Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 6**
Justice

ABDUL WAHAB,

Plaintiff,

-against-

AGRIS & BRENNER, LLC, et al.,

Defendants.

AGRIS & BRENNER, LLC, et al.,

Third-Party Plaintiffs,

-against-

ATLANTIC CONTRACTING, LLC,

Third-Party Defendant.

Index No. 27893/08

Motion
Date October 25, 2011

Motion
Cal. No. 30

Motion
Sequence No. 7

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Upon the foregoing papers it is ordered that plaintiff's motion for an order pursuant to CPLR 2304 quashing the subpoena duces tecum, dated July 19, 2011, served by defendants/third-party plaintiffs upon plaintiff and for an order pursuant to CPLR 3103 granting plaintiff a protective order; and third-party defendant's cross motion for the same relief as plaintiff requests are hereby decided as follows:

This action arises out of an incident occurring on August 9, 2008 whereby plaintiff, Abdul Wahab, a construction worker, maintains that he sustained serious personal injuries when the scaffold he was working on, collapsed and he fell.

Under CPLR 3120(1)(i), a party may serve upon any other party a subpoena duces tecum to produce documents or things for inspection, testing, copying or photographing that are in the

possession, custody or control of the party served. Under CPLR 3101 there shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action. The purpose of disclosure proceedings is to advance the function of trial, to ascertain truth and to accelerate disposition of suits. The CPLR further provides that disclosure should be construed broadly to effectuate this purpose (CPLR 3101[a][1][2]; Allen v. Crowell-Collier Publishing Co., 21 NY2d 403 [1968]). "Evidence" is defined to mean not the equivalent to that evidence which might be admissible on trial of the action, but means evidence required in preparation for trial. The information sought need not qualify as evidence admissible at the trial of an action, but only lead to such evidence. Disclosure is required as to all relevant information calculated to lead to relevant evidence (Siegel, NY Prac § 344, at 550 [4th ed 2005],); see also, Twenty Four Hour Fuel Oil Corp v. Hunter Ambulance Inc., 226 AD2d 175 [1st Dept 1996]; Polygram Holding, Inc. v. Cafaro, 42 AD3d 339 [1st Dept 2007]).

It is well-established law that under CPLR 3101(a), the parties may engage in liberal discovery of evidence that is "material and necessary" for the preparation of trial (see, Allen v. Crowell-Collier Publ. Co., 21 NY2d 403 [1968]). "The words 'material and necessary' as used in the statute are to be interpreted liberally, to require disclosure, upon request, of any facts bearing on the controversy which will assist in the preparation for trial" (Anonymous v. High School for Environmental Studies, et. al., 820 NYS2d 573, 578 [1st Dept 2006] [citations omitted]). The Court is given broad discretion to supervise discovery (Lewis v. Jones, et. al., 182 AD2d 904 [3d Dept 1992]). "The test is one of usefulness and reason. CPLR 3101(subd [a]) should be construed . . .to permit discovery of testimony 'which is sufficiently related to the issues in litigation to make the effort to obtain it in preparation for trial reasonable' (Weinstein-Korn-Miller, NY Civ Prac, ¶ 3101.07, p 31-13)" (Allen, supra). The CPLR directs full disclosure of all relevant material. The test is one of usefulness and reason (CPLR 3101[a]; Allen, supra; Andon v. 302-304 Mott Street Assoes., 94 NY2d 740 [2000]; Hoenig v. Westphal, 52 NY2d 605 [1981] [pre-trial discovery is to be encouraged, limited only by the test of *materiality of "usefulness and reason"*]; Spectrum Sys. Int'l. Corp. v. Chemical Bank, 78 NY2d 371, 376 [1991]). With respect to discovery, in order to withstand a challenge to the disclosure request, the party seeking disclosure must satisfy the threshold requirement that the disclosure sought is "material and necessary" (Kooper v. Kooper, 74 AD3d 6 [2d Dept 2010]). Moreover the adequacy and circumstances and reasons for the

disclosure will ultimately be determined by the trial court, and the "determination of whether a particular discovery demand is appropriate, are all matters within the sound discretion of the trial court, which must balance competing interests" (Id.; Santariga v. McCann, 161 AD2d 320 [1st Dept 1990] [the scope and supervision of disclosure is a matter within the sound discretion of the court in which the action is pending]).

"The standard to be applied on a motion to quash a subpoena duces tecum is whether the requested information is 'utterly irrelevant to any proper inquiry'" (Ayubo v. Eastman Kodak Company, Inc., 158 AD2d 641 [2d Dept 1990]) or whether its "futility . . .to uncover anything legitimate is inevitable or obvious" (La Belle Creole International, S.A. v. Attorney-General of the State of New York, 10 NY2d 192 [NY 1961]).

"Moreover, the burden of establishing that the requested documents and records are utterly irrelevant is on the person being subpoenaed" (Velez v. Hunts Point Multi-Serv. Ctr., Inc., 29 AD3d 104 [1st Dept 2006][internal citations omitted]).

It is undisputed that the defendants served a judicial subpoena duces tecum on or about July 19, 2011 upon the plaintiff, which sought the following items of discovery:

> A. All business records which show the customers Abdul Wahab and Atlantic Contracting LLC actually performed work for in 2006, 2007, 2008, 2009, 2010 and 2011 and the work actually performed by them, including invoices, contracts, payment receipt documentation;
>
> B. All records showing all persons or entities that Abdul Wahab and Atlantic Contracting LLC offered to do work for in each of the above years, but were not hired by the customers to perform;
>
> C. All records that record the total number of customers Abdul Wahab and Atlantic Contracting LLC actually performed work for in each of the above years.

It is undisputed that plaintiff has not responded to the subpoena.

Plaintiff maintains that the "subpoena is in violation of this Court's Orders, overbroad, not specified with reasonable particularity, seeks information which is irrelevant to the issues in this case, and is merely an attempt to harass the plaintiff in this matter". Plaintiff maintains that: items B&C are outside the parameters of the discovery orders in this case and were never requested in discovery; and with regards to item A, defendants were denied records for 2006 by the Compliance Conference Order of the Hon. Martin E. Ritholtz dated April 12, 2010, defendants were denied requests for customer invoices from 2010 by this Court in an Order dated June 2, 2011, and no such request has been made in discovery for records from 2011. Finally, plaintiff asserts that he provided tax returns including all schedules for plaintiff and Atlantic Contracting LLC for the years 2007, 2008, 2009, and 2010.

Defendants/third-party plaintiffs contend that the plaintiff has failed to set forth any documentation or factual basis that the items requested in the subpoena are utterly irrelevant or futile; and the documentation sought in the subpoena is material and necessary to a defense as and against plaintiff's claim of lost earnings. Defendants/third-party plaintiff maintain that regarding items B&C: said items were never addressed by the Court and since the plaintiff has an ongoing claim of lost earnings in excess of $1,000,000 and has admitted that he was employed by third-party defendant, Atlantic Contracting, LLC as a construction worker and an owner, records indicating who plaintiff and/or third-party defendant offered to do work for are relevant to plaintiff's claim that he can no longer do work as a result of the accident and records indicating the total number of customers that plaintiff and/or third-party defendant actually performed work for are relevant to whether or not the plaintiff performed any of the work himself. Defendants/third-party plaintiffs contend that with regard to item A: (1) the records sought for 2006 were not denied by the Compliance Conference Order of the Hon. Martin E. Ritholtz dated April 12, 2010 in that the order requires the plaintiff to provide customer invoices from 2007, 2008, and 2009, and it does not contain a directive that the defendants/third-party plaintiffs were not entitled to customer invoices from 2006 and; (2) the records were not denied by this Court in its order dated June 2, 2011 as being irrelevant or immaterial but rather, the order denied defendants/third-party plaintiffs' request for 2010 customer invoices on a purely procedural basis in that defendants/third-party plaintiffs failed to file a motion to vacate the Note of Issue in accordance with NYCRR 202.21(d). Defendants/third-party plaintiffs further contend and said order

of this Court only resolves the issue of what discovery the defendants/third-party plaintiffs are entitled to prior to the certification of this matter as ready for trial and as the Note of Issue was filed in 2010, but the trial is not likely to occur until 2012, they should be entitled to subpoena the records from 2011 for the purposes of defending plaintiff's lost wage claim at trial.

This Court finds that discovery was deemed completed when the Note of Issue and Certificate of Readiness was filed in October 2010 and as this Court stated in its order dated June 2, 2011:

> "After the filing of the Note of Issue in October 2010, Hon. Martin J. Schulman issued an order dated March 14, 2011, which order stated, in relevant part, "ORDERED that discovery herein is deemed completed, and, accordingly; it is further ORDERED that any further motions and/or requests for orders to show cause related to discovery will be considered as further attempts to delay the resolution of this action and, accordingly, are strongly discouraged".

Additionally, as the motion is being made after the service of a Note of Issue/Certificate of Readiness and the defendants have not demonstrated unusual or unanticipated circumstances, the instant motion is denied (see this Court's decision dated June 2, 2011).

Accordingly, it is hereby ORDERED that the subpoena duces tecum, dated July 19, 2011 served by defendants upon plaintiff is hereby quashed.

This constitutes the decision and order of the Court.

Dated: November 30, 2011

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Howard G. Lane, J.S.C.

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