

**Bridgeton 396 Broadway Fee, LLC v HiRise Engg.
P.C.**

2023 NY Slip Op 34250(U)

November 29, 2023

Supreme Court, New York County

Docket Number: Index No. 652458/2018

Judge: Sabrina Kraus

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This opinion is uncorrected and not selected for official publication.

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

PRESENT:	<u>HON. SABRINA KRAUS</u>	PART	57TR
	<i>Justice</i>		
	-----X	INDEX NO.	<u>652458/2018</u>
BRIDGETON 396 BROADWAY FEE, LLC		MOTION DATE	<u>11/17/2023,</u> <u>11/17/2023</u>
Plaintiff,		MOTION SEQ. NO.	<u>002 003</u>
- v -			
HIRISE ENGINEERING P.C.,		DECISION + ORDER ON	MOTION
Defendant.			

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 153, 154, 155, 156, 157, 158
 were read on this motion to/for PRECLUDE.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 149, 150, 151, 152, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174
 were read on this motion to/for PRECLUDE.

BACKGROUND

This matter is scheduled for trial in January. Pending before the court are two *in limine* motions.

Defendant moves for an order: precluding trial testimony from Conor O’Byrne (“O’Byrne”) to what constitutes HiRise’s contract for the services it provided; and precluding all opinion and claimed expert testimony from O’Byrne; and precluding the introduction at trial of any further documents not previously exchanged by plaintiff allegedly substantiating its claimed damages; and precluding any cross-examination of defendant’s witness Joseph Celentano as to the violation that was pleaded to by HiRise Engineering, P.C. (Motion Seq 2).

Plaintiff moves for an order precluding Defendant from offering evidence that non-party DXA Studio Architecture PLLC was responsible for damages sustained by the Plaintiff on the construction project located at 396 Broadway (Motion Seq No 3).

The motions are consolidated herein and determined as set forth below.

DISCUSSION

Motion Seq No 2

The Statement of Qualifications & Mr. O'Byrne's Testimony

Defendant seeks to preclude Plaintiff's witness, Conor O'Byrne, from testifying at the time of trial that the Statement of Qualifications constitutes part of the HiRise contract for the project. Joseph Celentano, Defendant's principal testified at his deposition that the Statement of Qualifications is provided to a prospective client as inducement to retain HiRise.

There is no basis to find that the Statement of Qualifications is part of the contract and Mr. O'Byrne may not testify to said legal conclusion. The contract is the proposal which was executed by the parties.

However, the Statement of Qualifications would still be admissible as it was admittedly provided as inducement to Plaintiff to enter into the contract that was executed.

Thus, the motion is granted only to the that Mr. O'Byrne cannot testify that the Statement of Qualifications constitutes part of the HIRise contract, but not to the extent of precluding the admission of the Statement of Qualifications.

The motion to preclude O'Byrne from offering expert testimony is denied. A witness may serve as both a fact and expert witness. *See McDermott v. Manhattan Eye Hosp.*, 15 N.Y.2d 20, 27-28 (1964); *Matter of Eshaghian*, 144 A.D.3d 1158 (2d Dept. 2016); *Hirschfeld v. IC Securities, Inc.*, 132 A.D.2d 332, 337 [1st Dept.1987], *lv. dismissed* 72 N.Y.2d 841 (1988).

Mr. O'Byrne's *curriculum vitae* shows that he obtained a bachelor's degree in civil engineering, and he received a master's degree in civil engineering, construction engineering and management, from the University of Colorado in addition to other professional qualifications. These qualifications are sufficient to allow for the testimony. *See Price ex rel. Price v. New York City Hous. Auth.*, 92 N.Y.2d 553, 559 (1998). "[T]he lack of a license or certification does not, in and of itself, disqualify a witness from testifying as an expert." *People v. Stevenson*, 158 A.D.3d 825, 826 (2d Dept. 2018), *citing Steinbuch v. Stern*, 2 A.D.3d 709, 710 (2d Dept. 2003).

Any issues regarding alleged deficiencies in his qualifications can go to the weight to be accorded to Mr. O'Byrne's testimony by the trier of fact.

Plaintiff Shall Be Precluded from Offering at Trial any Documents Not Exchanged in Discovery Pertaining to Damages

On July 16, 2018 and May 28, 2021, Defendant served two separate demands seeking all documents substantiating Plaintiff's claimed damages. Plaintiff has had ample opportunity to respond to same. Plaintiff's argument that a motion to preclude for failure to respond to discovery can not be made as a motion *in limine* is unfounded. *See eg Calabrese Bakeries, Inc. v Rockland Bakery* 139 AD3d 1192.

It would be unfair to allow Plaintiff to surprise Defendant at trial with documents previously requested but not produced. Moreover, even on this motion Plaintiff fails to identify any such documents or offer any explanation as to why said documents would not have been produced previously giving rise to an assumption that the failure to produce any such documents was willful.

Celentano May Not be Cross-Examined Regarding the Violation Pled to by HiRise

Under CPLR §4513, conviction of a crime and the underlying facts of the criminal acts may be used to impeach the credibility of a witness at a civil trial (*Moore v. Leventhal*, 303 N.Y.

534; *Able Cycle Engines v. Allstate Ins. Co.*, 84 A.D.2d 140). However, under CPLR 4513, the impeachment is limited to “crimes,” *i.e.*, felonies or misdemeanors. In this case only a violation was pleaded to, not even a misdemeanor. As such, testimony pertaining to the violation is more prejudicial to HiRise than any probative value and shall be precluded.

Motion Seq. No. 3

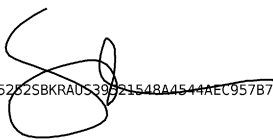
The Motion is Denied

HiRise will not be precluded from offering testimony as to Project services provided by DXA since those allegedly deficient services are central to HiRise’s defense of this case. The ARH/HiRise specifically provided that HiRise was not responsible for the malfeasance of others, including the Project Architect. HiRise should be permitted to offer evidence at the time of trial as to the malfeasance of others, including, but not limited to DXA.

The Disclaimer Language contained in HiRise’s contract entitles HiRise to raise the issue of DXA’s conduct at the trial of this action. The Disclaimer Language specifically identified the Project Architect as one of the entities who HiRise would not be responsible for if there was malfeasance on that party’s part.

Based on the foregoing Motion Seq No 3 is Denied.

This constitutes the decision and order of the court.


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SABRINA KRAUS, J.S.C.

11/29/2023
DATE

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> GRANTED IN PART
	<input type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> REFERENCE