

<b>Mutual Redevelopment Houses, Inc. v Skyline Eng'g, L.L.C.</b>
2018 NY Slip Op 33020(U)
November 27, 2018
Supreme Court, New York County
Docket Number: 651927/2016
Judge: Marcy Friedman
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 60

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MUTUAL REDEVELOPMENT HOUSES, INC., INDEX NO. 651927/2016

Plaintiff, MOTION DATE

- v -

SKYLINE ENGINEERING, L.L.C. and LAKHANI &amp; JORDAN ENGINEERS, P.C., MOTION SEQ. NO. 007

Defendants. DECISION AND ORDER

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SKYLINE ENGINEERING, L.L.C.,

Third-Party Plaintiff,

- v -

RCDOLNER, LLC, LAKHANI &amp; JORDAN ENGINEERS, P.C., CDM SMITH INC., f/k/a CAMP DRESSER &amp; MCKEE and TURNER &amp; TOWNSEND FERZAN ROBBINS LLC,

Third-Party Defendants.

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HON. MARCY S. FRIEDMAN:

The following e-filed documents, listed by NYSCEF document number (Motion Seq. No. 007) 166, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 185

were read on this motion to PRECLUDE and for SANCTIONS

This action arises out of a project to replace HVAC systems in a multi-building residential cooperative known as Mutual Redevelopment Houses, Inc. (Mutual). By four separate motions, third-party defendants moved to dismiss the third-party complaint in its entirety. The court granted the motions to dismiss in a decision on the record on November 8, 2018. Argument was also heard on November 8 on a separate motion by third-party defendant

CDM Smith Inc., f/k/a Camp Dresser & McKee (CDM), to compel third-party plaintiff Skyline Engineering, L.L.C. (Skyline) to return and/or destroy a “mediation statement” to which Skyline referred in its opposition to the motions to dismiss. CDM’s motion also requested an order “suppressing the use of this document and a protective order preventing the production of any similarly confidential documents in Skyline’s possession.” Finally, CDM moved, pursuant to NYCRR 130-1.1, for sanctions against Skyline. The court reserved decision on CDM’s motion.

It is undisputed that the mediation statement was created by CDM for a mediation in 2015 between CDM and Mutual, and that Skyline obtained the mediation statement from Mutual in November 2016 during discovery in the main action. (CDM Memo. In Supp., at 2; Skyline Memo. In Opp., at 2, 6.) The document is captioned, in bold type, “For Mediation Purposes Only.” It states that CDM submits the statement “as part of its good faith attempt to amicably resolve this dispute. This statement is made solely for mediation/settlement purposes and shall be afforded all protections provided under CPLR §4547 and all other applicable statutes, rules and case law governing such statements.”

The mediation statement is thus, by its terms, a settlement document that was not subject to disclosure. (See Employers Ins. of Wausau v American Home Prods. Corp., 238 AD3d 154, 154 [1st Dept 1997]; Lynbrook Glass & Architectural Metals Corp. v Elite Assocs., Inc., 238 AD2d 319, 320 [2d Dept 1997]; compare Nineteen Eighty-Nine, LLC v Icahn, 96 AD3d 603, 606-607 [1st Dept 2012].) Moreover, Skyline made no showing on the motions to dismiss that the document was material and necessary to Skyline’s prosecution of the third-party action. (See Employers Ins. of Wausau, 238 AD3d at 155; City of Newburgh, N.Y. v Hauser, 126 AD3d 926, 926-927 [2d Dept 2015].) The court accordingly assumes for purposes of this motion that had

CDM made a timely request, CDM would have been entitled to the return of the mediation statement and an order preventing disclosure of its contents.

CDM has, however, waived its right to the return of the mediation statement. In September 2017, in a prior third-party action between the same parties, Skyline attached the mediation statement as an exhibit to its opposition to CDM's motion to dismiss. (Aff. of Kenneth A. McLellan [Skyline's Atty.] In Opp., Ex. 2 [Index No. 651298/2016, NYSCEF Doc. No. 34].) The motion was withdrawn and the action was discontinued without prejudice by stipulations dated September 26 and 29, 2017 (Index No. 651298/2016, NYSCEF Doc. Nos. 39-40). The instant third-party action was brought in March 2018. CDM did not request the return of the mediation statement until June 19, 2018, after it was referenced in Skyline's opposition, dated June 15, 2018, to CDM's motion to dismiss the instant third-party action. (See Memo. In Supp., at 3; Reply Memo., at 4.) CDM thus waited until nine months after Skyline's initial use of the mediation statement to request its return. Moreover, the document has been publicly accessible on the court e-filing system since September 2017. Under these circumstances, no claim may be made that the document remains confidential.

The court notes that the mediation statement did not contain any sensitive information and was not relied on by the court in its November 8, 2018 decision granting the third-party defendants' motion to dismiss. The only referral to the document in Skyline's opposition to the motions to dismiss was the unexceptional one-sentence statement that CDM was the engineering consultant engaged to perform work on the project. (Skyline's Memo. In Opp. to Third-Party Defs.' Motions to Dismiss, at 6 [NYSCEF Doc. No. 166].)

CDM's motion for an order directing return, or precluding use of the mediation statement will be accordingly be denied. CDM's further request for an order preventing the disclosure of

any "similarly confidential documents" (see Notice of Motion to Compel) must also be denied.

On this record in which the documents are not identified or described, there is no basis on which the court could determine whether they are protected from disclosure.

It is hereby ORDERED that the branch of the motion of CDM Smith Inc., f/k/a Camp Dresser & McKee (CDM), for an order directing Skyline to return and/or destroy the mediation statement, for an order suppressing the use of this document, and for an order preventing disclosure of similarly confidential documents is denied; and it is further

ORDERED that the branch of CDM's motion for sanctions is denied in the discretion of the court and as unwarranted.

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11/27/2018

DATE

CHECK ONE:

  
  

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

APPLICATION:

CHECK IF APPROPRIATE:

  
  

NON-FINAL DISPOSITION  
GRANTED IN PART  OTHER  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT  REFERENCE



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MARCY S. FRIEDMAN, J.S.C.