

**Ash v The Board of Managers of the 155
Condominium**

2006 NY Slip Op 30260(U)

October 25, 2006

Supreme Court, New York County

Docket Number:

Judge: Walter Tolub

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WALTER B. TOLUB

PRESENT: _____
Justice

PART 15

ASH
- v -
Bo of Managers
155 CONDO.

INDEX NO. 106769/03
MOTION DATE 8.11.2006
MOTION SEQ. NO. 006
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...	_____
Answering Affidavits - Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is consolidated with motion sequence 005 and resolved in the accompanying Memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED
NOV 02 2006
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/27/06

WALTER B. TOLUB J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

-----x
ALLAN A. ASH and JOEL S. ASH, as co-executors
for the estate of Ruth Mishkin, deceased,
and on behalf of the 155 CONDOMINIUM

Plaintiff,

Index No. 106769/03
Motion Seq. 005, 006

-against-

THE BOARD OF MANAGERS OF THE 155
CONDOMINIUM, GARY DONG, ARNOLD
GITOMER, NEW BEDFORD MANAGEMENT CORP.,
MICHAEL WECHSLER and THE 155 CONDOMINIUM,

Defendants.

-----x

WALTER B. TOLUB, J:

Motion sequence 005 and 006 are consolidated and resolved in
the accompanying memorandum decision.

For the fifth and sixth time, this court revisits the
instant action arising out of a claim of breach of fiduciary
duties against a Manhattan residential cooperative, its board of
managers, and former managing agent.

This action was originally commenced in the form of a
derivative action by the late Ruth Mishkin during the spring of
2003. Ms. Mishkin was the owner of unit 17B of defendant, the
155 Condominium (the "Condominium"). Ms. Mishkin's original
complaint alleged three causes of action against defendants:
breach of fiduciary duty, entitlement to attorneys fees and

costs, and sought an order discharging defendants New Bedford Management Corp. ("New Bedford") and Michael Wechsler (defendant "Wechsler") from their duties as managing agents. The first and second motions entertained by this court resulted in dismissal of the second and third causes of action, leaving only the cause of action for breach of fiduciary duty.

Shortly thereafter, plaintiff brought the third motion sequence in this litigation, which sought to add Allan A. Ash (hereinafter, "Mr. Ash") as a co-plaintiff in the instant action, and to amend the complaint to include a claim for attorneys fees, a demand for an accounting, and to assert a claim against the defendants for improper use of condominium funds. By decision dated June 17, 2004, this court denied plaintiff's sought after amendment for attorneys' fees, but allowed the inclusion of a second cause of action seeking an accounting and a third cause of action for improper use of condominium funds as against all defendants. The application to add Mr. Ash as a co-plaintiff was however, denied because:

Mr. Ash did not acquire any interest in the Condominium until 2003 and consequently, was not harmed by any actions the Condominium did or did not take prior to that acquisition (Decision dated June 17, 2004).¹

¹ The court notes however, that the papers submitted with the two present motions make it abundantly clear that Mr. Ash, despite being denied status as a co-plaintiff in 2004, was undeniably already an active participant in this litigation, having declared to the board that he not only held a power of

In 2005, following Ms. Mishkin's death, this court, upon motion, permitted Mr. Ash and Joel Ash to be substituted as plaintiff in the above action (Decision Dated December 2, 2005). From the issuance of the order until the parties appeared for a compliance conference on February 3, 2006, Mr. Ash wrote and circulated at least ten letters and/or publications which he sent to the individual defendants and the owners of the defendant condominium.² All of these documents contain a multitude of remarks, many of which could easily be classified as disparaging, about the litigation, counsel for the defendants, and the individual defendants themselves. The literary "gems" excerpted from Mr. Ash's publications and letters include:

Yesterday you got another lying letter from the Board of Liars, Chiefs, Ansbro and Dong (January 24, 2006)

I have never in my life met such a group of liars and immoral people as I have met in the administration of this Condominium. Every one of you is an appalling miscarriage in the creation of living on this continent. You are joined by the accountants you have hired, the managing agents you have hired and the lawyer you have hired. Slime mixes with slime. [...] (January 23, 2006)

attorney for Ms. Mishkin, but was also asserting co-ownership (see, November 8, 2003 and August 7, 2003 letters from Mr. Ash to the Board of Managers, Notice of Cross-Motion, Exhibit A).

² Examination of the Affidavit of Alan Ash as well as the Cross-Motion exhibits submitted by defendants reveal that since 2003, Mr. Ash had written well over fifty letters and/or publications that he had circulated to the board, and in many cases, condominium owners and tenants.

These lies are artfully written. They are sly, sneaky. They carry the stamp of John Van Der Tuin, Esq. John Ansbro, Esq., and Gary Dong, an executive with JP Morgan Chase. As to the letter from AKAM, the liar Christopher Eisler, it comes up from the sewer, the same as Eisler (January 23, 2006)

[John Ansbro] is a most polished liar [...] an experienced artist - a cover up artist [...] (January 20, 2006)

I was fooled when I voted for John Ansbro. Within 40 days I learned that John Ansbro was a dishonorable creature [...] (January 18, 2006)

The Condominium's money has been spent for self-serving purposes for the benefit of Ansbro, Dong, and Board Members and perhaps their close friends and for cover-up of theft and misappropriation of our funds. I am certain of one thing - Ansbro, Dong, and other Board Members are immoral, lack integrity, and have committed acts which no doubt are illegal (December 8, 2005)

\$403,424 A Partial list of money our condominium lost directly due to the misbehavior of Gary Dong and John Ansbro. How much more could I have found if Ansbro and Dong did not conspire with Michael Wechsler to cover up wechsler's theft and other improper activities? Plenty! [...] Owners, I have written you again and again showing you the vile character of Ansbro, Dong, the Board and John Van Der Tuin [...] (December 1, 2005)

(Notice of Motion, Affidavit of Alan Ash).

The letters written during this time frame, which include discovery demands that were made directly to the defendants and then Mr. Ash's responses about the discovery process which were

circulated to the owners and the individual defendants, led this court to believe that plaintiffs' prior counsel had lost the ability to control his client.³ This was further illustrated at the conference on February 3, 2003. As such, this court directed that plaintiff was to cease "contacting any members of the condominium with respect to this litigation" and further directed that "all inquiries are to be presented to counsel who will then make appropriate inquiry" (Notice of Motion, Exhibit A).

On March 24, 2006, this court again held a compliance conference at which Mr. Ash appeared *pro se*. Because of his *pro se* status and the fact that this action is a derivative action, this court stayed discovery so as to allow Mr. Ash obtain counsel. The court also directed that:

Plaintiff is further ordered to cease contacting any members of the condominium with respect to this litigation.

This restriction includes contacting any member of any publication whatsoever, including fliers, advertisements [sic], etc.

Plaintiff is free to contact members of the condominium with respect to notifying them about new conditions not related in any way to this litigation.
(Notice of Motion, Exhibit C).

³ The court uses this phrase because since the substitution of Allan and Joel Ash as plaintiffs in this matter, only Mr. Ash has ever been present for any of the conferences and motion practice.

Motion Sequence 005

By motion sequence 005, plaintiff's newest counsel moves this court to vacate the orders issued by this court on February 3, 2006 and March 24, 2006 prohibiting plaintiff Alan Ash from contacting the condominium members about this litigation on the grounds that said orders are violative of the United States and New York Constitutions. Defendants cross move for a restraining order.

Plaintiff's counsel asserts that neither of this court's orders restricting Mr. Ash from communicating directly with members of the condominium about this litigation is permissible because it violates State and Federal Law. To a certain extent, plaintiff's counsel is correct. "Orders restraining extrajudicial comments by the parties or their attorneys are not generally permitted unless there is a reasonable likelihood of the existence of a serious threat to a fair trial" (Lowinger v. Lowinger, 264 Ad2d 763 [2nd Dept. 1999], citing, Matter of National Broadcasting Co. v. Cooperman, 116 AD2d 287 []; Sheppard v. Maxwell, 384 US 333[]).

However, the courts are also given an "inherent power over the control of their calendars and the disposition of business before them" (Hochberg v. Davis, 171 AD2d 192 [1st Dept 1991] so that they may "regulate proceedings, promote and foster order and

decorum, and to further the administration of justice" (Id., citing, People v. Jelke, 308 NY 56; Matter of Goldberg v. Extraordinary Special Grand Juries of Onondaga County, 69 AD2d 1, app. den. 49 NY2d 608).

The orders imposed by this court restricting Mr. Ash's actions were not implemented on a whim. They were a response to a litigant who, while enjoying unfettered access to the courts, has been clearly using the discovery process to not only delay the legal proceedings, but to harass the individual defendants, ~~their families, their neighbors, their employees⁴, and their~~ lawyers. The result of this relentless campaign, was essentially a freeze on any meaningful discovery.

Mr. Ash's involvement in this litigation, and his interest in the goings-on of the condominium board of managers far precede his substitution as a plaintiff in this action. He has made countless demands to see the records of the Condominium. While that is well within his rights as a shareholder, and as a litigant,⁵ those demands become detrimental to the discovery

⁴ One of the most recent letters written by Mr. Ash was sent to Gary Dong's employer. That letter, alleges that Mr. Dong's actions were "unethical, immoral, and perhaps in some cases, criminal" and suggests that Mr. Dong participated in a felony (see, Letters Dated January 19, 2006, and January 18, 2006, Cross Motion, Exhibit B).

⁵ Again, the court reminds Mr. Ash that he has been substituted into this action not as an individual litigant, but as co-executor for the Estate of Ruth Mishkin.

process with the issuance of letters to defendants, or those holding records belonging to defendants, containing comments such as this:

"I acknowledge the receipt of your letter addressed to me dated November 16, 2005 to examine The 155 Condominium records. Once again. Ansbro, Dong, and your agent, Eisler, you are liars (Letter From A. Ash to John Ansbro, Gary Dong, and Christopher Eisler dated December 8, 2004, Notice of Cross-Motion, Exhibit A).

or this:

~~I wanted to know what records were available to me, and I~~
wanted you to know that if the only time you would let me come in is between 3:00 and 5:00, 2 hours to look at a lot of records, that I would have some trouble.

The trouble would be that when I go to the toilet and come out, the 2 hours would be over. So what do I do? Do I take the records into the bathroom with me? [...]

So, Your Majesty, please ask Empty Emperor Ceasar, John Ansbro, how much time will be available to me to see the records or to sit on the toilet and audit the records?
(Letter from Alan Ash to Christopher S. Eisler, AKAM Associates (current managing agent of the Condominium) Dated March 31, 2005, Notice of Cross Motion, Exhibit A)

(Letter from Alan Ash to Christopher S. Eisler, AKAM Associates (current managing agent of the Condominium) Dated March 31, 2005, Notice of Cross Motion, Exhibit A).

These letters represent only a very small sample of the stack of documents presented to this court on these motions. It is detrimental to the litigation process, and it is thwarting the resolution of this already three-year-old action. A litigant, regardless of whether they are appearing pro se or are represented by counsel, may not use the discovery process as a weapon to harass others (see, Scomello v. Firestone, 11 Misc.3d 1009(A), 819 NYS2d 851, 2006 WL 1222389 (U) [Sup. Ct. Suffolk Co. 2006]; Kane v. City of New York, 468 F.Supp 586 [SDNY 1979], ~~aff'd 614 F.2d 1288 [2nd Cir. 1979]~~). As such, under these circumstances, while this court may have erred in barring Mr. Ash from voicing his opinions to other board members, it certainly, under the circumstances, did not err in barring Mr. Ash from communicating directly with defendants or entities which hold the records that Mr. Ash seeks to review. The court therefore modifies the orders issued in February and March of 2006 so as to preclude Mr. Ash from directly contacting the defendants involved in this action. Mr. Ash however, is cautioned that while he is free to speak his mind, the spoken word often has consequences, and more importantly, may be actionable in a court of law. Moreover, since it has been more than adequately demonstrated that there are discovery problems which remain in this action, all remaining discovery disputes shall be handled by a Special Referee.

Motion Sequence 006

By motion sequence 006, defendants move for an order limiting and quashing the subpoenas issued by plaintiff pursuant to CPLR 3103(a) and 2304. Specifically, defendants move to quash the subpoenas of nonparties John Ansbro and John Scelfo, both former members of the Board of Managers, and Jay Fingerman, an employee of new managing agent AKAM. Defendants move to limit the subpoenas of defendants Michael Wechsler (employee of former managing agent New Bedford), Gary Dong (current member of the Board of Managers), and Arnold Gitomer (former member of the Board of Managers).

Contrary to plaintiff's argument, even in the First Department, a party seeking disclosure from a nonparty witness must first demonstrate special circumstances or that the information sought is relevant and can not be obtained from other sources (Tannenbaum v. City of New York, 30 A.D.3d 357 [1st Dept 2006]). Moreover, even in the absence of a "special circumstances" requirement, the party seeking the disclosure must demonstrate that the information sought "bears on the controversy and will assist in the preparation for trial; the ultimate test is one of "usefulness and reason" (In re New York County DES Litigation, 171 A.D.2d 119, 123 [1st Dept 1991] quoting, (O'Neill v. Oakgrove Constr., 71 N.Y.2d 521, 526; Allen v. Crowell-Collier Publ. Co., 21 N.Y.2d 403, 406).

Here, plaintiff seeks to depose nonparty John Ansbro and John Scelfo, both former members of the Board of Managers, and Jay Fingerman, an employee of new managing agent AKAM. All of the information sought from each of these individuals is identical to the information sought from the defendants in this action, and, it is more than likely that the defendants will be able to either produce or testify to the information sought. It is therefore doubtful, that any of the testimony elicited from the proposed nonparty deponents would be useful or assist in the ~~preparation of trial. It would however, be unduly repetitive.~~

As such, until it is established that testimony from nonparty John Ansbro, John Scelfo, and Jay Fingerman is required, the subpoenas for these individuals are quashed pursuant to CPLR 2304.

The balance of defendant's motion to quash the subpoenas denied inasmuch as there remains too much outstanding discovery that has not yet been produced, and which requires production. However, as with the remaining discovery in this matter, any disputes as to production, discovery or scope of depositions shall hereby be referred to a Special Referee to expeditiously resolve. Accordingly, it is

ORDERED that plaintiff's motion (sequence 005) seeking to vacate the portion of the orders issued by this court on February 3, 2006 and March 24, 2006, which sought to prohibit plaintiff

Alan Ash from contacting, in any form, whatsoever, the condominium members about this litigation, is granted to the following extent:

Plaintiff Alan Ash is prohibited from directly contacting any of the litigants involved in this matter during the duration of this action. Any communications, questions, assertions of opinion, discovery demands, etc. must be presented to plaintiff's counsel, who shall then present said communications, questions, assertions of opinion, ~~discovery demands, etc. to counsel for the defendants.~~

Within three days of receipt, counsel for defendants will present said communications, questions, assertions of opinion and discovery demands to the defendants.

The balance of the portion of this court's orders dated February 2, 2006 and March 24, 2006 which sought to restrict plaintiff Alan Ash's contact with the members of the Condominium Board are hereby vacated; and it is further

ORDERED that defendant's cross-motion for a restraining order is denied; and it is further

ORDERED the portion of defendant's motion (sequence 006) seeking to quash the subpoenas of nonparties John Ansbro, John Scelfo, and Jay Fingerman is granted; and it is further

ORDERED that the portion of defendant's motion (sequence 006) which sought to limit the subpoenas of defendants Michael

Wechsler, Gary Dong, and Arnold Gitomer is at this juncture, denied; and it is further

ORDERED that all remaining discovery issues, including deposition disputes which may arise, are hereby referred to a Special Referee who shall oversee discovery and make appropriate rulings resolving discovery disputes where necessary; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Judicial Support Office (Room 311) to arrange a date for the reference to a Special Referee.

Counsel for the parties are directed to appear for a compliance conference in IA Part 15, Room 335, New York County Courthouse, 60 Centre Street, New York, New York, on December 8, 2006 at 11:00 a.m.

This constitutes the decision and order of the court.

DATED:

10/25/06

ENTER:

[Signature]
HON. WALTER B. TOLUB, J.S.C.

FILED

NOV 02 2006

COUNTY CLERK'S OFFICE
NEW YORK