[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EDWARD H. LEHNER Justice PART 19

QUILES

-v-

TERM EQUITIES

INDEX NO. 009

MOTION DATE

MOTION SEQ. NO. 114083/01

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

FILED MAR 01 2006 COUNTY CLERK'S OFFICE NEW YORK

motion is decided in accordance

with accompanying memorandum decision

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: FEB 02 2006

FEB 02 2006

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19

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MARIA QUILES, VICTOR GUZMAN, SERAFIN CALO, EMILIA GARCIA, MARIA E. LEDESMA, and CEFERINA OYOLA

Plaintiffs,

Index No. 114083/01

-against-

TERM EQUITIES, NASSER FARHADIAN, and KEIVAN FARHADIAN

Defendants.

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Lehner, J.:

In motion sequence 009, plaintiffs seek to compel defendants to disclose communications with their counsel, or in the alternative, preclude defendants from raising an advice of counsel defense at trial. In motion sequence 010, plaintiffs move for a civil contempt order against non-party, George Schwartz, for failure to comply with plaintiffs' June 3, 2005 subpoena. In motion sequence 011, plaintiffs move to preclude defendants from introducing evidence at trial pertaining to repairs at the subject premises, and to the amount of rent received from the leasing of apartments at the subject premises since the fire.

Background

This action is for damages resulting from defendants' alleged failure to restore plaintiffs to their rent-regulated apartments after a 1998 fire at the subject premises. Plaintiffs

allege that they sustained property damage, personal injury, and, among other things, were wrongfully evicted from their apartments after the fire. As the court's previous decision, dated August 16, 2004, sets forth a detailed account of the facts, it is not necessary to repeat them here.

Motion Sequence 009

In June 2005, plaintiffs defaulted on their discovery motion to compel defendants to disclose communications with their counsel (motion sequence 008), and the action was struck from the court's calendar. On August 19, 2005, this court ordered that the action be restored. On August 22, 2005, the parties entered into a stipulation to vacate the default, and set a date to recommence the plaintiffs' motion to compel/preclude. Therefore, the court will now decide plaintiffs' motion on its merits.

Plaintiffs claim that the defendants have invoked the attorney-client privilege to prevent disclosure of communications with their attorneys concerning defendants' decision not to restore plaintiffs to their apartments, and thus, should be precluded from making reference to an advice of counsel defense at trial. Plaintiffs further claim that if defendants plan to make such reference, they must be compelled to disclose communications with their attorneys in regard to restoring plaintiffs' apartments. Defendants assert that they have not invoked the attorney-client privilege.

Plaintiffs rely on the non-party deposition of Sherwin Belkin of the firm Belkin, Burden, Wenig & Goldman, the attorney who allegedly advised defendants in regard to the subject premises, in support of their argument. At Belkin's deposition, plaintiffs marked into evidence a letter sent by Belkin to defendant Keivan Farhadian, which Belkin, and his colleague Joseph Burden, asserted was privileged. This document was not produced by Belkin, and it is not clear how plaintiffs received the document. Upon further questioning, Belkin asserted attorney-client privilege, but he is a non-party witness, not representing the defendants in this matter, and thus, has no standing to assert the privilege on behalf of defendants. However, defendants' current attorney, Charles O'Bryan, was also present at the Belkin deposition, and he unequivocally asserted privilege on behalf of his clients. Plaintiffs' attorney specifically asked O'Bryan "for the record are you asserting the privilege for your clients," and O'Bryan replied "yes." *See* Deposition of Sherwin Belkin, Plaintiffs' Exhibit B. Thus, the attorney-client privilege was asserted. The court does not find merit in defendants' argument that it was not asserted, because it was a non-party deposition.

Although defendants clearly asserted attorney-client privilege in regard to communications with Belkin, there is no indication, besides plaintiffs' allegations, that defendants have

raised or plan to raise an advice of counsel defense. The answer does not raise this defense, and the court does not find that defendant Keivan Farhadian's deposition testimony put the advice of counsel defense in issue. However, defendants never assert that they will not raise an advice of counsel defense at trial. In fact, defendants' counsel states in his Affirmation of Opposition that plaintiffs are "seeking to prevent the Court from considering their defense when, as, and if it becomes appropriate at the time of the trial of this matter to invoke this defense." *See* Affirmation of Charles O'Bryan in Opposition ¶ 13.

Therefore, defendants must provide an affidavit stating whether or not they plan to rely at trial on advice of counsel to defend any of the plaintiffs' claims, within thirty (30) days from service of a copy of this order with notice of entry. Unless defendants affirmatively waive such a defense, they must also, within the same time period, provide plaintiffs with the communications between defendants and their advising counsel. In addition, plaintiffs may re-subpoena Sherwin Belkin to appear for oral or written deposition to answer the questions blocked by defendants' attorney.

Motion Sequence 010

In motion sequence 010, plaintiffs move, by order to show

cause, for an order finding non-party George Schwartz[1] in civil contempt for allegedly failing to comply with a June 2005 subpoena requiring Schwartz to appear for deposition. Plaintiffs claim that they served Schwartz with the subpoena on June 3, 2005, directing him to appear for deposition on June 29, 2005, and Schwartz made no such appearance.

On June 9, 2005, O'Bryan sent plaintiffs' counsel a letter acknowledging receipt of the Notice to Take a Deposition Upon Oral Examination of Schwartz, and stated that there were procedural irregularities in the service of the subpoena. O'Bryan also cited to *Brooks v City of New York* (178 Misc 2d 104 [Sup Ct, NY County 1998]), as a basis for plaintiffs to withdraw the subpoena. *Brooks* holds that, in order to depose an expert, a court order must be obtained upon the showing of special circumstances. Plaintiffs' counsel responded that Schwartz was not served improperly, and that Schwartz was not being deposed as an expert.

Service of a subpoena is governed by CPLR 2303 (a), which provides, in relevant part,

> "A subpoena requiring attendance or a subpoena duces tecum shall be served in the same manner as a summons [CPLR 308], except that where service of such subpoena is made pursuant to subdivision two or four of section three

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[1]Schwartz was defendants' architect, involved with work on the apartment building after the fire.

> hundred eight of this chapter, the filing of proof of service shall not be required and service shall be deemed complete upon the later of the delivering or mailing of the subpoena, if made pursuant to subdivision two of section three hundred eight of this chapter ..."

CPLR 308 (2) provides, in relevant part,

> "Personal service upon a natural person shall be made by any of the following methods:
>
> 2. by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend 'personal and confidential' and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such delivery and mailing to be effected within twenty days of each other;"

Plaintiffs' counsel submitted an affirmation of service, which affirms that he served Schwartz by going to Schwartz' place of business, on a certain date and time, and leaving the subpoena with a secretary of suitable age and discretion, whom counsel sufficiently describes. Counsel also affirms that he placed a copy of the subpoena in the mail, in an envelope bearing the label "Personal and Confidential," without a return address, with the proper first class postage, addressed to Schwartz at his place of business. This was proper service under CPLR 2303 (a).

Also, the court does not find merit in defendants' reliance

on *Brooks*. Defendants do not allege that Schwartz is an expert witness retained for trial. Schwartz was hired by the defendants to work on the apartment building after the fire, and it is clear that plaintiffs wish to depose Schwartz in connection with this work, and not as an expert. Plaintiffs were not required to show special circumstances as required by *Brooks* and CPLR 3101 (d) (1) (iii).

In their opposition papers, defendants argue that the subpoena did not comply with CPLR 3101 (a) (4), an argument they previously made in support of their January 2005 order to show cause to quash a similar subpoena served on Schwartz in November 2004, which this court granted. The court agrees that plaintiffs' subpoena did not meet the requirements of CPLR 3101 (a) (4).

CPLR 3101 (a) (4) requires a party, when seeking disclosure from a non-party, to serve notice on all other parties, and a subpoena on the non-party, advising of the disclosure, and "stating the circumstances or reasons such disclosure is sought or required." CPLR 3101 (a) (4). The plaintiffs' subpoena was facially defective because it did not state the circumstances or reasons for such disclosure from Schwartz. *See Lazzaro v County of Nassau*, 240 AD2d 546 (2nd Dept 1997). The plaintiffs' Notice to Take Deposition on Oral Examination to defendants' counsel also does not state the circumstances or reasons for disclosure.

See Bigman v Dime Sav. Bank, 138 AD2d 438 (2nd Dept 1988). In light of this defect, the court cannot grant plaintiffs' motion for civil contempt against George Schwartz. However, if the plaintiffs properly serve Schwartz with a subpoena satisfying all the necessary requirements of CPLR 3101, this court will not tolerate any delay by Schwartz or the defendants.

Motion Sequence 011

In motion sequence 011, plaintiffs move to preclude defendants from introducing evidence at trial pertaining to repairs at the subject premises, and to the amount of rent received from the leasing of apartments at the subject premises since the fire.

On October, 28, 2004, this court directed defendants to furnish discovery pertaining to, among other things, repairs at the premises, and rents received since the fire. Defendants were further ordered to submit an affidavit from the person(s) charged with maintaining such records if unable to comply with the court's direction. Defendants responded to this order by submitting a Response. Defendants' Response stated that discovery pertaining to rent amounts had already been provided by Keivan Farhadian, and that defendants were not in possession of the discovery requested in regard to repairs at the subject premises after the fire.

Plaintiffs argue that defendants are in possession, at the

very least, of bills and architectural plans from Schwartz, because defendant Keivan Farhadian testified at his deposition that Schwartz prepared plans and rendered bills for dividing the vacant apartments, which defendant believed he had in his files. Defendants, however, argue that these architectural plans were for new construction, and not repairs, the subject of plaintiffs' requested discovery. However, even though defendants contend that the work was for new construction, these documents pertaining to work on the apartments are relevant to plaintiffs' discovery request. Plaintiffs are entitled to discovery that is not only relevant to their case, but also discovery that might lead to the discovery of admissible proof. *See Keenan v Harbor View Health & Beauty Spa*, 205 AD2d 589 (2nd Dept 1994). Further, from Farhadian's deposition excerpt, it is not clear whether the work was new construction, and Farhadian does not label the work as such. These documents are discoverable, and should be furnished to the plaintiffs, if in defendants' possession.

In so far as defendants' Response states that all documents pertaining to the rents have been furnished to plaintiffs, and that other discovery, not specifically addressed above, are not in defendants' possession, this court previously ordered that defendants must provide a statement under oath from a person maintaining these records if they cannot comply with the plaintiffs' requests. Defendants have failed to do so. The

Response is not sworn to, and only signed by defendants' attorney. Therefore, plaintiffs' motion to preclude is granted unless defendants provide a sworn affidavit from the person(s) charged with maintaining such records within ten (10) days from service of a copy of this order with notice of entry.

Accordingly, it is

ORDERED that plaintiffs' motion to preclude defendants from raising an advice of counsel defense at trial is granted at this time. Defendants must provide an affidavit stating whether or not they plan to rely at trial on advice of counsel to defend any of the plaintiffs' claims, within thirty (30) days from service of a copy of this order with notice of entry. Unless defendants affirmatively waive such a defense, they must also, within the same time period, provide plaintiffs with the communications between defendants and their advising counsel. In addition, plaintiffs may re-subpoena Sherwin Belkin to appear for oral or written deposition to answer the questions blocked by defendants' attorney; and it is further

ORDERED that plaintiffs' motion for a civil contempt order against non-party, George Schwartz, for failure to comply with plaintiffs' June 3, 2005 subpoena is denied; and it is further

ORDERED that plaintiffs' motion to preclude defendants from introducing evidence at trial pertaining to repairs at the subject premises, and to the amount of rent received from the

leasing of apartments at the subject premises since the fire is granted unless defendants provide plaintiffs with the documents in regard to work on the apartments after the fire within twenty (20) days from service of a copy of this order with notice of entry. In regard to any documents defendants are not in possession of, pertaining to rents and work on the subject premises, defendants must provided a sworn affidavit from the person(s) charged with maintaining such records, within twenty (20) days from service of a copy of this order with notice of entry, or continue to be precluded from introducing such evidence at trial.

Dated: FEB 0 2 2006

ENTER:

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