

Groom v Cipriano

2007 NY Slip Op 31696(U)

June 13, 2007

Supreme Court, Richmond County

Docket Number: 0100099/2006

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND PART DCM 3**

**Index No.: 100099/2006
Motion No.: 1, 2 & 3**

SHIRLEY GROOM a/k/a/ SALLY GROOM,

Plaintiff

against

DECISION & ORDER

HON. JOSEPH J. MALTESE

**EMIL CIPRIANO a/k/a/ SONNY CIPRIANO d/b/a
CRYSTAL CLEAN HOME REMODELING and
CRYSTAL CLEAN HOME REMODELING, INC.,**

Defendants

The following items were considered in the review of this motion regarding discovery

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1, 2, 3
Answering Affidavits	4, 5
Exhibits	Attached to Papers
Memorandum of Law	

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

In motion number 1, the defendants move for an order pursuant to CPLR § 2304 quashing the subpoenas duces tecum served upon the defendant's mother, aunt, employer, seller of real property, and business associate as it is alleged that the information sought is irrelevant and immaterial to the instant action. In motion number 2, the defendants move for an order pursuant to CPLR § 3122 for a protective order, relieving them of the necessity to respond to the notice for discovery and inspection and plaintiff's first demand for production of documents dated December 11, 2006. The plaintiff opposes both motion number 1 and 2 and cross-moves in motion number 3 for an order pursuant to CPLR § 3126 and § 3126 striking the defendant's answer for failure to comply with discovery demands or in the alternative directing the defendants, *inter alia*, to produce the documents for inspection and copying at the plaintiff's office and directing the defendants to appear for an oral deposition within 30 days.

This action is to recover a sum certain from the defendant based upon his oral and written promises of repayment for the monetary loans that the plaintiff previously tendered to him. As of January, 2006, the value of the loan is alleged to be at least \$229,972.00.

The plaintiff moved to seek documents from the plaintiff's mother and employer based upon the fact that the mother was the real estate agent contracted to sell one of the properties owned by the defendant in this action after he accrued his debts. The plaintiff's complaint propounds the following causes of action: 1) breach of contract; 2) money had and received; 3) money lent; 4) fraud; 5) unjust enrichment; and 6) promissory estoppel.

The plaintiff is the holder of a promissory note dated October 8, 2006 wherein the defendant promised to pay the plaintiff at least \$165,000.00 "on receipt all money I receive from the sale of my interest in 223 Woolley Avenue, Staten Island or from the sale of other property or business that I own." The plaintiff alleges that both the defendant's mother, Angela Cipriano, the real estate agent, as well as the employer, Neuhaus Realty, have relevant and material information in connection with the real estate transaction of the premises located at 223 Woolley Avenue, Staten Island, New York.

The plaintiff has also served the aunt of the defendant, Vivian Mastellone, who was with the payee, endorser, or co-endorser of at least 18 checks that the plaintiff tendered to the defendant as monetary loans from her personal, investment, and retirement accounts. Michael Clementoni was served with a subpoena as he was the seller of real property to the defendant on or around December, 2004. This is the real property where the defendant currently resides. And finally, Roseann DePaolo was served with a subpoena as it is alleged that she withdrew \$4,000 from the plaintiff's home equity line of credit held at New York Community Bank on April 23, 2006 without the plaintiff's consent, knowledge or authorization.

It is well settled that the purpose of a *subpoena duces tecum* is to "compel the production of specific documents that are relevant and material to facts at issue in a pending judicial proceeding (*Matter of Terry D.* 81 NY2d 1042 [1993]; *Valdez v. Sharaby* 258 AD2d 458 [2d Dept 1999]).

Furthermore, the disclosure provisions of the CPLR are to be liberally construed with the test being one of usefulness and reason (*Wood v. NYCHA*, 228 AD2d 235 [2d Dept 1996]). All evidence that is material and necessary in the prosecution of case must be adduced in the discovery process, regardless of the burden of proof (*Perrotte v. Eli Lilly & Co.* 171 AD2d 119 [1st Dept 1991]).

The term “material and necessary” is broadly interpreted to “require disclosure, upon request, or any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason.” (*Allen v. Crowell-Collier Publishing Co.* 21 NY2d 403 [1968]).

After reviewing the subpoenas, notice for discovery and inspection, and notice for production of documents previously served, the court finds that they are relevant to this action and that they are limited in scope and narrowly tailored to the subject matter of the underlying action pending before the court. Accordingly, the information sought is discoverable and motions number 1 to quash the subpoenas and motion number 2 for a protective order are both denied in their entirety.

Motion number 3 seeking to strike the defendants’ answers or in the alternative compelling the defendants to produce documents for inspection is granted to the extent that the defendants are to produce the documents enumerated in the December 20, 2006 letter within 60 days or the defendant’s answer is stricken.

Accordingly, it is hereby:

ORDERED, that motion number 1 seeking to quash is denied in its entirety; and it is further

ORDERED, that motion number 2 seeking a protective order is denied in its entirety; and it is further

ORDERED, that motion number 3, is granted to the extent that the defendant's are to produce the documents enumerated in the December 20, 2006 letter within 60 days or the defendants answer is stricken; and it is further

ORDERED, that all parties are to return to DCM 3 at 9:30 AM on **July 9, 2007** for a compliance/status conference

ENTER,

DATED: June 13, 2007

Joseph J. Maltese
Justice of the Supreme Court