

**Board of Directors of 133 Essex St. Condominium v
Evanford, LLC**

2010 NY Slip Op 32429(U)

June 8, 2010

Sup Ct, NY County

Docket Number: 112906/07

Judge: Judith J. Gische

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

PRESENT: GISCHE

PART 10

~~HON. JUDITH J. GISCHE~~ Justice
 Index Number : 112906/2007
 133 ESSEX STREET CONDOMINIUM
 vs.
 EVANFORD, LLC
 SEQUENCE NUMBER : 007
 QUASH

INDEX NO. _____
 MOTION DATE _____
 MOTION SEQ. NO. 007
 MOTION CAL. NO. _____

is motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

Answering Affidavits – Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.

FILED
 JUN 14 2010
 NEW YORK
 COUNTY CLERK'S OFFICE

Dated: 6/8/10

JG
HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
 Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

-----X
BOARD OF DIRECTORS OF 133 ESSEX STREET
CONDOMINIUM,

Plaintiff,

Index No.: 112906/07
DECISION/ORDER

-against-

EVANFORD, LLC, CALABRESE INVESTORS, LLC,
and "JOHN DOE NO. 1" through "JOHN DOE NO. 25,"
the names of the last defendants being fictitious, the true
names being unknown, it being intended to designate the
agents of the aforesaid defendants,

Defendants.
-----X

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these)
motion(s):

Papers

	Numbered
Calabrese n/m (quash subpoena) w/ LAD affirm, exhs	1
Pltff x/m (compel) w/AJ affirm, exhs	2
Calabrese opp to x/m and further support w/LAD affirm, exhs	3
Pltff reply w/AJ affirm, exhs	4

FILED

JUN 14 2010

NEW YORK
COUNTY CLERK'S OFFICE

-----X
Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

In this action for injunctive relief, one of the defendants moves for an order to quash certain subpoenas, while plaintiff cross-moves for an order to compel compliance with said subpoenas (motion sequence number 007). For the following reasons, the motion is denied, and the cross motion is granted.

BACKGROUND

The plaintiff Board of Directors of 133 Essex Street Condominium (the Board) consists

of the elected representatives of the unit owners of a condominium building (the Building) located at 133 Essex Street in the County, City and State of New York. *See* Notice of Motion, Exhibit B (complaint), ¶ 3. Defendant Calabrese Investors, LLC (Calabrese), a New York State limited liability company, is the building’s sponsor. *Id.*, ¶¶ 4-5. Defendant Evanford, LLC (Evanford), also a New York State limited liability company, is the tenant occupying the Building’s two ground-floor commercial units. *Id.*, ¶ 6. The remaining defendants, designated as “John Doe Nos. 1 through 25” (the John Doe defendants) are purported to be principals and agents of Calabrese and Evanford. *Id.*, ¶ 7. Although he is not named either individually or as a John Doe defendant, former Board member Lorenzo DeLuca, Esq. (DeLuca) has submitted all of Calabrese’s papers herein in his capacity as Calabrese’s “managing member” and “general counsel.”¹ *See* Notice of Motion, DeLuca Affidavit, ¶ 1.

The court has discussed the facts of this case at length in several previous decisions, and will not repeat that discussion here. For the purposes of this motion, it noteworthy that in 2007, a dispute arose among the Board and defendants regarding the Building’s commercial units. Briefly, the Board alleges that Calabrese failed to disclose certain financial information that it maintained in its role as the Building’s sponsor, and that Calabrese also failed to make maintenance payments in its role as the owner of the Building’s two commercial units. *See* Notice of Cross Motion, Jaskot Affirmation, ¶¶ 4-10. The Board also alleges that Calabrese

¹ The Board points out that DeLuca was suspended from the practice of law in New York State on October 14, 1993, by order of the Appellate Division, First Department. *See* Notice of Cross Motion, Exhibit C. The Board also asserts that DeLuca has since been reinstated as an attorney in good standing; however, this is unclear inasmuch as the reinstatement order that the Board presents was issued by the Supreme Court of New Jersey. *Id.* This issue, and its ramifications, remain unresolved but do not affect the outcome of the instant motion.

improperly authorized, and that Evanford improperly conducted, certain construction work in the commercial units, and in the Building's common areas, all in violation of the Building's by-laws and certificate of occupancy. *Id.* The Board asserts that it became aware of these alterations when defendants sought their signatures on an application to the appropriate New York City authorities to legalize said alterations, at which point the Board denied permission and requested information that defendants refused to provide. *Id.* As a result of this dispute, on May 1, 2008, the Board served an amended complaint that sets forth ten claims for injunctive relief, one claim for property damage and one claim for breach of fiduciary duties. *See* Notice of Motion, Exhibit B. On May 29, 2008, defendants served an amended answer. Subsequently, on January 8, 2010, the Board served a subpoena duces tecum on non-party TD Bank (TD Bank) that is the subject of the instant motion. *Id.*; Exhibit A.

TD Bank is alleged to be the successor in interest to Commerce Bank, the financial institution in which DeLuca originally maintained both Calabrese's and the Building's accounts. *See* Notice of Cross Motion, Jaskot Affirmation, ¶ 1, fn 1. The subject subpoena requests that TD Bank produce the following documents, that it may have in its possession, from the period of January 1, 2006, to the present: 1) all documentation pertaining to Calabrese's accounts; 2) all statements and balances of Calabrese's accounts; 3) all deposit slips and other memoranda of transactions regarding Calabrese's accounts; 4) all accounting books, ledgers and reports regarding Calabrese's accounts; 5) all printed or electronic documents regarding Calabrese's accounts; 6) all correspondence concerning Calabrese; 7) all correspondence concerning DeLuca; 8) any loan applications, mortgage applications, closing statements, guarantees and/or promissory notes made by Calabrese or DeLuca; and 9) copies of statements regarding four certain accounts whose

numbers are specified and which are alleged to belong to Calabrese. *Id.*; Exhibit A. On January 18, 2010, TD Bank sent the Board a letter stating that it had completed its document search, and was ready to turn over the requested material. *Id.*; Exhibit D. On January 19, 2010, Calabrese submitted the instant motion to quash the subject subpoena, while the Board thereafter cross-moved for an order to compel TD Bank to comply with said subpoena (collectively, motion sequence number 007).

DISCUSSION

Calabrese's Motion

Calabrese's motion invokes CPLR 3103 and 2304 as grounds to support its request to quash the Board's subpoena. CPLR 3103 (a) provides that:

The court may at any time on its own initiative, or on motion of any party or of any person from whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.

CPLR 2304 provides, in pertinent part, that:

A motion to quash, fix conditions or modify a subpoena shall be made promptly in the court in which the subpoena is returnable. ... Reasonable conditions may be imposed upon the granting or denial of a motion to quash or modify.

With respect to the former statute, Calabrese alleges that "there is nothing contained in any document [or] checking account statement ... that would be even remotely relevant or material to any matter at issue herein," and that "the subpoena ... is merely a fishing expedition intended [to] cause expense, annoyance or embarrassment." *See* Notice of Motion, DeLuca Affidavit, ¶ 5.

The Board responds that the latter claim is "spurious," and presents TD Bank's January 18, 2010 letter to refute it. *See* Notice of Cross Motion, Jaskot Affirmation, ¶¶ 20-21; Exhibit D. The

Board also notes that the material sought in the subpoena is plainly relevant to its twelfth cause of action for breach of fiduciary duty. *Id.*, ¶¶ 22-23. In this, the Board is clearly correct. *See e.g. Velez v Hunts Point Multi-Service Ctr.*, 29 AD3d 104 (1st Dept 2006) (subpoenaed bank account records held material to breach of fiduciary duty claim). However, Calabrese's reply papers do not address these points at all, but merely recite a number of unrelated factual allegations. In view of the documentation supplied by the Board, the court must reject Calabrese's allegations that the subject subpoena seeks irrelevant material and is unduly burdensome, and denies its application to quash said subpoena pursuant to CPLR 3103.

Calabrese's moving papers do not assert any specific argument relating to CPLR 2304; however the Board does assert that that statute affords grounds to deny Calabrese's motion, in that it requires that Calabrese have made a request to modify the subpoena prior to moving to quash it. *Id.*, ¶ 19. The court rejects this argument, however, because that portion of the statute only applies where a subpoena is not returnable in court, whereas the instant subpoena clearly sets forth a return date of January 22, 2010. *Id.*; Exhibit A. Nonetheless, for the reasons set forth above, the court finds that Calabrese's motion to quash should be denied.

The Board's Cross Motion

In its cross motion, the Board identifies CPLR 3124 and 3126 as grounds to compel Calabrese to comply with the subject subpoena. CPLR 3124 provides that:

If a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, ... the party seeking disclosure may move to compel compliance or a response.

CPLR 3126 provides, in pertinent part, that:

If any party, ... refuses to obey an order for disclosure or wilfully fails to disclose

* 7
information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just ...

The Board refers to findings set forth in prior orders from this court as proof that Calabrese has repeatedly failed to comply with discovery requests, and invokes the foregoing statutes as affording grounds to support its application for a motion to compel TD Bank's compliance with the instant subpoena. See Notice of Cross Motion, Jaskot Affirmation, ¶ 19. The Board also notes that TD Bank does not object to complying with said subpoena. *Id.*, ¶ 20; Exhibit D. Calabrese's reply papers do not address these points. In the absence of any viable defense, and in view of DeLuca's own reluctance to turn over Calabrese's accounts to the Board, the court finds that the Board's application for a motion to compel should be granted.

CONCLUSION

ACCORDINGLY, for the foregoing reasons, it is hereby


ORDERED that the motion, pursuant to CPLR 3103 and 2304, of defendant Calabrese Investors, LLC is, in all respects, denied; and it is further

ORDERED that the cross motion, pursuant to CPLR 3124 and 3126, of the plaintiff Board of Directors of 133 Essex Street Condominium is granted and TD Bank is directed to turn over the subpoenaed documents within 10 days of receipt of a copy of this order with notice of entry; and it is further

ORDERED that this action shall continue.

Dated: New York, New York
June 08, 2010

ENTER:


Hon. Judith L. Gische, J.S.C.

FILED
JUN 14 2010
NEW YORK
COUNTY CLERK'S OFFICE