

**Born to Build LLC v 1141 Realty LLC**

2012 NY Slip Op 30471(U)

February 22, 2012

Sup Ct, NY County

Docket Number: 113855/10

Judge: Joan A. Madden

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

PRESENT: Hon. Joan A. Madden  
Justice

PART 11

Index Number : 113855/2010  
BORN TO BUILD LLC  
vs.  
1141 REALTY LLC  
SEQUENCE NUMBER : 002  
ORDER OF PROTECTION

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

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

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED	

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision + Order

**FILED**

FEB 29 2012

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: February 22, 2012

[Signature]  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/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 11

-----X  
BORN TO BUILD LLC, and RICHARD ALAN DALEY  
d/b/a RICHARD ALAN DALEY ARCHITECT,

Index No. 113855/10

Plaintiffs,

-against-

1141 REALTY LLC, and JOHN DOE #1 through  
JOHN DOE #10, said names being fictitious and  
unknown to Plaintiff, the person or parties intended  
being the person or parties, if any, having or claiming  
an interest in or lien upon the premises described in the  
Verified Complaint,

Defendants.

**FILED**

**FEB 29 2012**

NEW YORK  
COUNTY CLERK'S OFFICE

-----X  
JOAN A. MADDEN, J.:

Defendant 1114 Realty LLC ("1141 Realty") moves pursuant to CPLR 3103 for a protective order with respect to plaintiffs' Notice of Deposition Upon Oral Examination dated August 4, 2011 (the "Notice"), of non-party Robert Toshi Chan ("Chan"), pursuant to a subpoena duces tecum. Plaintiffs oppose the motion, which is granted for the reasons below.

Background

This action seeks to foreclose on plaintiffs' mechanics liens for non-payment of approximately \$1 million allegedly owed to them for work performed on the property known as 1141 Broadway, New York, NY (the "Property" or "the Flat Iron Hotel") in connection with a project involving the construction of the Flat Iron Hotel (the "Project"). Plaintiff Born to Build LLC ("BTB") was the general contractor on the Project, and plaintiff Richard Alan Daley d/b/a Richard Alan Daley Architect ("RAD") was the architect on the Project. Non-party Chan owns non-party Smart Apartments, LLC which, in August 2011, entered an agreement with 1141

Broadway to lease the Flat Iron Hotel with an option to lease for another five years or to buy.

The complaint seeks a judgment declaring that plaintiffs' mechanics liens are good and valid, and directing that 1141 Realty's interest in the Property be sold, with the proceeds paid to plaintiffs to the extent of their liens, and a money judgment be entered in the event the sale is insufficient to cover the amounts of plaintiffs' liens. 1141 Realty answered the complaint and asserted counterclaims for breach of contract, wilful exaggerated lien, and negligence and seeks damages of approximately \$14 million.

On August 3, 2011, plaintiffs served Chan with a subpoena duces tecum, and on August 4, 2011, the Notice was served on counsel for 1141 Broadway. The subpoena requires that Chan appear at the offices of plaintiffs' counsel for a deposition on September 7, 2011 with the following documents: (1) a copy of the lease for the Flat Iron Hotel, (2) a copy of an operating agreement regarding the operation of the Flat Iron Hotel, (3) copies of correspondence between Chan and 1141 Realty, (4) copies of all rent payments or wire transfers, (5) copies of all bills received from the landlord pursuant to the lease for the Flat Iron Hotel, and (6) copies of any funds, checks, or wires paid by the lessor.

1141 Realty now moves for a protective order and seeks to strike the Notice and quash the subpoena on the ground that the information sought from Chan is not relevant to the issues in this action, which concern whether plaintiffs properly performed their work and are entitled to be paid.<sup>1</sup> Specifically, 1141 Realty argues that plaintiffs are seeking the information from Chan in

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<sup>1</sup>1141 Realty also asserts that counsel for plaintiffs has been "harassing Chan" by sending him a letter dated August 1, 2011, notifying Chan of the default judgments obtained against 1141 Realty and Saleh, and by coming to the hotel every day following the sending of the letter, and that the subpoena improperly threatens Chan with imprisonment if he fails to appear for the deposition.

[\*4]  
order to enforce two judgments obtained on default in other actions by BTB and another client of BTB's attorney against 1141 Realty and its former employee Ibrahim Saleh ("Saleh").<sup>2</sup>

Plaintiffs oppose the motion, arguing that the information sought is relevant as Smart Apartments LLC, which as indicated above is an entity owned by Chan, recently acquired a leasehold interest in the Property, with an option to purchase and therefore is a potential defendant in this action. In support of its opposition, plaintiffs submit a Memorandum of Lease recorded in the Office of the City Register on or about August 22, 2011, showing that Smart Apartments LLC and 1141 Realty entered into a five-year lease, with an option for an additional five years and an option to buy. Plaintiffs also submit copies of articles published on-line indicating Chan's interest in purchasing the Hotel and an Amended Verified Complaint in an action to foreclose on the mortgages on the Property, in which Smart Apartments LLC is one of the named defendants.

Plaintiffs also assert that as the tenant of 1141 Broadway, Chan's entity has become the "owner" of the Property within the meaning of Lien Law § 2(3), and thus even though Chan and Smart Apartments LLC may not have been involved in the transactions which resulted in the plaintiffs filing mechanics liens, and Smart Apartments LLC may be a "necessary party" defendant to this action under Lien Law § 44(3).<sup>3</sup> Plaintiffs assert that the materials sought from Chan are relevant and necessary to plaintiffs' decision as to whether to join Smart Apartments,

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<sup>2</sup>Before the submission date of this motion, Justice Bernard Fried issued an order dated October 13, 2011, granting 1141 Realty's motion to vacate its default.

<sup>3</sup> Under Lien Law § 44(3) additional necessary parties include "[a]ll persons appearing by the records in the office of the county clerk or register to be owners of such real property." Under Lien Law § 2(3), the term owner includes "a lessee for a term of years."

LLC as a party defendant. Specifically, plaintiffs contend that the information and documents sought will provide them with details concerning the terms of Smart Apartments LLC's tenancy and its relationship to the landlord, particularly with respect to the payment of rent, and will provide a basis for plaintiffs to determine whether the Property will be more or less marketable if made subject to Smart Apartment LLC's tenancy.

Plaintiffs further contend that as Saleh, who purported to be one of 1141 Broadway's principals has apparently fled the country, and 1141 Realty is claiming to be owned by other persons and entities, including John Mei, who signed the Memorandum of Lease with Chan, the information sought from Chan may clarify issues relating to 1141 Broadway's ownership and assist in determining whether other persons or entities should be joined as parties. In addition, plaintiffs argue that this information is also relevant to determine whether the interest of Smart Apartments LLC in the Property is a legitimate encumbrance on the Property.

#### Discussion

"It is well settled that the purpose of a subpoena duces tecum is to compel the production of specific documents that are relevant and material to facts at issue in a pending judicial proceeding." Velez v. Hunts Point Multi-Serv. Ctr., Inc., 29 A.D.3d 104, 108 (1st Dep't 2006).

"For [such] purposes, a party is distinguished from a nonparty[,] and where disclosure is sought against a nonparty[,] more stringent requirements are imposed on the party seeking disclosure."

Id.

Even when it is shown that discovery is material and necessary, entitlement to such discovery is "tempered by the trial court's authority to impose, in its discretion, appropriate restrictions on demands which are unduly burdensome, and to prevent abuse by issuing a

protective order where the discovery request may cause 'unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.'" Kooper v. Kooper, 74 A.D.3d 6, 10 (2d Dep't 2010); quoting CPLR 3103(a). See generally CPLR 3101(a)(4). See also Tannenbaum v. City of New York, 30 A.D.3d 357, 358-59 (1st Dep't 2006) (holding that trial court properly exercised its discretion in denying requests to depose a non-party in the absence of special circumstances).

In keeping with these principles, when discovery is sought from a non-party, the court considers whether the disclosure is warranted by examining whether the proponent of disclosure can obtain the evidence from sources other than the non-party. Reich v. Reich, 36 A.D.3d 506, 507 (1st Dep't. 2007); Tannenbaum, 30 A.D.3d at 358-59; See Kooper 74 A.D.3d at 18; Troy Sand & Gravel Co., Inc. v. Town of Nassau, 80 AD3d 199, 203 (3d Dept 2010); but see Velez, 29 A.D.3d at 112 (noting that "the proper standard in assessing a motion to quash a subpoena duces tecum pursuant to a protective order is whether "the materials sought are utterly irrelevant to any proper inquiry").

Under this standard, the court finds that the motion for a protective order should be granted, and the subpoena quashed. First, while information regarding Smart Apartments LLC's interest in the Property is arguably relevant as to whether to join it as a party, plaintiffs do not explain the need for further information in this regard since plaintiffs already have submitted proof of Smart Apartments LLC's interest in the form of a lease between 1141 Realty and Smart Apartments LLC which has been recorded with the City Register.

In addition, it does not appear that details concerning the terms of Smart Apartments LLC's tenancy and its relationship to the 1141 Realty are material and relevant to the issues in

\* 7]

this action. In any event, plaintiffs have not demonstrated that such information could not be obtained from a source other than a non-party, that is, from 1141 Realty. See Reich, 36 A.D.3d at 507; Tannenbaum, 30 A.D.3d at 358-59; see generally, Robert L. Haig, 3 NY Prac., Com. Lit. in New York State Courts § 22:14 (3d ed 2011). Likewise, to the extent relevant, information about the ownership structure of 1141 Realty, including issues regarding whether John Mei and/or Saleh are owners of 1141 Realty, can be obtained from 1141 Realty.

Conclusion

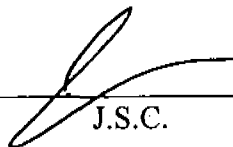
In view of the above, it is

ORDERED that the motion for a protective order is granted, and the subpoena served on non-party Robert Toshi Chan is quashed; and it is further

ORDERED that a compliance conference shall be held on April 26, 2012 at 9:30 am.

A copy of this decision and order is being mailed by my chambers to counsel for the parties.

DATED: February 29, 2012

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

**FILED**

**FEB 29 2012**

**NEW YORK  
COUNTY CLERK'S OFFICE**