

Kimso Apts., LLC v Gandhi
2007 NY Slip Op 32851(U)
September 14, 2007
Supreme Court, Richmond County
Docket Number: 0013489/2003
Judge: Robert Gigante
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

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KIMSO APARTMENTS, LLC, successor by merger
to KIMSO APARTMENTS, INC.,
POONAM APARTMENTS, LLC, successor by merger
to POONAM APARTMENTS, INC.,
185-225 PARKHILL, LLC, successor by merger
to 185-225 PARKHILL, CORP.,

Plaintiffs,

-against-

MAHESH GANDHI

Defendant.

-and-

ARLINGTON FILLER,
DARSHAN SHAH,
AMITY PARK ASSOCIATES,
DREW INVESTMENT, INC.
UNITHREE MANAGEMENT, INC.
UNITHREE INVESTMENT CORP.,
UNITHREE SERVICES CORP., and
EVEREADY SECURITY, INC.

Additional Counterclaim Defendants.

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DCM PART 4

Present:
Hon. Robert J. Gigante

DECISION & ORDER

Index No. 013489/03
Motion No. 1539 - 014

The following papers numbered 1 to 4 were submitted on this motion the 29th day of
June, 2007:

	Papers Numbered
Notice of Motion to Quash Subpoena Duces Tecum with Supporting Papers.....	1
Affidavit in Opposition to Motion.....	2
Reply Affirmation.....	3
Affidavit in Further Opposition to Motion.....	4

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Upon the foregoing papers, the motion to quash certain nonparty subpoenas *duces tecum* is denied.

Plaintiffs commenced this action to recover monies allegedly due on loans made to defendant Mahesh Gandhi (hereinafter “Gandhi”) while a shareholder in the plaintiff corporations, Kimso Apartments, Inc. (hereinafter “Kimso”), Poonman Apartments, Inc. (hereinafter “Poonman”) and 185-225 Parkhill, LLC (hereinafter “Parkhill”)¹. It is undisputed that Gandhi and two of the additional counterclaim defendants, Darshan Shah (hereinafter “Shah”) and Arlington Filler (hereinafter “Filler”), were one-third owners in each of the plaintiff companies. In his answer, defendant Gandhi has denied plaintiffs’ allegations and interposed eighteen counterclaims, including fraud and breach of contract. According to Gandhi, he had settled his differences with plaintiffs by agreeing to sell his interest in the subject corporations at a mutually agreed price, and plaintiffs had agreed, in return, to release him from any obligation to repay the loans for which recovery is now sought. Additionally, Gandhi alleges that plaintiffs (1) had perpetrated a fraud by conspiring with the additional counterclaim defendants to make unauthorized distributions of corporate income, assets and profits, (2) made unauthorized loans to the additional counterclaim defendants on which they have failed to collect, and (3) entered into various lucrative real estate transactions with the additional counterclaim defendants that generated profits that were wrongfully diverted

¹ Plaintiff 185-225 Parkhill, LLC is the successor, by merger, of plaintiff 185-225 Parkhill Corp.

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by Shah and Filler.

In the present application, Filler, Shah and plaintiff 185-225 Parkhill, LLC have asked this Court to quash four subpoenas *duces tecum* served by defendant upon three nonparty banks, i.e., Citibank, Staten Island Savings Bank and Column Financial, Inc. In support, movants contend that the respective subpoenas (1) are facially defective, (2) fail to sufficiently identify the documents sought, (3) seek documents which are irrelevant to the action, and (4) seek documents of a private and confidential nature.

The following subpoenas are at issue. (1) A subpoena *duces tecum* to Citibank, dated May 10, 2007, which seeks the account records of nonparty Ranjana Shah, the wife of additional counterclaim defendant Darshan Shah, for the period January 1, 2001 through December 31, 2006; (2) a subpoena *duces tecum* to Citibank, dated April 26, 2007, which seeks the account records of additional counterclaim defendants Unithree Management, Inc., Unithree Investment Corp., Unithree Services Corp. (collectively “Unithree”), Eveready Security, Inc. (hereinafter “Eveready”) and nonparty Lithium & Gold for the period January 1, 2001 through December 31, 2006; (3) a subpoena *duces tecum* to Staten Island Savings Bank, dated April 26, 2006, which seeks the account records of additional counterclaim defendant Unithree Investment Corp. for the period January 1, 2001 through December 31, 2006; and (4) a subpoena *duces tecum* to nonparty Column Financial Inc., dated April 26, 2006, which seeks the documents, if any, relating to any loans that it may have made to plaintiffs in connection with the refinancing of properties owned by plaintiffs, as well as the disbursement of any such

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loan proceeds.

In seeking to quash the subpoenas, movants assert that Gandhi has (1) failed to set forth the “special circumstances” warranting such disclosure from a nonparty as required by CPLR 3101(a)(4), (2) failed to sufficiently identify the documents which are sought, (3) issued subpoenas that are overly broad and irrelevant to the extent that they seek documents which post-date August 2002, the latest date of wrong-doing alleged in the complaint, and (4) improperly sought the personal banking records of Ranjana Shah, which are confidential and privileged.

In opposition, Gandhi argues that the information sought is material and necessary to the establishment of his counterclaims and defenses to this action. In addition, defendant points out that in a Decision and Order dated November 2, 2006, this Court upheld certain similar subpoenas issued on behalf of plaintiffs which sought the financial documents of other nonparties claimed to have participated in the diversion of funds from the corporate plaintiffs. Gandhi maintains that the subpoenas at issue “seek virtually identical categories of information relating to Gandhi’s defenses and counterclaims.”

Gandhi further maintains that the subpoenas issued to Citibank and Staten Island Savings Bank for the account records of Uithree, Eveready and Lithium & Gold are necessary to establish the use of these entities “as vehicles to defraud [Gandhi] at the time he was a shareholder of the plaintiff corporations as well as subsequent to the time that he relinquished his shares.” Moreover, he contends that his counterclaim for

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rescission of the settlement agreement is based, in part, on plaintiffs' alleged fraudulent misrepresentation of the amount he was owed by the plaintiff corporations, and that the information sought will help to show how these corporations were and are still being used to divert monies rightfully belonging to Gandhi.

As for the subpoena issued to Column Financial, Inc., Gandhi contends that information relative to the \$40-million refinancing of the mortgages on plaintiffs' properties is relevant both to his counterclaims for damages and plaintiffs' claim that he remains personally liable on certain "non-recourse" loans. It is also claimed that these documents are relevant to Gandhi's claim for rescission of the settlement agreement based on fraud and duress, and that they will serve to demonstrate that plaintiffs did not make appropriate disclosures to either HUD or Column Financial, Inc. when they refinanced the properties at issue in this litigation.

Finally, it is alleged that the information sought with respect to nonparty Ranjana Shah is especially material to Gandhi's claims of fraud and diversion. For example, it is alleged that certain checks issued by Unithree to Mrs. Shah totaling \$545,000.00 and endorsed by her husband are evidence of a fraudulent diversion of corporate assets. In this regard, Gandhi points to the deposition testimony of Alexis Cimera, Unithree's accountant, who was unable to explain these payments to Mrs. Shah, and professed ignorance of any monies that she was owed by Unithree.

"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

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pending judicial proceeding” (Velez v Hunts Point Multi-Service Ctr., 29 AD3d 104, 112 citing Matter of Terry D., 81 NY2d 11042, 1044), and that “a motion to quash...should be granted only where the materials sought are utterly irrelevant to any proper inquiry” (*id.* at 112). The burden of demonstrating an improper subpoena is on the person from whom the information is demanded (*id.*; *see* New Hampshire Ins. Co. v Varda, Inc., 261 AD2d 135).

In the matter at bar, it is the Court’s opinion that the moving plaintiff and the additional counterclaim defendants have failed to establish that the information sought by the subpoenas at issue are “utterly irrelevant” to Gandhi’s defense and counterclaims in this action. Pertinent in this regard are Gandhi’s assertions of fraud and collusion on the part of plaintiffs and the additional counterclaim defendants to wrongfully divert assets and/or profits from the corporations in which he was relinquishing his interest. Moreover, even if the subpoenas at issue are somewhat lacking in their recitation of the circumstances or reasons warranting such nonparty discovery (*see* CPLR 3101[a][4]), any perceived deficiency has been rendered academic in view of (1) the additional explanations found in Gandhi’s opposing papers, and (2) the absence of prejudice (*see* Velez v Hunts Point Multi-Service Ctr., 29 AD3d at 111). Finally, as this Court has previously held in its Decision and Order dated November 2, 2006, in view of the lengthy period over which the alleged improprieties are claimed to have taken place, the subpoenas are not overly broad as to time.

Accordingly, it is

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ORDERED, that the motion to quash is denied in all respects.

E N T E R,

Dated: September 14, 2007

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Robert J. Gigante, J.S.C.