

Worth Constr. Co., Inc. v Cassidy Excavating, Inc.

2014 NY Slip Op 33017(U)

January 10, 2014

Sup Ct, Westchester County

Docket Number: 61224/2012

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER-COMPLIANCE PART

-----X
WORTH CONSTRUCTION CO., INC.,

Plaintiff

DECISION and ORDER

Index No. 61224/2012
Motion Date: Jan. 6, 2014
Seq. Nos. 2, 3

-against-

CASSIDY EXCAVATING, INC.,
CHARLES H. CASSIDY, JR.,
JEFFREY CASSIDY and
BARBARA CASSIDY, as officers and/or shareholders of
CASSIDY EXCAVATING, INC.,

Defendants

-----X
LEFKOWITZ, J.

The following papers were read on this: (1) motion (seq. no 2) by plaintiff for an order compelling defendants to produce documents and records noticed on June 5, 2013, and (2) motion (seq. no. 3) by defendants seeking a protective order striking plaintiff's document demands.

- Order to Show dated November 18, 2013
- Affirmation in Support
- Memo of Law in Support
- Exhibits A-C
- Memo of Law in Opposition
- Order to Show Cause dated December 2, 2013
- Affirmation in Support
- Memo of Law in Support
- Memo of Law in Opposition to Motion and in Reply

Upon the foregoing papers and upon oral argument heard on January 6, 2014, these motions are determined as follows:

Plaintiff commenced this action against defendants alleging fraud and fraud in the

inducement. Plaintiff claims that defendants acted in concert and with fraudulent intent to pay their workers less than the prevailing wage on a public works contract at Westchester Community College in which plaintiff was the general contractor and defendant corporation was the sub-contractor.

In its first cause of action for fraudulent inducement, plaintiff alleges that defendants represented to plaintiff, during execution of the subcontract, that they intended to observe all labor laws, which representation they knew to be false and which they knew plaintiff would rely upon in entering the subcontract on which plaintiff relied to its detriment. In its second cause of action plaintiff alleges that defendants committed fraud by submitting certified payroll records which allegedly reflected materially false rates of pay upon which plaintiff relied to its detriment.

More particularly, plaintiff alleges that in August, 2007, it entered into a contract with the County of Westchester for the construction of a building, the Gateway Center, in Valhalla, New York. On October 15, 2007, plaintiff entered into a subcontract with the defendant corporation¹ for more than one million dollars for certain construction services. Plaintiff contends that the subcontract required the defendant corporation to pay prevailing wages and benefit rates to its workers. Plaintiff further alleges that in August 2010, the Bureau of Public Works of the New York State Department of Labor, initiated an investigation into the labor practices of the defendant corporation. The Bureau issued a Notice to Withhold Payment to Westchester County, directing the county to withhold \$ 337,913.93 of contract funds owed to plaintiff. Plaintiff contends that the defendant corporation had been paid in full and the money withheld by the Bureau was owed to plaintiff.

Plaintiff asserts various factual allegations as to how defendants allegedly carried out their plan to underpay their workers including hiring illegal immigrant workers, having workers return a portion of their paychecks to the defendant corporation, bribing union officials to ignore “ghost” workers (workers who were not listed on certified payrolls) and/or non-union workers on the project, and having workers sign forms stating that they were independent contractors.

Plaintiff alleges that in April, 2010, its investigators located five illegal immigrant workers who performed labor at the site. They stated that they were paid \$ 8 per hour when they began working for the defendant corporation and no more than \$ 22 an hour when they were fired in 2010. They also stated that they often worked in excess of 40 hours per week but received no overtime. These workers stated that they could not own a business because they were illegal immigrants.

¹Plaintiff alleges that defendants Charles Cassidy, Jeffrey Cassidy and Barbara Cassidy are all shareholders and officers of the defendant corporation which is a closely held family corporation.

Plaintiff also alleges that four additional public projects took place where the defendant corporation performed work pursuant to a government contract. Plaintiff alleges that defendant corporation similarly falsified payroll records on these projects. None of these contracts involved plaintiff.

Plaintiff served upon defendants a demand for the production of documents dated June 5, 2013. In the Compliance Conference Order dated August 29, 2013, this Court (Lefkowitz, J.), directed defendants to serve outstanding responses to plaintiff's discovery demands on or before September 13, 2013. Defendants responded to plaintiff's demand for the production of documents on or about September 12, 2013.

Presently, in the first motion considered herein, plaintiff seeks an order compelling defendants to provide further documents and if they don't produce the documents, an order striking their answer. In this case plaintiff is alleging that defendants acted in concert in engaging in a pattern of fraud in their execution of their contract with plaintiff (as well as multiple other public construction contracts) during the same period. Plaintiff states that the documents it seeks will demonstrate that defendants misrepresented to it facts regarding their intentions about wages and that plaintiff relied on these misrepresentations and that defendants conspired to generate cash to pay their workers less than the prevailing wage and to commit fraud against it.

Plaintiff notes that its document request falls into three broad categories: financial documents that would demonstrate the generation of cash to pay workers off the books; documents that would demonstrate the individual defendants' participation in the scheme; and, documents that demonstrate defendants' intent to defraud by proving defendants' actions were not isolated but rather a part of a wide ranging scheme. Plaintiff asserts that its request is not a fishing expedition but rather it is based on witness/worker interviews and on the New York State Department of Labor's investigation that has resulted in charges now pending against defendants in all five public projects.

Plaintiff states that defendants have responded to nine of its document requests, denied possession relative to 16 requests and objected to producing documents in 102 instances.

Plaintiff's motion is opposed by defendants. Defendants note that although the New York State Department of Labor has initiated an investigation into their labor practices, the Department has never provided a finalized audit. Defendants assert that plaintiff has failed to provide specificity and details in support of its generalized allegations. Regarding the four other public projects about which plaintiff has wielded allegations, defendants state that these other projects don't involve plaintiff. Defendants note that of plaintiff's 128 demands for information and documentation, 100 involve these four other projects. Defendants furthermore allege that the majority of the remaining 28 demands are overbroad and irrelevant. Defendants assert that they have responded to plaintiff's demands accordingly and that they have provided all relevant documentation in their possession. Defendant note that the four other public contracts were

executed two to three years after the subject subcontract and therefore are not relevant to show defendants were possibly engaged in a scheme of fraud some two to three years earlier.

In the second motion considered herein, defendants are moving for a protective order. They note that plaintiff's claims that they failed to properly pay workers are devoid of any specificity or detail. Defendants further note that although plaintiff wields allegations surrounding four other public projects, none of these other projects involved plaintiff. Defendants assert that plaintiff's document demands are overbroad, irrelevant and exceed the scope of discovery. Defendants additionally note that plaintiff seeks confidential information concerning the individual defendants, in the form of bank accounts and email correspondence.

Plaintiff opposes the motion for a protective order. Plaintiff asserts that it seeks documents that go directly to three key elements of its case. Plaintiff alleges that defendants, acting in concert, committed fraud through the execution of illegal and criminal acts in the performance of the subject contract. The emails it requests would show, among other things, that defendants were actively engaged in carrying out a fraudulent scheme. Plaintiffs also allege that defendants intended to defraud them. Therefore, it seeks documents that would tend to prove that each defendant acting in concert with the corporate defendant intended to misrepresent to plaintiff facts regarding their intention to pay prevailing wages. Plaintiff further notes that because defendants committed similar acts on other public contracts in or about the same time with many of the same workers, it seeks documents that show that defendants' failure to pay wages on the subject contract was not an aberration but a wide ranging fraudulent scheme. Finally, plaintiff seeks financial documents that would demonstrate that defendants were engaged in a common scheme to generate cash to fund payrolls across the board.

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." The phrase "material and necessary" is "to 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. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 406 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). The court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*Mironer v City of New York*, 79 AD3d 1106, 1108 [2d Dept 2010]; *Auerbach v Klein*, 30 AD3d 451, 452 [2d Dept 2006]).

In this case plaintiff has alleged that each individual defendant, acting in concert through the corporate defendant intended to misrepresent to plaintiff facts regarding their intention to pay prevailing wages and to follow OSHA guidelines. Plaintiff also alleges that defendants committed similar acts on other public contracts in or about the same time with many of the same workers employed on the subject Westchester Community College project at issue here. Defendants, relying on *Brown v Lockwood* (76 AD2d 721 [2d Dept 1980]), have asserted that fraud cannot be predicated upon statements which are promissory in nature at the time they

were made and which relate to future actions or conduct.

Defendants' interpretation of *Brown* is incomplete. The *Brown* court further stated that an exception to the general rule is that when a defendant makes a promise as to future action for the purpose of inducing plaintiff to enter into a contract and does not fulfill that promise, a party who relies thereon to its detriment may recover for fraud where it can prove that at the time the promise was made the defendant had no intention of carrying it out. In order to establish its case, plaintiff must prove that at the time it contracted, defendant had no intention of performing a certain act (in this case, to pay its workers proper wages). Herein, proof relating to how defendants conducted themselves on other public project contracts that were executed at about the same time as the contract at issue here, is material and relevant (*compare Interstate Cigar Co., Inc. v I.B.I. Security Svc., Inc.*, 105 Misc2d 179 [Supreme Court, Nassau County, 1980; court found, in a case involving plaintiff, a distributor of defendant's products, that defendant, in its counterclaim stating a cause of action in fraud by conspiracy, was entitled to disclosure of evidence of allegedly similar transactions involving plaintiff's fraudulent conduct with other manufacturers involving other products since discovery may be permitted if there is a possibility of the admissibility of the evidence]).

The court notes that most of the documents requested by plaintiff in its demand dated June 5, 2013, are discoverable and should be provided by defendants to plaintiff. However, plaintiff's request no. 114², for the federal, state and local tax returns of each defendant for the years 2007-2011 is improper. Generally, a party seeking disclosure of tax returns must make a strong showing that the information is indispensable to the claim and cannot be obtained from other sources (*Gilin v Chirinkin*, 71 AD3d 728 [2d Dept 2010]; *Nasca v D.M.R. Indus., Inc.*, 70 AD3d 908 [2d Dept 2010]). In the present case, plaintiff has not set forth what specific information contained in defendants' income tax returns is relevant (*compare Singh v Singh*, 51 AD3d 770 [2d Dept 2008]) and unavailable through other means. Plaintiff fails to demonstrate that the disclosure of defendants' tax returns is warranted (*see Panasuk v Viola Park Realty, LLC*, 41 AD3d 804 [2d Dept 2007]). The court also finds that plaintiff's demand for the production of the following documents is also improper: copies of the driver's license of each of the individual defendants (request no. 115); the credit card statements of each defendant for the years 2007-2011 (request no. 117); the personnel records for all of defendants' employees from 2007- 2011 (request no. 124); documentation related to all real property owned in whole or part by any defendants between 2007-2013 (request no. 125); documents related to vehicles, boats or property valued over \$ 5,000 which are owned by any defendant between 2007-2013 (request no.

² The request numbers of the documents sought by plaintiff does not exactly correlate to the response numbers set forth by defendants in their response dated September 12, 2013. In this decision, the court follows the document numbers set forth by plaintiff in its demand dated June 5, 2013. The court further notes that in its demand, plaintiff misnumbered some of its document requests. For example, regarding the documents relating to the Bedford project, plaintiff numbers its first request as request no. 20 although the request preceding it (relating to the Westchester Community College project) is request no. 28.

126); documents of all subcontractors employed by defendants from 2005-2011 (request no. 127) and documents of all joint venture agreements between 2007-2011 to which defendants were a party (request no. 128).

To the extent they have not already done so, defendants should provide to plaintiff the following documents as specified below:

Request no. 1 for bank statements of each defendant for the period from October 2007 to April, 2011.

As to the Westchester Community College Project: (pages 5-7 in Plaintiff's Demand)

Request nos. 2; 3; 5-16; 18; 25-28

Request no. 17- documents showing payments to subcontractors from October, 2007 through July 2010.

Request nos. 19- 24-non-privileged documents, emails and correspondences for the period from October, 2007 through July 2010, relating to the Westchester Community College project at issue herein.

As to the Bedford Project: (pages 7-9 in Plaintiff's Demand)

Request nos. 22-23; 25-36

Request nos. 37-42-non-privileged documents, emails and correspondences for the period from January 2010 through October, 2010, relating to the Bedford project.

As to the Town of North Salem Project (pages 9-11 in Plaintiff's Demand)

Request nos. 45-46; 48-59

Request nos. 60-65- non-privileged documents, emails and correspondences for the period from December 2009 to December 2010 relating to the North /Salem project.

As to the Yorktown Project (pages 11-13 in Plaintiff's Demand)

Request nos. 68-69; 71-82; 89

Request nos. 83-88- non-privileged documents, emails, correspondences for the period from June 2010 through April, 2011 relating to the Yorktown project.

As to the Sleepy Hollow Project (pages 13-15 in Plaintiff's Demand)

Request nos. 92-93; 95-107 (all documents for the period from May 2010 to November 2010)

Request nos. 108-113-non-privileged documents, emails, correspondences for the period from May 2010 through November 2010, relating to the Sleepy Hollow project.

Defendants should also comply with request nos. 116 (record of shareholders of defendant corporation) and 119-123 (documents relating to the investigation of defendants by the New York State Department of Labor).

To the extent defendants state that they are not in possession of any of the documents that this court directs should be provided to the plaintiff, an affidavit of one of the individual defendants should be provided to this court and to plaintiff, stating what search was made for the requested documents, when and where, and/or why defendants are not in possession thereof and to the extent defendants assert a privilege as to any of the documents that this court directs should be provided to plaintiff (eg, regarding an email or other correspondence), a privilege log in reference thereto.

In light of the foregoing it is:

ORDERED that plaintiff's motion to compel is granted only to the extent that on or before January 31, 2014, defendants are to provide documents to plaintiff as herein above outlined and, to the extent it is necessary, if defendants assert that they are not in possession of any of the documents that this court now directs should be provided, an affidavit of one of the individual defendants should be provided to this court and to plaintiff, stating what search was made for the requested document, when and where, and/or why defendants are not in possession thereof and to the extent defendants assert a privilege as to any of the documents that this court directs should be provided to plaintiff (eg, regarding an email or other correspondence), a privilege log in reference thereto; and it is further,

ORDERED that defendant's motion for a protective order is denied as moot in light of the court's determination of plaintiff's motion; and it is further,

ORDERED that counsel appear for a conference in the Compliance Part, Room 800, on February 6, 2014.

Dated: White Plains, New York
January 10, 2014


HON. JOAN B. LEFKOWITZ, JSC