

<b>Wong v 200 E. Tenants Corp.</b>
2015 NY Slip Op 31024(U)
June 16, 2015
Supreme Court, New York County
Docket Number: 155341/13
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ PART 13
Justice

EDWARD C. WONG and ELLA W. HUNG, Plaintiffs,
-against-
200 EAST TENANTS CORP., Defendants.

INDEX NO. 155341/13
MOTION DATE 06-03-2015
MOTION SEQ. NO. 006
MOTION CAL. NO.

200 EAST TENANTS CORP., Third-Party Plaintiff,
-against-
JDM CONTRACTING, LLC, Third-Party Defendant.

The following papers, numbered 1 to 9 were read on this motion to punish for contempt and cross-motion to quash non-party subpoenas:

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits cross motion
Replying Affidavits

Table with 2 columns: PAPERS NUMBERED, values: 1 - 4, 5 - 8, 9

Cross-Motion: X Yes No

Upon a reading of the foregoing cited papers, it is ordered that plaintiffs' motion seeking to hold Anthony Accardo PE, Kenneth Amorello, Esq. and Cooper Square Realty, Inc. - Goodstein Division, in contempt for failure to appear and give testimony pursuant to subpoena, is denied. Defendant's cross-motion for an Order pursuant to CPLR §2304, quashing plaintiffs' subpoena duces tecum served on non-parties, Anthony Accardo PE, Kenneth Amorello, Esq. and Cooper Square Realty, Inc. - Goodstein Division, is granted.

Plaintiffs brought this action for trespass to plaintiffs apartment #16, located at 200 East 57th Street, a building owned by the defendant cooperative corporation. Plaintiffs claim that on July 1, 2010, defendant, aware that they were out of the country, entered their apartment with a contractor and damaged their second bathroom, by removing the shower and shower drain assembly. They claim that a few weeks later at the end of July, defendant had the toilet and toilet drain assembly removed in the same second bathroom causing additional damage.

On January 21 and 22, 2015, plaintiffs attempted to serve a subpoena duces tecum seeking documentation and deposition testimony, on Anthony Acardo, P.E., the engineer that allegedly supervised the work; Anthony Amorello, Esq., the in house attorney for the defendant; and Cooper Square Realty, Inc. - Goodstein Division, the defendant's management company (hereinafter collectively referred to as "non-party witnesses"). The subpoenas were rejected by defendant's attorney as defective, for failure to pay the appropriate witness fees and to state the reason the disclosure was required. On March 18, 2015, at a compliance conference, plaintiff withdrew and amended the subpoenas served in January of 2015 to include a handwritten explanation for the discovery sought and had them "so ordered." The amended subpoenas were served on March 23 and 25, 2015, and rejected by defendant's attorney as defective.

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

Plaintiffs motion seeks to punish the non-parties for contempt, in failing to comply with the second set of subpoenas served in March of 2015. The movant seeking a finding of contempt bears the burden of proof to establish, based on clear and convincing evidence, that the subpoena was disobeyed (*Tener v. Cremer*, 89 A.D. 3d 75, 931 N.Y.S. 2d 552 [1<sup>st</sup> Dept., 2011] and *Doors v. Greenberg*, 151 A.D. 2d 550, 542 N.Y.S. 2d 324 [2<sup>nd</sup> Dept., 1989]). The Court is required to expressly find that the actions of the non-complying party, "were calculated to or actually did defeat, impair, impede, or prejudice the rights or remedies of a party to a civil proceeding " (*Clinton Corner, H.D.F.C. v. Lavergne*, 279 A.D. 2d 339, 719 N.Y.S. 2d 77 [1<sup>st</sup> Dept., 2001] and *Taveras v. General Trading Co., Inc.*, 73 A.D. 3d 659, 901 N.Y.S. 2d 263 [1<sup>st</sup> Dept., 2010]). The failure to tender a witness fee either, "...with the subpoena or within a reasonable time before it is returnable" results in no basis for finding contempt for disobeying it (*Jaggars v. Scholeno* 6 A.D. 3d 1130, 776 N.Y.S. 2d 684 [4<sup>th</sup> Dept., 2004]). Plaintiffs have not stated a basis to punish the non-party witnesses for contempt since they failed to pay the full amount of the witness fees prior to the return date of the amended non-party subpoenas.

Defendant cross-moves for an Order pursuant to CPLR §2304 quashing plaintiff's amended subpoenas duces tecum served on the non-party witnesses in March of 2015. Defendant argues the amended subpoenas are defective, that there is no basis for a finding of contempt, and they should be quashed.

Defendant argues that plaintiffs have failed to show there are special circumstances warranting the discovery sought from Anthony Accardo, P.E., in the form of both documentation and testimony. It is defendant's contention that plaintiffs were provided with a CPLR §3101[d] notification that Anthony Accardo, P.E., is the expert witness retained by the defendant to testify in this action for trespass, concerning the leaks coming from plaintiff's apartment and the necessity to enter it.

CPLR §3101 [d][1][iii], applies to disclosure of testimony of an expert witness. It specifically states, "...expert disclosure may be obtained only by court order upon a showing of special circumstances and subject to restrictions as to scope..." The Courts are reluctant to permit depositions of a party's expert absent a showing of special circumstances, which include when material physical evidence has been lost or destroyed, or otherwise becomes unavailable to the subpoenaing party's expert (*Hallahan v. Ashland Chem. Co.*, 237 A.D. 2d 697, 654 N.Y.S. 2d 443 [3<sup>rd</sup> Dept., 1997]). Special circumstances require a showing of substantial need and the inability without undue hardship to obtain the equivalent of the discovery sought by other means (*McCoy v. State*, 52 A.D. 3d 1212, 860 N.Y.S. 2d 355 [4<sup>th</sup> Dept., 2008]). Upon a finding by the Court that special circumstances exist, the deposition of the expert is limited to factual observations, not opinion (*Coello v. Progressive Ins. Co.*, 6 A.D. 3d 282, 774 N.Y.S. 2d 706 [1<sup>st</sup> Dept., 2004]).

Plaintiffs failed to obtain an order from this Court upon a showing of special circumstances before seeking to depose defendant's expert Anthony Accardo, P.E., and there is no basis for the discovery sought in the amended subpoena. The reason as stated in the amended subpoena for deposing Anthony Accardo, P.E. is that he, "supervised demolition" of the plaintiffs' apartment and "submitted bills" for activities. Plaintiffs fail to establish that the discovery sought could not be obtained through other sources without hardship. There has been no proof submitted by plaintiffs that the documentation sought will not include the expert's opinions.

According to the defendant, the amended subpoena served on Cooper Square Realty, Inc. - Goodstein Division (hereinafter referred to as "Cooper Square"), is defective

because it seeks testimony from an entity that no longer exists and the witness sought to testify on behalf of the entity has not been identified by plaintiffs. Defendant also argues that the subpoena is improper because it seeks testimony and documentation related to billing by the defendant for the contractor's services related to work performed in plaintiffs' second bathroom. Defendant contends that it possesses the records which were never sought as part of the discovery process, and would have been provided if sought.

A motion to quash a subpoena duces tecum should be granted, "only when the futility of the process to uncover anything legitimate is inevitable or obvious ...or when the information sought is, utterly irrelevant to any proper inquiry" (*Kapon v. Koch*, 23 N.Y. 3d 32, 11 N.E. 3d 709, 988 N.Y.S. 2d 559 [2014]). Once the subpoenaed non-party meets its burden on a motion to quash, the burden then shifts back to the party that served the subpoena to establish that the discovery sought is "material and necessary, to the prosecution or defense of the action" failure to do so requires dismissal (*Ferolito v. Arizona Beverages USA, LLC*, 119 A.D. 3d 642, 990 N.Y.S. 2d 218 [2<sup>nd</sup> Dept., 2014]). A subpoena seeking documentation related to a prior action may be quashed if the party opposing the subpoena can demonstrate that other forms of discovery would provide the same information (*Financial Structures Limited v. UBS AG*, 96 A.D. 3d 433, 944 N.Y.S. 2d 884 [1<sup>st</sup> Dept., 2012]).

Cooper Square no longer exists, the testimony and documentation sought from this entity as the "perpetrator of the bills," is not material and necessary to the claim of trespass asserted in this action. Plaintiffs have failed to establish that the discovery sought from Cooper Square in the amended subpoena cannot be obtained through other forms of discovery served directly on the defendant.

Defendant argues that the subpoena seeking to depose non-party, Kenneth H. Amorello, Esq., should be quashed because it seeks patently privileged attorney-client information and is overbroad. Defendant contends that all non-privileged discovery has been provided to the plaintiffs by Mr. Amorello and that the testimony and documentation sought is overbroad because it seeks, "all other deeds, evidences and writings, which you now have in your custody or power concerning the premises." Plaintiffs have failed to establish that the discovery sought is not overbroad, or that verification of Mr. Amorello's signature, identified by plaintiffs as the sole reason for this discovery, could only be accomplished through the amended subpoena instead of the previously exchanged discovery. It is not the Court's role to "cull the good from the bad" and subpoenas for the production of "any and all" materials may include privileged information rendering them overbroad (*Grotallio v. Soft Drink Leasing Corp.*, 97 A.D. 383, 468 N.Y.S. 2d 4 [1<sup>st</sup> Dept., 1983]). Regardless of whether proposed testimony is precluded due to attorney-client privilege, the prior provision of documentary and testimonial evidence addressing the information sought in a subpoena without any reason for seeking it, for example that documentation is missing, precludes a finding that the discovery sought is "material and necessary" (*Ruthman, Mercadante & Hadjis, P.C. v. Nardiello*, 288 A.D. 2d 593, 732 N.Y.S. 2d 455 [3<sup>rd</sup> Dept., 2001]). Plaintiffs have failed to establish that verification of Mr. Amorello's signature is material and necessary to this action, could not have been accomplished through the previously exchanged discovery, or that the documentation sought is not excessive.

Accordingly, it is ORDERED that plaintiffs' motion seeking to hold Anthony Accardo PE, Kenneth H. Amorello, Esq. and Cooper Square Realty, Inc. - Goodstein Division, in contempt for failure to appear and give testimony, and provide other

discovery sought in the amended subpoenas duces tecum served on March 23 and 25, 2015, is denied, and it is further,

ORDERED that defendant's cross-motion for an Order pursuant to CPLR §2304, quashing plaintiffs' amended subpoenas duces tecum served on Anthony Accardo PE, Kenneth Amorello, Esq. and Cooper Square Realty, Inc. - Goodstein Division, on March 23 and 25, 2015, is granted, and it is further,

ORDERED, that the amended subpoena duces tecum served individually on Anthony Accardo PE, Kenneth H. Amorello, Esq. and Cooper Square Realty, Inc. - Goodstein Division, on March 23 and 25, 2015, are quashed, and it is further,

ORDERED, that the defendant shall serve a copy of this Order with Notice of Entry on the plaintiff and Anthony Accardo PE, Kenneth H. Amorello, Esq. and Cooper Square Realty, Inc. - Goodstein Division, within thirty (30) days from the date of entry of this Order.

ENTER:

  
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MANUEL J. MENDEZ,  
J.S.C.

Dated: June 16, 2015

Check one:  FINAL DISPOSITION    X NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST                       REFERENCE