

**Board of Mgrs. of 225th E. 86th St. Condominium v
Ren**

2014 NY Slip Op 31427(U)

May 28, 2014

Sup Ct, New York County

Docket Number: 104424/11

Judge: Donna M. Mills

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This opinion is uncorrected and not selected for official publication.

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

PRESENT : DONNA M. MILLS
Justice

PART 58

BOARD OF MANAGERS OF 225TH EAST 86TH STREET CONDOMINIUM,

INDEX NO. 104424/11

Plaintiff,

MOTION DATE _____

-v-

MOTION SEQ. NO. 02, 03, 04

WEI DE REN,

MOTION CAL NO. _____

Defendant.

The following papers, numbered 1 to _____ were read on this motion to _____.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits... 1, 2, 4, 6, 8, 9

Answering Affidavits- Exhibits 3, 5

Replying Affidavits 7

JUN 03 2014

CROSS-MOTION: YES NO
COUNTY CLERK'S OFFICE
NEW YORK

Motion sequence numbers 002, 003 and 004 are consolidated for disposition.

In motion sequence number 002, plaintiff Board of Managers Of 225th East 86th Street Condominium seeks an order punishing defendant Wei De Ren for contempt.

In motion sequence number 003, nonparty Romeo Burke seeks to quash the subpoena duces tecum and ad testificandum directed to him and issued by defendant.

Defendant opposes the motion and cross moves for an order dismissing the complaint and/or for an order directing Romeo Burke to appear for a deposition pursuant to the subpoena that was served upon him.

In motion sequence number 004, plaintiff seeks an order compelling defendant

to fully comply with all outstanding discovery.

The underlying matter arises from plaintiff's allegation that defendant poses a clear and imminent danger to the condominium and its residents, because defendant has repeatedly fallen asleep with food cooking on the stove top of his condominium unit, thus causing smoke to be discharged into the hallways.

Plaintiff claims that the defendant should be held in contempt of court as a result of his willful violation of the Settlement Agreement between Plaintiff and Defendant, dated March 27, 2010, and his willful violation of the Court's decision and order, dated July 26, 2011 requiring him to comply with the Settlement Agreement.

The burden of proof is on the party seeking the contempt adjudication, and the facts constituting the basis of the contempt must be proved by clear and convincing evidence (see *Miller v Miller*, 61 AD3d 651, 652 [2009]). The question of whether to then grant a civil contempt motion and, if so, the fixing of the appropriate remedy, is addressed to the sound discretion of the motion court upon consideration of the surrounding circumstances (see *Matter of Philie v Singer*, 79 AD3d 1041, 1042 [2010]). This Court does not find that the plaintiff has met its burden by clear and convincing evidence that defendant disobeyed a prior order, and that the movant was prejudiced by the offending conduct.

Defendant served nonparty Romeo Burke, who is employed as a service technician for ADT, LLC with a subpoena duces tecum and ad testificandum, dated October 9, 2013. The subpoena seeks to compel Mr. Burke's attendance to give testimony and to produce records pertaining to the defendant's apartment. Counsel for the nonparty now moves to quash the subpoena on the ground that it is invalid,

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defective and unenforceable because it was not properly served on Mr. Burke. The nonparty also contends that the subpoena is facially defective and unenforceable with respect to its demand for the production of documents.

CPLR 3101(a), which establishes the broad scope of disclosure in CPLR Article 31 and mandates full disclosure of all matter material and necessary in the prosecution or defense of an action, "sounds the keynote for the entire article and has pervasive bearing on all of it" (Connors, McKinney's CPLR Practice Commentary C3101:1).

For disclosure 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 (see Connors, *supra*, Practice Commentary C3101:19). Thus, where the person to be deposed is not a party, he or she must be served with a subpoena issued pursuant to CPLR 3106 (b). Where production of "books, papers and other things" is also sought in conjunction with his or her deposition, a notice or subpoena pursuant to CPLR 3111 is the appropriate device, and the party serving the subpoena should describe the items sought and be certain to make the subpoena unambiguous, requiring both attendance by the recipient and production of the item.

CPLR 3101(a)(4) requires that a nonparty served with a subpoena be given notice "stating the circumstances or reasons such disclosure is sought or required." (*Velez v. Hunts Point Multi-Service Ctr., Inc.*, 29 AD3d 104 [1st Dept 2006] CPLR 3101(a)(4) applies to non-party subpoenas.) "The purpose of such requirement is presumably to afford a nonparty who has no idea of the parties' dispute or a party affected by such request an opportunity to decide how to respond." (*Velez*, 29 AD3d at 111.).

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The court should grant a motion to quash a subpoena duces tecum only when the materials sought are utterly irrelevant to any proper inquiry. *New Hampshire Ins. Co. v. Varda, Inc.*, 261 A.D.2d 135 (1st Dept.1999); *Matter of Reuters Ltd. v. Dow Jones Telerate*, 231 A.D.2d 337, 341 (1st Dept.1997). The burden of establishing that the requested documents and records are utterly irrelevant is on the person being subpoenaed. *Gertz v. Richards*, 233 A.D.2d 366 (2d Dept.1996).

While CPLR § 3120 was amended effective September 1, 2003 to dispense with the requirement of a motion and require only the service of a subpoena duces tecum on a non-party witness for production of documents, the subpoena must specify the time, place and manner of making the inspection, copy, test or photograph, and set forth individually or by category the items to be inspected and describing each item and category with reasonable particularity. *Velez*, 29 AD3d at 109. The amendment did not change the requirement of CPLR § 3101(a)(4) that, where disclosure is sought from a nonparty, the nonparty shall be given notice stating the circumstances or reasons such disclosure is sought or required. *Id.* at 111. Here, the defendant satisfied this requirement. In light of the claims made by the plaintiff in this action, the information sought in the subpoena by the defendant is relevant, material, and necessary, and unavailable through other means.

"The supervision of discovery, and the setting of reasonable terms and conditions for disclosure, are within the sound discretion of the Supreme Court" (*Ito v Dryvit Sys.*, 5 AD3d 735, 735 [2004]). Applying the aforementioned legal principles, this Court finds that defendant has the right to issue the subject subpoenas and is entitled to the deposition of the nonparty. The Court has considered the nonparty's remaining

