Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DAVID ELLIOT** IAS PART 10
Justice

A.F.C. ENTERPRISES, INC.,	Index No.15956/96
Plaintiff, -against-	Motion Date May 25, 2004
THE NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY (MAXWELL HIGH SCHOOL),	Oral Argument May 25, 2004
Defendant.	Motion Cal. No.1

	PAPERS NUMBERED
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On July 15, 1994, plaintiff A.F.C. Enterprises, Inc. (AFC) was awarded a contract by defendant The New York City School Construction Authority (SCA) for construction of an addition and modernization of existing facilities at Maxwell High School. Plaintiff commenced this action alleging, inter alia, that it's contract was wrongfully terminated by defendant.

Defendant SCA moves for an order (1)pursuant to CPLR §3216 dismissing the complaint on the grounds of plaintiff's willful concealment and misrepresentation as to the whereabouts of critical documents seized by the United States Attorney or, in the alternative, vacating plaintiff's note of issue for failure to comply with discovery; (2)granting monetary sanctions; and (3)disqualifying Mark E. Klein, Esq., and the law firm of Ingram, Yussek, Gaines,

Carroll & Bertolotti (Ingram) from representing plaintiff in this action.

BACKGROUND OF ACTION

On July 15, 1994, a contract in the amount of $28,943,000 was awarded to plaintiff for construction of an addition and modernization of facilities at Maxwell High School. On April 28, 1994, defendant SCA had entered into an agreement with HRH Construction Corporation and Blackstone Enterprises Inc., a Joint Venture (HRH) for HRH to manage the construction of the project. Plaintiff AFC was to commence work on August 8, 1994, pursuant to a notice to proceed issued on August 1, 1994. AFC was required to submit a construction progress schedule that used the critical path method for scheduling work. On September 30, 1994, plaintiff AFC submitted the schedule which forecasted completion of the modernization by on or about December 29, 1995.

It was claimed by defendant SCA that plaintiff AFC failed to meet the December 29, 1995, completion date for the addition so defendant SCA initiated proceedings to terminate the contract by letter dated April 16, 1996. There was a cure meeting on May 1, 1996, and plaintiff AFC committed to obtaining a temporary certificate of occupancy (TCO) by December 16, 1996. Defendant SCA claims AFC failed to meet the milestone schedule and was given notice of a termination conference by letter dated November 25, 1996. The hearing would have been cancelled if AFC increased its workforce so as to reasonably ensure substantial completion and the TCO by January 15, 1997. Allegedly, AFC did not increase its workforce. Termination conferences were held on December 23, 1996 and January 22, 1997. A default of contract finding was issued on March 7, 1997. It was upheld on appeal by the president of the SCA. By letter dated July 30, 1997, SCA made a demand under AFC's performance bond underwritten by American Home Assurance Company (American). By letter dated July 30, 1997, American agreed to reimburse SCA for the cost to complete the project in excess of the funds remaining under the contract subject to a reservation of rights against SCA for its losses on the project. SCA then awarded the contracts to HRH.

CONTENTIONS OF THE PARTIES

With respect to the issue of concealment of records, defendant SCA contends that on October 28, 2003, plaintiff's general manager John Mikuszewski testified at his deposition that plaintiff was being investigated by the United States Attorney but that it was not a target. Defendant's counsel contacted the United States Attorney's Office and was informed that it had seized from plaintiff documents relating to the Maxwell High School Project and that plaintiff had received a target letter in connection with the criminal investigation. At his November 7, 2003 continued deposition, Mr. Mikuszeuski testified that the records were seized in the Fall of 2001. At his deposition on November 13, 2003, plaintiff's President Andrew Catapano testified that such records were seized; denied receiving a target letter; and stated that John Ruggiero, plaintiff's Vice-President, maintained a list of the seized documents. Defendant's demand for a copy of the list was denied by plaintiff's attorney, Mr. Klein on November 14, 2003.

Defendant argues that it had duly noticed for production on September 18, 1996, the records subsequently seized by the United States Attorney in the Fall of 2001. A prior order dated March 26, 2002, signed by Vincent Torna, Esq., AFC's former counsel, required document production to be complete by November 2, 2002. A second order dated April 7, 2003, signed by Mr. Klein also required the production of documents. Neither order made reference to the earlier seizure of the documents nor of plaintiff's inability to produce them due to the seizure. SCA further contends that the job records and invoices allegedly seized were specifically requested in Request 44. On January 26, 2003 AFC produced certain documents for inspection at its office. By letter dated January 23, 2003, Mr. Klein was informed that certain documents remained outstanding. Another letter dated April 25, 2003 informed Mr. Klein as to outstanding document demands. By letter dated May 5, 2003, Mr. Klein responded with respect to Request 44 that account and ledgers and invoices were produced in Box 2756. With respect to invoices, checks, check registers and bank statements, Mr. Klein wrote that it would be unduly burdensome and expensive to cull such records due to its

filing practice. SCA contends both statements were false. By letter dated October 17, 2003 (after the criminal investigation was discovered), Mr. Klein contradicted his earlier statement of May 5, 2003 and reported for the first time that some of the documents were in the possession of the NYCDOI as a result of an unrelated investigation by the USDOJ, Eastern District and suggested a joint application to obtain access.

As to the disqualification of Mark Klein and Ingram, defendant SCA contends that at the November 12, 2003 deposition of Ted Martucci, a former employee of HRH, SCA learned for first time that Mr. Klein and Ingram, which has represented plaintiff AFC since November 19, 2002, previously represented HRH in an action brought by Bohemia Woodwork and Millwork, Inc., (Bohemia) in connection with the Maxwell HS Project.

Defendant SCA contends that Mr. Slaney, formerly an attorney with Ingram, is currently General Counsel of HRH. Mr. Klein appeared on behalf of HRH at a Preliminary Conference and another conference and entered into a stipulation regarding discovery and signed an order of reference to Alternative Dispute Resolution. Pursuant to the Construction Management Agreement (CM), HRH was to provide comprehensive construction management services for the project. HRH was to act as SCA's agent in the performance of manager duties and to assist and cooperate in any legal actions or proceedings arising out of or relating to the work encompassed under the HRH agreement. Plaintiff's complaint also implicates HRH in its role as completion contractor as plaintiff AFC's direct claim and the surety's assigned claim both call into question whether the costs to complete the project incurred by HRH were reasonable.

Plaintiff contends that its contract was terminated after a Star Chamber proceeding. Credible evidence showed that the project was prematurely bid out with incomplete and defective plans and specifications and design errors resulting in over 600 potential impacts to the Project schedule. SCA made an error and omissions claim against the architect. Contrary to defendant's attorney's statements discovery has been active for more than 10 months.

Defendant SCA never responded to plaintiff's letter dated May 5, 2003 in which it objected to production of the so-called critical documents. Defendant never previously moved for discovery relief. The March 2002 order does not refer to critical documents. Neither party really complied as both were engaged in intensive discovery in AFC's federal action concerning SCA's alleged improper actions in connection with another school project. The April 7, 2003 order was entered after tens of thousands of pages of documents had been produced and inspected. Again, no reference was made as to critical documents.

AFC argues that disqualification of the Ingram law firm and Klein should be denied as AFC would be severely prejudiced. Further, at no time has the law firm or Mr. Klein represented SCA. A non-client has no standing to bring a disqualification motion. The Bohemia action was commenced in February 1999 almost two years after SCA terminated AFC. There was limited participation in that action and a court ordered mediation resulted in settlement of the Bohemia action. There was only limited written discovery and no deposition discovery. No one at the firm spoke with any SCA employee other than for the preparation of an affidavit. The law firm and Klein represented HRH solely in defense of the lawsuit by the subcontractor Bohemia and there was no agency or fiduciary relationship between SCA and HRH.

Decision of the Court

The motion by defendant SCA is granted solely to the extent that the note of issue is hereby vacated and the matter is stricken from the trial calendar. The time to file a note of issue is hereby extended to January 28, 2005;

The parties are directed to proceed forthwith with discovery including arranging for inspection of the documents to be made available by the office of the United States Attorney. In all other respects, defendant's motion is denied.

Initially, the issue of attorney disqualification must be addressed.

"It is well settled that the disqualification of an attorney is a matter which rests within the sound discretion of the court (see, Fischer v Deitsch, 168 AD2d 599, 563 NYS2d 839). A party's entitlement to be represented in ongoing litigation by counsel of his own choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted (see, Feeley v Midas Props., 199 AD2d 238, 604 NYS2d 240), and the movant bears the burden on the motion (see, S&S Hotel Ventures Ltd. Partnership v 777 S.H. Corp., 69 NY2d 437, 445, 515 NYS2d 735, 508 NE2d 647; Matter of Reichenbaum v Reichenbaum & Silberstein, 162 AD2d 599, 556 NYS2d 933)." Olmoz v Town of Fishkill, 258 AD2d 447.

The issue presented is based upon Mr. Klein and Ingram having previously represented HRH in a matter arising out of the subject project.

DR5-108 states as follows:

"A. Except as provided in DR 9-101 [1200.45](B)with respect to current or former government lawyers, a lawyer who has represented a client in a matter shall not, without the consent of the former client after full disclosure:

1. Thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client.

2. Use any confidences or secrets of the former client except as permitted by DR 4-101 [1200.19](C)or when the confidence or secret has become generally known.

B. Except with the consent of the affected client after full disclosure, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

1. Whose interests are materially adverse to that person; and

2. About whom the lawyer had acquired information protected by DR 4-101 [1200.19](B)that is material to the matter.

C. Notwithstanding the provisions of DR 5-105 [1200.24](D), when a lawyer has terminated an association with a firm, the firm is prohibited from thereafter

representing a person with interests that are materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm only if the law firm or any lawyer remaining in the firm has information protected by DR4-101 [1200.19](B)that is material to the matter, unless the affected client consents after full disclosure.

In the instant case, no evidence has been presented to show that Mr. Klein or the Ingram law firm ever represented defendant SCA. As stated by the court in Ogilvie v McDonald's Corp., 294 AD2d 550 at 552:

"The basis of a disqualification motion is an allegation of a breach of a fiduciary duty owed by an attorney to a current or former client." (Rowley v Waterfront Airways, 113 AD2d 926, 927). Since the plaintiffs are neither present nor former clients of the subject attorneys, they have no standing to seek their disqualification (see, Vanarthros v St. Francis Hosp., 234 AD2d 450; Matter of Reichenbaum v Reichenbaum & Silberstein, 162 AD2d 599; Rowley v Waterfront Airways, 113 AD2d 926)."

Absent representation of defendant SCA, Mr. Klein and the Ingram law firm owed no duty to SCA and absent a duty owed there can be no duty breached. Rowley v Waterfront Airways, supra at 927. Defendants SCA and HRH are not so united in interest as to warrant a finding that the legal representation of HRH constituted representation of SCA. Defendant SCA is a non-client of Mr. Klein and Ingram and, therefore, lacks standing to seek their disqualification.

With respect to the issue of the alleged concealment and misrepresentations as to disclosure of certain documents, this court finds that there is an insufficient basis upon which to invoke the drastic remedy of dismissing plaintiff's complaint. Substantial discovery has been conducted in this matter and further discovery remains. The prior conduct of plaintiff does not rise to the level of being willful, contumacious or in bad faith so that granting that branch of defendant SCA's motion seeking dismissal of the complaint is not warranted. Payne v Rouse Corp., 269 AD2d 510 at 511. Both parties are now aware that certain documents are in the custody of the Office of the United

States Attorney which office apparently has indicated its willingness to provide inspection thereof. Therefore, the parties are directed to contact said office to arrange for the availability of the documents for discovery.

Accordingly, the motion by defendant SCA is granted solely to the extent that the note of issue is hereby vacated and this matter is stricken from the trial calendar. In all other respects, the motion is denied.

Dated: August 27, 2004

HON. DAVID ELLIOT

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