

**Adria Infrastructure, LLC v Henick-Lane, Inc.**

2019 NY Slip Op 32532(U)

July 8, 2019

Supreme Court, Richmond County

Docket Number: 100930/2015

Judge: Kim Dollard

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND**

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ADRIA INFRASTRUCTURE, LLC

DCM PART 4  
Present:  
Hon. Kim Dollard

*Plaintiffs,*

**DECISION AND ORDER**

*-against-*

Index No. 100930/2015

HENICK-LANE, INC., JACOB'S FACILITIES, INC.,  
DORMITORY AUTHORITY STATE OF NEW YORK,  
LEVEST ELECTRICAL CORP., TRAVELERS  
CASUALTY AND SURETY OF AMERICA AND JOHN  
DOES 1-10.

Motion No. 15,16,17

*Defendants.*

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The following papers numbered 1 to 4 were fully submitted on the 5<sup>th</sup> day of May, 2019:

Pages Numbered

Notice of Motion to Reargue and to Compel By Plaintiff  
With Supporting Affirmation, Papers, and Exhibits  
(Dated: March 8, 2019) .....1

Notice of Cross-Motion for Protective Order and to Preclude By Defendant  
Henick Lane, Inc. With Supporting Affirmation, Papers, and Exhibits  
(Dated: March 22, 2019) .....2

Opposition to Cross-Motion and in Further Support of Motion to Reargue and  
Compel By Plaintiff With Supporting Affirmation, Papers and Exhibits  
(Dated: April 28, 2019) .....3

Notice of Cross-Motion to Dismiss By Defendant Dormitory Authority of the  
State of New York ("DASNY") With Supporting Affirmation, Papers and Exhibits  
(Dated: April 17, 2019).....4

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The plaintiff, Adria Infrastructure, LLC (hereinafter "Adria") moves to reargue with respect to this Court's decision of January 2, 2019 and further moves for the deposition of Ernest Henick and discovery pertaining to the settlement agreement reached between defendants, Henick and DASNY (motion sequence no. 15). The defendant, Henick-Lane, Inc. (hereinafter

“Henick”) cross-moves for a protective order with regard to the deposition of Ernest Henick and discovery documents (motion sequence no. 16). The defendant, DASNY, moves to dismiss the proposed second amended complaint should the plaintiff’s motion to reargue be granted and should plaintiff be permitted to further amend the complaint (motion sequence no. 17).

The Court has considered the arguments made by plaintiff, Adria, in support of its motion to reargue. Accordingly, Adria’s motion for leave to reargue is granted and upon reargument, the Court adheres to its prior determination.

The plaintiff Adria also moves to compel discovery and for the deposition of Mr. Henick. Adria contends that the deposition of Mr. Henick is warranted because “he was thoroughly involved with the Project and, in several cases, is the only person at Henick with knowledge of material issues such as Henick’s claim negotiations with DASNY”. Mr. Henick was also involved in the financial aspects of the project, accounting and owner oversight of the project. Plaintiff claims that Mr. Henick was the ultimate decision maker in the project. Moreover, plaintiff Adria wants to question Mr. Henick concerning the counterclaim and the amount expended to complete Adria’s work. Plaintiff claims that Mr. Henick generated certain cost summaries that form the basis of Henick’s counterclaim.

Plaintiff further asserts that pursuant to CPLR §3106, only a person who was an officer, director, member or employee of a party at the time of the deposition qualifies as a party deposition. Therefore, since Mr. Modica was no-longer employed by Henick at the time of his deposition and testified pursuant to Adria’s subpoena, his deposition cannot constitute a party deposition.

A corporation has the right to determine which of its officers with knowledge of the facts may appear for pretrial examination (*see, Colicchio v. City of New York*, 181 A.D.2d 528, 581 N.Y.S.2d 36; *D’Ulisse v. Town of Oyster Bay*, 81 A.D.2d 825, 438 N.Y.S.2d 601; *Consolidated Petroleum Term. v. Incorporated Vil. of Port Jefferson*, 75 A.D.2d 611, 427 N.Y.S.2d 66). A party seeking to depose additional witnesses must make a detailed showing of the necessity for taking further depositions (*see, Colicchio v. City of New York, supra*).

The Court finds that plaintiff has made a necessary showing warranting the deposition of Mr. Henick and therefore directs that the deposition of Mr. Henick be conducted within the next sixty days. Additionally, the Court will not limit the anticipated deposition of Mr. Henick, as this Court cannot rule on the propriety of deposition questions before they asked (see, K.C. v. City of New York, 56 A.D.3d 527, 867 N.Y.S.2d 527, 2<sup>nd</sup> Dept., 2008).

Plaintiff also seeks discovery related to e-mails and other documents responsive to its demands related to the negotiated settlement of Henick's delay claim between Henick and DASNY. Plaintiff claims that Henick should produce all settlement e-mails and documents. In response, Henick claims that the demand is unduly burdensome. Since CPLR §3101 requires "full disclosure of all matter material and necessary in the prosecution or defense of an action", all documents, including e-mails, pertaining to the settlement between Henick and DASNY of the delay claim are to be produced in sixty days.

Lastly, DASNY asserts that should the plaintiff be permitted to further amend the complaint and file a second amended complaint, the proposed second amended complaint should be dismissed as against DASNY. Since the Court denied the plaintiff's reargument motion to further amend the complaint, DASNY's motion is denied as moot.

Accordingly, it is

ORDERED that the plaintiff's motion to reargue, is granted, and upon reconsideration, the Court adheres to its original decision; and it is further,

ORDERED, that the plaintiff's motion for the deposition of Mr. Ernest Henick is granted and the cross-motion for a protective order by defendant, Henick, is denied. The deposition of defendant, Henick, is to be conducted within sixty days of the date of this order; and it is further,

ORDERED, that the plaintiff's motion for additional discovery pertaining to the settlement of Henick's delay claim between defendants, Henick and DASNY, is granted and the cross-motion for a protective order of defendant, Henick, is denied. All such discovery is to be produced within sixty days of this order; and it is further,

ORDERED, that cross-motion of defendant, DASNY, to dismiss the proposed second amended complaint is denied as moot.

ENTER,

*Kim Dollard*

Hon. Kim Dollard

Acting Supreme Court Justice

DATED: 7/8/19