

**DiPizio Constr. Co., Inc. v New York State Urban
Dev. Corp.**

2014 NY Slip Op 33886(U)

August 5, 2014

Supreme Court, Erie County

Docket Number: 2013-801815

Judge: Timothy J. Walker

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STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

DiPIZIO CONSTRUCTION COMPANY, INC.,

Plaintiff,

vs.

Index No.: 2013-801815
(Defamation Action)

NEW YORK STATE URBAN DEVELOPMENT
CORPORATION d/b/a EMPIRE STATE
DEVELOPMENT, ET. AL.,

Defendants.

DiPIZIO CONSTRUCTION COMPANY, INC.,

Plaintiff,

vs.

Index No.: 2013-602666
(Commercial Action No. 1)

EMPIRE STATE DEVELOPMENT, ET. AL.,

Defendants.

DiPIZIO CONSTRUCTION COMPANY, INC.,

Plaintiff,

vs.

Index No.: 2013-803777
(Commercial Action No. 2)

EMPIRE STATE DEVELOPMENT, ET. AL.,

Defendants.

BEFORE: **HON. TIMOTHY J. WALKER, Presiding Justice**

APPEARANCES: HISCOCK & BARCLAY, LLP
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WALKER, J.

The Defendants in the defamation action have applied, pursuant to CPLR §§6313 and 3103, by Order to Show Cause granted on July 28, 2014, for a temporary restraining order (“TRO”) “enjoining [P]laintiff from disclosing/disseminating deposition transcripts, deposition video recordings and/or deposition audio recordings to any third party without written application to and approval by the Court, with notice to [D]efendants,” and “a Protective Order permanently precluding [P]laintiff from disclosing/disseminating deposition transcripts, deposition video recordings and/or deposition audio recordings to any third party without written application to and approval by the Court, with notice to [D]efendants.” The Defendants in the two commercial actions have joined in the motion.

Messrs. Sam Hoyt and Thomas Dee are individual defendants in the defamation action, and are representatives of Defendant, ECHDC, in all three (3) actions. Plaintiff, who is the same party in all three (3) actions, has indicated that it intends to disclose/disseminate the deposition testimony of, *inter alia*, Messrs. Hoyt and Dee to persons or entities that are not parties to these matters, including, but not limited to, the local media.

The standard for issuing a TRO is set forth in CPLR §6313, as follows:

A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had.

The standard for issuing a protective order is stated in CPLR §3103, as follows:

The court may at any time on its own initiative, or on motion of any party or of any person from whom or about whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.

The First Amendment to the United States Constitution provides for freedom of the press. However, that freedom does not extend to "all stages of a civil litigation" (*Matter of Westchester Rockland Newspapers v. Marbach*, 66 AD2d 335, 337 [2nd Dept 1979]). The right to attend preliminary stages of a civil matter may be limited to safeguard against the press influencing the proceedings or threatening the integrity of the legal system (*Craig v. Harney*, 331 US 367 [1947]).

These general rules are based upon the principles that

pretrial depositions . . . are not public components of a civil trial. Such proceedings were not open to the public at common law, and, in general, they are conducted in private as a matter of modern

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practice. Much of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action (*Seattle Times Co. v. Rhinehart*, 467 US 20, 33 [1984]; *see also, Seaman v. Wyckoff Heights Med. Ctr., Inc.*, 8 Misc3d 628, 632 [Sup Ct, Nassau Co 2005])["Examinations before trial are not sittings of court which are required to be open to the public. A deposition is a private matter between the parties designed to assist them in their search for the relevant issues at the upcoming trial. Parties are entitled to broad questions at depositions in an effort to ascertain the truth and to flush out the relevant issues that may assist them in the prosecution or defense of their action"] *affd* 25 AD3d 598 [2nd Dept 2006]).

The basis for granting the motion in these matters is well stated in *Seaman, supra*, as follows:

Courts are bound to protect parties and witnesses from having irrelevant and personal matters broadcast publicly. It is troubling to this court when a party seeks to utilize the information obtained during disclosure and discovery to gain an unfair advantage or leverage in the prosecution or defense of an action. Our legal system is based upon the premise that the truth is being sought and to that end jurors and the courts are imbued with the power to hear the facts as they are deemed relevant and to issue a decision based solely upon those facts. To permit the dissemination of discovery to the public prior to the commencement of a trial violates the doctrine of fairness (*Id.*).

Plaintiff contends that it should be allowed to disseminate the sworn statements made by, *inter alia*, Defendants Hoyt and Dee, to counter allegedly disparaging statements made by the Defendants and their representatives ("Defendants' Statements"). However, Defendants' Statements, some of which form the basis of the defamation action, are distinguished from **deposition testimony** that Plaintiff wishes to disseminate, because they were not made under oath in the context of a deposition. Plaintiff is free to make statements about Defendants by way of a press conference or similar device, outside the context of pretrial discovery in these actions.

The Court acknowledges that the media plays a vital role in informing the public, and that these actions and the development of the underlying public works project may be of interest to the general public. However, by granting the motions before it, the public's "right to know" will not be subverted, but "merely delayed until the trial begins" (*Scollo v. Good Samaritan Hosp.*, 175 AD2d 278, 280 [2nd Dept 1991]).

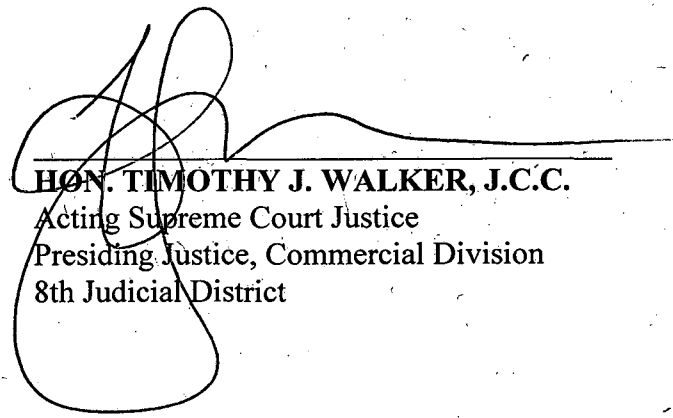
For the foregoing reasons, it is hereby

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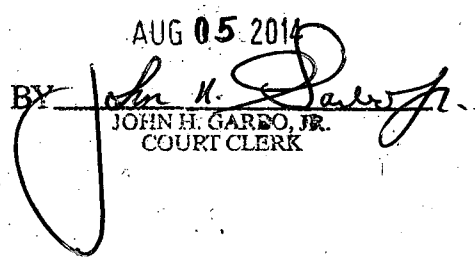
ORDERED, that Defendants' motions are granted, and there shall be no dissemination of any discovery in these matters to any third party or non-party. This constitutes the Decision and Order of this Court. Submission of an order by the

Parties is not necessary. The delivery of a copy of this Decision and Order by this Court shall not constitute notice of entry.

Dated: August 5, 2014
Buffalo, New York


HON. TIMOTHY J. WALKER, J.C.C.
Acting Supreme Court Justice
Presiding Justice, Commercial Division
8th Judicial District

GRANTED

AUG 05 2014
BY 
JOHN H. GARBO, JR.
COURT CLERK