

**Five Star Elec. Corp. v A.J. Pegno Constr. Co.,  
Inc./Tully Constr. Co., Inc.**

2017 NY Slip Op 31591(U)

July 27, 2017

Supreme Court, New York County

Docket Number: 400897/11

Judge: Charles E. Ramos

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION

-----X  
FIVE STAR ELECTRIC CORP.,

Plaintiff,

- against -

Index No. 400897/11

A.J. PEGNO CONSTRUCTION CO., INC./TULLY  
CONSTRUCTION CO., INC., a Joint Venture,  
TULLY CONSTRUCTION CO., INC., and A.J.  
PEGNO CONSTRUCTION CO., INC.,

Defendants.

-----X

**Hon. C.E. Ramos, J.S.C.**

In motion sequence 001, Plaintiff Five Star Electric Corporation ("Five Star") moves pursuant to CPLR 3120 and 3124 to compel defendants A.J. Pegno Construction Co., Inc./Tully Construction Co., Inc., a Joint Venture, Tully Construction Co., Inc., and A.J. Pegno Construction Co., Inc. (collectively "Pegno/Tully") and non-party the City of New York ("City") to produce all documents requested in items 5-11 of Five Star's Notice for Discovery and Inspection dated August 2, 2016 ("Document Demand") and Subpoena Duces Tecum dated September 30, 2016 ("Five Star Subpoena") (Singh Aff., Ex. 1, 2).

For the reasons set forth below, this Court denies Five Star's motion to compel.

**Background**

On August 17, 2000, Five Star and the New York City Department of Environmental Protection ("NYCDEP") entered into a contract ("Contract"), wherein Five Star agreed to perform

certain electrical work for the expansion of the Newtown Creek Water Pollution Control Plant, located in Greenpoint, Brooklyn ("Newtown Project") in exchange for \$44,444,000 (Singh Aff., ¶ 18).

On July 10, 2000, Pegno/Tully entered into a contract with the City to perform general construction on the Project (Singh Aff., ¶ 18).

In November 2008, Five Star filed a complaint against Pegno/Tully for alleged delays related to the Newtown Project in New York Supreme Court, Queens County (Index No. 28213/08) ("Queens County Action") (Singh Aff., Ex. 5).

In June 2010, the Queens County Action was consolidated with the action brought by Pegno/Tully against the City ("City Action") (Singh Aff., Ex. 8).

Discovery commenced in mid-June 2010, and was ongoing until June 2014. On May 20, 2014, the parties appeared for a compliance conference with the Court, wherein the Court ordered Pegno/Tully to respond to outstanding document requests by June 6, 2014, and ordered Five Star to respond to outstanding document demands by June 20, 2014.

In January 2016, Pegno/Tully and the City commenced settlement discussions (Bridge Aff., ¶ 11). Subsequently, Pegno/Tully and the City agreed to exchange limited settlement materials under a confidentiality agreement ("Confidentiality

Agreement") (Bridge Aff., ¶ 11).

The Confidentiality Agreement provides, in relevant part:

Any information, documents, or analysis shared as part of the settlement negotiations, and not previously produced or provided to the opposing Party in the course of discovery, e.g. correspondence, will be treated as confidential and will not be shared or disclosed to third parties...the exchange of any information, documents, or analysis pursuant of the terms of this Agreement will not be considered a waiver of any attorney-client privilege or attorney-client work product privilege.  
(Monte Aff., Ex. A).

In April 2016, Pegno/Tully and the City reached a settlement in principal, and in July 2016, Pegno/Tully and the City executed a settlement agreement ("Settlement Agreement") (Bridge Aff., ¶ 12).

The Settlement Agreement resolved all claims and counterclaims by or between Pegno/Tully and the City arising out of the Contract and the Project (Singh Aff., Ex. 12, ¶ 2). The Settlement Agreement further provides that the "payment set forth in paragraph 1 does not include any monies attributable to Pegno/Tully's herein resolved claims against the City for indemnification or breach of contract with respect to the claims asserted against Pegno/Tully by Five Star" (*Id.*).

On August 2, 2016, after retaining new counsel, Five Star served new document requests, seeking delay analyses, claim evaluations, and related correspondence exchanged relating to the Settlement Agreement (Singh Aff., Ex. 1).

On September 27, 2016, Pegno/Tully discontinued its action against the City (Bridge Aff., Ex. G).

On September 30, 2016, Five Star served the City with the Five Star Subpoena, which the City objected to on multiple grounds.

Both Pegno/Tully and the City object to the disclosure because the documents sought are protected from discovery under the attorney-client privilege, the attorney work product doctrine, and are privileged settlement communications.

In November 2016, the City and Pegno/Tully provided Five Star with their Settlement Agreement (Bridge Aff., ¶ 18).

#### **Discussion**

At the outset, it has previously been determined by this Court that it was procedurally proper for Five Star to subpoena the City without filing a motion, as it was served at the direction of the Court (NYSCEF Doc. No. 57, p. 17: 13-15) (CPLR 2307).

Generally, there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action (CPLR 3101[d]). Likewise, a party seeking disclosure from a non-party must establish that the information and documents sought are material and necessary to the action (CPLR 3101[a][4]; *Kapon v Koch*, 23 NY3d 32 [2014]). "The test for disclosure is one of

usefulness and reason" (*Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 406 [1968]).

Five Star asserts that Pegno/Tully and the City waived any claims of privilege or confidentiality with respect to the disclosed materials, and that they failed to make the requisite showing that the discovery sought was prepared solely for litigation. Five Star further alleges that the sought disclosure may not be withheld from production on the grounds that they are settlement documents, as it is well settled that settlement related materials are categorically discoverable.

In opposition, Pegno/Tully and the City allege that Five Star's document requests are untimely, overbroad, and seek documents which are immune from disclosure under CPLR 3101(b) and ©. Pegno/Tully asserts that providing Five Star with access to settlement materials clearly violates the expressed public policy of this state, and would negatively impact settlement negotiations in the future.

The City maintains that Five Star is attempting to use Pegno/Tully and the City's settlement to improperly revive document discovery two years after the Court closed it. In addition, the City argues that it was not contractually obligated to prepare delay claim analysis documents, and therefore has no obligation to produce them.

The Court finds that the documents requested in the Five Star Subpoena and the Document Demand are immune from disclosure (*Those Certain Underwriters at Lloyds v Occidental Gems, Inc.*, 41 AD3d 362, 364 [1st Dept 2007]). Both during oral argument and in the briefs, Five Star has yet to articulate any reason supporting the necessity and materiality of the information and documents sought.

After review of the requested documents at oral argument dated March 30, 2017, this Court finds that the documents requested in the Document Demand and the Five Star Subpoena are privileged, and therefore, immune from disclosure under CPLR 3101[b] ((NYSCEF Doc. No. 57, 29:15-21). Five Star has failed to establish that the documents requested in the Document Demand were not created solely in anticipation of litigation or for the purpose of settlement negotiations between Pegno/Tully and the City. Further, Five Star has failed to persuade the Court that Pegno/Tully and the City waived any privilege by voluntarily disclosing the documents at issue during the Settlement.

Documents and claims analyses disclosed during settlement discussions are inadmissible for the purpose of establishing Pegno/Tully or the City's liability in the underlying action (*Masterwear Corp. v Bernard*, 298 AD2d 249, 250 [1st Dept 2002]).

Moreover, the claims analyses and correspondence that Five Star seeks, with the Confidentiality Agreement in place, are

neither material nor necessary to the prosecution of this action (In re New York County Data Entry Worker Product Liability Litigation, 222 AD2d 381, 382 [1st Dept 1995]; cf American Re-Insurance Co. v U.S. Fidelity & Guar. Co., 19 AD3d 103 [1st Dept 2005]).

This Court recognizes the competing public policy concerns between encouraging settlements and pre-trial disclosure, but finds that requiring disclosure would undermine future settlement negotiations (*Mahoney v Turner Constr. Co.*, 61 AD3d 101 [1st Dept 2009]).

With respect to the documents bearing some relevance to the complaint's allegations, these documents have already been made available to Five Star (NYSCEF Doc. No. 57, 30-31:23-5) (*DeLeonardis v Hara*, 136 AD3d 558, 558 [1st Dept 2016]). The relevant documents already produced include the PMA Reports and the Newtown Creek WP-283 Delay Analysis, and are responsive to Document Demand numbers 5-8 (*Singh Aff.*, Ex. 21).

The Document Demand and the Five Star Subpoena are improper to the extent that they request documents previously produced in discovery (*Kimmel v Paul, Weiss, Rifkind, Wharton & Garrison*, 214 AD2d 453, 453 [1st Dept 1995]).

Although the Five Star Subpoena was properly served, it seeks the same documents requested in the Document Demand, which have already been produced or are otherwise not discoverable.



Accordingly, it is hereby

ORDERED that Five Star's motion to compel is denied in its entirety; and it is further

ORDERED that depositions of all parties and non-parties shall take place on or before September 29, 2017; and it is further

ORDERED that the remainder of the action shall continue.

Dated: July 27, 2017

ENTER:

  
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J.S.C.

**CHARLES E. RAMOS**