

**Klewin Bldg. Co., Inc. v Heritage Plumbing & Heating, Inc.**

2007 NY Slip Op 34555(U)

February 13, 2007

Supreme Court, Westchester County

Docket Number: 10428/05

Judge: Kenneth W. Rudolph

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

FILED AND ENTERED ON 2/16 2007 WESTCHESTER COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK COMMERCIAL DIVISION, WESTCHESTER COUNTY

Present: HON. KENNETH W. RUDOLPH Justice.

KLEWIN BUILDING COMPANY, INC

Plaintiff,

-against-

HERITAGE PLUMBING & HEATING, INC and THE HARTFORD FIRE INSURANCE CO.

Defendants,

HARTFORD FIRE INSURANCE CO., incorrectly sued as THE HARTFORD FIRE INSURANCE CO.,

Third-Party Plaintiff, :

-against-

NANCY BERARDIS, ANTHONY BERARDIS, JR., LISA BERARDIS, and ANTHONY BERARDIS, SR.,

Third-Party Defendants:

The following papers numbered 1 to 57 were read on these motions.

PAPERS NUMBERED

Table with 2 columns: Document Description and Page Range. Includes entries for Notice of Motion/Affirmation/Affidavits/Exhibits 1-11/Memorandum of Law (1-18), Notice of Cross Motion/Affirmation/Exhibits A-B/Affidavit/Exhibits 1-25/Memorandum of Law, Klewin (19-49), Reply-Opposition Affidavit/Exhibits A-F, Hartford (50-56), and Stipulation (57).

FILED FEB 16 2007 TIMOTHY C. DOMINGUEZ COUNTY CLERK COUNTY OF WESTCHESTER

Upon the foregoing papers, it is ORDERED that this motion by defendant/third-party plaintiff, Hartford Fire Insurance Co. s/h/a The Hartford Fire Insurance Co. ("Hartford"), made pursuant to CPLR 3103, for a protective order vacating a subpoena served by plaintiff upon non-party witness, Stephen Hopkins ("Hopkins") of SCS Consulting, Inc. ("SCS") and pursuant to CPLR 2304, for an order quashing said subpoena and the cross motion of plaintiff, Klewin Building Company, Inc. ("Klewin") for an order, pursuant to CPLR 3214, compelling defendant, Hartford to produce all documents with respect to the construction project in Ardsley, New York, in the possession, custody or control of Hopkins or SCS that were prepared (1) after June 17, 2004, up to and including August 10, 2004 and (2) after August 10, 2004, if the documents were not prepared exclusively for litigation, are decided as follows.

This action arises out of a \$32,400,000.00 project for the construction of the Woodlands Senior Living Facility in Ardsley, New York ("project"). By contract dated March 7, 2003, the project owner, Ardsley Housing Associates, LLC ("Project Owner") retained plaintiff, Klewin as the construction manager for the project and by contract dated March 27, 2003, Klewin retained defendant, Heritage Plumbing & Heating ("Heritage") as the plumbing subcontractor for the project. The amount of Heritage's plumbing subcontract was \$2,600,000.00. Heritage obtained a performance bond from defendant, Hartford in that amount to secure performance of its subcontract work. Heritage also obtained a payment bond from Hartford in the amount of \$2,600,000.00 to secure payment to Heritage's laborers, subcontractors and material suppliers. It is undisputed that while performing its subcontract work, Heritage experienced financial difficulties, was unable to keep pace with the project schedule, abandoned the project on June 2, 2004, and was formally declared in default by plaintiff on July 2, 2004.

Plaintiff's complaint alleges causes of action against Hartford for breach of the performance bond and breach of the payment bond. Hartford's answer alleges denials, multiple affirmative defenses and a first set-off and counterclaim against plaintiff alleging plaintiff's breach of its subcontract with Heritage and a cross claim against Heritage pursuant to a general indemnity agreement. Hartford's third-party complaint seeks damages from the named individual third-party defendants pursuant to a general indemnity agreement given by said individuals upon the issuance of surety bonds by Hartford to Heritage.

By stipulation dated December 22, 2006, plaintiff has agreed to produce its consultant Hopkins for a deposition and to produce project documents, which were prepared up to and including June 17, 2004. Too, the parties have agreed to modify plaintiff's motion to limit said motion to one for a protective order as to production of project documents in Hopkins' possession, custody or control, which were prepared in anticipation of litigation subsequent to June 17, 2004. The stipulation covers the subpoena and a second subpoena dated December 15, 2006.

Accordingly, Hartford's motion is denied as moot, in accord with the stipulation.

To be determined is whether project documents prepared by Hopkins subsequent to June 17, 2004 were prepared in anticipation of or for purposes of litigation and are therefore privileged.

In its letter to plaintiff dated June 17, 2004, Hartford advises plaintiff that if plaintiff has not terminated Heritage, Hartford has no obligation under the terms and conditions of its surety bonds. The letter cites bond paragraph 3.2 providing as a condition precedent to Hartford's bond obligations "that the Owner has declared a Contractor Default and formally terminated the Contractor's right to complete the contract". The letter further advises plaintiff

that Hartford had engaged Hopkins and SCS to review the current status and the project

Plaintiff's letter dated July 2, 2004 notifies Hartford that pursuant to subsection 3.2 that plaintiff has declared a Contractor Default and formally terminated the contractor's right to complete the contract. Hartford's letter to plaintiff dated August 10, 2004 reiterates plaintiff's failure to satisfy the strictly construed condition precedent, *supra*, leaving Hartford with no obligation under the bond.

The burden of showing that specific material is conditionally immune from discovery under CPLR 3101(d) because it was prepared solely in anticipation of litigation, is upon the party asserting the immunity. See, Koump v. Smith, 25 NY2d 287, 294. "... in distinguishing between an experts report prepared in the regular course of business to aid an insurance carrier's decision in evaluation of a claim and an expert's report prepared exclusively for anticipated litigation, the date a firm decision to disclaim coverage is made is the relevant date,"... See, Landmark Insurance Company v. Beau Rivage Restaurant, Inc., 121 AD 2d 98, 101.

The Court finds that Hartford's letter of June 17, 2004 evinces Hartford's firm decision to disclaim coverage under the bond, that Hartford has met its burden of demonstrating that SCS and Hopkins were retained in anticipation of litigation and that documents prepared by SCS and Hopkins on June 17, 2004 and thereafter are privileged and not subject to discovery by plaintiff. Nor has plaintiff demonstrated that information sought from non parties, Hopkins and SCS cannot be obtained through other sources. See, Attinello v. DeFelippis, 22 AD 3d 574.

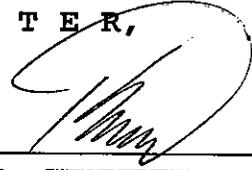
Plaintiff's cross motion is denied; project documents prepared by Hopkins and SCS subsequent to June 17, 2004 shall not be discoverable by plaintiff.

The attorneys and their clients are directed to attend a trial readiness/pretrial settlement conference at the Commercial Division on March 14, 2007 at 12 P.M.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York  
February 13, 2007

E N T E R,



HON. KENNETH W. RUDOLPH  
Justice of the Supreme Court

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