

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

GILBANE BUILDING COMPANY,)	
)	
Plaintiff,)	
)	
v.)	No. 02 C 2260
)	
DOWNERS GROVE COMMUNITY HIGH SCHOOL DISTRICT NO. 99)	Judge Rebecca R. Pallmeyer
)	Magistrate Judge Nan R. Nolan
)	
Defendant)	

MEMORANDUM OPINION & ORDER

This matter is before the court for ruling on third-party defendant Healy, Snyder, Bender & Associates' ("HSB") *Emergency Motion to Strike [plaintiff/counterdefendant] Gilbane's Supplemental Expert Report and for Sanctions* ("motion to strike), which defendant/counterplaintiff/third-party plaintiff Downers Grove Community High School District No. 99 (the "District") has joined. For the reasons explained below, the court grants the motion to strike to the extent HSB and the District ask the court to bar Gilbane from using the opinions set forth in the supplemental expert report at trial and awards reasonable attorneys' fees relating to the motion, but denies the remaining sanctions that HSB and the District seek.

I. BACKGROUND

Before explaining the reasoning underlying the court's ruling, it is first necessary to set forth in detail the factual background that led up to Gilbane's supplemental expert report and HSB's motion to strike that report.

This litigation relates to a construction project at Downers Grove North and South High Schools. The District, as owner, hired HSB as the architect and Gilbane as the construction

manager for the project (the "Project"). Gilbane sued the District in March 2002 for breach of contract, alleging that the District owes Gilbane more than \$2 million for additional labor costs and direct job costs that Gilbane incurred in handling numerous delays and disruptions in work caused by acts and events that were beyond Gilbane's control. For example, Gilbane contends it had to commit more resources and more employee-time to the Project in order to address problems discovered in the architectural drawings, problems with trade contractors, etc. The District filed a counterclaim against Gilbane for breach of contract and negligent misrepresentation, alleging that Gilbane failed to adequately perform its duties as construction manager, and that as a result the District has incurred additional expenses exceeding \$2 million. The District also filed a third-party complaint against its architect, HSB, alleging that in the event the District is found liable to Gilbane for damages caused by the failure of HSB to adequately perform its services as the architect, then HSB is liable to the District for such damages.

This matter was originally set to go to trial on December 6, 2004. Fact discovery in this case closed on July 15, 2004. (Minute Order of 5.07.04.) Under the terms of an agreed order entered on May 7, 2004, Gilbane and the District had until August 15, 2004 to disclose the names and reports of all expert witnesses, and the depositions of those experts were to be completed by September 15, 2004. (*Id.*) HSB, as third-party defendant, was scheduled to disclose the names and reports of its expert witnesses by September 15, 2004. (*Id.*) Gilbane and the District's rebuttal opinions also were to be disclosed by September 15, 2004, and the depositions of HSB's experts and any rebuttal experts were to be completed by October 15, 2004. (*Id.*)

As part of its expert disclosures, on August 16, 2004, Gilbane disclosed Gilbane employees Steve Rothamer, Jerry Kocko and Mark Karaskiewicz as its expert witnesses

regarding construction scheduling, and disclosed their joint expert report entitled “Scheduling and Management Staffing Impacts” (the “Expert Report”), which offered opinions regarding events that occurred on the Project that affected scheduling of the Project and the manpower Gilbane had to commit to the Project.¹ To demonstrate and supplement the narrative opinions, the Expert Report included a project schedule update, dated October 15, 2000. Karaskiewicz, Kocko and Rothamer created the project schedule update by taking two of the actual schedules from the Project (one from Downers Grove North High School and one from Downers Grove South High School) to use as baselines, and updating those schedules to show how numerous delays had affected the Project by the Fall of 2000, and to show the measures Gilbane utilized to mitigate the effects of those delays on the Project schedule. (Gilbane Expert Report, Tab 1.A and Tab 5.)

Gilbane also disclosed Michael Callahan as its expert on scheduling methodology.² Callahan’s expert report explained, in relevant part, that he was retained to “assist and advise Gilbane in the preparation of its schedule analysis to be used for identifying durations and causes

¹The Gilbane Expert Report dated August 16, 2004 is HSB exhibit 2 from the August 2004 evidentiary hearing.

By way of example only, the Expert Report states that the contract documents relating to a new masonry wall in Building A at Downers Grove North High School failed to include adequate masonry reinforcing steel. Although HSB agreed that additional reinforcing steel was necessary, both HSB and the District initially refused to authorize a change order that would define the additional, necessary work as extra work beyond the scope of the masonry trade contractor’s original contract. HSB and the District eventually authorized a change order several months later, but the delay not only forced the masonry trade contractor to reallocate its resources but also significantly impacted subsequent work on the masonry, steel, roofing, windows, doors, floor slab, etc. (Gilbane Expert Report, Tab 1.B at 4.)

²Although Gilbane also disclosed other experts, those experts are not relevant to the pending motion to strike.

