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

PRESENT: PAUL G. FEINMAN J.S.C. PART 12

Index Number : 102132/2004

KELLY, JOSEPH J.

VS.

NASON, BART L.

SEQUENCE NUMBER : 005

QUASH SUBPOENA; FIX CONDITIONS

INDEX NO. 102132/04

MOTION DATE

MOTION SEQ. NO. 005

MOTION CAL. NO. 5

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4-5
Replying Affidavits Affidavit of Olsen	6 7

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION AND ORDER.

FILED
APR 06 2010
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 3/27/2010 at 4:13 pm

Paul G. Feinman
J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12
----------X

JOSEPH J. KELLY,
Plaintiff,
-against-

Index Number 102132/2004
Mot. Seq. No. 005

BART L. NASON,
Defendant.
----------X

DECISION AND ORDER

For the Plaintiff:
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Jeffrey M. Schwartz, Esq.
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For Proposed Non-party Witness Olsen:
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Counsel, Office of Court Administration
By: Shawn Kerby, Esq.
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Papers considered in review of this motion to quash:

Papers	Numbered
Notice of Motion, Affidavit, Memo of Law	1-3
Affirmation in Opposition, Exhibits, Memo of Law	4-5
Reply Memorandum	6
Affidavit of Olsen	7

PAUL G. FEINMAN, J.:

Proposed non-party witness Shelley Rossoff Olsen moves for an order pursuant to CPLR 2304 to quash the subpoena ad testificandum issued by plaintiff and dated May 22, 2009 (Mot. Ex. A). Plaintiff opposes. Defendant has not submitted papers on the motion. For the reasons which follow, the motion is granted.

Plaintiff Joseph J. Kelly commenced this action on about February 10, 2004, seeking to recover payments allegedly owed to him by defendant Bart L. Nason on a promissory note (Schwartz Aff. in Opp. ¶¶ 3, 4). Issue was joined on about July 15, 2004, when defendant served an answer with counterclaims, and plaintiff thereafter served a reply to the counterclaims (Schwartz Aff. in Opp. ¶¶ 5, 6). The note of issue was filed on December 22, 2005.

Pursuant to New York County Supreme Court rules, the post-note matter was then referred to the court's Neutral Evaluation Program ("Mediation"). The parties met several times in April

and May of 2007 before Shelley Rossoff Olsen, Esq. a Neutral Evaluation Attorney, then employed by the Unified Court System in order to try to settle the matter (Schwartz Aff. in Opp. ¶ 7). According to plaintiff, the parties ultimately agreed to settlement terms on about May 4, 2007, which were to be finalized in a signed stipulation agreement (Schwartz Aff. in Opp. ¶ 8). The matter was marked "settled before trial" as of May 4, 2007 (Opp. Ex. H, eLaw printout). Plaintiff's attorney then drafted a stipulation and forwarded it to defendant's attorney, but the document was not signed (Schwartz Aff. in Opp. ¶¶ 9-12).

In April 2008, plaintiff's attorney e-mailed Neutral Evaluator Olsen and defense counsel, and requested a new trial date (Schwartz Aff. in Opp. ¶ 13, Ex. A). Olsen responded by e-mail to both attorneys that she would try to accommodate whatever trial date they picked, and stated further that "settlements entered into before me are considered 'in court settlements' entitled to full force, as per the case law of the First Dept." (Opp. Ex. A, Olsen email of Apr. 22, 2008). In the early fall of 2008, the parties engaged in several phone conferences with Neutral Evaluator Olsen, but without resolution (Schwartz Aff. in Opp. ¶¶ 15-18).

In November 2008, plaintiff moved by notice of motion seeking to enforce the agreement or alternatively, to restore the matter to the trial calendar (Opp. Ex. B, Notice of Mot.). Defendant opposed on the ground that there was no meeting of the minds or final agreement as to all the material terms (Opp. Ex. C, Nason Aff. in Opp. [Dec. 22, 2008] ¶¶ 9-10). The motion, and the entire action, was at that point reassigned to this court, as the justice previously handling it had been appointed to the Appellate Division, First Department. At oral argument on March 11, 2009, the court granted plaintiff's motion to the extent of directing that the issue of whether a "binding open court" settlement was reached in Mediation, should be referred to a special referee to hear and report, and providing that the parties could, alternatively, choose to proceed directly with a bench

trial before this court (Opp. Ex. E, transcript of oral argument of Mar. 11, 2009, p. 16-17). The parties chose to proceed before a special referee. Thereafter, plaintiff served the subject subpoena on Neutral Evaluator Olsen, based in part on the statement of the court that the resolution of the matter could potentially involve putting the attorneys and Olsen "on the stand" to determine what terms were agreed to and whether it occurred in open court (Opp. Ex. E, transcript of oral argument of Mar. 11, 2009, p. 3-4).

Neutral Evaluator Olsen moves to quash the subpoena on the ground that the testimony sought concerning a proceeding that is part of the court's Alternative Dispute Resolution (ADR), is confidential. She argues that the protocol for the Neutral Evaluation Program states that the communications made to the Evaluation Attorney "may not be used by any party as an admission or otherwise in the case or in any other litigation," and that the Evaluation Attorney "will not testify about any aspect of the evaluation process, whether as a witness in that case or in another case." (See Kerby Aff. Ex. B, Protocol for the Court-Annexed Neutral Evaluation § B). The protocol specifically provides that the Evaluation Attorney will not testify about concessions, admissions, agreements to settle, or "any particular terms" of a settlement that were discussed (Kerby Aff. Ex. B, Protocol for the Court-Annexed Neutral Evaluation § B). She therefore argues that complying with the terms of the subpoena would require her to reveal the existence or amount of the settlement allegedly agreed to, in violation of the protocol.

Plaintiff argues in opposition that he is not seeking confidential information from Olsen, but only whether there was an "open court settlement" (Pl. Memo of Law in Opp. p. 7). Disregarding the clear language of the protocol that an Evaluation Attorney will not testify as to whether "any party agreed to settle a matter in general," or as to "any aspects of the . . . process" plaintiff argues that Olsen would only be required to testify as to whether there was an "open court stipulation," but

not as to which party settled or which did not, or as to the merits of the case or any admissions (Pl. Memo of Law in Opp. p. 7). He argues that the testimony is necessary and that therefore that the motion to quash should be denied, citing *Sonsini v Memorial Hosp. for Cancer and Diseases*, 262 AD2d 185 (1st Dept. 1999).

Thereafter, Neutral Evaluation Attorney Olsen submitted an affidavit dated December 10, 2009, in which she averred in relevant part that the parties reached a settlement before her on about May 4, 2007, in the amount of $75,000 (Olsen Aff. ¶ 3).

Article 31 of the CPLR provides that in general, there shall be "full disclosure of all matter material and necessary" to prosecute or defend an action (CPLR 3101[a]). The words "material and necessary" have been interpreted to "require disclosure, upon request, of 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, 406 [1968]). Not all matter is discoverable. Here, the confidentiality of the court's Neutral Evaluation Program, as with all the ADR programs, must be protected. Confidentiality encourages full and open disclosure because the parties are assured that communications will not be disclosed to the trier of fact (Olsen Memo of Law, citing various decisions, p. 3-4). The importance of ADR in the modern court system must not be undermined, especially here, where there are other resources for the hearing examiner to consider, in particular the Olsen affidavit of December 10, 2009. It is therefore

ORDERED that the motion to quash the subpoena is granted, and that plaintiff shall serve a copy of this order on the special referee assigned to hear and report on the matter.

This constitutes the decision and order of the court.

Dated: March 27, 2010
New York, New York

Paul G. Feinman
J.S.C.