allegedly worked on the project as well.

Plaintiffs claim that, on December 23, 2011, the premises located at 185 Columbia Street partially collapsed and were thereafter demolished as a result of the excavation and subsurface construction performed at the WPS. They further claim that the work caused YSPM to vacate 183 Columbia Street until August of 2012 and that it caused a decrease in the "present day and future value" of the premises. Plaintiffs claim that the work at the WPS by the City and DEP resulted in

an “inverse condemnation” warranting damages of at least \$5 million.

The Project Documents

Pursuant to an Order on Consent dated January 14, 2005, which they entered into with the New York State Department of Environmental Conservation (“the DEC”), the City and the DEP were required, inter alia, to undertake certain CSO abatement projects, including that at the WPS. See Ex. 1 to Plaintiffs’ Aff. in Opp. Article II of the Order on Consent imposed a civil penalty for the DEP’s failure to comply with a 1992 order and Article III directed the City and DEP to perform work in accordance with “specified project descriptions and schedules set forth therein.” *Id.* Article IV required, inter alia, that the City and DEP submit quarterly status reports to the DEC describing actions taken towards completing the work, including information regarding delays. *Id.* Article IV, subsection B provided for penalties in the event the City and DEP failed to meet certain project schedule milestones. *Id.* Article IV, subsection D directed that “representatives of the parties shall hold quarterly progress meetings, to discuss and resolve any problems that may arise in the planning, design and construction of the CSO abatement facilities set forth in [the] Order.” *Id.* Article VI, entitled “Force Majeure”, provided that the City and DEP shall not be deemed in default of failing to meet certain project milestones in the event their “non-compliance [was] directly attributable to” certain circumstances beyond their control. *Id.*

As noted above, the alleged incident occurred on December 23, 2011. The following day, the City and DEP retained HMM for its “expert engineering services in the area of micro-tunneling

design and construction.”¹

On January 4, 2012, the City and DEP notified the DEC of a force majeure event at the WPS which could affect the scheduled 2014 construction completion date at the project. The City and DEP stated in a letter to DEC that “[o]n December 23 [of 2011] as the micro-tunneling (tunnel boring) machine penetrated the exterior wall into the Exit Chamber, groundwater, sand, and silt from the underground area surrounding the Exit Chamber unexpectedly entered the borehole thereby undermining the ground beneath 185 Columbia Street and causing a partial building collapse.” Plaintiffs’ Aff. in Opp., at Ex. 3. The City and DEP advised the DEC that the delay to the construction could not be quantified until the City and DEP could “fully investigate and review the cause” of the subsidence. *Id.*

An Order on Consent dated March 8, 2012 modified the compliance schedule set forth in the 2005 Order on Consent and also imposed a penalty on the City and DEP for their failure to meet certain construction deadlines. See Ex. 2 to Plaintiffs’ Aff. in Opp.

The materials presented by the City and the DEP for their quarterly meeting with the DEC scheduled for March 21, 2012 reported, inter alia, that the construction was 42% complete, that a force majeure had occurred due to micro-tunneling, that work on the tunnel and force main had been

¹It is undisputed that the City and DEP retained nonparty HMM in connection with the project. However, since the motion papers did not reflect the scope of HMM’s role at the project, this Court requested that the City and DEP submit HMM’s contract for in camera inspection. Although a cover letter to the contract indicated that it was not registered by the City until June 4, 2012, the DEP noted that work on the contract began on December 24, 2011. Attachment 1 of the contract reflected that HMM was retained not only to ascertain the cause of the incident of December 23, 2011 but also, inter alia, to determine what, if anything, could have been done to prevent the incident, conduct weekly meetings with the DEP to discuss progress made, and to determine “near-term actions required.”

stopped, and that “corrective actions [were] underway.” Ex. 4 to Plaintiffs’ Aff. in Opp.

On May 2, 2012, the DEC requested an update from the City and DEP regarding the force majeure, including the results of the DEP’s investigation as to how the incident occurred. Ex. 5 to Plaintiffs’ Aff. in Opp.

On or about June 27, 2012, the DEP withdrew the claim of force majeure with respect to the construction. Ex. 6 to Plaintiff’s Aff. in Opp.

On or about September 3, 2013, plaintiffs served a subpoena duces tecum on HMM seeking “[a]ll documents relating to the movement of subsurface material at the [WPS] on December 23, 2011” and “[a]ll documents received and generated by [HMM] prior to and after December 23, 2011 relating to the [WPS].” The City and DEP now move, by order to show cause pursuant to CPLR 2304, to quash the subpoena, and plaintiffs oppose the motion.

Positions of the Parties:

The City and DEP maintain that it is improper for plaintiffs to subpoena discovery from HMM, an engineering consulting firm hired by the City on December 23, 2011 to evaluate “the circumstances surrounding the building collapse”, which evaluation was needed “to generate a report to be used by the City and DEP in potential litigation arising from the incident.” They assert that any documents they gave HMM were “given in the context of attorney-client privilege” and that any attempt to obtain the documents should be made by a discovery demand, so that they can object to the same.

Alternatively, the City and DEP maintain that the documents in the possession of HMM are privileged as material prepared in anticipation of litigation and that, as such, they cannot be provided

to plaintiffs unless plaintiffs demonstrate that they are unable, without undue hardship, to obtain the materials by other means. They urge that the materials given to HMM were provided solely for the purpose of generating a report containing an opinion as to why the incident occurred and that the report was requested in anticipation of litigation.

In opposition to the motion, plaintiffs assert that their subpoena is proper insofar as it seeks information relevant and material to the instant litigation. They further assert that the materials sought are not protected by the attorney-client privilege and that there is no proof, other than a conclusory attorney affirmation, supporting the argument by the City and the DEP that materials were provided by them to HMM solely to have HMM prepare a report for the purpose of litigation. Rather, urge plaintiffs, the City and DEP retained HMM to investigate the cause of the incident solely to mitigate construction delays and to prevent a similar occurrence in the future.

Alternatively, plaintiffs urge that, if the City and DEP have established that HMM was retained solely for the purpose of litigation, then they have demonstrated a substantial need for the information in the possession of HMM and that they will sustain undue hardship if they do not obtain the materials.

In their reply affirmation in further support of their motion, the City and DEP reiterate their argument that the subpoena is improper. They further assert that plaintiffs have no support for their claim that HMM was retained to help the project recommence and/or to avoid the possibility of a reoccurrence, and not for the sole purpose of rendering an opinion as to the cause of the incident. In support of their argument, the City and DEP submit the affidavit of Kevin Clarke, a Portfolio Manager for the DEP, Bureau of Engineering Design and Construction, who states HMM was “retained for the purposes of providing an objective analysis and report of the event to assist DEP

[* 7]
in preparation for potential litigation.”

Conclusions of Law:

CPLR 3101(a) provides that there shall be “full disclosure of all matter material and necessary in the prosecution or defense of an action.” A party asserting a privilege based on the fact that materials were prepared in anticipation of litigation “bears the burden of demonstrating that the material . . . is immune from discovery by identifying the particular material with respect to which the privilege is asserted and *establishing with specificity that the material was prepared exclusively in anticipation of litigation (citations omitted).*” *New York Schools Ins. Reciprocal v Milburn Sales Co., Inc.*, 105 AD3 716, 718 (2d Dept 2013) (*emphasis provided*). “An attorney’s affirmation containing conclusory assertions that requested documents are conditionally immune from disclosure pursuant to CPLR 3101(d)(2) as material prepared in anticipation of litigation, without more, is insufficient to sustain the movant’s burden of demonstrating that the materials were prepared exclusively for litigation (*citations omitted*).” *Id.*, at 718.

If the party asserting the privilege establishes that the materials were prepared solely for litigation, the party seeking the disclosure may only obtain the same “upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means.” CPLR 3101(d)(2).

Here, the City and the DEP have failed to establish with any specificity that the materials sought by the subpoena were prepared exclusively for litigation. *New York Schools Ins. Reciprocal v Milburn Sales Co., Inc.*, 105 AD3d, *supra* at 718 The contract between the DEP and HMM,

produced by the City and the DEP for in camera inspection, clearly reveals that HMM was hired not only to determine the cause of the incident, but also to conduct weekly meetings with the DEP to discuss progress made as well as to determine “near-term actions required.” Thus, the contract submitted for in camera inspection by the City and the DEP undermines their contention that plaintiffs have no support for their claim that HMM was retained to help the project recommence and to avoid the possibility of a reoccurrence, and was not hired for the sole purpose of rendering an opinion as to the cause of the incident.

This Court further notes that, since the City and the DEP faced penalties for construction delays, it is entirely conceivable that HMM was also hired to assist them in minimizing such delays. Additionally, since the materials presented by the City and the DEP for their quarterly meeting with the DEC scheduled for March 21, 2012 reported, inter alia, that a force majeure had occurred due to micro-tunneling and that “corrective actions [were] underway” (Ex. 4 to Plaintiffs’ Aff. in Opp.), it is also conceivable, if not probable, that HMM was guiding the City and the DEP with respect to which such corrective actions needed to be taken.

Since nothing other than the conclusory affirmation of counsel for the City and the DEP supports their contention that the materials in HMM’s possession were prepared solely for litigation purposes, their argument must fail. *See New York Schools Ins. Reciprocal v Milburn Sales Co., Inc.*, 105 AD3d, *supra* at 718.

The affidavit of Clarke does not warrant a different result. First, his affidavit must be disregarded, as it was improperly submitted for the first time with the reply affirmation served by counsel for the City and the DEP. *See Kevin Kerveng Tung, P.C. v J.P. Morgan Chase & Co.*, 105 AD3d 709 (2d Dept 2013). In any event, Clarke’s representation that HMM was retained by the

DEP for the sole purpose of determining the cause of the accident is, as noted above, belied by the very contract submitted by the City and the DEP for in camera inspection.

“Since the [City and the DEP] did not establish that the [subpoenaed] material was protected by the qualified immunity privilege set forth in CPLR 3101 (d) for material prepared exclusively in anticipation of litigation, there was no need for [plaintiffs] to establish that [they] had ‘substantial need’ for the material or would sustain ‘undue hardship’ if the material were not produced.” See *New York Schools Ins. Reciprocal v Milburn Sales Co., Inc.*, 105 AD3d, *supra* at 718.

Moreover, plaintiffs established at oral argument that the documents sought by their subpoena were “relevant, material, and necessary.” *New York Schools Ins. Reciprocal v Milburn Sales Co., Inc.*, 105 AD3d, *supra* at 718-719, citing *Tenore v Tenore*, 45 AD3d 571, 571-572 (2d Dept 2007). Indeed, as plaintiffs assert, the City and DEP do not deny that the materials sought in the subpoena are material and relevant to this litigation.

Finally, the claim by the City and the DEP that the documents in possession of HMM are protected by the attorney-client privilege is without merit. Although CPLR 4503(a) establishes a privilege for communications between an attorney and his or her client, neither the City nor the DEP even contends that an attorney client relationship existed between either or both of those entities and HMM. On the contrary, the City and the DEP concede that the DEP hired HMM as consultant to determine the cause of the incident.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the motion by defendants The City of New York and New York City Department of Environmental Protection is denied; and it is further,

ORDERED that this constitutes the decision and order of the Court.

DATED: May 30, 2014

ENTER:

MAY 30 2014



Hon. Kathryn E. Freed,

J.S.C.

**HON. KATHRYN FREED
JUSTICE OF SUPREME COURT**