

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION NO. 2008-04641-B

JOHNSON GOLF MANAGEMENT, INC.,

Plaintiff,

v.

TOWN OF DUXBURY, ET AL.,

Defendant.

**OPPOSITION OF ROBERT TROY TO THE
DEFENDANT TOWN OF DUXBURY'S MOTION TO COMPEL
ANSWERS TO DEPOSITION QUESTIONS AND TO PRODUCE DOCUMENTS**

FACTS

This case is a claim by a disappointed bidder, Johnson Golf Management, Inc. ("Johnson") against the Town of Duxbury ("Town") based on alleged irregularities in a public bidding process for a contract to manage a public golf course. Attorney Robert Troy represented the Town until May 2012. The Town is currently represented by Attorneys Leonard Kesten and Arthur Kreiger.

On September 12, 2012, the Town filed an emergency motion to compel Troy to answer deposition questions that he had refused to answer on the ground of attorney-client privilege and to compel him to produce e-mails that the Town claims belong to it. The Town also requested an evidentiary hearing on whether there was an attorney-client relationship between Troy and Attorney Kesten and Kreiger. The Town did not conduct the mandatory Rule 9C conference, nor does the Town's motion contain the certification required by Rule 9C.

This Court (Haggerty, J.) originally granted the motion to compel production of documents and scheduled an evidentiary hearing on the issue of the attorney-client relationship. On September 17, 2012, however, the Court vacated these orders “pending the opportunity of counsel for Robert Troy to take a position.” The Town’s motion should be denied for failure to comply with Rule 9C and because it is moot.

ARGUMENT

I. THE TOWN’S MOTION MUST BE DENIED FOR FAILURE TO COMPLY WITH RULE 9C

The Town’s motion says that it is brought pursuant to Mass. R. Civ. P. 37. Superior Court Rule 9C requires that a party bringing a discovery motion pursuant to Rule 37 engage in a conference with the other party “in a good faith effort to narrow areas of disagreement to the fullest extent.” The Rule requires the moving party to initiate the conference and to certify in the motion that the conference has been held. “Motions unaccompanied by such a certificate will be denied without prejudice to renew when accompanied by such a certificate.”

The Town has not complied with Rule 9C and, consistent with its failure to comply, has not and cannot certify that it has complied. The Town’s failure to comply with Rule 9C is not simply a technical oversight. As will be shown below, in response to the Town’s motion, Troy has produced the requested documents and has agreed to answer the questions the Town wants him to answer. He would have done this in a Rule 9C conference. This would have saved the Court and the parties the expense and trouble of dealing with an unnecessary motion. For this reason alone, the Town’s motion should be denied.

II. THE TOWN'S MOTION IS MOOT

A. THE DEPOSITION QUESTIONS

Troy's deposition lasted two days and is over 400 pages long. Of the hundreds of questions put to him, he answered all but eight. He refused to answer those eight because he believed they required him to divulge information protected by the attorney-client privilege. The privilege is based on substantial evidence that Attorneys Kesten and Kreiger represented him in preparing for his deposition. Troy has filed an affidavit describing the reasons why there was an attorney-client privilege, and Kesten and Kreiger have filed affidavits setting out their explanation for why even though they prepared him for his deposition, they did not intend to represent him. These affidavits are attached to the Town's motion. Troy will answer the eight questions he did not answer at his deposition.

The unanswered questions the Town has identified in its motion are:

- So at that point I agreed to be your lawyer and that I would keep your confidence from the Town of Duxbury. Is that what you are saying? (p. 38).
- You were operating under the belief, right, that I was your lawyer and these were private conversations, right? (p. 40).
- Q. Mr. Troy, the meeting we had in my office on April 13th, do you remember that meeting where you brought the files up?
A. I do.
Q. Was that privileged? (p. 40).
- Do you have any memoranda whatsoever of any of these privileged meetings? (p. 41).
- When did I first agree to represent you? (p. 47).
- Do you remember me asking whether or not you had put that in after Gordon Cushing's deposition? (p. 47).
- Q. Do you remember my appearance at the pretrial?
A. I do.
Q. Was I your lawyer then? (p. 48).

- Do you have any indication from me, and by that I mean a letter or e-mail, of an attorney-client relationship between us? (p. 223).

Two observations are in order concerning these questions. First, they are irrelevant to the plaintiff's claims in this case or to the Town's defenses. Troy answered questions about his understanding of G.L. c. 30B and the actions he and the Town took in connection with the bidding process. He is prepared to answer those and related questions at trial. The questions at issue deal with Troy's preparation for his deposition by Attorneys Kesten and Kreiger. They are irrelevant to any claim or defense in this case.¹

Second, with one exception, all of the questions can be answered either "yes" or "no." The one exception asks for a date. Troy is prepared to answer these questions in writing under oath forthwith. Given the irrelevance of the questions, and the Town's failure to comply with Rule 9C, this is an appropriate resolution to this issue and gives the Town precisely the information it says it wants.

B. THE DOCUMENTS

When Troy ceased representing the Town in May 2012, the Town asked for his file in this case. Troy gave the Town the hard copy of the file he kept. The Town then asked for e-mails from and to Troy regarding the bidding process that were not part of the file he gave the Town. The vast majority of these e-mails are between Troy and various Town officials that are already in the Town's possession. Notwithstanding this, Troy has printed all of the relevant e-mails and they were delivered to counsel for the Town on September 27, 2012.

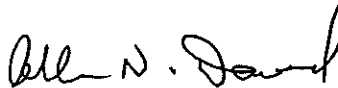
¹ They may be relevant to the Town's effort to build a claim against Troy. The Town unsuccessfully tried to bring him into this case as a third party defendant (Docket, Paper No. 128). Following that failed effort, the Town brought a separate claim against him in Plymouth Superior Court. Town of Duxbury v. Troy, Plymouth Super. Ct. No. 2012-0864. This, of course, would be an improper use of discovery in this case.

CONCLUSION

For the above reasons, Troy requests that the Town's motion be denied.

The Defendant,
ROBERT S. TROY,

By his attorneys,



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September 28, 2012

CERTIFICATE OF SERVICE

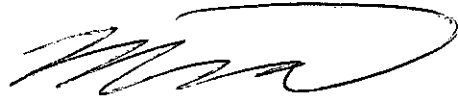
I, William R. Covino, hereby certify that on September 28, 2012 I served a copy of this document via email and first class mail, postage pre-paid, upon:

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