

Sammy v First Am. Tit. Ins. Co. of N.Y.

2015 NY Slip Op 31337(U)

March 17, 2015

Supreme Court, Queens County

Docket Number: 24400 2008

Judge: David Elliot

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE David Elliot
Justice

IAS Part 14

VENESSA SAMMY,

Index

No. 24400 2008

Plaintiff,

-against-

Motion

Date November 17, 2014

FIRST AMERICAN TITLE INSURANCE
COMPANY OF NEW YORK, et al.,

Motion

Cal. No. 124

Defendants.

Motion

Seq. No. 14

The following papers numbered 1 to 10 read on this motion by defendant First American Title Insurance Company (First American) for, inter alia, an order pursuant to CPLR 2304 quashing subpoenas issued by plaintiff; and on this cross motion by defendants Expedient Title, Inc. (Expedient Title), and Robert Tambini (Tambini) for, inter alia, an order pursuant to CPLR 2304 quashing a subpoena issued by plaintiff; and on this cross motion by plaintiff for an order compelling defendants to make disclosure.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1
Notice of Cross Motion - Affidavits - Exhibits	2-3
Answering Affidavits - Exhibits.....	4
Reply Affidavits.....	5-7
Memoranda of Law	8-10

Upon the foregoing papers it is ordered that the branches of the motion by First American for an order quashing the subpoenas served on Dennis J. Gilmore and Lee S. Wiederkehr, Esq., are granted. That branch of its motion for an order vacating the notice to

take the deposition of Parker S. Kennedy is granted. That branch of its motion for an order imposing sanctions is denied. The branch of the cross motion by Expedient Title and Tambini for an order quashing the subpoena served on Tina Zerilli, Esq., is granted. The branch of their motion for an order imposing sanctions is denied. Plaintiff's cross motion is denied.

The complaint alleges the following: On or about March 16, 2007, plaintiff, as buyer, entered into a contract with Astenie Sainvil, as seller, for the purchase of premises known as 117-18 150th Avenue, South Ozone Park, New York. Plaintiff hired First American and Expedient Title to examine and insure title, and, after the closing, to record instruments such as the deed. First American issued a policy of title insurance, dated May 31, 2007, to plaintiff in the amount of \$600,000. After title closed on May 31, 2007, plaintiff gave the deed and mortgage instruments to these defendants for recording. Defendants did not record the deed and mortgage instruments until December 6, 2007. In the interim, on or about October 30, 2007, South Ozone Park Realty Holdings Corp., recorded a deed for 117-18 150th Avenue from Astenie Sainvil. On or about January 15, 2008, South Ozone Park Realty Holdings Corp., began an action in the New York State Supreme Court, County of Queens, against plaintiff herein seeking a judgment quieting title (*South Ozone Park Realty Holdings Corp. v Sammy*, Index No. 1214/08). On or about March 26, 2008, Countrywide Home Loans, Inc., began an action in the New York State Supreme Court, County of Queens against plaintiff herein seeking to foreclose on the mortgages (*Countrywide Home Loans, Inc. v Sammy*, Index No. 7693/08). Plaintiff made a claim under her title insurance policy which First American did not honor.

In January, 2008, plaintiff gave notice to First American of a claim made pursuant to her title insurance. First American investigated the claim and denied coverage. This action ensued on or about October 2, 2008. The initial complaint asserted five causes of action, the first for breach of contract, the second for negligence, the third for punitive damages, the fourth for breach of the duty to defend, and the fifth for "bad faith." Plaintiff, alleging that defendants had failed to pay off existing mortgages with \$519,000 entrusted to them, amended her complaint to add a cause of action for conversion. Plaintiff was also granted leave to add Tambini as a party-defendant.

Plaintiff's attorney erroneously asserts that a prior order to show cause seeking to quash the subpoenas served on individuals related to First American was denied. The County Clerk records of this court show that the order to show cause, designated sequence no. 9, was withdrawn, and defendants produced a copy of the order to show cause marked "XWD" by Justice Martin J. Schulman.

CPLR 2304, "Motion to quash, fix conditions or modify," provides in relevant part: "A motion to quash, fix conditions or modify a subpoena shall be made promptly in the court

in which the subpoena is returnable.” “A motion to quash or vacate, of course, is the proper and exclusive vehicle to challenge the validity of a subpoena or the jurisdiction of the issuing authority” (*Matter of Brunswick Hosp. Ctr. v. Hynes*, 52 NY2d 333, 339 [1981]).

In regard to deposition subpoenas,

“the witness, in moving to quash, must establish either that the discovery sought is ‘utterly irrelevant’ to the action or that the ‘futility of the process to uncover anything legitimate is inevitable or obvious.’ Should the witness meet this burden, the subpoenaing party must then establish that the discovery sought is ‘material and necessary’ to the prosecution or defense of an action, i.e., that it is relevant” (*Kapon v Koch*, 23 NY3d 32, 34 [2014]; *Ferolito v Arizona Beverages USA, LLC*, 119 AD3d 642 [2014]).

Plaintiff served a subpoena duces tecum dated April 22, 2014 for the purpose of taking the deposition of Dennis J. Gilmore by delivering it to an employee at First American’s New York City office. Making reference to a “Code of Ethics and Conduct” apparently downloaded from First American Financial Corporation’s (First Financial) website, a company related to, though separate from, First American, the subpoena states that Gilmore’s testimony is needed “as to how the actions of [First American] violated the Code of Ethics and Conduct as set forth by First American . . . as they failed amongst other items to deal fairly and in good faith with company customers, in taking unfair advantage of Plaintiff, Sammy, through manipulation, concealment . . . In that in violation of its publically provided Code of Ethics and Conduct it engaged in fraudulent conduct . . .” Gilmore, First American’s Chief Executive Officer, works and resides in California. He had no involvement in the investigation of the plaintiff’s claim or in the denial of the claim.

In regard to the subpoena served on Gilmore, as an officer of a party, he himself is treated as a party for the purposes of a deposition, and there was no need to serve him with a subpoena (*see* CPLR 3106 [b]). “A person who was an officer, director, member or employee of a party at the time the deposition is taken qualifies as a ‘party’ rather than as a mere ‘witness.’ CPLR 3106(b). Hence, deponents in these categories need not be served with a subpoena” (Connors, *Supplementary Practice Commentaries, Book 7B, McKinney’s Cons Laws of NY, C3106:3*). Thus, Gilmore’s argument based on the subpoena power of the court over a witness has no merit.

Nevertheless, plaintiff did serve him with a subpoena, and he is entitled to have it quashed. First, plaintiff is not entitled to the requested disclosure because, after Gilmore made the showing required from him (*see Kapon v Koch, supra*), she failed to show that the information sought is “material and necessary in the prosecution . . . of [her] action” (CPLR

3101 [a]; *see Matter of Kapon v Koch, supra; Klein Varble & Assoc., P.C. v DeCrescenzo, supra*). Plaintiff's complaint does not mention the Code of Ethics and Conduct, and plaintiff failed to show that a breach of the Code of another corporation gives rise to liability upon the part of First American. Second, plaintiff failed to show the necessity of producing Gilmore, First American's Chief Executive Officer, for a deposition in this case (*see Arendt v General Elec. Co.*, 270 AD2d 622 [2000] [Chief Executive Officer]; *Broadband Communications Inc. v Home Box Off.* (157 AD2d 479 [1990] [Chief Executive Officer])). Third, plaintiff has already taken the deposition of Theresa Garelli, an employee of First American, and plaintiff did not make the showing required for obtaining an additional deposition from this defendant (*see Saxe v City of New York*, 250 AD2d 751 [1998]; *Filpo v Linemaster Switch Corp.*, 244 AD2d 454 [1997]).

The notice to take the deposition of Parker S. Kennedy must be vacated. Parker S. Kennedy, Chairman of the Board of Directors of First Financial, works and resides in California. He had no involvement in the investigation of plaintiff's claim or in the denial of the claim. Plaintiff served a notice to take his deposition, erroneously designating him as an employee of First American, not First Financial, which mentions an "attached subpoena." However, First American has no record of the delivery of a subpoena to its office in New York. All that First American received was a notice of nonparty deposition dated May 1, 2014, which plaintiff sent to First American's attorney by e-mail on May 9, 2014. First American has no record of receiving a check in payment of the witness fee. CPLR 3106, "Priority of depositions; witnesses; prisoners; designation of deponent," provides in relevant part, "(b) Witnesses. Where the person to be examined is not a party or a person who at the time of taking the deposition is an officer, director, member or employee of a party, he shall be served with a subpoena." First Financial is not a party to this action but, rather, a separate corporation from First American. Even if plaintiff did serve a subpoena, it would be quashed since, after the requisite showing was made by First American, plaintiff failed to show, *inter alia*, as she has failed to do so with respect to Gilmore, that the information sought is "material and necessary in the prosecution . . . of [her] action." (CPLR 3101 [a]; *see Matter of Kapon v Koch, supra; Klein Varble & Assoc., P.C. v DeCrescenzo, supra, Arendt v General Elec. Co., supra; Broadband Communications Inc. v Home Box Office, Inc., supra*).

The deposition subpoena *duces tecum* served on Lee S. Wiederkehr, Esq., must be quashed. The subpoena sought "[a]ll records showing, memorializing, evidencing, concerning, reports, assessments, and/or analysis, as submitted to the above referenced defendants, on concluding the pre-suit investigation at the request of defendant, First American." Wiederkehr is an attorney retained by First American to represent it in this action, not one of its employees, and he resides and has an office in Westchester County. Wiederkehr's law firm "analyzed certain legal issues presented by First American and provided legal counseling to [the] client." He did not make any coverage determinations.

The subpoena is overly broad, requesting an attorney's reports and legal analysis given to his client. Confidential communications from an attorney to a client for the purpose of obtaining legal advice or services are protected by the attorney client privilege (*see* CPLR 4503; *Rye Police Assn. v City of Rye*, 34 AD3d 591 [2006]; *All Waste Sys. v Gulf Ins. Co.*, 295 AD2d 379 [2002]). Plaintiff cannot obtain disclosure of documents and communications which "are primarily and predominately legal in nature" and which, "in their full content and context," were prepared to communicate legal advice or services to a client (*All Waste Sys. v Gulf Ins. Co.*, *supra* at 380; *Rye Police Assn. v City of Rye*, *supra*; *see generally* *New York Schools Ins. Reciprocal v Milburn Sales Co., Inc.*, 105 AD3d 716 [2013]). Moreover, plaintiff failed to show that the deposition testimony of Weiderkehr, who has no first-hand knowledge of the facts, is necessary (*see* *Sonsini v. Memorial Hosp. for Cancer and Diseases*, 262 AD2d 185 [1999]).

As to the cross motion of Expedient Title and Tambini, the subpoena duces tecum served on Tina Zerilli, Esq., must be vacated. Zerilli is a member of Wilson Esler, Moskowitz, Edelman & Dicker, LLP, the law firm retained to defend these cross movants. Defendants have alleged, inter alia, that plaintiff requested that the recording of documents be delayed and that they obtained a release from her discharging them from liability arising from the delay in the recording. The subpoena seeks documents pertaining to conversations Zerilli may have had with Heidi Gliboff, a notary public, who purportedly notarized the release alleged to have been given by plaintiff to defendants. The notice of deposition seeks testimony from Zerilli concerning conversations she may have had with Gliboff. The subpoena must be quashed because: (1) Zerilli has no personal knowledge of the facts giving rise to this action and of the drafting of the release other than that obtained in her capacity as an attorney; (2) the subpoena is overly broad because it seeks information protected by the attorney-client privilege and attorney work product privilege (*see* *Parnes v Parnes*, 80 AD3d 948 [2011]); and (3) the information sought from Zerilli may be obtained through alternate means and, indeed, on September 19, 2011, Gliboff gave her deposition, including testimony about her one conversation with Zerilli. Gliboff essentially testified that Zerilli "went through a whole list of people" and that she "didn't recall any of them" except for Mr. Raghunath. Pursuant to a decision and order dated June 27, 2011, this court permitted defendants to take the deposition of nonparty witness Ishwardt Raghunath, who was then confined to the Metropolitan Detention Center. Under the circumstances, plaintiff failed to show that the evidence she seeks to procure from attorney Zerilli is necessary to the preparation of her case. "The practice of attorneys deposing their adversaries hardly seems calculated to 'assist preparation for trial by sharpening the issues and reducing delay and prolixity' " (*Equitable Life Assur. Socy. of U.S. v Rocanova*, 207 AD2d 294, 296 [1994], quoting *Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 406 [1968]).

Plaintiff's cross motion to compel disclosure is without merit. Plaintiff failed to demonstrate that she is entitled to the enforcement of the subpoenas and the notices to take deposition discussed above. Plaintiff's "notice to produce as to conversion" (Exhibit K) is overly broad and patently burdensome (*see Wesche v Wesche* 51 AD3d 909 [2008]). The affirmation submitted by plaintiff's attorney fails to clarify what other discovery he might be seeking. Therefore, plaintiff failed to show that "discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims' " (*Vyas v Campbell*, 4 AD3d 417, 418 [2004], quoting *Crazytown Furniture v Brooklyn Union Gas Co.*, 150 AD2d 420, 421 [1989]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2010]).

Accordingly, that the branches of the motion by First American for an order quashing the subpoenas served on Dennis J. Gilmore and Lee S. Wiederkehr, Esq., are granted. That branch of its motion for an order vacating the notice to take the deposition of Parker S. Kennedy is granted. That branch of its motion for an order imposing sanctions is denied. The branch of the cross motion by Expedient Title and Tambini for an order quashing the subpoena served on Tina Zerilli, Esq., is granted. The branch of their motion for an order imposing sanctions is denied. Plaintiff's cross motion is denied.

Dated: March 17, 2015

J.S.C.