SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: EMILY JANE GOODMAN PART 17
Justice

SIMON LORNE and LUDMILLA LORNE

MOTION INDEX NO. 602769/07

MOTION DATE

- v -

MOTION SEQ. NO. 17

50 MADISON AVENUE LLC, et al.

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

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

Upon the foregoing papers, it is ordered that this motion for a protective order made pursuant to CPLR § 3103 is granted, with the exceptions described below. 50 Madison Avenue LLC (50 Madison) and Samson Management LLC (Samson) bring this motion seeking to limit or deny the disclosure sought by Plaintiffs in two separate subpoenas served on non-parties Michael Souter (Souter) and Louise Phillips Forbes (Forbes) of Halstead Property LLC (Halstead).[1] While Plaintiffs request a wide range of materials, including documents concerning Souter's purchase agreements and Forbes' compensation by Defendants for marketing and selling units at the Condominium, only documents concerning the building's physical condition and Sponsors' allegedly fraudulent business practices are relevant to the Plaintiffs' causes of action.

Prior History

Plaintiffs' original complaint contained five causes of action: "1) breach of contract against 50 Madison and Samson (Sponsors); 2) fraud by . . . the Sponsors; 3) breach of express warranty by . . . the Sponsors; 4) breach of the common law implied warranty of habitability (the Housing Merchant Warranty law) by the Sponsors; and 5) breach of fiduciary duty by the Board of Managers" of the Condominium (*Lorne v 50 Madison Ave.*, Sup Ct, New York County, Dec. 11, 2008, Goodman, J., index No. 602769/07 at 6).

[1] Defendants may move on behalf of non-parties to quash a subpoena or move for a protective order (CPLR § 2304; *see also Matter of MacLeman*, 2005 NY Slip Op 51675[U] [2002]; *Morano v Slattery Skanska Inc.*, 2007 Slip Op 27491[U] [2007]).

Pursuant to the decision dated December 11, 2008, Plaintiffs' motion for leave to serve and file an Amended Verified Complaint was granted, allowing Plaintiffs to add a cause of action under "General Business Law (GBL) § 349 for deceptive business practices and GBL § 350, for false advertising . . against Sponsors" and "add a claim for declaratory relief . . to determine responsibility for repairing the concrete substrate of [Plaintiffs'] unit" (*id.* at 17). Additionally, the Court granted summary judgment, dismissing Plaintiffs' claim for breach of implied warranty. On appeal, the First Department reversed that part of the decision appealed by the board of directors which did not dismiss the breach of fiduciary duty claim, holding that "defendants' . . . motion for summary judgment should have been granted as against the Board" (*Lorne v 50 Madison Ave. LLC*, 65 AD3d 879, 882 [1st Dep't 2009]).

Arguments

50 Madison and Samson move for a protective order to deny or limit disclosure sought by Plaintiffs in their subpoenas because they claim the disclosure is not relevant to Plaintiffs' causes of action. According to the defendants, as to non-party Souter:

> [t]here appears to be no reason for Plaintiffs to seek discovery from Mr. Souter, as he had no involvement in the construction of Unit 7, the sale of Unit 7 to Plaintiffs, Plaintiffs' complaints about the condition of Unit 7, or any other efforts to remedy any alleged defects in Unit 7. He is merely the purchaser of another Unit in the Building, which occurred after the Lornes had already purchased their Unit (Affidavit of Ralph Berman in Support of [Sponsors'] Motion for a Protective Order at 2).

Accordingly, Defendants argue that Plaintiffs' disclosure requests amount to little more than a fishing expedition.

Similarly, Sponsors move for a protective order to limit Forbes' disclosure to testimony and documents concerning Plaintiffs' purchase of unit 7. Defendants argue that the subpoena seeks a host of documents that are not material and necessary to the underlying actions, including: "contracts between Ms. Forbes' employer Halstead Property LLC and 50 Madison, all documents in Halstead's possession concerning the sale and marketing of any units in the [condominium], documents concerning the purchase of unit 5, and documents concerning Ms. Forbes' compensation" (Memorandum of Law of Defendants at 5-6). Consequently, Defendants also characterize the Forbes' subpoena as a fishing expedition, initiated "to embarrass Samson"

(Reply Memorandum of Law of Defendants at 3).

Conversely, Plaintiffs' argue that Sponsors have not offered evidence illustrating that the discovery they seek "has been sought to unreasonably annoy, embarrass or prejudice the non-party witnesses" or is irrelevant, claiming that as the movants, Defendants have not satisfied their burden (Affirmation in Opposition to Order to Motion for a Protective Order at 3; *see Westhampton Adult Home v National Union Fire Insurance Co.*, 105 AD2d 627 [1st Dep't 1984] [the moving party has the burden to illustrate the impropriety or irrelevance of the discovery sought]).

Specifically, Plaintiffs claim that documents concerning *all* agency agreements that Halstead entered into with the Sponsor Defendants are relevant to "determine whether Halstead acted within its usual scope of duties and responsibilities in connection with the sale of units at the Condominium" (Affirmation in Opposition to Order to Motion for a Protective Order at 5). Moreover, the Lornes argue that documents involving Forbes' marketing and sale of *other* units at the condominium are pertinent to the fraud and GBL claims because they could reveal the type of false representations needed to satisfy the elements of these causes of action (*id.* at 4-5). Plaintiffs also seek documents reflecting Souter's payment of attorney's fees and deposits to the board of directors in connection with any Alteration Agreement, even though the breach of fiduciary duty claim against the board was dismissed by the First Department on appeal (*see Lorne v 50 Madison Ave. LLC*, 65 AD3d at 882, *supra*).

Discussion

I. Documents concerning Plaintiffs' GBL §§ 349 and 350 claims

To demonstrate a violation of GBL § 349, the movant must prove that the defendant engaged in deceptive acts and practices in the conduct of a business (N.Y. Gen. Bus. Law § 349). Similarly, a violation of GBL § 350 requires evidence of false advertizing in carrying out that business (N.Y. Gen. Bus. Law § 350). Notably, the First Department has determined that GBL

claims made in the context of a single real estate transaction are not actionable if the allegedly false representations concern only one individual consumer (*see Thompson v Parkchester Apts. Co.*, 271 AD2d 311, 311-12 [1st Dep't 2000]). Thus, to satisfy a claim under GBL § 349, Plaintiffs' must illustrate that "the alleged deceptive acts, if permitted to continue, would have a broad impact on consumers at large" (*id.*), making it necessary that the Lornes prove that *other* purchasers in the building fell victim to deceptive statements about the condition of their units.[2] Thus, documents from Forbes concerning her work selling and marketing units in the building may produce material relevant and necessary to the GBL claims (*see Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 406 [1968] [reasoning that discovery is allowed to the extent it is material and necessary to the underlying claims]; *In re New York County DES Litigation v Eli Lilly & Co.*, 171 AD2d 119, 123 [1st Dep't 1991] [reasoning that non-party discovery is permissible provided it "bears on the controversy and will assist in the preparation for trial"]; *Thompson v Parkchester Apts. Co.*, 271 AD2d at 311, *supra*).

II. Documents concerning Plaintiffs' Breach of Contract claim

Additionally, to prove that Sponsors breached their contractual obligations, Plaintiffs must illustrate that their unit was defectively constructed. Any documents concerning Souter's or Linc LLC's Alteration Agreements with the Sponsors are relevant here to the extent they illustrate building-wide defects. Most importantly, such disclosure may uncover information about the concrete substrate flooring, in regard to which the First Department has already stated that "the sponsor[s] and property manager essentially admitted the existence of alleged material defects in the flooring of plaintiffs' unit" (*Lorne v 50 Madison LLC*, 73 AD2d 621, 621 [1st

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[2] Notably, the Sponsor Defendants made this exact argument in opposition to Plaintiffs' earlier motion to amend their complaint to add the GBL claims (*Lorne v 50 Madison Ave.*, Sup Ct, New York County, Dec. 11, 2008, *supra* at 18-19).

Dep't 2010]).[3] It is hereby

ORDERED that the motion (seq. no. 017) by Defendants for a protective order, pursuant to CPLR § 3103, limiting the disclosure sought from non-party Forbes and denying the disclosure sought from non-party Souter is granted, except that non-party Souter is directed to produce the documents requested in paragraphs 8, 9, 10, 12, 12, 14, 20, 21 of Plaintiffs' subpoena, which may be redacted for everything but repair work and construction defects, by October 11, 2010 and non-party Forbes is directed to produce the documents requested in paragraphs 1-3 (limited to the building at issue), 4, 5, 10, 11, and 12 of Plaintiffs' subpoena by October 11, 2010; and it is further

ORDERED that no deposition of Souter shall occur except upon the Court's finding, upon motion, that the documents produced by Souter are not sufficient, and that a deposition is necessary.

This constitutes the Decision and Order of the Court.

Dated: September 7, 2010

ENTER:

EMILY JANE GOODMAN

Check one: ☐ **FINAL DISPOSITION** ☑ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**

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[3] Defendants submit reply affidavits from Souter and Forbes in support of their motion. Both affidavits state that complying with the subpoenas would be unduly burdensome and expensive, "requir[ing] hundreds of hours of additional work" (Affidavit of Louise Phillips Forbes at 2; *see also* Affidavit of Michael Souter at 2). However, new arguments are not accepted in reply papers because "the opposing party has no opportunity to respond" (*Sanford v 27-29 W. 181st St. Assn.*, 300 AD2d 250, 251 [1st Dep't 2002]). The purpose of reply papers is to "address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of" the motion (*Dannasch v Bifulco*, 184 AD2d 415, 417 [1st Dep't 1992]). Accordingly, the Court disregards this argument as improperly made.