

Hailey Insulation Corp. v Turner Constr. Co.

2023 NY Slip Op 31897(U)

June 5, 2023

Supreme Court, New York County

Docket Number: Index No. 654169/2020

Judge: Frank P. Nervo

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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 04

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HAILEY INSULATION CORPORATION,

Plaintiff,

INDEX NO. 654169/2020

MOTION DATE 04/18/2023

- v -

TURNER CONSTRUCTION COMPANY, FLIGHT
CENTER HOTELS LLC

MOTION SEQ. NO. 004

Defendant.

**DECISION + ORDER ON
MOTION**

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HON. FRANK P. NERVO:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 77, 78, 79, 80, 81, 82, 83, 84, 85

were read on this motion to/for CONFIRM/DISAPPROVE AWARD/REPORT.

Plaintiff moves to confirm the report of the Discovery Referee assigned under motion sequence 003 and further seeks to reallocate the costs associated with the Discovery Referee so as to be borne solely by Turner Construction. Defendant Turner Construction opposes and prays this Court to partially confirm and partially disaffirm the Referee’s report. Turner Construction likewise seeks to reallocate costs associated with the Discovery Referee, although to be borne solely by Hailey Insulation.

CPLR § 4403 provides that parties shall move to confirm or disaffirm a referee's report within 15 days from the date the report was filed.¹ “The report of a referee should be confirmed whenever the findings are substantially supported by the record, and the referee has clearly defined the issues and resolved matters of credibility” (*Flagstar Bank, F.S.B. v. Konig*, 153 AD3d 790 [2d Dept 2017]; *Courtview Owners Corp. v. Courtview Holding, B.V.*, 193 AD3d 1032 [2d Dept 2021]).

Here, the Referee's recommendation that the SDI policy be disclosed by Turner Construction, subject to a confidentially agreement, is substantially supported by the record. The Referee appropriately considered whether, given the bankruptcy of JPR, the SDI policy could reasonably be used to satisfy a portion of a judgment in favor of Hailey and against Turner. The Referee's determination that it was premature to declare the SDI policy could not potentially be so used and, therefore, militated in favor of disclosure, finds basis in the record and as a practical matter. The Referee then appropriately considered whether any compelling interest existed for the public disclosure of

¹ The Court notes, without deciding supremacy, that Uniform Rule § 202.44 requires a motion by defendant be brought within 30 days of the report filing, despite the CPLR's 15-day limit on same under § 4403.

the SDI policy and found that it did not, thus recommending disclosure of the policy following execution of a confidentiality agreement.

To the extent that Turner argues the Referee's interpretation of the SDI policy, including the definition of "Subcontractor/Supplier", is erroneous, the Court notes that Turner has not provided a copy of the unredacted SDI policy under seal or for in-camera review. Accordingly, Turner seeks to have this Court reject the Referee's interpretation of evidence submitted and discussed by the Referee, but not submitted to this Court. The Referee's Report was mindful of this very issue and recommended that the policy be filed under seal from public view on further motion practice ("... I report and recommend ... that if the unredacted SDI Policy is to be used in motion practice, this Honorable Court issue a sealing order directing the County Clerk to that effect"). This recommendation went unheeded by the parties. The Court, therefore, declines Turner's invitation to reject the Referee's interpretation of documents which Turner has not provided to the Court.

As to reallocation of costs, the Court declines to reallocate the costs associated with the Discovery Referee. The Referee's report accepted portions

of each parties' argument, and the resulting recommendation is best characterized as a partial success by each party on the referenced issue.

Accordingly, it is

ORDERED that the thoughtful, detailed, diligent, and comprehensive report of Referee Marilyn Sugarman, Esq. is confirmed in its entirety, including extension of discovery deadlines as set forth therein; and it is further

ORDERED that counsel for Hailey Insulation and Turner Construction shall, within 5 days of this order, shall complete and execute the confidentiality agreement annexed hereto as to the disclosure of the SDI policy; and it is further

ORDERED that within 10 days of execution of the confidentiality agreement above, Turner Construction shall serve both a redacted and an unredacted copy of the SDI policy upon Hailey Insulation, with an affirmation of service of same contemporaneously filed via NYSCEF; and it is further

ORDERED that the applications for reallocation of the costs associated with the Discovery Referee are denied; and it is further

ORDERED that the failure to comply with this order shall result in sanctions, in the Court’s discretion, including but not limited to the striking of pleadings, preclusion of evidence at time of trial, and monetary sanctioning of counsel and/or parties.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT

06/05/2023
DATE

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

APPLICATION:


SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
 GRANTED IN PART
 SUBMIT ORDER
 FIDUCIARY APPOINTMENT

OTHER
 REFERENCE



HON. FRANK P. NERVO

J.S.C.