

**Saratoga Assoc. Landscape Architects, Architects,  
Engr. & Planners, P.C. v Luter Dev. Group**

2010 NY Slip Op 30456(U)

March 4, 2010

Supreme Court, Albany County

Docket Number: 2322-09

Judge: Joseph C. Teresi

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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

SARATOGA ASSOCIATES LANDSCAPE  
ARCHITECTS, ARCHITECTS, ENGINEERS AND  
PLANNERS, P.C.,

Plaintiff,

**DECISION and ORDER**  
**INDEX NO.: 2322-09**  
**RJI NO.: 01-09-097106**

-against-

THE LUTER DEVELOPMENT GROUP AND  
SANFORS ZIMMERMAN,

Defendant.

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Supreme Court Albany County All Purpose Term, February 24, 2010  
Assigned to Justice Joseph C. Teresi

**APPEARANCES:**

Wardlaw Associates, P.C.  
Attn: Donna E. Wardlaw, Esq.  
*(Attorney for Plaintiff - Saratoga Assoc., et al.)*  
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Breakell Law Firm, P.C.  
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*(Attorney for Defendant - The Lauter Development Group, et al.)*  
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Whiteman, Osterman & Hanna, L.L.P.  
Attn: Christopher M. McDonald, Esq.  
*(Attorney for Defendant - Non-party Abode Blue Chip, LLC)*  
One Commerce Plaza  
Albany, New York 12260

**TERESI, J.:**

By notice of motion non-party Abode Blue Chip, LLC (herein after referred to as Abode)  
moves for an Order of this Court to pursuant to CPLR §2304 to quash a Subpoena Duces Tecum

dated January 12, 2010 and the Judicial Subpoena and Judicial Duces Tecum dated January 12, 2010 served upon Abode by plaintiffs and further moves pursuant to CPLR §3104 prohibiting plaintiffs from seeking to compel Abode to produce the information sought in the Subpoenas. The defendants take no position in respect to the motion.

An application to quash a subpoena should be granted only when the fertility of the process to uncover anything legitimate is inevitable or obvious or where the information sought is utterly irrelevant to any proper inquiry. Hogan v. Cuomo 67 A.D.3d, 1144(3d Dept. 2009). The burden is on the person challenging a subpoena of demonstrating the lack of authority, relevancy, or factual basis for its issuance.

Although disclosure provisions are liberally construed, the scope of permissible disclosure is not limitless and trial court is vested with broad discretion in supervising disclosure. Kozuch v. Certified Ambulance Group, Inc. 301 A.D.2d 840(3d Dept. 2003) where a subpoena is overly broad to the extent that it did not set forth a specific time period for records should be limited to reasonable period of time. Ayubo v. Eastman Kodak Company 158 A.D. 2d 641(2d Dept. 1990). Further, a fair view of the Notice of Discovery and Subpoena in this case clearly demonstrates that the issuing party is attempting to ascertain the possible existence of evidence rather than subpoena documents that it knows that are in existence and in the possession of the non-party witness. Garnot v. Ladue 445 A.D. 3d 1080(3d Dept. 2007).

This case is in essence a contract action between the parties. The issue was joined on May 7, 2009. Initially Abode was a party to this case. Pursuant to an Order of this Court dated July 25, 2009 then defendant Abode's motion for Summary Judgment was granted and the complaint was dismissed together with the canceling of the plaintiff's mechanics lien filed January 20, 2009.

On January 12, 2010 the plaintiff served upon non-party Abode(formerly a defendant) a Judicial Subpoena Judicial Duces Tecum referring to an attached notice of discovery and

inspection on which listed fourteen (14) separate definitions applying to the notice; and thirty (30) separate items many of which are indefinite in time which they are to cover.

The non-party Abode seeks to quash the Subpoena Duces Tecum upon the grounds that it is overly broad and unduly burdensome. The plaintiff opposes the motion.

This Court has examined the affidavit submitted in this case, and the subject Subpoena Duces Tecum. On its face the document request attached to the Subpoena Duces Tecum is overly broad and unduly burdensome for a variety of reasons including but not limited to the fact that the request is unlimited in time and does not request documents for a limited period of time; the plaintiff has failed to establish that documents exist or are even in the continued possession of the non-party Abode; the plaintiff has failed to demonstrate the relevancy of the documents other than by counsel's own conclusory, speculative and unsubstantiated statements.

This motion rests on the sound discretion of the Court. Based upon the record before the Court, the Subpoena Duces Tecum is in all respects quashed. However, that portion of the motion seeking to quash the Subpoena deposition testimony of Peter Cornell is denied. Since he is apparently the principle of a now non-party witness who was at one time a party to this case and which also brought claims against the plaintiff, the Court will Order that his deposition be conducted. That deposition must be conducted within twenty (20) days of the date of this Decision and Order, within Albany County at a location as agreed to by counsel. The deposition will begin at 9:00 a.m. until 4:30 p.m. with the usual recesses for lunch and personal needs. Deposition will continue from day to day until completed without adjournment or postponement.

At that deposition Mr. Cornell will bring with him all writings, documents, contracts within the time period of the claims of this case and for 2 years before this action for filed.

Any other writings and documents identified during that deposition of Mr. Cornell and/or any other person who has knowledge of these documents shall be produced at a further deposition

to be held within fourteen (14) days of the first.

This Court notes that the scheduling order in this case requires that a Notice of Issue be filed on or before April 15, 2010 which was the date selected by all counsel at the time. A note of issue is to be timely filed.

The Court will hold a final conference in this case on April 27, 2010 at 8:30 a.m. The purpose of the conference is to discuss settlement and if a settlement is not achieved to schedule a trial date. Well before the final conference plaintiff must provide the defendant with a settlement demand. Counsel are to discuss with their clients, experts, witness and each other the availability for trial. At least three(3) days before the final conference each party shall deliver to the Court a statement of contentions, no longer than two (2) pages in length.

In view of the age of this case, no further extensions can be granted.

A copy of this Decision and Order and all motion papers upon which it was decided are being returned by this Court to the Albany County Clerk's Office. The original Decision and Order are being return to the plaintiff's counsel for filing with the Albany Clerk and service pursuant to CPLR 2220.

So Ordered.

Dated: March 4, 2010  
Albany, New York

  
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JOSEPH C. TERESI, J.S.C.

**PAPERS CONSIDERED:**

1. Notice of Motion dated February 3, 2010
2. Affidavit of Peter Cornell dated February 3, 2010
3. Affidavit of Neil Levine, Esq. dated February 3, 2010, together with Exhibits A - G
6. Answering Affirmation of Donna E. Wardlaw, Esq. dated February 16, 2010, together

with attached Exhibits A - H

7 Reply Affidavit of Neil Levine, Esq. dated February 23, 2010.