

Lahens v Town of Hempstead
2012 NY Slip Op 33825(U)
October 23, 2012
Supreme Court, Nassau County
Docket Number: 22200/10
Judge: Jeffrey S. Brown
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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

**P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE**

-----X **TRIAL/IAS PART 17**
JEAN ROBERT LAHENS and MARGARET LAHENS,

Plaintiffs,

- against -

**Index No. 22200/10
Mot. Seq. # 03
Mot. Date 10-5-12
Submit Date 10-5-12**

**THE TOWN OF HEMPSTEAD, COUNTY OF NASSAU
and MARK BLACK,**

Defendants.

-----X

The following papers were read on this motion:	Papers Numbered
Notice of Motion, Affidavits (Affirmations), Exhibits Annexed.....	1
Answering Affidavit	2
Reply Affidavit.....	3

Defendant, Mark Black, moves by notice of motion for the following relief: an order pursuant to CPLR 2304, quashing plaintiff's judicial subpoenas served upon Theresa Black, Mark Black Jr., Mykia Black, and Triek Black, and for a protective order, preventing the above named individuals from being called as a witness at the trial of this action.

The underlying action is for personal injuries allegedly sustained by plaintiff on April 29, 2010, when he tripped and fell on the sidewalk in front of the property owned by defendant Mark Black. Plaintiff served judicial subpoenas upon Theresa Black, Mark Black Jr., Mykia Black, and Triek Black and gave notice to take their depositions.

Defendant Mark Black testified at a deposition on September 6, 2012. He testified that he is the sole owner of the home; that he never delegated responsibility for inspecting the sidewalk to his wife or four children. Defendant Black argues that there is no reason to call his family as non-party witnesses since they were not responsible for the sidewalk in question. Defendant further argues that plaintiff already had a chance to depose him as the owner of the home, and to allow plaintiff to depose these non-party witnesses would be unduly burdensome.

[* 2]

He states that nowhere in his deposition transcript does it state that his wife and daughter were responsible for the maintenance of the home or the cleaning of the sidewalk. Therefore, their testimony is unnecessary and unwarranted.

In opposition, plaintiff's counsel states that defendant Black lacks standing to contest the non-party subpoenas. He additionally argues, in the alternative, that depositions of the non-party witnesses are necessary because they may have knowledge of the sidewalk's condition. He claims that defendant Black was evasive with the answers he gave at his deposition. He questions the credibility of defendant Black concerning his testimony that he never inspected the sidewalk during the 17 years that he lived at that location, and that he had no knowledge of the condition of the sidewalk or the defect which consisted of a raised flag that measures two inches in height. Counsel asserts that defendant Black was uncooperative in that he refused to identify photographs depicting the sidewalk in front of his home.

At defendant Black's deposition, plaintiff's counsel tried to ascertain whether the other members of the household had knowledge of the sidewalk's condition. Testimony revealed that Black's two sons shoveled the sidewalk when it snowed and that his children rode their bicycles and played in front of the house on the sidewalk.¹

In reply, defendant argues that plaintiff is obviously on a fishing expedition and is seeking a second bite of the apple by trying to elicit answers he wants and trying to harass defendant by bringing in defendant's wife and children to testify based on speculative conclusions. Defendant rebuts plaintiff's assertion that he was evasive when questioned about the photographs inasmuch as most of them do not clearly depict his premises and just show a sidewalk or a tree. Furthermore, defendant points out that he testified that he and his family never made any sidewalk repairs and are not experienced in construction, masonry, concrete work, or landscaping work. Thus, their depositions are not warranted.

Based on the foregoing, the decision of the court is as follows:

The court finds that defendant Black has standing to make the instant application. A motion to quash may be made on behalf of a non-party witness or the witness' lawyer, or by one of the parties or a party's lawyer (*see McDaid v. Semegran*, 16 Misc.3d 1102(A), 841 N.Y.S.2d 826 ; *In re MacLeman*, 9 Misc.3d 1119(A); David D. Siegel, Practice Commentaries, McKinney's Cons. Laws 473 of N.Y., Book 7B, CPLR C2304:1, at 275).

"A motion to quash is, thus, properly granted where the party issuing the subpoena has failed to show that the disclosure sought cannot be obtained from sources other than the nonparty (*see Moran v. McCarthy, Safrath & Carbone, P.C.*, 31 A.D.3d at 726, 819 N.Y.S.2d 538; *Tannenbaum v.*

¹The court notes that the children plaintiff is seeking to depose are now over the age of twenty (20).

[* 3]

Tenenbaum, 8 A.D.3d at 360, 777 N.Y.S.2d 769; *Lanzello v. Lakritz*, 287 A.D.2d at 601, 731 N.Y.S.2d 763; *Tsachalis v. City of Mount Vernon*, 262 A.D.2d at 401, 690 N.Y.S.2d 746; *Matter of Validation Review Assoc.* [Berkun-Schimmel], 237 A.D.2d at 615, 655 N.Y.S.2d 1005), and properly denied when the party has shown that the evidence cannot be obtained from other sources (see *Cespedes v. Kraja*, 70 A.D.3d at 622, 892 N.Y.S.2d 884; *Tenore v. Tenore*, 45 A.D.3d at 571-572, 844 N.Y.S.2d 704; *Thorson v. New York City Tr. Auth.*, 305 A.D.2d at 666, 759 N.Y.S.2d 880; *Bostrom v. William Penn Life Ins. Co. of N.Y.*, 285 A.D.2d at 483, 727 N.Y.S.2d 160) . . .

. . . [m]ore than mere relevance and materiality is necessary to warrant disclosure from a nonparty" (*Dioguardi v. St. John's Riverside Hosp.*, 144 A.D.2d at 334-335, 533 N.Y.S.2d 915; accord *Tannenbaum v. Tenenbaum*, 8 A.D.3d at 360, 777 N.Y.S.2d 769; *Lanzello v. Lakritz*, 287 A.D.2d at 601, 731 N.Y.S.2d 763)." (*Kooper v. Kooper*, 74 A.D.3d 6, 16-17, 901 N.Y.S.2d 312, 322 [2010]).

Applying the above principals to the case at bar, the court finds that plaintiffs have not met their burden. The record does not support compelling pre-trial disclosure from defendant's wife and children at a deposition. Although plaintiffs may not be satisfied with the answers given by defendant Black at his deposition, it does not give rise to production of these non-party witnesses. However, plaintiffs are free to call any of these witnesses at a trial of this action.

Accordingly, it is

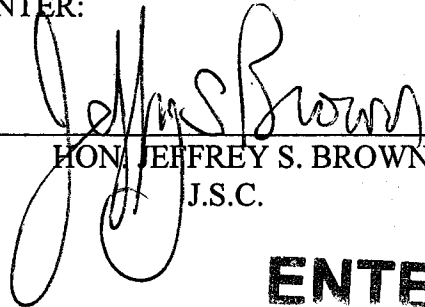
ORDERED, that pursuant to CPLR 2304, the application to quash the judicial subpoenas served upon non-party witnesses Theresa Black, Mark Black Jr., Mykia Black and Triek Black is hereby **GRANTED**; and it is further

ORDERED, that the application for a protective order preventing Theresa Black, Mark Black Jr., Mykia Black and Triek Black from testifying at a trial of this action is hereby **DENIED**.

This constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
October 23, 2012

ENTER:


HON. JEFFREY S. BROWN
J.S.C.

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ENTERED
OCT 25 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE