

Splash, LLC v Shullman Family Ltd. Partnership

2014 NY Slip Op 30711(U)

January 6, 2014

Supreme Court, Westchester County

Docket Number: 56585/2013

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER-COMPLIANCE PART

-----X
SPLASH, LLC, SPLASH MANAGEMENT GROUP, LLC,
SPLASH BEDFORD HILLS, LLC, MARCH CURTIS and
CHRISTOPHER FISHER,

Plaintiffs,

-against-

SHULLMAN FAMILY LIMITED PARTNERSHIP,
ROBERT SHULLMAN, MICHAEL SHULLMAN, and
RUSSELL SPEEDERS CAR WASH, LLC,

Defendants.
-----X

LEFKOWITZ, J.

DECISION & ORDER

Index No. 56585/2013

Decision Date: Jan. 6. 2014

Motion Seq. #5 & #6

The following papers were read on this motion by defendants (Motion Sequence #5) for a protective order pursuant to CPLR 3103(a) against certain of plaintiffs' discovery demands and to quash subpoenas served on David J. Squirrell, Esq. and Banks Curran Schwam & Squirrell, and staying the appearance of the attorneys for nonparty Dino DeFeo at forthcoming depositions, and staying discovery as against Dino DeFeo, and to remove certain of plaintiffs' causes of action to the Bedford Town Court pursuant to CPLR 325-326; and this motion by nonparty Dino DeFeo (Motion Sequence #6) for a protective order pursuant to CPLR 3103(a) against plaintiffs' discovery demands, to quash subpoenas served on him, and to stay discovery as against him:

Motion Sequence #5: Order to Show Cause, Aff. in Support, Exhs.
Movant's Memorandum of Law
Aff. in Opposition, Exhs.
Respondent's Memorandum of Law

Motion Sequence #6: Order to Show Cause, Aff. in Support, Exhs.
DeFeo Affidavit, Exhs.
Movant's Memorandum of Law
Opposition Papers Submitted Jointly in Motion Sequence #5

Upon the foregoing papers and the proceedings held on January 6, 2014, the motions are consolidated purposes of decision and are determined as follows:

Plaintiffs (hereinafter collectively "Splash") are affiliated limited liability companies and their principal members, who operated a car wash at 527 North Bedford Road in Bedford, New York, under a lease initially executed in 1985 and thereafter assigned with property title to nonparty members of the Shullman family. The Shullman family owners, in turn, conveyed title and assigned Splash's lease to defendant Shullman Family Limited Partnership, whose general partners are co-defendants Robert and Michael Shullman ("Shullman defendants"). With extensions on Splash's lease due to expire on April 30, 2013, certain of plaintiffs signed a lease in 2010 for another premises at 562-570 North Bedford Road, with the intention of moving their car wash business to that location; the lease was made contingent on those plaintiffs obtaining necessary area variances, use variances, a special use permit and site plan approval from the Town of Bedford Planning Board and Zoning Board of Appeals. Splash avers that the Shullman defendants conspired to frustrate Splash's applications before the Town of Bedford, ultimately delaying approvals so long that Splash could not start operations at the new location before the April 2013 termination of their lease at 527 North Bedford Road. The gravamen of Splash's action is that defendants secretly mobilized neighbors, including nonparty movant Dino DeFeo, to oppose Splash's applications; paid attorneys and experts to assist the opposition; and misled the Town of Bedford as to who the true opponents were. Splash avers that defendants' goal was to force Splash out of business, open defendants' own car wash at plaintiffs' original location without nearby competition from Splash, and take Splash's customers and goodwill.

Splash commenced the instant action against defendants on April 30, 2013 – the same day as the lease at 527 North Bedford Road was due to expire – alleging tortious interference with business relations, breach of implied covenant of good faith and property damage. Splash then held over at 527 North Bedford Road, and defendants commenced a summary eviction proceeding in Bedford Town Court (*see Shullman Family Limited Partnership v Mark Curtis, et al.* Docket No. 13050076 [Bedford Town Ct. Westchester Co]). During the holdover period, Splash moved in Supreme Court for a preliminary injunction to stay the Town Court summary proceeding and consolidate it with the instant action, and defendants cross-moved pursuant to CPLR 3211(a)(7) to dismiss this action. While these motions were pending, Town Court (Jacobson, J.), by Decision and Order dated August 3, 2013, granted the eviction petition but stayed eviction until September 30, 2013, conditional on Splash paying back rent. One week later, by Decision and Order dated October 8, 2013, this Court (Connolly, J.) denied Splash's injunction motion and defendants' cross motion to dismiss. Defendants then moved pursuant to CPLR 2221(e) to renew its dismissal application; defendants' renewal motion remains pending.

Meanwhile, after Bedford approved Splash's land use applications for the new business location, nonparty Dino DeFeo commenced a CPLR article 78 petition against Bedford and certain of the plaintiffs in the instant action to annul Bedford's determinations (*see DeFeo v Zoning Board of Appeals, Town of Bedford*, Index No. 1178/2013 [Sup Ct Westchester Co]). By Decision and Order dated October 4, 2013, this Court (Zambelli, J.), denied so much of DeFeo's article 78 petition as sought to annul the Planning Board's "negative declaration" under the State Environmental Quality Review Act but granted so much of the petition as sought to overturn Bedford's use variances, holding that the Zoning Board of Appeals had granted them without rational basis. On the basis of that determination, the Court also vacated as moot the area variances, special use permits and site plan. All parties to the article 78 proceeding appealed.

The present applications arise from discovery prior to any Preliminary Conference Order or Stipulation between the parties. Splash served deposition notices on nonparty Dino DeFeo and his attorney in the article 78 petition, nonparty David J. Squirrell. On October 15, 2013, Splash served on defendants a Notice to Inspect demanding document discovery concerning legal representation in the article 78 proceeding, including from nonparties Squirrell and his firm, Banks Curren Schwan & Squirrell LLP (hereinafter "Banks"), which represented DeFeo in the article 78 proceeding. The relevant provisions of Splash's Notice to Inspect include:

3. All bills, invoices and statements for services rendered by any professionals for services rendered opposing the plaintiffs' land use applications to the Town of Bedford or any of its boards or agencies and/or relating to an Article 78 proceeding concerning the real property at 562-570 Bedford Road and/or Valerio Court, Bedford Hills, New York ["New Location"], including but not limited to bills by the following persons or entities:

- (a) David J. Squirrell, Esq.
- (b) Banks Curren Schwan & Squirrell, LLP
- (c) Edward J. Potenta, and
- (d) Potenta Environmental Consultants, LLC

4. All checks, credit card slips, receipts, or the records evidencing the payment for the professional services referred to in paragraph 3, above.

5. All retainer agreements or engagement letters between any of the professionals referred to in paragraph 3 above and any of the defendants herein or entities affiliated with them.

6. All e-mails, letters, memoranda, correspondence and/or notes of conversations between the defendants herein or entities affiliated with them and the following persons concerning the Plaintiffs' New Location:

- (a) David J. Squirrell, Esq.
- (b) Banks Curren Schwan & Squirrell, LLP
- (c) Garo B. Garabedian
- (d) Edward J. Potenta
- (e) Potenta Environmental Consultants, LLC
- (f) Gregory DiNapoli
- (g) Robin DiNapoli
- (h) Dino DeFeo

7. All documents, articles or publications provided by defendants or entities affiliated with them to:

- (a) David J. Squirrell, Esq.
- (b) Banks Curren Schwan & Squirrell, LLP

- (c) Garo B. Garabedian
- (d) Edward J. Potenta
- (e) Potenta Environmental Consultants, LLC
- (f) Gregory DiNapoli
- (g) Robin DiNapoli
- (h) Dino DeFeo

The subpoenas and deposition notices demand substantially the same materials, in addition to other enumerated materials and “[o]ther than materials privileged from disclosure, your entire file pertaining to the Article 78 petition and opposition to the applications by the plaintiffs, ONAB Corp. and 570 North Bedford Road LLC, for variances, special use permits, SEQRA approval and site plan approval with respect to the real property located at 562 and 570 North Bedford Road and Vaierio Court, Bedford Hills, New York.”

Pursuant to briefing schedules, the Shullman defendants and nonparty Dino DeFeo separately moved by Order to Show Cause to quash the subpoenas and for protective orders pursuant to CPLR 3103(a) against the foregoing discovery demands as applied to Squirrell, Banks and DeFeo, respectively. As relevant here, movants assert that these materials are exempt from disclosure under the attorney-client and work-product privileges, overbroad as to any arguable materiality, and palpably irrelevant inasmuch as Supreme Court deemed the Town of Bedford approvals to be illegal. The Shullman defendants append to their discovery motion an application to remove to Splash’s property damage claim to the Bedford Town Court pursuant to CPLR 325-326, and to stay discovery in light of Supreme Court’s determination granting the article 78 petition to annul the Town of Bedford’s land use determinations.

As to the Shullman defendants’ CPLR 325-326 removal application, the same is denied without prejudice to a further application after the close of discovery. At this substantially pre-discovery stage in litigation, there is insufficient record evidence to determine the amount in controversy as to Splash’s cause of action for property damage. Accordingly, the Shullman defendants cannot and do not carry their burden to demonstrate that the removal provisions of CPLR article 3 apply to such cause of action.

Contrary to plaintiffs’ suggestion, this Court does not construe the Shullman defendants’ motion as an application to stay discovery. To be sure, that Supreme Court annulled certain of the Town of Bedford’s land use determinations does not alone vitiate plaintiffs’ causes of action for property damage and tortious interference with business relations, and the Shullman defendants’ cases do not demonstrate to the contrary. Accordingly, this Court perceives no basis to stay discovery. Rather, the instant motions concern the substance and, critically, the timing of discovery demands against persons potentially relevant to the overall constellation of disputes between the instant litigants but not directly parties to this action.

As to movants’ applications with respect to such discovery, this Court agrees that all of the disclosure at issue was made prematurely, prior to party discovery and even prior to a Preliminary Conference. To be sure, it is axiomatic that parties are entitled to liberal discovery of “all matters material and necessary in the prosecution” of their action (CPLR 3101[a]), and

the determination of what is “material and necessary” is within the sound discretion of the trial court (see e.g. *Andon v 302-304 Mott Assocs.*, 94 NY2d 740 [2000]). The phrase “material and necessary” is “interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason” (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403 [1968]; *Foster v Herbert Clepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). These standards vest in the trial court broad discretion to supervise discovery and issue such determinations as necessary to vindicate litigant rights and enforce litigant duties arising in the individual case (see *Mironer v City of New York*, 79 AD3d 1106, 1108 [2d Dept 2010]; *Auerbach v Klein*, 30 AD3d 451, 452 [2d Dept 2006]). Where disclosure is sought from a nonparty, the discovery device must state the “circumstances or reasons” warranting nonparty discovery (*Tenore v Tenore*, 45 AD3d 571 [2d Dept 2007]; *Smith v Moore*, 31 AD3d 628 [2d Dept 2006]; *Matter of Lutz v Goldstone*, 31 AD3d 449 [2d Dept 2006]). Nonparty discovery must be not only material and necessary but also unavailable by means other than the nonparty (*Kooper v Kooper*, 74 AD3d 6 [2d Dept 2010]; *Kondratick v Orthodox Church in America*, 73 AD3d 708 [2d Dept 2010]).

At this early stage in litigation, where non-party discovery was demanded before so much as a Preliminary Conference had been held or party discovery had been commenced, movants are correct that Splash cannot show – and this Court perceives no basis to conclude – that nonparty discovery at this time is material and necessary to prosecute this action. Splash’s motion papers do not so much recite, much less demonstrate, that any of the discovery demanded from DeFeo or her attorneys is unavailable from parties, as *Kooper* requires as a condition precedent to nonparty discovery. Neither, apparently, have plaintiffs made so much as a reasonable attempt to obtain these documents by other means, also as *Kooper* requires. Given the policy of *Kooper* that nonparties should not be forced to bear the cost and inconvenience of participating in litigation without compelling justification, and given Splash’s failure to establish the relevance of demanded discovery at this stage of litigation, this Court perceives no basis for DeFeo to be hailed into this litigation at this time. Much the same *Kooper* analysis, and much the same failure by plaintiffs to adhere to its requirements, obtain with regard to Squirrell and Banks inasmuch as Splash’s discovery demands proceed against them in their capacities as DeFeo’s counsel in the article 78 proceeding. Splash having failed to demonstrate the materiality and necessity of such discovery as to Squirrell and Banks at this juncture, the Shullman defendants are entitled to relief against such discovery demands. Accordingly, a CPLR 3103 protective order denying discovery as against DeFeo, Squirrell and Banks properly lies to “prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice” to them (CPLR 3103[a]).

By the same token, however, it is premature to hold – and this Court therefore does not hold – that Splash cannot later show that discovery from DeFeo, Squirrell and Banks is relevant in this action. Neither does this Court hold that such materials are privileged against disclosure under CPLR 4503(a): defendants’ arguments concerning attorney-client privilege and work product privilege are not ripe for decision at this time inasmuch as the discoverability of such materials is not now properly before this Court. Accordingly, this Court reserves to future

motion practice, if properly presented, the questions of whether discovery that is the subject of the instant motion might be protected by attorney-client and/or work product privilege.

Subsequent to this motion, the parties entered into a Preliminary Conference stipulation. The parties are directed to proceed to party discovery, and are admonished to avoid unnecessary motion practice. If after the completion of party discovery Splash wishes to pursue the nonparty depositions and documents demands disallowed herein, then Splash may seek an order to vacate the protective order herein issued, pursuant to a briefing schedule in accordance with the Differentiated Case Management rules of this Court. Accordingly it is hereby

ORDERED that the branch of defendants' motion to remove plaintiffs' property damage action to the Bedford Town Court pursuant to CPLR 325-326 is denied without prejudice; and it is further

ORDERED that defendants' application to stay discovery is denied; and it is further

ORDERED that the remaining branches of defendants' motion are granted, plaintiffs' subpoenas and deposition notices on Squirrel and Banks are quashed, and a protective order is issued against discovery against them until the completion of party discovery; and it is further

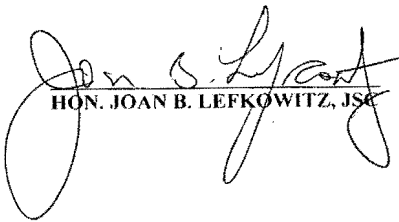
ORDERED that the motion by nonparty DeFeo is granted, plaintiffs' subpoena and deposition notice on DeFeo are quashed, and a protective order is issued against further discovery against him until the completion of party discovery; and it is further

ORDERED that defendants shall serve this Decision and Order, with Notice of Entry thereof, on plaintiffs by NYSCEF and on nonparty movants by first class U.S. mail within seven days hereof; and it is further

ORDERED that counsel for all parties shall appear in the Compliance Part, Room 800 of this Courthouse, at 9:30am on January 14, 2014 for a Compliance Conference.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
January 6, 2014


HON. JOAN B. LEFKOWITZ, JSC

To: Kenneth J. Finger, Esq.
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By NYSCEF