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SHORT FORM ORDER

INDEX No. 00-6126

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 9/23/05
ADJ. DATE 12/8/05
Mot. Seq. # 006 - MotD
007 - XMD

RECKSON OPERATING PARTNERSHIP, L.P., Plaintiff, - against - NEW YORK STATE URBAN DEVELOPMENT CORPORATION d/b/a EMPIRE STATE DEVELOPMENT CORPORATION and the NEW YORK STATE DORMITORY AUTHORITY, Defendants.	HAMBURGER, MAXSON, et al. Attorneys for Plaintiff 225 Broad Hollow Road, Suite 301E Melville, New York 11747 ARENT FOX PLLC Attorneys for Defendants 1675 Broadway, 25th Floor New York, New York 10019-5820

Upon the following papers numbered 1 to 108 read on this motion for summary judgment and sanctions or to compel depositions and cross motion for sanctions; Notice of Motion/ Order to Show Cause and supporting papers 1 - 60; Notice of Cross Motion and supporting papers 61 - 94; Answering Affidavits and supporting papers _____; Replying Affidavits and supporting papers 95-103; 104-108; Other_____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendants for an order pursuant to CPLR 3212 granting defendants summary judgment dismissing the complaint and for the imposition of sanctions on plaintiff pursuant to 22 NYCRR 130-1.1 awarding defendants attorney's fees or, in the alternative, for an order pursuant to CPLR 3124 compelling the depositions of the Controller of Reckson Operating Partnership, LP and the Controller of Reckson Construction Group, Inc. is determined herein; and it is further

ORDERED that this cross motion by plaintiff for the imposition of sanctions on defendants pursuant to 22 NYCRR 130-1.1 awarding plaintiff the reasonable expenses and attorney's fees incurred in responding to the instant motion is denied.

This action arises out of an uncompleted sale by public bid by defendants to plaintiff of four parcels of excess land, constituting approximately 655 out of 840 acres of land of the Pilgrim State Psychiatric Center located in Islip, New York. Defendants had brought a prior motion for summary judgment dismissing plaintiff's complaint in its entirety, and plaintiff had cross-moved for summary judgment solely on its first cause of action. By order dated September 18, 2001, this court had addressed the motion and cross motion on their merits and had granted plaintiff summary judgment on its first cause of action and had granted defendants summary judgment solely on the second cause of action for breach of express contract and had found issues of fact with respect to plaintiff's remaining third through sixth causes of action. Defendants appealed said order. By order and decision dated December 2, 2002, the Appellate Division, Second Department determined that "[t]he Supreme Court properly denied that branch of the defendants' motion which was for summary judgment dismissing the third through sixth causes of action" (*see*, ***Reckson Operating Partnership, L.P. v New York State Urban Dev. Corp.***, 300 AD2d 291, 751 NYS2d 279, 280 [2d Dept 2002]).

Defendants are now moving once again for summary judgment dismissing the causes of action that remain based on the determination by the Appellate Division, Second Department that there is an issue of fact as to whether the work plaintiff performed was covered by the terms of the invitation to bid. Defendants are also seeking the imposition of sanctions on plaintiff on the ground that plaintiff's complaint lacks merit since plaintiff cannot satisfy the requirement of demonstrating that the work plaintiff performed was outside the invitation to bid.

Plaintiff now cross-moves for the imposition of sanctions on defendants pursuant to 22 NYCRR § 130-1.1 awarding plaintiff the reasonable expenses and attorney's fees incurred in responding to the instant motion. Plaintiff contends that defendants' failure to move for leave to renew or reargue their prior motion for summary judgment now bars defendants from bringing a second motion for summary judgment using the same arguments based on a 1995 Preliminary Reutilization Master Plan and maps of the property, which defendants held in their possession prior to bringing their first summary judgment motion more than four years ago.

This second summary judgment motion by defendants violates the general proscription against successive summary judgment motions absent "a showing of newly discovered evidence or other sufficient cause" (*see*, ***Lapadula v Kwok***, 304 AD2d 798, 757 NYS2d 869, 870 [2d Dept 2003], *citing* ***Marine Midland Bank v Fisher***, 85 AD2d 905, 906, 447 NYS2d 186 [4th Dept 1981]; *see also*, ***Williams v City of White Plains***, 6 AD3d 609, 775 NYS2d 868 [2d Dept 2004]). It is well settled that successive motions for summary judgment should not be made based upon facts or arguments which could have been submitted on the original motion for summary judgment (*see*, ***Capuano v Platzner Intl. Group, Ltd.***, 5 AD3d 620, 774 NYS2d 780 [2d Dept 2004]). By order of this court dated September 18, 2001, the motion by defendants for summary judgment dismissing the complaint was addressed on the merits and was determined in its entirety, and no portion of the motion was denied with leave to renew or adjourn (*compare*, ***Fernandez v Elemam***, 25 AD3d 752, 809 NYS2d 513 [2d Dept 2006]). The order and decision of the Appellate Division, Second Department affirmed this court's determination that there are issues of fact with respect to the remaining causes of action and the fact that the Appellate Division, Second Department pointed to and acknowledged one such issue of fact did not entitle defendants to bring a new motion for summary judgment to resolve said issue. It is also worth mentioning that defendants are not basing this second summary judgment motion on any new materials obtained through discovery since

the prior round of motion practice (*compare*, ***Fielding v Environmental Resources Mgt. Group***, 253 AD2d 713, 678 NYS2d 253 [1st Dept 1998]). Instead, this is a belated attempt by defendants to obtain leave to reargue their prior motion for summary judgment, which was decided by this court more than four years ago. Therefore, that portion of defendants' motion for summary judgment and the imposition of sanctions on plaintiff is denied.

Defendants are also moving for an order pursuant to CPLR 3124 compelling the depositions of the Controller of Reckson Operating Partnership, LP and the Controller of Reckson Construction Group, Inc. on the grounds that the consultants produced by plaintiff could not answer certain questions at their depositions relating to billing and invoices such that defendants are unable to determine if plaintiff sustained damages. Through their submission of the deposition transcripts of the Reckson consultants Gregg Rechler and Thomas Kirwin, defendants sufficiently demonstrated that the witnesses produced by defendants did not possess sufficient knowledge concerning billing practices and that said information was material and necessary to ascertain plaintiff's damages (*see*, ***D & S Realty Dev., LP v Town of Huntington***, 22 AD3d 455, 802 NYS2d 206 [2d Dept 2005]). Therefore, the court directs that depositions of the Controller of Reckson Operating Partnership, LP and the Controller of Reckson Construction Group, Inc. shall be conducted on ten (10) days written notice as to time and place to be given within forty (40) days of the date of this order. Said depositions are to continue on a day-to-day basis until they are all completed.

Finally, although the court is mindful of plaintiff's inconvenience, the court declines to grant plaintiff's cross motion for an award of reasonable expenses and attorney's fees at this juncture.

Dated: April 18, 2006

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION