CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART E

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ONLY PROPERTIES LLC

Petitioner-Landlord

-against-

DECISION & ORDER
Index No.: L&T 84682/10

HON. SABRINA B. KRAUS

MARK BEAVEN
277 Church Street, 3rd Floor Unit
New York, New York 10013

Respondent-Tenant

_____X

BACKGROUND

This summary holdover proceeding was commenced by **ONLY PROPERTIES LLC** (Petitioner) seeking to recover possession of the 3rd Floor Unit at 277 Church Street**,** New York, New York 10013 (Subject Premises) based on the allegations that **MARK BEAVEN** (Respondent)**,** the rent-stabilized tenant of record does not maintain the Subject Premises as his primary residence.

PROCEDURAL HISTORY

The notice of Petition issued on October 1, 2010, and the proceeding was initially returnable on October 18, 2010. Respondent appeared by counsel and filed an answer and counterclaim. The proceeding was marked off calendar on the intimal return date, pursuant to the parties' stipulation, and Respondent consented to discovery.

On or about January 18, 2011, Petitioner moved to restore the proceeding to the calendar,

and sought an order compelling Respondent to comply with outstanding discovery request. The motion was granted by the Court. Respondent was directed to produce certain of the requested documents by February 28, 2011. Respondent was directed to appear for a deposition on or before April 15, 2011. The case was marked off calendar by the Court pending the completion of discovery.

THE PENDING MOTIONS

On or about March 28, 2011, Respondent moved for a protective order pursuant to CPLR § 3103, preventing Petitioner from obtaining privileged and confidential information from third parties, suppressing any improperly obtained information, and precluding Petitioner from using any wrongfully information obtained at trial.

Respondent asserts that in March 2011, he learned that Petitioner's counsel had contacted his physicians and requested that the physicians forward documentation to Petitioner's attorney, regarding visits by Respondent to his doctor. Respondent also states that he was informed by various members of the staff at Advanced Alternative Media, that an unidentified person called the office and sought personal information about Respondent. Respondent's counsel contacted Petitioner's counsel asking that he cease any such pursuit, and Petitioner responded by refusing and insisting that its course of conduct was proper.

Carl T. Peluso, attorney for Petitioner submits an affidavit in opposition. Mr. Peluso states that he contacted one of Respondent's physicians, and asked that the physician provide him with records and other documents, in redacted form to ascertain on what dates Respondent had visited his physician in California. Mr. Peluso states that the physician stated he would

consult with his attorney regarding any HIPAA implications before responding. Mr. Peluso denies that any one contacted Advanced Alternative Media on behalf of Petitioner.

Petitioner argues that it sought no privileged information, only dates of treatment, and that it is permitted for Petitioner to contact non-parties without notice to his adversary. Mr. Peluso goes on to state that he intends to contact Respondent's gardener in Beverly Hills, and that he has already been in contact with Respondent's landlord in California. Petitioner's counsel takes the position that as long as it has served no subpoenas, there is no prohibition against contacting third parties , and Petitioner's counsel states it has served no such subpoenas.

Petitioner moves for a order to strike pursuant to CPLR § 3126, leave to serve a supplemental discovery request, an order directing Respondent to provide authorization to obtain documents or alternatively leave to serve subpoenas.

Petitioner asserts that Respondent has failed to comply with the January 21, 2011 order of the Court directing the production of documents. Petitioner objects to the reservation of rights asserted by Respondent in its document production, to produce additional responsive documents at a later date.

On April 5, 2011 the motions were marked submitted and the Court reserved decision.

DISCUSSION

It is well settled that discovery in summary proceedings is only permitted by leave of court (CPLR 408, RPAPL 701). The rationale behind requiring leave of court is that discovery is adverse to the expeditious nature of a summary proceeding, and should only be allowed by courts where ample need is demonstrated (*Dubowsky v. Goldsmith* 202 AD818; *Antillean Holding v. Lindley* 76 Misc2d 644).

When leave of court is given, discovery takes place pursuant to CPLR 3101, which provides for disclosure of all information material to an asserted defense or claim (*Town of Pleaseant Valley v. NYS Board of Real Property Services* 253 AD2d 8; CPLR 3101).

Absent a formal request for disclosure of non-parties, or prior to making such a request, " .. there is nothing precluding ... counsel from initially attempting to contact non-parties ... (*Nagle v. Grayson* 24 Misc.3d 476, at 477-478). Thus, the case law clearly differentiates interviewing potential witnesses as opposed to deposing them. As one Court noted ...

> The trial judge apparently looked upon an interview as the taking of a deposition. In fact, there is little relation between them. A lawyer talks to a witness to ascertain what, if any, information the witness may have relevant to his theory of the case, and to explore the witnesses' knowledge, memory and opinion ...
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> .....
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> In contrast to the pre-trial interview with prospective witnesses, a deposition serves an entirely different purpose, which is to perpetuate testimony, to have it available for use or confrontation at the trial, or to have the witness committed to a specific representation of such facts as he might present. A desire to depose formally would arise normally after preliminary interviews might have caused counsel to decide to take a deposition.

(*International Business Machines Corp. v. Edelstein* 526 F2d 37, at 41 and FN4).

> The right to effective assistance of counsel is held to incorporate "... time-honored and decision-honored principles, namely that counsel for all parties have a right to interview an adverse party's witnesses (the witness willing) in private, without the presence or consent of opposing counsel and without a transcript being made.

(*Id* at 42).

The New York State Court of Appeals has sanctioned the use of informal interviews in preparation for trial, as opposed to depositions, holding "(c)ostly formal depositions that may deter litigants with limited resources, or even somewhat less formal and costly interviews attended by adversary counsel, are no substitute for ... off the record private efforts to learn and assemble, rather than perpetuate information (*Niesig v. Team 1*, 76 NY2d 363, at 372)". In

conducting such interviews it is expected that "... attorneys would make their identity and interest known to the interviewees and comport themselves ethically (*Id* at 376)."

Neither CPLR Article 31, nor Court Rules mention *ex parte* interviews with witnesses, however, as noted above, the Court of Appeals has indicated that counsel has a right to conduct said interviews in the course of preparing their case.

> Plaintiffs counter that informal interviews of treating physicians are nonetheless impermissible because article 31 of the CPLR and part 202 of the Uniform Rules do not identify them as a disclosure tool. But there are no statutes and no rules expressly authorizing or forbidding ex parte discussions with *any* nonparty ... Attorneys have always sought to talk with nonparties who are potential witnesses as part of their trial preparation. Article 31 does not 'close off' these 'avenues of informal discovery' ...

Arons v. Jutkowitz, 9 NY3d 393 at 409 citing Niesig, 76 NY2d at 372.

The Court concluded "(i)n sum, an attorney who approaches a nonparty treating physician (or other health care professional) must simply reveal the client's identity and interest, and make clear that any discussion with counsel is entirely voluntary and limited in scope ..." to non-privileged information (*Id* at 410).

In *Arons v. Jutkowitz*, the Court of Appeals specifically held that this right extended to a party's physician. The Court found that the plaintiff had waived any privilege by putting his medical condition at issue in bringing the personal injury law suit. Petitioner asserts that no privilege is at issue in this case, because Petitioner is clearly seeking only dates of treatment and not any privileged medical information.

However, notwithstanding its strong support of counsel's right to conduct *ex parte* interviews, the Court in *Arons* concluded that where the nonparty is a health care professional, Health Insurance Portability and Accountability Act (HIPAA) regulations will require that a party obtain HIPAA authorization or court order, prior to contacting a non-party physician, even

if its only for the purpose of conducing an *ex parte* interview. "The Privacy Rule generally provides that covered entity may not use or disclose an individual's protected health information to third parties without a valid authorization, except as otherwise permitted or mandated under the rule (*Id* at 413)."

The *Arons* Court found that the privacy rule "superimposes procedural prerequisites" on a an attorney wishing to conduct such informal discovery. "As a practical matter, this means that the attorney who wishes to contact an adverse party's treating physician must first obtain a valid HIPAA authorization or a court or administrative order; or must issue a subpoena, discovery request or other lawful process with satisfactory assurances relating to either notification or a qualified protective order (*Id* at 415)."

Finally, the Court noted that even with a HIPAA authorization, cooperation by the nonparty is voluntary. "Of course, it bears repeating that physicians remain entirely free to decide whether or not to cooperate with defense counsel. HIPAA compliant authorizations and HIPAA court orders cannot force a health care professional to communicate with anyone; they merely signal compliance with HIPAA and the Privacy Rule as is required before any use or disclosure of protected health information may take place (*Id* at 416)."

While Petitioner's counsel argues that the dates of treatment do not constitute privileged information, counsel offers no legal authority for that position. CPLR § 4504 provides that "unless the patient waives the privilege ... a person authorized to practice medicine ... shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity."

Moreover, "protected health information" for the purposes of HIPPAA is defined as "individually identifiable health information (42 CFR §164.502[a])", which in turn is defined as health information that "is created or received by a health care provider, health plan, employer, or health care clearinghouse and relates to the past, present or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present or future payment for the provision of health care to an individual; and (I) that identifies the individual; or (ii) with respect to which there is a reasonable basis to believe the information can be used to identify the individual (42 CFR §160.103; *Matter of Antonia E*. NYLJ, June 22, 2007, p.23, col.3)."

In *Arons,* the Court of Appeals found that there was "no conflict between New York Law and HIPAA on the subject of ex parte interviews of treating physicians because HIPAA does not address this subject (*Arons* at 416)." However, this is also predicated on the Court's analysis that CPLR §4504 did not apply because plaintiff had waived his privilege. At least one lower court has found that, in the context of special proceedings, CPLR §4504 is more stringent than HIPAA, and that HIPAA does not supercede New York Law absent a waiver of the privilege (*Matter of Antonia E*. NYLJ, June 22, 2007, p.23, col.3).

Given the foregoing, the Court finds that while generally *ex parte* interviews of witnesses do not constitute disclosure requiring leave of court, where the witness sought to be interviewed is the treating physician of a party, leave of court must be sought prior to engaging in such *ex parte* interviews, particularly in the context of a summary proceeding. Furthermore the Court finds that given the broad definitions of protected information and the broad scope of CPLR 4504, even the dates of treatment constitute privileged or protected information.

Additionally, once a request for document production is made, other concerns come into play. The CPLR contains several provisions pertaining to the use of a subpoena to obtain documents from a non-party. CPLR § 3120 governs production of documents pursuant to pretrial disclosure, and CPLR § 2301 governs production of documents for a trial. Petitioner's request for the doctor to provide documents is clearly in the nature of a discovery request, and could only be made after moving for leave to conduct such discovery and complying with CPLR § 3120.

Notwithstanding the foregoing, Respondent's motion is denied. There was no privileged information provided by the physician to Petitioner's counsel. The only thing reported to have been said by the physician is that he would speak with his lawyer about HIPAA regulations. Therefore there is nothing to suppress or preclude. Petitioner's counsel denies contacting anyone other than the physician, and as indicated above he need not seek leave of court to conduct *ex parte* interviews of other non-healthcare witnesses as long as counsel complies with the guidelines set forth by the Court of Appeals, namely that the attorney identify himself, the purpose of the information being sought and the fact that any information that the witness wishes to provide is voluntary and the witness need not speak with the attorney if he or she does not wish to do so.

Respondent's motion for attorneys' fees is also denied, as the Court does not find that Petitioner's conduct was sanctionable or warrants the impositions of fees as a penalty.

Petitioner's Motion

Petitioner's motion to the extent that it seeks additional discovery not previously requested is denied. However, this Court had previously directed Respondent to comply with

document requests. Specifically paragraph 39 of Petitioner's document request which sought "Copies of medical and dental bills whether paid for by the respondent or a business entity for the medical or dental treatment of respondent, with the medical information redacted." This was included in the documents Respondent was ordered to produce by February 28, 2011, pursuant to Judge Schneider's January 21, 2011 decision and order. Judge Schneider's order provided that the documents produced could be redacted as to dollar figures, account numbers and social security numbers.

Respondent has not complied in anyway with the order and the letters produced by the doctors stating that Respondent's address of record is the Subject Premises do not constitute compliance. Respondent is to provide such documents on or before May 31, 2011, or Petitioner may renew its application to strike. Petitioner implies that the discovery ordered by Judge Schneider is broader than the actual document request. Petitioner states "(w)e want the actual bills, documents and records including the respondent's intake forms, i.e., the initial forms completed by the respondent when respondent first visited the medical provider." However as noted above Judge Schneider's order only provided for redacted copies of the bills, no other documents or medical records were sought by Petitioner, in its discovery request nor did the Court direct for the production of medical records beyond the bills.

Respondent has entirely failed to comply with the Court order to produce diaries and calendars in response to Document Request number 5. Respondent is directed to produce such documents by May 31, 2011 or submit a sworn statement affirming that no such documents exist. In the event Respondent defaults, Petitioner may renew its application to strike.

Respondent has entirely failed to comply with the Court order to produce in response to document request 17 " (a)ll documents which concern or reflect any meetings Respondent has had" during the relevant period. Respondent is directed to produce such documents by May 31, 2011, or submit a sworn statement affirming that no such documents exist. In the event Respondent defaults, Petitioner may renew its application to strike.

Respondent has entirely failed to comply with the Court order to produce in response to document request 20 "(a)ll celluar telephone bills for any cellular phone used by respondent" during the relevant period. Respondent is directed to produce such documents by May 31, 2011. In the event Respondent defaults Petitioner may renew its application to strike.

Respondent has entirely failed to comply with the Court order to produce in response to document request 21 "(a)ll correspondence sent by or on behalf of the respondent regarding all cellular telephone bills including but not limited to requests for a change of billing address and/or change of account name or account holder" during the relevant period. Respondent is directed to produce such documents by May 31, 2011 or to submit a sworn statement that no such documents exist by said date. In the event Respondent defaults Petitioner may renew its application to strike.

Respondent has entirely failed to comply with the Court order to produce in response to document request 33 "(a)ll documents which reflect where the respondent votes" during the relevant period. Respondent is directed to produce such documents by May 31, 2011. In the event Respondent defaults Petitioner may renew its application to strike.

Respondent has produced some documents in response to request 1 which is for "(a)ll Utility (gas, electric, telephone, water and other) bills for the premises" and the California

address. However, Respondent has only provided the first page of most of the bills provided, which was not directed by the Court, and appears to have provided no documentation for the California address. Respondent is to provide complete copies of all such bills in accordance with Judge Schneider order, as far as redacted information and time period, or to submit a sworn statement that such documents do not exist. Respondent is to comply on or before May 31, 2011. In the event Respondent fails to do so Petitioner may subpoena such documents directly from the providers in accordance with CPLR §3120 without further leave of Court.

With regard to document requests 8, 9 and 10 which pertain to cars used by Respondent, although the Respondent asserts documents responsive to request for 8 and 10 have already been complied with and produced, the Court sees no evidence of such compliance in the voluminous document productions left with the Court, and Petitioner asserts that Respondent has refused to produce documents regarding leased vehicles which will show where he is. Additionally, Respondent denies being in possession of leases for any such vehicles.

Petitioner's request to directly subpoena Mercedes Benz for the lease and documents related to same is thus granted. Petitioner may subpoena said records pursuant to CPLR 3120 without further leave of court, or may explore this issue further at Respondent's deposition and if leased vehicles have been used by Respondent and the documents not provided by the deposition date, Petitioner may serve non-party subpoenas on appropriate entities for disclosure and production of said documentation in accordance with CPLR §3120, without further leave of court.

Respondent states that he has no documents responsive to request 11, which seeks documents which reflect any electronic or manual road toll invoices for travel by Respondent.

Respondent is directed to produce such documents by May 31, 2011 or to submit a sworn statement that no such documents exist by said date. In the event Respondent defaults Petitioner may renew its application to strike.

Respondent states that he has no documents responsive to request 14 which seeks documents relevant to any insurance policy covering the premises at 1290 San Ysidro. Respondent is directed to produce such documents by May 31, 2011 or to submit a sworn statement that no such documents exist by said date. In the event Respondent defaults Petitioner may renew its application to strike.

Respondent states that he has no documents responsive to request 15 which seeks documents relevant to his address in California such as leases and bills. Based on the forgoing Petitioner may issue a nonparty subpoena for the production of said documents to the Respondent's California Landlord in accordance with CPLR §3120.

With regard to the request for correspondence to providers regarding change of utility accounts, as Respondent states he has no such documents in his possession, Petitioner may subpoena said documents directly from the providers pursuant to CPLR 3120, without further leave of court.

Petitioner's request to subpoena American Airlines for Respondent's travel information is granted as Respondent states he has no copies of airline tickets or documents reflecting dates and locations of travel. Petitioner may serve a subpoena pursuant to CPLR 3120, without further leave of court.

Petitioner's request to subpoena the Post Office for documents where Respondent requested a hold be put on mail to the Subject Premises is granted as Respondent states he has

no such documents in his possession. Petitioner may submit such subpoena to be so-ordered by the Court in accordance with CPLR 3120 with out further leave of court.

Respondent is directed to produce a complete copy of all pages of his passport on or before May 31, 2011 or Petitioner may renew its motion to strike.

This constitutes the decision and order of this Court.

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HON. SABRINA B. KRAUS

Dated: New York, New York
May 9, 2011

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