

**Benavides v Hauze**

2011 NY Slip Op 32367(U)

August 22, 2011

Sup Ct, NY County

Docket Number: 102278/08

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: DEBRA A. JAMES  
*Justice*

PART 59

BETTY BENAVIDES AND CINDY HO, SHAREHOLDERS  
OF AND SUIING IN THE RIGHT OF 322 WEST 47TH  
STREET HOUSING DEVELOPMENT FUND CORP.,  
Plaintiffs,

Index No.: 102278/08

Motion Date: 05/10/11

Motion Seq. No.: 03

- v -

MARTA HAUZE, SARA L. MUHIRAD, COREY L.  
BROTHERS, AND 322 WEST 47TH STREET HOUSING  
DEVELOPMENT FUND CORP.,  
Defendants.

**FILED**

**AUG 24 2011**

The following papers, numbered 1 to 6 were read on this motion to quash **NEW YORK COUNTY CLERK'S OFFICE**

Notice of Motion/Order to Show Cause -Affidavits -Exhibits	No(s).	1, 2
Answering Affidavits - Exhibits	No(s).	
Replying Affidavits - Exhibits	No(s).	3 - 6

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is  
Motion sequence numbers 3 and 4 are consolidated for  
disposition.

In each respective motion, non-party JPMorgan Chase Bank,  
N.A. (Chase) moves pursuant to CPLR 3103 (a) and 2304, for a  
protective order quashing the notice to take deposition and  
document subpoena issued by the plaintiffs and for sanctions.

Plaintiffs Betty Benavides and Cindy Ho are tenant  
shareholders in 322 West 47th Street Housing Development Fund

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

- CHECK ONE:  CASE DISPOSED  NON-FINAL DISPOSITION
- CHECK AS APPROPRIATE: .. MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- CHECK IF APPROPRIATE:  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

Corporation, a low income housing cooperative corporation (the cooperative housing corporation). The defendants Marta Hauze, Sara L. Muhirad and Corey L. Brothers are also tenant shareholders.

This is an action involving a dispute over control of the cooperative housing corporation's board. The complaint alleges various violations of the by-laws and seeks, inter alia, removal of Hauze as President of the corporation (first cause of action).

The cooperative housing corporation maintains a bank account at the non-party Chase. In separate lawsuits, this court dismissed plaintiff's claims against Chase in connection with transactions with the corporation. See Benavides v Hauze, Index No.: 602078/2008, (Sup Ct, NY County, June 4, 2009); see also Benavides v Chase Manhattan Bank, Index No.: 602710/2009, (Sup Ct, NY County, January 26, 2011). The plaintiffs allege that on August 3, 2003, a transfer of the sum of \$25,629.11 was made from the cooperative housing corporation's account at Chase. The plaintiffs allege alternatively that the transfer went to either the cooperative housing corporation's management company, or to the defendant Hauze. The plaintiffs submit as an exhibit in opposition to Motion Sequence No. 4 a document from Chase entitled "original advice of debit" indicating that the "beneficiary" of the transfer was "322 West 47th St. HDFC 322

West 47 St. 2F." The plaintiffs allege that apartment 2F is defendant Hauze's apartment.

The court notes that the non-party subpoena at issue here was dated only two days in advance of the note of issue filing and that plaintiffs have now served two subpoenas; one for discovery purposes (Motion Seq. No. 3) and one for trial (Motion Seq. No. 4).

In support of its motion for a protective order and to quash, Chase argues that its testimony is neither material nor necessary, and is available from another source. In opposition, the plaintiffs argue that Chase's testimony is essential and relevant to the plaintiffs' causes of action against Hauze, and that the plaintiffs have no other means of obtaining relevant information. It is argued that, because the plaintiffs did not authorize such money transfer, and because the defendant Hauze denies authorizing such transfer, "the only way to ascertain who requested said transfer and/or under what basis Chase released/transferred said funds can only come from Chase."

CPLR 3101 (a) mandates full disclosure of all matters material and necessary in the prosecution or defense of an action. Where the disclosure is sought from a non-party, more stringent requirements are imposed on the party seeking disclosure. A non-party to be deposed must be served with a subpoena (CPLR 3106 [b]). Where the production of paper is also

sought, a notice or subpoena describing the items sought is the appropriate device (CPLR 3111). Where only the production of paper without a deposition is sought, the remedy is a subpoena under CPLR 3120. In addition, where disclosure is sought from a non-party, the non-party shall be given notice stating the circumstances or reasons such disclosure is sought or required (CPLR 3101 [a] [4]).

CPLR 3103 allows for a protective order limiting, conditioning, or regulating disclosure devices. CPLR 2304 provides for a motion to quash, fix conditions, or modify a subpoena.

The subpoenas duces tecum with notice of deposition served on non-party Chase are facially defective as they fail to "stat[e] the circumstances or reasons such disclosure is sought or required", as provided in CPLR 3101(a)(4). DeStafano v MT Health Clubs, Inc., 220 AD2d 331 (1<sup>st</sup> Dept 1995). The court concurs with non party Chase that the language of the subpoenas that states "concerning the subject matter of the lawsuit" does not comply with CPLR 3101(a)(4).

In addition, this court concurs with defendant Hauze's argument that plaintiffs' request for "bank procedures and/or federal guidelines with regards to the requirements necessary to instruct the transfer of funds from this account and/or any other commercial checking account when they are not signatories under

the Banking Resolution for said account... and any rules or regulations regarding said actions" is utterly irrelevant to the only issues remaining in this action, i.e. whether defendant Hauze breached her fiduciary duty and 322 West 47<sup>th</sup> Street Housing Development Fund Company ("HDFC") bylaws when lacking the proper authority, she initiated transactions related to the HDFC bank account, and the retention of 10 K Management as managing agent. See Ledonne v Orsid Realty Corp., 83 AD3d 598 (1st Dept 2011); Velez v Hunts Point Multi-Serv. Ctr., Inc., 29 AD3d 104 (1st Dept 2006). Nor have plaintiffs demonstrated that federal banking laws or guidelines governing any banking transaction cannot be obtained from another source.

Moreover, the record before the court establishes that the records related to the \$25,629.11 banking transaction at issue were already received or made available to plaintiffs.

DeStafano, supra.

Finally, plaintiffs submit no proof that either subpoena was served in accordance with CPLR 2303(a).

The court shall deny the movant's application for attorneys' fees or sanctions. The fact that this court found Chase not liable to plaintiffs in other suits has no bearing on whether the information plaintiffs seek here is relevant to the claims being asserted against these defendants.

Accordingly, it is

the Banking Resolution for said account... and any rules or regulations regarding said actions" is utterly irrelevant to the only issues remaining in this action, i.e. whether defendant Hauze breached her fiduciary duty and 322 West 47<sup>th</sup> Street Housing Development Fund Company ("HDFC") bylaws when lacking the proper authority, she initiated transactions related to the HDFC bank account, and the retention of 10 K Management as managing agent. See Ledonne v Orsid Realty Corp., 83 AD3d 598 (1st Dept 2011); Velez v Hunts Point Multi-Serv. Ctr., Inc., 29 AD3d 104 (1st Dept 2006). Nor have plaintiffs demonstrated that federal banking laws or guidelines governing any banking transaction cannot be obtained from another source.

Moreover, the record before the court establishes that the records related to the \$25,629.11 banking transaction at issue were already received or made available to plaintiffs.

DeStafano, supra.

Finally, plaintiffs submit no proof that either subpoena was served in accordance with CPLR 3106.

The court shall deny the movant's application for attorneys' fees or sanctions. The fact that this court found Chase not liable to plaintiffs in other suits has no bearing on whether the information plaintiffs seek here is relevant to the claims being asserted against these defendants.

Accordingly, it is

ORDERED that the motions of JPMorgan Chase Bank, N.A. to quash, for a protective order and for sanctions, are GRANTED; and it is further

ORDERED that the motions of JPMorgan Chase Bank, N.A. for sanctions are DENIED.

This is the decision and order of the court.

Dated: August 22, 2011

ENTER:

~~\_\_\_\_\_~~ J.S.C.

**DEBRA A. JAMES**

**FILED**

**AUG 24 2011**

**NEW YORK  
COUNTY CLERK'S OFFICE**