

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA**

TRIAL DIVISION-CIVIL 2018 JUN 18 PM 1:03

MECO CONSTRUCTORS, INC.,

Plaintiff,

v.

CITY OF PHILADELPHIA,

Defendant.

Meco Contractors Inc. Vs City Of Philadelphi-OPFLD



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McINERNEY, S.J.

October Term 2016
No. 4431
Commerce Program
675 CD 2018

OPINION

June/8, 2018

The instant appeal is relative to this court's order dated April 24, 2018 granting Meco Constructors, Inc.'s ("Meco") Motion to Compel Dawood Engineering Inc.'s ("Dawood") compliance with a third party subpoena. For the reasons discussed below, this court's order should be affirmed.

Meco Constructors, Inc. ("Meco") entered into a contract with the City of Philadelphia ("City") for work on three projects, Mid-Girard Project, Chinatown Plaza Revitalization Project and 52nd Street Streetscape Project. The contracts required Meco to remove existing curbs and sidewalks identified in the contracts, construct ADA access ramps, reconstruct sidewalks, and enhance utilities and streetscape. The City was in control of the designs and approvals. The plan and schedules required Meco to install traffic controls, complete demolition and install the new sidewalks and curb working in coordination with the subcontractors. Shortly after the work began, issues arose relating to the City and its consultant's, Dawood, failure to timely review and approve Meco's submittals on the ADA curb design. The City's delay in reviewing and approving Meco's plans allegedly caused Meco to suffer damages. As a result, in October 2016, Meco instituted suit against the City for breach of contract, *quantum meruit* and violation of the prompt pay act.

In September 2017, during the course of discovery, Meco served a third party subpoena on Dawood, a City contracted design consultant working on the Projects, who Meco alleges was responsible for the work delays, with a subpoena to produce the following:

1. All Documents related to the Mid-Girard Avenue Project, the Chinatown Plaza Revitalization Project, and the 52nd Streetscape Project. This includes but is not limited to meetings, minutes, notes, submittals, schedules, invoices, cost reports, plans, drawings, memoranda, and contracts for work related thereto.
2. All communications related to the Mid-Girard Avenue Project, the Chinatown Plaza Revitalization Project and the 52nd Street Streetscape Projects.¹

From September 17, 2017², the date Dawood received the subpoena, and April 24, 2018, the discovery hearing date for Meco's motion to compel production of documents in response to the third party subpoena, Dawood did not respond to the subpoena, file a motion for protective order, move to quash the subpoena or object to the subpoena. On April 2, 2018, Meco filed a discovery motion with the court seeking to compel Dawood to produce documents in response to the subpoena. On April 24, 2018, Meco appeared before the court for a hearing on the discovery matter. Dawood's counsel was present and argued for the first time that the subpoenaed documents are not discoverable or admissible as evidence in any legal action or proceeding based on two statutory provision, 75 Pa. C. S. A. § 3754 Accident Prevention Investigations and 23 USC § 409 Discovery and Admission of Evidence of Certain Reports and surveys which create a narrow privilege. Additionally, Dawood argued that a confidentiality provision in a contract between PADOT Engineering District and AECOM USA prevented the production of the subpoenaed documents. On April 24, 2018, after hearing the parties' arguments, the court

¹ Certificate Prerequisite to Service of a Subpoena Pursuant to Rule 4009.22 filed with the court on September 12, 2017.

² On or about September 17, 2017, Meco served Dawood by certified mail return receipt requested.

granted Meco's motion to compel documents and ordered Dawood to comply with the subpoena within ten (10) days from the order. On May 3, 2018, Dawood appealed the court's April 24, 2018 order. Thereafter, on May 30, 2018, at the court's direction, Dawood filed its statement of matters complained of on appeal.

A party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, content, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.³ Nonetheless, there are limitations on the scope of discovery. Certain materials are privileged and beyond the scope of discovery.

Here, Dawood relied upon 75 Pa. C. S. § 3754 and 23 U.S.C. § 409 to support its objection to produce documents sought by Meco's subpoena based on privilege.

As will be discussed, Dawood reliance on these provisions was not persuasive. Title 75 Pa. C. S. § 3754 provides in pertinent part as follows:

*“(b) Confidentiality of reports.—In-depth accident investigations and safety studies and information, records and reports used in their preparation shall not be discoverable nor admissible as evidence in any legal action or other proceeding, nor shall officers or employees or the agencies charged with the development, procurement or custody of in-depth accident investigations and safety study records and reports be required to give depositions or evidence pertaining to anything contained in such in-depth accident investigations or safety study records or reports in any legal action or other proceeding.”*⁴

³ Pa.R.C.P. 4003.1.

⁴ 75 Pa.C.S. §3754 (West 1996).

The Pennsylvania Supreme Court, in *Department of Transportation v. Taylor*, construed §3754 as granting a “narrow but absolute privilege” in the documents specified by §3754(b).⁵ The privilege applies to “In-depth accident investigations and safety studies and information, records and reports used in their preparation”.⁶ Here, the crux of this matter is a contract dispute regarding project delays. The third party subpoena does not seek accident investigations or safety studies and information, records or reports used for their preparation. On the contrary, the subpoena seeks documents pertinent to the construction projects including meetings, minutes, notes, submittals, schedules, invoices, cost reports, plans, drawings, memoranda, contracts for work related thereto as well as communications regarding the project schedule to determine whether a delay resulted from the time Meca submitted its proposals and the time the City and Dawood reviewed the proposals and issued approvals. Since the subpoena does not seek documents protected by the narrow privilege created by §3754(b), the subpoenaed documents are not privileged.

Similarly, Dawood’s reliance on 23 U.S.C. § 409 also fails. Title 23 U.S.C. § 409 also creates a narrow privilege regarding certain reports and surveys of potential accident sites, hazardous roadway conditions or railway-highway crossings. Section 409 provides as in pertinent part as follows:

Notwithstanding any other provisions of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 148 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in an Federal or State Court Proceeding or considered for other purposes in any action for damages arising

⁵ 576 Pa. 622, 635, 841 A.2d 108, 116 (2004).

⁶ Id.

from any occurrence at a location mentioned or addressed in such reports or surveys, schedules, lists or data.⁷

This statutory privilege has two parts. The first part excludes reports, data, and the like if they were compiled or collected to identify, evaluate, or plan “the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 148 of [Title 23].” The second part excludes such documents if they were compiled or collected to develop “any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds.”⁸ The narrow privilege created by § 409 does not exempt Dawood from complying with the subpoena since the subpoenaed documents do not seek documents compiled or collected to identify, evaluate, or plan safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings nor does the subpoena seek documents collected to develop “any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds.” As such, Dawood’s claim of privilege fails.

In addition to privilege, Dawood also argued that it was precluded from complying with the subpoena based on a confidentiality provision contained within a contract between PADOT Engineering District and AECOM USA. In the Statement of Matters Complained of on Appeal, Dawood stated it was a subconsultant to AECOM USA implying that the confidentiality provision applied to it as well. If any protections are provided by the confidentiality agreement on disclosing information, the provision was never provided to the court for its review. Moreover, as with the privilege objections, the confidentiality objection was never raised within

⁷ 23 U.S.C. A. § 409.

⁸ *Zimmerman v. Norfolk Southern Corp.*, 706 F.3d 170, 181 (3rd Cir. 2013).

the time to object as required by Pa. R. Civ. P. 4009.21-24. While confidentiality restrictions are important and enforced by this court, Dawood should have provided the court with a copy of the contract to determine its application hereto or more importantly Dawood should have negotiated protections such as requesting the parties hereto sign confidentiality agreements to protect the confidential nature of the documents requested by the subpoena. Dawood waived his right to object to the subpoena since its objections were not timely.

Based on the foregoing, this court's order dated April 24, 2018 compelling Dawood's compliance with the subpoena should be affirmed.

Date: 6/18/18

BY THE COURT,



PATRICIA A. McINERNEY, S.J.