

**Gandler v City of New York**

2008 NY Slip Op 31271(U)

April 30, 2008

Supreme Court, New York County

Docket Number: 0103281/2006

Judge: Paul G. Feinman

Republished from New York State Unified Court  
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

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

PRESENT: PAUL G. FEINMAN  
*Justice*

PART 11 Part 52

Gandler  
- v -  
City

INDEX NO. 103281/06  
MOTION DATE 2-13-08  
MOTION SEQ. NO. 003  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 6 were read on this motion to/for Quash

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...  
Answering Affidavits -- Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED  
no attached

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

**MOTION AND CROSS MOTION(S) ARE DECIDED  
IN ACCORDANCE WITH ANNEXED DECISION AND ORDER.**

**FILED**  
MAY 05 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

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

Dated: 4/30/08

[Signature]  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 52

-----X

DEBRA GANDLER,  
Plaintiff,

- against -

Index Number 103281/2006  
Mot. Seq. No. 003  
Submission Date Feb. 13, 2008

THE CITY OF NEW YORK, THE DEPARTMENT OF  
BUILDINGS, PATRICIA A. LANCASTER as  
Commissioner of the New York City Department of  
Buildings, and HECTOR M. VALENTIN a/k/a VICTOR  
VALENTINE d/b/a ARTISAN CONTRACTING,  
Defendants.

**DECISION AND ORDER**

-----X

**For the Plaintiff:**  
Debra Anne Gandler, Esq. *pro se*  
685 President Street  
Brooklyn NY 11215  
(718) 623-5979

**For City Defendants:**  
Michael A. Cardozo, Esq.  
Corporation Counsel of City of New York  
By: Christina L. Hoggan, Esq.  
100 Church Street  
New York NY 10007  
(212) 788-0461

Papers considered in review of the motion to quash and cross-motion to strike:

<b>Papers</b>	<b>Numbered</b>
Order to Show Cause, Amended Aff., Exhibits	1, 2
Cross-Motion .....	3
Reply Aff. and Opposition .....	4
Plaintiff Reply Affidavi .....	5,5a
Defendant Addendum to Exh. F.....	6

---

**PAUL G. FEINMAN, J.:**

The motion and cross-motion are consolidated for purposes of decision.

The City of New York, the Department of Buildings (DOB), and Commissioner Patricia Lancaster (the City defendants) move by order to show cause to quash plaintiff's subpoena duces tecum pursuant to CPLR 2304 on the ground that it is overbroad, unnecessary, and seeks the production of materials that are irrelevant to the action, and for a protective order pursuant to CPLR 3103 (a) to prohibit plaintiff from enforcing the subpoena. Plaintiff cross-moves pursuant to CPLR 3216 for an order striking the answer of the municipal defendants, and for attorney's fees. For the

reasons which follow, the motion is granted in part, and the cross-motion is denied in its entirety.

### *Background*

Plaintiff, an attorney representing herself in this action, is the owner of the premises known as 685 President Street, Brooklyn, New York (City's Aff. in Supp. Ex. B, Verified Complaint [hereinafter Complaint] ¶ 20). She alleges that employees of the City's Department of Buildings (DOB) improperly issued a home improvement renovation permit to co-defendant Valentin who had fraudulently represented that he was a licensed contractor.<sup>1</sup> Home improvement contractors are required to be licensed by the New York City Department of Consumer Affairs. Plaintiff contends that the DOB failed to protect her and other homeowners by not determining that Valentin was not actually licensed. As against the City defendants, plaintiff's third amended complaint asserts three causes of action: aiding and abetting Valentin in perpetrating unfair business practices in violation of the "Deceptive Practices Act" (General Business Law § 349); negligence, and detrimental reliance.<sup>2</sup>

On December 13, 2006, the parties entered into a so-ordered stipulation setting forth the course of discovery (Cross-Mot. Ex. D). The stipulation indicates that plaintiff would serve further discovery demands by December 29, 2006,<sup>3</sup> that defendants would respond to her demand for a bill

---

<sup>1</sup>This summary is taken from the court's previous decision and order in, *Debra Gandler v The City of New York, The New York City Dept. of Bldgs., Patricia A. Lancaster as Commissioner of the New York Dept. of Bldgs., and Hector M. a/k/a Victor Valentin d/b/a Artisan Contracting*, Sup Ct, NY County, Aug. 28, 2007, Feinman, J., index No. 103281/2006.

<sup>2</sup>Plaintiff was allowed to serve and file the amended complaint pursuant to the court's order of August 28, 2007.

<sup>3</sup>Plaintiff made her first demand for discovery and inspection on December 28, 2006 (Mot. Exh. C).

of particulars within approximately five weeks of the date of the stipulation, would respond to the additional discovery demands within 60 days of the demands, and that a deposition of a City witness would occur within 60 days of the plaintiff's designation. The stipulation also noted that the City's summary judgment motion was to be "submitted" on December 19, 2006. The motion was fully submitted on May 16, 2007.

While the motion was *sub judice*, the City defendants agreed by so-ordered stipulation dated February 21, 2007, to designate a witness for deposition within four weeks of the determination of the outstanding motion for summary judgment, and reserved their right to discovery pending the outcome of the motion (Mot. Exh. B). The court issued an interim decision on April 6, 2007, and ultimately denied defendants' motion by decision and order dated August 28, 2007.

Plaintiff served a letter by hand on October 2, 2007, on the office of the Corporation Counsel indicating that defendants as of that date had "provided nearly no discovery," and describing ten items or categories of items that she demanded (Cross-Mot. Ex. E). The letter also describes her two previous unreturned telephone calls asking for certain of this information. Included with the letter was plaintiff's Second Demand for Discovery and Inspection (Cross-Mot. Ex. E).

The parties appeared for compliance conferences in the Differentiated Case Management (DCM) part of the Supreme Court on October 24, 2007, and again on October 31, 2007. Upon being informed that the City was appealing the August 28, 2007 decision, the court attorney in the DCM part on October 31, 2007, advised the parties, in error, that proceedings are stayed automatically when a municipality files an appeal (Cross-Mot. Ex. C, Stipulation of Oct. 31, 2007). The matter was then adjourned for several months. However, plaintiff subsequently informed the court that the Appellate Division had informed her that there was no automatic stay in this

proceeding, and the parties agreed by so-ordered stipulation signed on December 19, 2007, to “lift [the] stay as of today.” (Cross-Mot. Ex. C, Stipulation of Dec. 19, 2007). The same stipulation indicated that plaintiff had served a subpoena nunc pro tunc as of December 19, 2007, and that defendants would respond by mail on or before January 11, 2008 (Cross-Mot. Ex. C, Stipulation of Oct. 31, 2007).

This instant subpoena duces tecum had been presented to the court for so ordering on November 28, 2007, and was originally made returnable to the court on December 18, 2007 (Cross-Mot. Gandler ¶ 5; Ex. B). The subpoena seeks all records and documents maintained by the DOB concerning the application of co-defendant Valentin for a tracking number, all insurance documents and information filed by Valentin in connection with the project at plaintiff’s home, a particular Operations Policy Procedure Notice and Departmental Memorandum, and “[a]ny and all complaints” or documents concerning the failure of the DOB to ensure that home improvement contractors were licensed when seeking work permits for one to four family homes (OSC Exh. A, Subpoena). No one appeared from the office of the Corporation Counsel on November 28, 2007 to oppose the subpoena,<sup>4</sup> and because of the “stay,” no one from that office or the Department of Buildings appeared in response to the subpoena on December 18, 2007 (Hoggan Amended Aff. in Supp. of Mot. ¶ 2, n. 1).

Defendant brought an application for an order to show cause seeking to quash the subpoena and for a protective order, which was signed by the court on January 11, 2008. The court directed

---

<sup>4</sup>Plaintiff alerted the Corporation Counsels’ Deputy Chief of Appeals by voice mail on November 23, 2007, but not the attorney assigned to the matter, that she would be presenting the subpoena in court for so ordering on November 28, 2007 (Gandler Cross-Mot. ¶ 5; Exh. A [unsigned Affidavit of Notice]).

that paragraph 4 of the subpoena could not be enforced pending the hearing of the motion on February 11, 2008. The court also indicated that to the extent that the subpoena listed items of discovery that had already been produced, such items need not be produced again.

#### The City's Application to Quash and for a Protective Order

Defendants seek to quash the subpoena and for a protective order. They argue that the subpoena is overbroad, unnecessary, and seeks the production of items which are irrelevant or immaterial. They argue that a subpoena is used to request specific documents and that nearly all of the items requested in the subpoena are described without particularity, and assert that plaintiff is on a fishing expedition to discover if certain evidence exists. They contend the subpoena is overbroad because it does not set forth the time period at issue, seeks "any and all" documents, as well as documents that are irrelevant to her claims, in particular the request for documents showing that the DOB issued permits to contractors who did not possess home improvement contractor licenses.

#### Plaintiff's Cross-Motion

Plaintiff cross-moves to strike the answer. She argues that the sanction of striking the answer is appropriate because the City defendants have repeatedly failed to comply with almost all of her demands for discovery set forth in her two discovery demands and in the so-ordered stipulations. She also argues that the City defendants' motion should be denied as they failed to move "promptly" to quash the subpoena, and that the scope of the subpoena is reasonable and not overbroad.

#### *Legal Analysis*

The rule for the use of a subpoena in disclosure under CPLR 3120, "is that if the paper or thing is relevant to the case . . . . under CPLR 3101 (a) . . . and does not fall under any of the

exclusionary provisions [of CPLR 3101], it is subject to disclosure and may be sought under CPLR 3120" (Connors, Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B, CPLR 3120, at 219). The items must be identified by "individual item or by category," and "each item and category" is to be described "with reasonable particularity." (CPLR 3120 [(2)).

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" (*Velez v Hunts Point Multi-Serv. Ctr., Inc.*, 29 AD3d 104, 112 [1<sup>st</sup> Dept. 2006], citing *Matter of Terry D.*, 81 NY2d 1042, 1044 [1993]). There is no explicit requirement in the statute that a deposition or other discovery take place prior to the use of a subpoena. However, "in general, the subpoena duces tecum may not be used for the purpose of discovery or to ascertain the existence of evidence" (*People v Gissendanner*, 48 NY2d 543, 551 [1979]). 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 at 1044, quoting *Matter of Constantine v Leto*, 157 AD2d 376, 377 [1990], *aff'd* 77 NY2d 975 [1991]).

Defendants seek to quash, and seek a protective order, arguing that the subpoena seeks broad categories of documents which may or may not exist, and which are irrelevant. However, the use of the term "any and all" is not necessarily overbroad, such as when the phrase is modifying a limited number of specific items (*see, Soho Generation v Tri-City Ins. Brokers*, 236 AD2d 276, 277 [1<sup>st</sup> Dept. 1997]; *but see Grotallio v Soft Drink Leasing Corp.*, 97 AD2d 383 [1<sup>st</sup> Dept. 1983] [in insurance matter, although some records requested were relevant, term "any and all" includes production of materials that are privileged]). Here, the first three categories of items sought under the subpoena are not overbroad, and there are undoubtedly documents in existence. The subpoena

seeks from the DOB “any and all” records, etc. connected solely with the application of co-defendant Valentin and his company for a tracking number, “any and all” insurance documents filed by Valentin solely in connection with plaintiff’s premises or under the specific DOB tracking number, and seeks two specific documents. While it may be, as defendants argue, that plaintiff is attempting to find information on Valentin, who she has had difficulties in locating (OSC, Hoggan Aff. ¶ 11), the documents requested are discrete and certainly relevant to plaintiff’s claims of negligence, detrimental reliance, and violation of the Deceptive Practices Act. There is no need for plaintiff to again seek these documents through other modes of disclosure, given that they were not previously provided. In addition, although defendants bear the burden to establish that the documents are “utterly irrelevant” (*Velez v Hunts Point*, 29 AD3d 104, at 112), they have not established that what has been requested is immaterial and unnecessary or would not lead to material and necessary discovery (CPLR 3101). Accordingly, defendants’ motion to quash the first three categories of items listed on the subpoena, and for a protective order, is denied.

The fourth category of document articulated in the subpoena, however, is overly broad and burdensome. Contrary to defendants’ argument, such documents could be relevant to plaintiff’s claim of detrimental reliance, in particular, but the use of a subpoena is improper when it is unclear whether documents exist and what they might be. Accordingly, defendants’ motion to quash the fourth category of documents in the subpoena is granted on the basis that it is overbroad, without prejudice to plaintiff’s seeking more specific documents, limited in time, after she has engaged in discovery including possibly a deposition, so as to better articulate what should be produced. Defendants’ motion for a protective order as concerns this fourth category of items is denied without prejudice in the event the request is renewed in its current form.

Plaintiff's cross-motion to strike the answer is denied. CPLR 3126 provides that where a party at a deposition or an inspection refuses to obey an order for disclosure or wilfully fails to disclose information which should have been disclosed, the court may fashion a sanction that includes striking the pleadings. Here, it cannot be said that defendants wilfully disobeyed any orders. Defendants responded to plaintiff's First Demand for Discovery in March 2007, and included "all known relevant documents which were responsive to Plaintiff's document demand" (Hoggan Reply Aff. ¶ 44), but did not designate a witness for deposition within four weeks of the determination of their summary judgment motion, which they agreed to do February 21, 2007 (Cross-Mot., Gandler Aff. ¶ 13).<sup>5</sup> Defendants concede they did not timely serve responses to plaintiff's second set of discovery demands, however they contend that their error was inadvertent as, after the "stay" was lifted, they focused on the subpoena, and overlooked the second set of demands (Hoggan Reply Aff. ¶¶ 45, 46). Their attorney states that responses to the Second Demand for Discovery were served on February 6, 2008 (Hoggan Reply Aff. ¶ 46).

Plaintiff's argument that defendants' motion was tardy, has no merit, given that the parties agreed on October 31, 2007, that defendants would respond to the subpoena "on or before" January 11, 2008, and the order to show cause was signed on January 11, 2008. In addition, the branch of her cross-motion seeking attorney's fees and costs is denied. It is

ORDERED that the motion to quash the subpoena and for a protective order is granted to the extent that the fourth category of items requested is quashed, without prejudice, and is otherwise denied; and it is further

---

<sup>5</sup>Defendants argue that plaintiff has never served them with a notice of deposition (Hoggan Reply Aff. ¶ 43).

ORDERED that defendants are to respond to the remainder of the subpoena within twenty (20) days of service of notice of entry of this order; and it is further

ORDERED that the cross-motion is denied in its entirety; and it is further

ORDERED that the parties are to appear as previously scheduled on June 18, 2008, for a compliance conference.

This constitutes the decision and order of the court.

Dated: April 30, 2008  
New York, New York

  
\_\_\_\_\_  
J.S.C.

**FILED**  
MAY 05 2008  
NEW YORK  
COUNTY CLERK'S OFFICE