

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 5
NASSAU COUNTY

DANIEL ROEPER,

Plaintiff(s),

-against-

GENE MAGISTRO HOME IMPROVEMENTS INC.,
GENE MAGISTRO INC., EUGENE MAGISTRO,
and EUGENE MAGISTRO,

Defendant(s).

ORIGINAL RETURN DATE: 05/16/08
SUBMISSION DATE: 05/16/08
INDEX No.: 001822/07

MOTION SEQUENCE #3,4

The following papers read on this motion:

Notice of Motion.....	1
Cross-Motion.....	2
Answering Papers.....	3
Reply.....	4
Memorandum of Law.....	6

Defendants move for an order, pursuant to CPLR 2304, quashing the subpoena served by plaintiff upon defendants' expert witness, Tom Rubino, upon the ground that plaintiff is not entitled to conduct a deposition of Mr. Rubino pursuant to CPLR 3101(d)(1)(iii). Plaintiff cross-moves for an order pursuant to 22 NYCRR 202.21 and CPLR 3101(d) granting leave to depose Tom Rubino after the filing of the Note of Issue, due to special circumstances.

This action arose as a result of construction of an extension to plaintiff's premises by defendants. Plaintiff alleges that there were structural, installation and construction damages, as well as damages after attempting repair and defective parts. An inspection of plaintiff's residence was conducted by Mr. Rubino on January 9, 2007.

Plaintiff served Interrogatories seeking, among other things, admissions from defendants that certain observations in Mr. Rubino's report are defects in construction. In their response defendants deny same as "[s]uch information is not within the possession of this answering defendant and the answering defendant does not have any personal knowledge of any such alleged defects." (Pl. Ex. B). Thereafter, plaintiff "requested any document created by the home inspector, Mr. Rubino" (Daw Aff. ¶8). Defendants provided plaintiff with a copy of Mr. Rubino's home inspection report.

Plaintiff claims that defendants "should have had, [sic] information from Mr. Rubino's report that would have enabled them to provide meaningful responses to the Interrogatories" (Id. ¶9). He now seeks to depose Mr. Rubino for those responses. Plaintiff is not seeking facts, however, but rather he is seeking conclusory opinions as to whether Mr. Rubino's observations were defects in construction.

CPLR 3101(d)1(iii) provides, in pertinent part, as follows: "Further disclosure concerning the expected testimony of any expert may be obtained only by court order upon a showing of special circumstances and subject to restrictions as to scope and provisions concerning fees and expenses as the court may deem appropriate. . . ."

The court does not find that plaintiff has set forth special circumstances that would warrant conducting the deposition of defendants' expert witness. Moreover, even if plaintiff had set forth sufficient special circumstances warranting disclosure from defendants' expert witness, his opinions would be excepted. *Rosario v. General Motors Corp.*, 148 AD2d 108 [1st Dept. 1989]; *see also, Stevens v. Metropolitan Suburban Bus Authority*, 117 AD2d 733[2d Dept. 1986])

Accordingly, defendants' motion is granted and the cross-motion of plaintiff is denied.

This decision constitutes the order of the court.

Dated: _____

6-30-08

HON THOMAS P. PHELAN



J.S.C.

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ENTERED

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COUNTY CLERK'S OFFICE