

Agovino & Asselta, LLP v Pile Constr. Co., Inc.

2012 NY Slip Op 30396(U)

February 6, 2012

Supreme Court, Nassau County

Docket Number: 9797/08

Judge: Anthony L. Parga

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - NASSAU COUNTY

Present:

HON. ANTHONY L. PARGA

Justice

-----X

AGOVINO & ASSELTA, LLP,

Plaintiffs,

-against-

PILE CONSTRUCTION COMPANY, INC.,

Defendants.
-----X

PART 6

INDEX NO. 9797/08

MOTION DATE: 12/15/11

SEQUENCE NO: 03, 04

Notice of Motion, Affs, Exs.....	<u>1</u>
Memorandum of Law.....	<u>2</u>
Notice of Cross-Motion, Exs.....	<u>3</u>
Reply Affirmation & Exs.....	<u>4</u>
Reply Affidavit.....	<u>5</u>

Upon the foregoing papers, the motion by non-party movant, Federal Insurance Company (hereinafter "Federal") to vacate the Restraining Notice dated September 8, 2011 served by plaintiff Agovino & Asselta, LLP (hereinafter "A&A"), to quash the Subpoena Duces Tecum which accompanied the Restraining Notice, pursuant to CPLR §§5522(b) and 5240, and for damages, and the cross-motion by plaintiff to compel Federal to appear for an examination in enforcement of a judgment and to produce the documents requested in the subpoena served upon it, pursuant to CPLR §5224, are resolved as follows.

The following facts are taken from pleadings and submitted papers and do not constitute findings of fact by this Court.

Non-party Federal is in the business of issuing surety bonds securing the obligations of contractors for public construction projects. In July 2004, the City of New York entered into a construction contract with Pile Foundation Construction Company, Inc. (hereinafter "Pile")

whereby Pile agreed to furnish labor, material, equipment and incidental work necessary to improve East River Park in Manhattan (hereinafter referred to as "the project"). As required by the contract, Federal issued a performance bond and a labor and material bond, each in the amount of \$54,205,968.39, securing Pile's obligations to complete the project and to pay persons and entities performing labor and supplying material for the project on behalf of Pile. In or about January 2008, Pile informed Federal that it no longer had the financial resources to complete the project and other projects. Pile requested that Federal, as its surety, provide it with the necessary funds to complete the project.

Thereafter, Federal and Pile negotiated and entered into a "Funding Agreement" wherein Federal agreed to fund Pile's continued performance on the project, subject to various conditions. In consideration, Pile provided, among other things, an assignment to Federal of all moneys due and to become due from the City in connection with the project. Accordingly, Federal has been funding Pile's performance on the project pursuant to its bond obligations, and it contends that it has incurred multi-million dollar losses in connection with its funding of the project. Federal claims that as of September 7, 2011, Federal had incurred a loss of more than \$25 million. Federal also contends that it has incurred huge losses on other projects where it provided bonds on behalf of Pile and claims that as of August 31, 2011, Pile's indebtedness to Federal totaled \$132,517,310.63.

A&A began the instant action to recover legal fees for legal services rendered to defendant Pile. On or about November 12, 2008, A&A obtained a judgment against defendant Pile in the amount of \$62,700.79. Thereafter, on November 14, 2008, A&A served a restraining notice and information subpoena on Federal. On May 8, 2009, Federal contends that it responded to said information subpoena by serving an affidavit, executed by Federal's Vincent C. Miseo. According to Federal, the affidavit confirmed that Federal owed no money to Pile and that Federal held no property in which Pile has an interest.

On September 8, 2011, A&A served its second restraining notice on Federal, along with a Subpoena Duces Tecum calling for a deposition and the production of documents. Non-party Federal moves to vacate the restraining notice, arguing that the plaintiff failed to obtain leave of the court for a second restraining notice, and also moves to quash the subpoena arguing, *inter*

alia, that it is overbroad and being used to harass Federal.

Plaintiff cross-moves to compel Federal's compliance with the subpoena, arguing, *inter alia*, that whether Federal owes money to Pile is irrelevant to A&A's entitlement to disclosure and that A&A was not required to obtain leave of Court to serve the restraining notice since Federal deemed the first notice a nullity due to improper service.

To begin, plaintiff's second restraining notice, dated September 8, 2011, is hereby vacated, as there is no evidence that the plaintiff obtained leave of the Court to serve its second restraining notice upon Federal. CPLR §5222(c) states that "leave of court is required to serve more than one restraining notice upon the same person with respect to the same judgment or order."

The Court has reviewed the Subpoena Duces Tecum served upon Federal on September 8, 2011 and has determined that a number of items contained therein are overbroad. CPLR §5240 provides that the court may "make an order denying, limiting, conditioning, regulating, extending or modifying the use of any enforcement procedure." The purpose of this section is to empower the Court to prevent unreasonable annoyance, expense, embarrassment or other prejudice in the use of post-judgment procedures. (*Paz v. Long Island R.R.*, 241 A.D.2d 486, 661 N.Y.S.2d 20 (2d Dept. 1997); *See also, Yeshiva Tifferees Torah v Keshet Intl. Trading Corp.*, 246 A.D.2d 538, 667 N.Y.S.2d 759 (2d Dept. 1998)(holding that CPLR §5240 gives courts broad discretionary power to regulate enforcement procedures)). An application to quash a subpoena is appropriately granted "where the futility to uncover anything legitimate is inevitable or obvious" or "where the information sought is utterly irrelevant to any proper inquiry." (*Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d 327, 525 N.Y.S.2d 815 (1988); *Technology Multi Sources, S.A. v. Stack Global Holdings, Inc.*, 44 A.D.3d 931, 845 N.Y.S.2d 357 (2d Dept. 2007)). The courts will be quick and firm to halt the employment of the power to investigate for irrelevant, illegitimate or oppressive purposes. (*See, Application of Dairymen's League Co-op. Ass'n*, 274 A.D. 591, 84 N.Y.S.2d 749 (1st Dept.1948)).

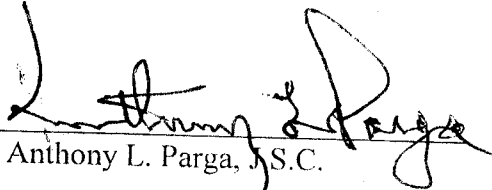
The first eight items on the Schedule of Requested Documents request documentation relating to all aspects of the construction work that Pile may have performed since the date of A&A's judgment, including all contracts to which Pile was a party, invoices for payment

submitted by or on behalf of Pile, monies received by or on behalf of Pile, monies received by or on behalf of Federal, as well as all payments to Pile's employees, subcontractors, vendors, suppliers, or family members since November 12, 2008. It is evident from the submissions before this Court that the East River Park Project involves millions of dollars of construction work, many subcontractors, and many suppliers and that Pile assigned all moneys due from the City in connection with the project to Federal by the terms of the Funding Agreement. Accordingly, plaintiff's request for said documentation is overly broad. Further, said documentation is irrelevant to the satisfaction of A&A's judgment, and, contrary to plaintiff's contentions, the documents and information sought in the subpoena are not directly related to *Pile's* income and assets.

Accordingly, it is hereby ordered that the first eight items listed in the Schedule of Requested Documents in the Subpoena Duces Tecum of September 8, 2011 are hereby quashed. Further, item number nine (9) is modified to limit said request to documents relating only to any monies paid or transferred from Federal to Pile, its officers, or family members of its officers, on or after November 12, 2008. Plaintiff is entitled to a response to item number ten (10). Item number eleven (11) is hereby modified to limit said request to copies of Pile's income tax returns for 2008, 2009, and 2010 which are within Federal's possession. Items numbered twelve (12) and thirteen (13) are hereby modified to limit said requests to cancelled checks drawn on Pile's bank accounts to which Federal has access and/or control and bank statements pertaining to Pile's bank accounts to which Federal has access and/or control from November 12, 2008 to present. Lastly, Federal shall not be required to produce a witness for deposition.

Non-party Federal shall respond to the subpoena, dated September 8, 2011, as modified above, within forty-five (45) days of the date of this Order. Federal's requests for damages and sanction are denied.

Dated: February 6, 2012


 Anthony L. Parga, J.S.C.

ENTERED
 FEB 08 2012
 NASSAU COUNTY
 COUNTY CLERK'S OFFICE

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