

**501 Fifth Ave. Co. LLC v Marion**

2013 NY Slip Op 32401(U)

October 4, 2013

Sup Ct, New York County

Docket Number: 151409/13

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

CYNTHIA S. KERN
J.S.C.

PRESENT: \_\_\_\_\_
Justice

PART \_\_\_\_\_

Index Number : 151409/2013
501 FIFTH AVENUE COMPANY
vs.
MARION, HERBERT
SEQUENCE NUMBER : 002
QUASH SUBPOENA, FIX CONDITIONS

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

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

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

Dated: 10/4/13

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

CYNTHIA S. KERN

[X] NON-FINAL DISPOSITION

- 1. CHECK ONE: [ ] CASE DISPOSED
2. CHECK AS APPROPRIATE: MOTION IS: [ ] GRANTED [ ] DENIED [ ] GRANTED IN PART [ ] OTHER
3. CHECK IF APPROPRIATE: [ ] SETTLE ORDER [ ] SUBMIT ORDER
[ ] DO NOT POST [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

-----x  
501 FIFTH AVENUE COMPANY LLC,

Plaintiff,

Index No. 151409/13

-against-

**DECISION/ORDER**

HERBERT MARION, OPTIMUM SECURITY  
SERVICES INC., AAIS SECURITY SERVICES  
INCORPORATED, ALWAYS VIGILANT SECURITY  
COMPANY INC.,

Defendants.

-----x  
**HON. CYNTHIA S. KERN, J.S.C.**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion  
for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Affidavit in Opposition.....	<u>2</u>
Exhibits.....	<u>3</u>

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Plaintiff 501 Fifth Avenue Company LLC ("501") commenced the instant action to recover rent allegedly due to plaintiff under a lease agreement (the "Lease") with non-party Urban Dynamics Career & Employment Services, Inc. ("Urban") and a limited guaranty signed by defendant Herbert Marion ("Marion"). Marion and defendant AAIS Security Services Incorporated ("AAIS") now move for an Order (1) pursuant to CPLR § 2304 quashing the two Subpoenas Duces Tecum served by plaintiff upon non-parties J.P. Morgan Chase Bank N.A. (the "Chase Subpoena") and Carver Federal Savings Bank (the "Carver Subpoena"); (2) pursuant to CPLR § 3103 granting them a protective order barring plaintiff from seeking discovery from

non-parties absent a showing that such discovery is necessary and unavailable from any party; and (3) reimbursing them for costs and attorney's fees. For the reasons set forth below, Marion and AAIS' motion is granted in part and denied in part.

The relevant facts are as follows. Plaintiff is the owner of the building located at 501 Fifth Avenue, New York, New York (the "building"). Plaintiff entered into the Lease, with Urban as tenant and Marion as the guarantor, for the commercial office space in the basement of the building (the "subject premises") for a ten year term which commenced on November 1, 2006 and expires on October 31, 2016. Up until March 2012, Urban made payments pursuant to the Lease through an account it held with Carver Federal Savings Bank ("Carver"). Due to Urban's alleged failure to pay rent starting in March 2012, on or about April 30, 2012, plaintiff commenced a proceeding in New York County Civil Court against Urban seeking unpaid rent from March and April 2012. Plaintiff alleges that in July 2012, Urban vacated the subject premises in breach of the Lease and has not paid rent or other costs since March 2012. It is undisputed that Urban is a defunct company and has been inactive since June 2011.

In or around February 2013, plaintiff commenced the instant action against Marion, AAIS, Optimum Security Services Inc. ("Optimum") and Always Vigilant Security Company ("Vigilant") seeking unpaid rent, electric metered charges, real estate taxes, maintenance and clean-up charges based on the allegation that Marion is the guarantor under the Lease and that Optimum, AAIS and Vigilant are alter egos and/or successors to Urban. Plaintiff brings these claims based on the allegations that: (1) Marion changed the name of Urban to AAIS in 2007; (2) Marion changed the name of AAIS to Optimum in 2010; and (3) from June 2011 through April 2012, plaintiff received cashiers checks issued by J.P. Morgan Chase Bank N.A. ("Chase") from

Vigilant to pay the outstanding arrears due under the Lease. Vigilant has failed to answer or appear in this action.

On May 2, 2013, plaintiff served its first demand for discovery and inspection upon Marion, Optimum and AAIS requesting the production of, *inter alia*, bank statements for all bank accounts in which Urban, Marion and Vigilant have an interest from October 4, 2006 to the present. Plaintiff alleges that no documents responsive to that request were produced. Thus, on May 14, 2013, plaintiff served the Carver Subpoena and the Chase Subpoena requesting information related to Urban's, Vigilant's and Marion's involvement with each respective bank. Defendants AAIS and Marion now move for an Order quashing the subpoenas, granting them a protective order and for costs and attorney's fees.

It has been repeatedly affirmed that the scope of disclosure under CPLR § 3101 is “generous, broad, and is to be construed liberally.” *Mann ex rel. Akst. v. Cooper Tire Co.*, 33 A.D.3d 24, 29 (1<sup>st</sup> Dept 2006). Further, it is well-settled that there shall be “full disclosure of all matter material and necessary in the prosecution or defense of an action.” CPLR § 3101(a). However, discovery under CPLR § 3101 does not include disclosure demands “used as a tool of harassment or for the proverbial ‘fishing expedition’ to ascertain the existence of evidence.” *Matter of New York City Asbestos Litig.*, 2010 N.Y. Slip Op. 33214 (Sup. Ct. N.Y. Cty. 2010), citing *Reuters Ltd. v. Dow Jones Telerate*, 231 A.D.2d 337, 342 (1<sup>st</sup> Dept 1997). Moreover, “on a motion to quash [a subpoena], the subpoena will be sustained unless it calls for documents which are ‘utterly irrelevant to any proper inquiry.’” *Del Vecchio v. White Plains Unit, Westchester County Chapter, Civil Service Employees Assoc., Inc.*, 64 A.D.2d 975, 976 (2d Dept 1978), citing *Application of Dairymen's League Co-op Assoc., Inc.*, 274 A.D. 591, 595 (1<sup>st</sup> Dept

1948).

In the instant action, Marion and AAIS' motion to quash the Carver Subpoena and Chase Subpoena is granted only as to that portion of each subpoena which requests the production of records solely associated with "Marion" or "Herbert Marion" as such requests seek information beyond the scope of discovery permitted under Article 31 of the CPLR and the information is "utterly irrelevant to any proper inquiry." Specifically, Document Requests 22-25 of the Chase Subpoena and Document Requests 21-28 of the Carver Subpoena must be quashed as they are not "material and necessary" in the prosecution of this action. Plaintiff's action seeks unpaid rent and other costs stemming from a Lease pursuant to which Marion is a guarantor. As an initial matter, plaintiff has not shown that Marion's personal banking records are material and necessary to proving his personal liability pursuant to the Lease as such records would only be relevant if plaintiff obtains a judgment against Marion. Additionally, plaintiff has not shown that Marion's personal banking records are material and necessary to prove Marion's co-defendants' liability pursuant to the Lease on the ground that they are alter egos and/or successor corporations of Urban as the banking records of Vigilant and Urban are sufficient to demonstrate such liability.

Plaintiff's assertion at oral argument on this motion that Marion's personal banking records are necessary to show a course of conduct and to discover whether Marion set up other corporations as alter egos and/or successor corporations of Urban is unavailing. Such assertion is merely speculation as plaintiff has not set forth any evidence that there are other possible alter egos or successor companies not sued herein. Therefore, allowing plaintiff to sort through Marion's personal banking records would consist of a fishing expedition to ascertain the existence of evidence and is improper pursuant to CPLR § 3101. Moreover, plaintiff's assertion

at oral argument that it is entitled to discovery of Marion's personal banking records pursuant to Business Corporation Law ("BCL") § 1006 and certain sections of the Debtor Creditor Law because he is liable for all debts of Urban due to Urban's dissolution while still maintaining monetary obligations to plaintiff is without merit. Neither BCL § 1006 nor the relevant sections of the Debtor Creditor Law provide that plaintiff is entitled to sift through Marion's personal banking records pursuant to such presumption of liability.

Marion and AAIS' assertion that the subpoenas should be quashed in their entirety on the ground that "Plaintiff has not requested this information from any party to this action, or otherwise shown that the documents are not 'readily available' through party-discovery" is without merit. As an initial matter, plaintiff has indeed requested the records from the parties in this case and has received no documents responsive to its request. Additionally, the court adjourned oral argument on this motion from August 13, 2013 to October 1, 2013 to give the parties additional time to exchange any documents responsive to the requests made in the subpoenas. However, defendants have provided none of the requested information. Thus, the remaining requests made in the subpoenas for information about Urban's and Vigilant's involvement with each respective bank are proper and should not be quashed.

Finally, that portion of Marion and AAIS' motion which seeks a protective order as well as costs and attorney's fees is denied as defendants have not provided a basis for such relief.

Accordingly, Marion and AAIS' motion for an Order quashing the two subpoenas served by plaintiff is granted only as to that portion of each subpoena which requests the production of records solely associated with "Marion" or "Herbert Marion." Additionally, that portion of

