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| Arch Ins. Co. v Delric Constr. Co., Inc. |
| 2019 NY Slip Op 34161(U) |
| August 1, 2019 |
| Supreme Court, Richmond County |
| Docket Number: 150563/2016 |
| Judge: Jr., Orlando Marrazzo |
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

ARCH INSURANCE COMPANY,

DECISION/ORDER

DCM PART 21

HON. ORLANDO MARRAZZO, JR.

Index No.: 150563/2016

Motion No. 3

Plaintiff,

-against-

DELRIC CONSTRUCTION CO., INC.,

Defendant.

The following numbered 1 through 6 were marked submitted on May 28, 2019

Papers
Numbered

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| Notice of Motion to Compel Expert Deposition, dated April 26, 2019..... | 1 |
| Affirmation of Gerard J. Onorata, Esq., in Support of Motion to Compel Expert Deposition, with Exhibits, dated April 26, 2019..... | 2 |
| Defendant Delric Construction Co. Inc.’s Memorandum of Law In Support of Motion to Compel Expert Deposition, dated April 26, 2019..... | 3 |
| Affirmation of Michael A. Prisco in Opposition to Motion to Compel Expert Deposition, with Exhibit, dated May 16, 2019..... | 4 |
| Plaintiff Arch Insurance Company’s Memorandum of Law In Opposition to Compel Expert Deposition Filed by Defendant Delric Construction Co., Inc., dated May 16, 2019..... | 5 |
| Defendant Delric Construction Co. Inc.’s Reply Memorandum of Law in Further Support of Motion to Compel Expert Deposition, dated May 24, 2019..... | 6 |

Defendant Delric Construction Co., Inc. (“Delric”) moves this Court to compel the deposition of the expert witness named by the Plaintiff, Arch Insurance Company (“Arch”),

Tony Ladardo of JS Held LLC f/k/a Lovett Silverman Construction Consultants (“Lovett Silverman”). The Court hereby grants Delric’s Motion.

The underlying action “is a complex commercial construction dispute arising out of the building of a multi-prime multimillion public construction project known as the ‘Staten Island Courthouse project (the “Project”)", consisting of a 5-story courthouse totaling 183,300 square feet plus a 220,000 square foot 5 floor parking garage.” (Delric’s Memorandum of Law, Page 4). According to Plaintiff, in or around September 2009, Delric, as general contractor, entered into a contract with the Dormitory Authority of the State of New York (“DASNY”). Arch is the surety of Delric’s miscellaneous steel subcontractor on the Project, Capco Steel, Inc. (“Capco”). Capco and Delric entered into a written subcontract (“Subcontract”) for the amount of \$1,255,000.00, under which Capco agreed to install, among other things, certain miscellaneous metals on the Project (“Subcontract”). Arch, as surety, issued a Subcontract Performance Bond (“Performance Bond”) and a Subcontract Labor and Material Bond (“Payment Bond”) on behalf of Capco, as principal, in favor of Delric, as obligee (collectively “Bonds”). On or about July 19, 2012, Delric terminated Capco under the Subcontract and demanded that Arch finish the work that was to be completed under the Performance Bond.

Arch and Delric entered into a takeover agreement dated March 20, 2013 (“Takeover Agreement”) after Arch elected to proceed as completing surety. Under the Takeover Agreement, Arch and Delric agreed that Arch would complete the remaining work under the Subcontract in accordance with the terms and conditions of the Bonds, Takeover Agreement and Subcontract. Plaintiff states that Delric agreed to pay it all monies due and to become due under the Subcontract, including any change orders or claims, and to review and/or submit to DASNY certain change orders and claims. Arch states it commenced this suit in September 2016 after

Delric failed to pay it under the Takeover Agreement, including \$171,127.94 due under the Subcontract, \$256,114.00 in change orders and compensation for delay.

Plaintiff notes that in March 2015, Arch and Capco submitted a Request for Equitable Adjustment (“REA”) seeking in excess of \$1,000,000.00 in compensation for the purported extreme delay and disruption that changed Capco’s timing of its work and planned conditions (“Arch REA”). In April 2015, Plaintiff states that Delric acknowledged receipt of the Arch REA and agreed to submit it to DASNY. Delric submitted its own REA (“Delric REA”) to DASNY, which Plaintiff states included the Arch REA. Plaintiff presents that after subsequent meetings, DASNY rejected the Delric REA and Delric and DASNY mediated their dispute without participation by Capco or Arch. After such mediation, Delric and DASNY entered into a settlement in September 2015 and Delric received in excess of \$9 million to resolve all claims, including the Arch REA. Plaintiff states that Delric has failed to make any payments. Arch is seeking to recover \$423,579.00 in contract balance and an additional amount to be determined at trial for a REA.

Lovett Silverman prepared the REA, which is comprised of 800 pages and spans two binder books. Defendant Delric argues that since the REA sets forth \$3,162,974.11 in its Summary of Damages, Delric should be given the opportunity to depose Lovett Silverman. Delric stresses that Arch is seeking to obtain two times the amount of the base contract amount that Delric entered into with Capco. Delric states that it would be highly prejudiced if it could not depose the expert that Arch has named as its delay damages expert that it intends to call at trial, since there would be no other way for Delric to understand and investigate the veracity of Arch’s purported claim. Delric also argues that Arch’s claim relies almost entirely on Lovett Silverman’s expert opinion/analysis. On March 13, 2019, Arch informed Delric that it intended

to call Mr. Ladardo of Lovett Silverman as the expert witness at the trial of the case and that the subject matter of such testimony is set forth in the REA prepared by Lovett Silverman. Delric states that outside of the REA, it has no other way beyond an expert deposition to explore and inform itself as to the basis of Lovett Silverman's opinions.

Another basis for Delric's Motion is its position that such an application would not be necessary if this matter was venued in a New York county that had a Commercial Division. Rule 13(c) of the Rules of the Commercial Division of the Supreme Court ("Commercial Division Rules") provides for expert disclosure, including depositions of testifying experts, to be completed within four months after discovery is complete. Due to Richmond County's lack of a Commercial Division, Delric requests that the Commercial Division Rules be applied to this matter "to permit an efficient and just process for this commercial matter." (Defendant's Memorandum of Law, Page 2).

Plaintiff opposes Defendant's Motion on the grounds that (1) Delric has not alleged special circumstances to justify deposing Arch's Expert, (2) the Commercial Division Rules for disclosure have never governed this matter and they should not be imposed at this late stage of the litigation, and (3) Delric should not be permitted to selectively enforce the Commercial Division Rules governing expert disclosure. Arch argues that Delric has not met the burden of showing "special circumstances" under CPLR §3101(d)(1)(iii), as there is an expert report that clearly indicates the nature of the expert's proposed testimony. Furthermore, Plaintiff argues that Delric's argument that it needs an oral examination of Mr. Ladardo to fully investigate the REA that it has possessed for over four years is disingenuous. Plaintiff asserts that Delric has been aware of the nature of its claims since 2015 when it received the Arch REA and was further notified of its positions in the Complaint, filed in 2016. In the event the Court grants Delric's

Motion, Plaintiff requests that the Commercial Division Rules be applied and require Delric to designate its own expert and provide an accompanying expert report before it is permitted to depose Mr. Lardardo.

Under CPLR §3101(d)(1)(iii), there must be a showing of special circumstances to warrant the deposition of a party's expert witness. *See Falcone v Karagiannis*, 93 A.D.3d 632, 634, 939 N.Y.S.2d 561, 563 (App. Div. 2d Dept., 2012); *McGowan v Great N. Ins. Co.*, 88 A.D.3d 665, 665-666, 930 N.Y.S.2d 881, 881 (App. Div. 2d Dept., 2011); *Kaufman v. Lund Fire Prods. Co.*, 8 A.D.3d 242, 243, 777 N.Y.S.2d 686, 687 (App. Div. 2d Dept., 2004); *Brooklyn Floor Maint. Co. v. Providence Wash. Ins. Co.*, 296 A.D.2d 520, 521, 745 N.Y.S.2d 208, 210 (App. Div. 2d Dept., 2002). The Second Department has held that the "special circumstances" requirement is more than a "nominal barrier to discovery" and that "such circumstances exist where physical evidence is 'lost or destroyed' or 'where some other unique factual situation exists' such as proof 'that the information sought to be discovered cannot be obtained from other sources.'" *Brooklyn Floor Maint. Co. v. Providence Wash. Ins. Co.*, 296 A.D.2d 520, 521-522, 745 N.Y.S.2d 208, 210 (App. Div. 2d Dept., 2002) (internal citations omitted). The Second and Third Departments have held that "a conclusory allegation that such discovery is necessary to fully prepare for litigation is insufficient to establish that requirement." *232 Broadway Corp. v. New York Property Ins. Underwriting Ass'n*, 171 A.D.2d 861, 861, 567 N.Y.S.2d 790 (App. Div. 2d Dept., 1991). *See Mead v. Benjamin*, 201 A.D.2d 796, 797, 607 N.Y.S.2d 472, 473-474 (App. Div. 3rd Dept., 1994).

After reviewing the relevant case law and the cases cited by both parties, the Court has not found an analogous case upon which it can establish whether the special circumstances prong of CPLR §3101(d)(1)(iii) has been met. Furthermore, the Court recognizes that several of the

relevant cases in which the Court examined whether special circumstances exist examine whether physical evidence was lost or destroyed or if the evidence could not be obtained through another source. However, as Defendant Delric correctly argues, the case law clearly allows for the Court to find that “special circumstances” exist “where some other unique factual situation exists.” *Brooklyn Floor Maint. Co. v. Providence Wash. Ins. Co.*, 296 A.D.2d 520, 521, 745 N.Y.S.2d 208, 210 (App. Div. 2d Dept., 2002) (quoting *Hallahan v. Ashland Chem. Co.*, 237 A.D.2d 697, 698, 654 N.Y.S.2d 443, 445 (App. Div. 3rd Dept., 1997)). Therefore, proof that evidence is lost or destroyed or that the evidence could not be obtained through another source are just some ways in which CPLR §3101(d)(1)(iii) can be met. They are not statutory requirements.

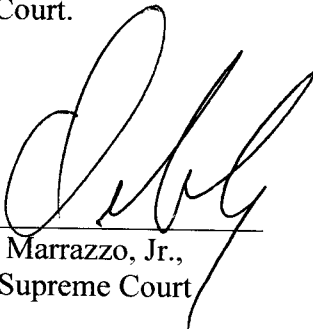
The Court finds that Defendant Delric’s arguments are not merely a conclusory allegation that the discovery sought is necessary to fully prepare for litigation. The Court also finds that allowing Delric to depose Arch’s expert does not render the special circumstances requirement of CPLR §3101(d)(1)(iii) a “nominal barrier to discovery.” Defendant Delric presents a meritorious argument in that it should be allowed to depose Mr. Ladardo since Richmond County does not have a Commercial Division in which this case would be adjudicated, and such expert disclosure would be permitted under the Commercial Division Rules. While Defendant Delric had the Arch REA in its possession for a significant period of time, Plaintiff did not inform Defendant Delric of its intent to call Mr. Ladardo as an expert witness until March 13, 2019. Therefore, the Court finds Plaintiff’s argument that such disclosure should not be compelled since Defendant had the REA for four years to be unavailing. Using the Commercial Division Rules as a guide, the deposition of testifying experts is to be done within four months

from when discovery is complete. Therefore, Delric's application to depose Mr. Ladardo is well within the parameters of the Commercial Division Rules.

The Court is not choosing to universally adopt the time frames or parameters set forth in the Commercial Division Rules. Rather, the Court is using the Commercial Division Rules in helping determine if the "special circumstances" prong of CPLR §3101(d)(1)(iii) has been met. The Court finds that Defendant Delric has sufficiently demonstrated that this is a case in which "some other unique factual situation exists" where the deposition of Plaintiff's expert witness is warranted. Therefore, the Court grants Defendant's Motion.

This constitutes the final Decision and Order of this Court.

Dated: August 1, 2019
Staten Island, New York



Orlando Marrazzo, Jr.,
Justice, Supreme Court

Hon. Orlando Marrazzo, Jr.
Acting Supreme Court Justice