Broman v Long Is. Floor Store, Inc.
2016 NY Slip Op 31853(U)
September 30, 2016
Supreme Court, Suffolk County
Docket Number: 09975/2015
Judge: William G. Ford
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SHORT FORM ORDER **INDEX NO.: 09975/2015**

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:
HON. WILLIAM G. FORD
JUSTICE SUPREME COURT

Motion Date: 04/13/16
Adjourn Date: 07/07/16
Motion Seq. #: 001 MD

Motion Date: 07/07/16
Motion Seq. # 002 MG

---x

CHESTER BROMAN,

Plaintiff,

-against-

LONG ISLAND FLOOR STORE, INC., d/b/a THE FLOOR STORE,

Defendant.

---x

PLAINTIFF'S ATTORNEY:
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By: Paula J. Warmuth, Esq.
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Farmingville, NY 11738

DEFENDANT'S ATTORNEY:
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NON-PARTY COUNSEL
NOURISON INDUSTRIES, INC.
ENOUNA & MIKHAIL, P.C.
By: Matin Enouna, Esq.
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Mineola, NY 11701

The Court has considered the following papers in reaching a determination on the motions pending before it:

1. Notice of Motion & Affirmation in Support by Matin Enouna, Esq. dated April 6, 2016, Exhibit A and supporting papers pursuant to CPLR 2304 to Quash a Subpoena for Records & Testimony and/or pursuant to CPLR 3103 for a Protective Order;

2. Notice of Motion & Affirmation in Support by Paula J. Warmuth, Esq. dated June 16, 2016, Exhibits A – J and supporting papers pursuant to CPLR 2304 to Quash a Subpoena for Records & Testimony and/or pursuant to CPLR 3103 for a Protective Order;

3. Affirmation in Opposition by Paula J. Warmuth, Esq. dated April 11, 2016, Exhibits A – E;

4. Affirmation in Opposition by Janet D. Slavin, Esq. dated June 24, 2016;

5. Reply Affirmation in Further Support by Paula J. Warmuth, Esq. dated July 5, 2016, Exhibits K – T; and it is

ORDERED that motion sequence # 001 by nonparty Nourison Industries, Inc. pursuant to CPLR 2304 to quash subpoenas seeking testimony at an examination before trial and the production of documents and/or for a protective order pursuant to CPLR 3103 is **DENIED** for the reasons explained thoroughly below, and it is further

ORDERED that motion sequence # 002 by nonparty Mary Broman pursuant to CPLR 2304 to quash subpoenas seeking testimony at an examination before trial and the production of documents and/or for a protective order pursuant to CPLR 3103 is **GRANTED** for the reasons explained thoroughly below.

Factual Background

This matter is before the Court on two separately noticed motions seeking to quash discovery subpoenas seeking testimony and the production of documents by non-parties to this litigation. Plaintiff Chester Broman brought this action against defendant the Long Island Floor Store, Inc. d/b/a the Floor Store. The litigation arises from the installation of a carpet at Broman's residence which he alleges was defective, requiring extensive repair and additional labor, and replacement by the manufacturer allegedly to no avail. As a result, Broman has filed suit claiming breach of contract, breach of the warranty of merchantability and fitness for a particular purpose. Plaintiff seeks damages in the amount of $ 24,707.84.

In response, the Floor Store joined issue with interposition of an answer with affirmative defenses and assertion of counterclaims seeking recovery for the costs of labor for stretching, repairing and/or replacing plaintiff's carpet valued at $ 1,200 and $14,000 respectively. The action is presently in the discovery phase with disclosure underway. The parties have exchanged documents in response to requests for discovery and inspection.

Presently pending is the Floor Store's subpoena directed to plaintiff's wife allegedly served on June 3, 2016, non-party Mary Broman seeking her appearance at an examination before trial to give testimony and to produce certain requested documents. In particular, the Floor Store has sought production of documents pertaining to the installation or work performed on plaintiff's carpet; documents in connection with the purchase of a central vacuum unit at plaintiff's residence; documents regarding the cleaning of the carpet in dispute; documents regarding caretakers or cleaners who worked on or cleaned the carpet; and photographs and/or video evidence of the carpet from installation to the present time.

Also pending is the subpoena seeking the production of documents and a witness for an examination before trial of non-party Nourison Industries, Inc. served by plaintiff on March 9, 2016. The parties' submissions on the motions make clear that Nourison is the manufacturer of the carpet that is the subject of this dispute. The subpoena for records sought production of documents concerning the purchase, inspection, installation or replacement of plaintiff's carpet; correspondence, cancelled checks and invoices between Nourison and defendant regarding the same; and records regarding latex backing application to the carpet in question. The subpoena for testimony sought the production of a witness knowledgeable about these documents and topics.

Nourison has moved to quash the subpoena served on it under CPLR 2304, or in the alternative moved seeking a protective order under CPLR 3103. The carpet manufacture makes it motion on the grounds that it views the subpoenas as nothing more than a fishing expedition since they believe the information sought to be overbroad and unduly burdensome. Additionally, Nourison argues the discovery requests lack sufficient notice for the reasons for disclosure or sufficient detail as required by CPLR 3101(a)(4). Lastly the manufacturer argues that the subject matter sought in the requests for production and testimony are collateral to the issues at the heart of the litigation.

Discussion

I. Nonparty Nourison's Motion to Quash and/or for a Protective Order

Nourison's motion to quash and/or for a protective order must be unsuccessful for a number of reasons.

CPLR 2304 titled "Motion to quash, fix conditions or modify" provides, in relevant part, that:

> [a] motion to quash, fix conditions or modify a subpoena shall be made promptly in the court in which the subpoena is returnable. If the subpoena is not returnable in a court, a request to withdraw or modify the subpoena shall first be made to the person who issued it and a motion to quash ... may thereafter be made in the supreme court ...

"An application to quash a subpoena should be granted [o]nly where the futility of the process to uncover anything legitimate is inevitable or obvious '... or where the information sought is utterly irrelevant to any proper inquiry' " It is the one moving to vacate the subpoena who has the burden of establishing that the subpoena should be vacated under such circumstances (***Campbell v. City of New York***, 51 Misc.3d 1231(A)[Sup. Ct., Kings Co. 2016]).

A recent decision from the Court of Appeals has broadened the scope of permissible disclosure that may be sought from non-parties in litigation. In *Kapon v. Koch* the Court noted that under similar circumstances the general rule is that the liberality and openness of the disclosure rules under the CPLR will militate towards the provision of discovery. Thus the Court stated:

> "We conclude that the "material and necessary" standard is in keeping with this state's policy of liberal discovery. as used in CPLR 3101 must "be 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 and Section 3101(a)(4) imposes no requirement that the subpoenaing party demonstrate that it cannot obtain the requested disclosure from any other source. Thus, so long as the disclosure sought is relevant to the prosecution or defense of an action, it must be provided by the nonparty."

Kapon v. Koch, 23 NY3d 32, 38 [2014].

The Court further elaborated that the type of application contemplated here is proper and

will be successful only where the futility of the process to uncover anything legitimate is inevitable or obvious' ... or where the information sought is 'utterly irrelevant to any proper inquiry' " and therefore movant bears the burden of establishing that the subpoena should be vacated under such circumstances (***Kapon*** *supra.* 23 N.Y.3d at 38–39.

Construing CPLR 3101(a)(4), our appellate courts have reasoned that nonparty disclosure requires no more than a showing that the requested information is "material and necessary," i.e. relevant to the prosecution or defense of an action. Thus "the subpoenaing party must first sufficiently state the 'circumstances or reasons' underlying the subpoena (either on the face of the subpoena itself or in a notice accompanying it), and 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 nonparty 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" (***Ferolito v. Arizona Beverages USA, LLC***, 119 AD3d 642, 643, 990 NYS2d 218, 219–20 [2d Dept 2014]).

The notice requirement of CPLR 3101(a)(4) "obligates the subpoenaing party to state, either on the face of the subpoena or in a notice accompanying it, 'the circumstances or reasons such disclosure is sought or required' ". Only after the subpoenaing party has established compliance with the CPLR 3101(a)(4) notice requirement, disclosure from a nonparty requires no more than a showing that the requested information is relevant to the prosecution or defense of the action (***Bianchi v. Galster Mgmt. Corp.***, 131 AD3d 558, 559, 15 NYS3d 189, 190 [2d Dept 2015]).

Applied here, plaintiff in opposition to Nourison's motion has emphasized that pursuant to plaintiff's Verified Bill of Particulars, plaintiff's amplified claims are for breach of contract, breach of implied warranty of merchantability, breach of warranty for fitness for a particular purpose, and unworkmanlike performance. Essentially plaintiff alleges that the carpet manufactured by Nourison and sold and installed by the Floor Store was defective beyond repair, despite repeated and multiple attempts at stretching, repairing and ultimate replacement. Accordingly plaintiff argues that given its claims, the correspondence and goings on between the manufacturer and retailer of his carpet are material and relevant in his litigation. Further, plaintiff notes that defendant by its own counterclaim asserts a claim for reimbursement for the costs and labor attendant to the carpet replacement, thus putting into issue transactions between the manufacturer and retailer. Plaintiff also puts emphasis on the fact that defendant's defense strategy appears to shift blame for any alleged carpet defects as being caused by nonparty Mary Broman's vacuuming technique and carpet cleaning habits. This is evidenced by questions put to plaintiff at his deposition and document demands served on plaintiff during the paper discovery phase. Therefore, plaintiff contends that sufficient detail and specificity have been provided to Nourison underlying its discovery requests in its subpoenas.

Concerning the propriety of Nourison's motion, the Court questions whether the application is procedurally premature. CPLR 2304 makes clear that a subpoena issued by requestor's counsel and not made returnable to supreme court requires that the recipient first make a request to withdraw before resorting to motion practice. (*See e.g.* ***Rubino v. 330 Madison Co., LLC***, 39 Misc3d 450, 451, 958 NYS2d 587, 588 [Sup. Ct., New York Co.

2013][where subject subpoena is not returnable in court a request to withdraw" the subpoena is required to be made prior to the filing of a motion under CPLR 2304 or 3101]). Nourison has made no attempts to satisfy this showing.

Additionally, the CPLR 3122 provides the proper procedure a recipient of a subpoena *duces tecum* must follow prior to resorting to motion practice. Under the circumstances presented, it requires that the recipient of a subpoena serve a response, which shall "state with reasonable *453 particularity the reasons for each objection", within twenty days of such service. CPLR 3122(a)(***Rubino*** *supra.* at 39 Misc. 3d at 452–53). Nourison has also failed to demonstrate compliance with this mandate.

To the extent that Nourison has argued that plaintiff provided insufficient notice for its application, that argument is deemed waived by virtue of the fact that the nonparty has appeared and responded to the motion with substantive argument.

The Court agrees that plaintiff has provided sufficient detail concerning the underlying substance for its nonparty discovery requests served via subpoena and thus nonparty Nourison's motion to quash the subpoenas seeking the production of records and testimony at deposition is accordingly **DENIED**.

II. Nonparty Mary Broman's Motion to Quash and/or for a Protective Order

Plaintiff's wife and nonparty Mary Broman has moved to quash subpoenas seeking records and her appearance at a deposition on several grounds. First, Mrs. Broman claims that the subpoena must be quashed as she asserts she was not properly served. Rather she insists that the subpoena was left on her doorstep without any attempt at personal service at her residence pursuant to CPLR 308(4) on a person of suitable age and discretion. Failing that, she submits an affirmation of her personally physician, Howard M. Hertz, M.D., dated June 10, 2016 wherin Dr. Hertz states that after examining Mrs. Broman on April 4, 2016 he had concluded that she is mentally and physical unable to be deposed. Mrs. Broman expounds upon this submitted sworn testimony given by plaintiff at his deposition stating that since her daughter's death approximately in March 2014, her mental condition has deteriorated. *See* Warmuth Aff. in Sup. at 3, Warmuth Aff. in Sup at 3, ¶ 8. Mrs. Broman concludes that the discovery sought of her is duplicative of that already sought and produced by her husband the plaintiff and thus the subpoena is merely a fishing expedition and not served in good faith.

In opposition to Mrs. Broman's motion, defendant counters that the nonparty Broman was properly served with a copy of the subpoena by personal service at her residence, the papers being accepted by a person of suitable age and discretion, one Chuck Broman on June 1, 2016. The Floor Store has annexed an Affidavit of Service in support of this proposition.

In reply, Mrs. Broman states no person by the name of "Chuck" resides at her home. Additionally, her counsel represents that she was never served with a copy of the subpoena as well as required by CPLR 2303(a).

As regards service, the law clearly provides that a process server's affidavit of service constitutes prima facie evidence of valid service and the mere conclusory denial of service is insufficient to rebut the presumption of proper service arising from the process server's affidavit.

Thus in order to warrant a hearing to determine the validity of service of process, the denial of service must be substantiated by specific, detailed facts that contradict the affidavit of service (***Washington Mut. Bank v. Huggins***, 140 AD3d 858, 859, 35 NYS3d 127, 128 [2d Dept 2016][internal citations omitted]). The Second Department has repeatedly held that no Traverse hearing is required where the defendant fails to swear to "specific facts to rebut the statements in the process server's affidavits" (***Scarano v. Scarano***, 63 AD3d 716, 716, 880 NYS2d 682, 683 [2d Dept 2009]).

The Court is not persuaded that nonparty Broman has made specific, concrete and sufficiently factual objections to service as to warrant a hearing here. Further, given Broman's appearance by counsel with several substantive objections and arguments opposing the subpoena, the Court deems those arguments waived, or for the reasons that follow, moot.

Defendant has opposed nonparty Broman's motion to quash or for a protective order as concerns her mental status and condition arguing that Dr. Hertz's affirmation is not in admissible form, and lacks sufficient objective medical detail as to be probative. Defendant's arguments are misplaced. Both the affirmation, sworn by a licensed and practicing medical doctor within this State, and plaintiff's sworn deposition testimony adduce that Mrs. Broman's status has deteriorated. More importantly, defendant has not contested that the records subpoena directed to her sought the same or substantially similar documentation previously provided by plaintiff. Therefore to the extent that the documents sought of nonparty Broman constitute cumulative, duplicative or repetitive document production of documentary evidence, nonparty Broman's motion to quash is **GRANTED**. Further, the Court is satisfied that nonparty Broman has supplied credible medical evidence as to her mental condition preventing her from being able to appear at deposition. Accordingly, Broman's motion to quash her subpoena securing her attendance at an examination before trial is similarly **GRANTED.**

The foregoing constitutes the Decision and Order of this Court.

Dated: September 30, 2016

HON. WILLIAM G. FORD, J.S.C.

____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**