NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7

MARIE CISLER, by her attorney-in-fact,
CATHERINE SCHMIDLEIN,

Plaintiff,

-against-

RUPPERT HOUSING COMPANY, INC.,

Defendant.

Index No.: 160918/13
DECISION/ORDER
Motion Seq. No. 1

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing defendant's motion to quash.

Papers	**Numbered**
Defendant's Notice of Motion	1
Plaintiff's Affirmation in Opposition	2
Defendant's Reply Affirmation	3

Abbott & Bushlow & Schechner, LLP, Ridgewood (Matthew A. Kaplan of counsel), for plaintiff.
Martin Clearwater & Bell, LLP, New York (Sarah A. Kinne of counsel), for defendant.

Gerald Lebovits, J.

On February 19, 2013, plaintiff, Marie Cisler, allegedly sustained personal injuries while operating her motorized wheelchair on the sidewalk adjacent to defendant Ruppert Housing Company, Inc.'s (Ruppert Housing) property located at 92nd Street in New York County. The wheelchair's wheels allegedly struck an elevated sidewalk defect causing plaintiff to be thrown from the wheelchair onto the sidewalk from which plaintiff sustained injuries. Plaintiff alleges that defendant was negligent in maintaining the sidewalk because defendant was on notice about the alleged defect and failed to repair the sidewalk.

Defendant moves under CPLR 2304 to quash plaintiff's three subpoenas to take non-party witness examinations before trial (EBTs) of Maxwell-Kates, Inc., and Maxwell-Kates's agents, Robert Freedman (President) and Eugene DeGidio (Vice President), and to produce records[1] "with respect to management activities, inspections, reports, notices to and from NYC repairs, notices to 'Board' with respect to Ruppert Housing Co. Inc. . . . for the period 01/01/03 through 12/31/14 and any other documents . . . pertain[ing] to an accident involving the plaintiff

[1] On April 4, 2016, non-party Maxwell-Kates, Inc. produced these documents. (Plaintiff's Affirmation in Opposition. Exhibit I.)

on or about 02/12/13 or 92nd Street between 2nd and 3rd Avenue. . . ."[2] (Plaintiff's Affirmation in Opposition, Exhibit A.) According to defendant, Maxwell-Kates manages defendant's properties. Defendant asks this court to quash the subpoenas under CPLR 2304 because Barbara Payne, who has the most knowledge about any alleged defects on defendant's property, was already deposed and because DeGidio and Freeman have no personal or unique knowledge material or necessary to plaintiff's case. Defendant states that Payne is a Maxwell-Kates employee who has worked for the past 20 years as property manager. Defendant argues that plaintiff has failed to establish a factual basis that Freedman's, DeGidio's, and Maxwell-Kates's EBTs are relevant. According to Freedman's and DeGidio's affidavits in support of defendant's motion, they have no personal knowledge about any sidewalk defect.

Defendant also moves in the alternative under CPLR 3103 for a protective order to prevent plaintiff from deposing the above-mentioned witnesses. Defendant argues that plaintiff has not demonstrated that the witnesses possess unique or personal knowledge — the burden plaintiff must satisfy to depose a corporate defendant's senior executive.

In opposition to defendant's motion, plaintiff raises several arguments. Plaintiff argues that defendant's motion is untimely; defendant waited six months after plaintiff served the subpoenas to move to quash them. According to plaintiff, defendant, under CPLR 3122, had 20 days to object to the subpoenas. Plaintiff also argues that defendant uses the wrong standard in moving to quash the non-party subpoenas and that the cases on which defendant relies have been abrogated by the Court of Appeals in *Matter of Kapon v Koch* (23 NY3d 32, 32 [2014]) and that defendant failed to satisfy its burden under *Matter of Kapon*. Plaintiff also argues that it complied with CPLR 3101 (a) (4)'s notice provision. In the alternative, plaintiff argues that the disclosure plaintiff seeks is material and necessary to prosecute this action. Plaintiff also argues that no evidence exists that Payne is Maxwell-Kates's employee. According to plaintiff, Payne testified at her EBT that she is a Ruppert Housing employee and, thus, that Payne never testified on Maxwell-Kates's behalf. Lastly, plaintiff argues that according to a Managing Agreement between Ruppert Housing and Maxwell Kates, either Freedman or DeGidio were required to inspect the Ruppert co-op buildings once every week. According to the meeting reports Maxwell-Kates produced to plaintiff, DeGidio attended the meetings and has knowledge of sidewalk conditions.

Defendant's motion is untimely. CPLR 2304 provides the following:

> "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

[2] Plaintiff's complaint alleges that plaintiff was injured on February 19, 2013. (Complaint, at ¶ 7.) Plaintiff's Amended Verified Bill of Particulars alleges that plaintiff was injured on February 19, 2013, around noon. (Defendant's Notice of Motion, Exhibit F, at ¶ 1.) Plaintiff's subpoenas state that plaintiff's accident occurred on February 12, 2013.

> and a motion to quash, fix conditions or modify may thereafter be made in the supreme court. . . ."

Courts have interpreted CPLR 2304's "in the court in which the subpoena is returnable" to mean a subpoena returnable in a court action or proceeding. (*City of New York v Bleuler Psychotherapy Center, Inc.*, 181 Misc 2d 994, 996 [Sup Ct, NY County 1999], citing *Brooks v City of New York*, 178 Misc 2d 104, 105 [Sup Ct, NY County 1998].) CPLR 2304 does not define "promptly." In any event, a motion to quash should be made before the return date of a subpoena. (*Santangello v People*, 38 NY2d 536, 539 [1st Dept 1976] ["A motion to quash . . . . should be made prior to the [subpoena's] return date."].)

In opposing defendant's motion, plaintiff submits Exhibits A through J to account for all the efforts it made since October 2015 to serve the subpoenas. For the most part, plaintiff's efforts were futile because it failed properly to serve defendant and defendant's counsel. (Plaintiff's Affirmation in Opposition, Exhibit A.) Plaintiff failed to address defendant's counsel at its proper address: Plaintiff addressed the notices to "200 East 42nd St." instead of "220 East 42nd Street." (Plaintiff's Affirmation in Opposition, Exhibits C, H.) Plaintiff further failed to serve the non-party at the correct address: Plaintiff sent the subpoenas to "5 East 38th Street, 5th Floor" instead of "9 East 38th Street, 6th Floor." (Plaintiff's Affirmation in Opposition, Exhibit E.) Although plaintiff shows that she sent the subpoenas to the proper parties and addresses in early March 2016, plaintiff does not provide proof of service. (Plaintiff's Affirmation in Opposition, Exhibit C, D.)

Despite all its earlier efforts, plaintiff properly served those subpoenas dated April 20, 2016, returnable May 25, 2016. Although plaintiff shows proof of effectuating service on May 2, 2016, defendant acknowledges service on April 21, 2016. (Plaintiff's Affirmation in Opposition, Exhibit G; Defendant's Reply Affirmation, at ¶ 6.) Defendant had until May 24, 2016 — the day before the return date of the subpoenas — to move to quash. But defendant filed its motion to quash on June 10, 2016, after the return date. Defendant does not explain why it waited until June 10, 2016, to file its motion. According to defendant, it contacted plaintiff on May 27, 2016, to withdraw or modify the subpoenas first before defendant moved to quash. (Defendant's Notice of Motion, Exhibit J.) But no need existed for defendant to have sought plaintiff to withdraw its subpoenas — that remedy is necessary only for subpoenas "not returnable in a court." (CPLR 2304.)

And defendant fails to apply the correct standard under *Matter of Kapon* in its moving papers. Only in its reply papers does defendant apply that standard.

Defendant's motion under CPLR 2304 to quash the non-party subpoenas is denied.

Defendant's motion under CPLR 3103 for a protective order is granted, however. CPLR 3103 (a) allows a movant to seek a protective order "at any time." Under CPLR 3101 (a), a party must disclose "all matter material and necessary in the prosecution or defense of an action." The same standard — material and necessary — applies to disclosure by nonparties. (CPLR 3101 [a] [4].) A court has the discretion to resolve disclosure disputes. (*Andon v 302-304 Mott St. Assocs.*, 94 NY2d 740, 745 [2000] ["[D]iscovery determinations rest within the sound discretion of the

trial court . . . ."].) In fashioning a remedy, a court may issue a protective order "designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts." (CPLR 3103 [a].) In *Matter of Kapon*, the Court of Appeals found that

> "[T]he 'material and necessary' standard adopted by the First and Fourth Departments is the appropriate one and is in keeping with this state's policy of liberal discovery. The words 'material and necessary' as used in section 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.' . . . Thus, so long as the disclosure sought is relevant to the prosecution or defense of an action, it must be provided by the nonparty." (23 NY3d at 38 [internal citations omitted].)

A person who has no information to provide need not appear at an EBT. (*Carter Clark v Random House, Inc.*, 2002 WL 31748573, at *2 [Sup Ct, NY County 2002] ["No person should have to appear for a deposition at which he or she does not have needed information to give. This is particularly so for a former United States President, such as President Clinton . . . . Thus, his deposition would not be material and necessary."]).

Preliminarily, defendant's motion for a protective order is timely.

Also, according to plaintiff's opposition papers, Maxwell Kates already turned over responsive documents to plaintiff on April 4, 2016. (Plaintiff's Affirmation in Opposition. Exhibit I.) That aspect of plaintiff's subpoenas seeking records from Maxwell Kates, Freedman, and DeGidio is no longer at issue. But the court must determine whether deposing Maxwell Kates, Freedman, and DeGidio is material and necessary to plaintiff's prosecution of this action.

Deposing Maxwell Kates, Freedman, and DeGidio is not material and necessary to plaintiff's prosecution of this action. In support of defendant's motion, DeGidio submits an affidavit that provides the following: "I have no personal knowledge of plaintiff's February 19, 2014 accident . . . . [or] of any alleged sidewalk defect at the accident location. . . ." (Defendant's Notice of Motion, Exhibit B, at ¶¶ 4, 5.) DeGidio states that no other employee, other than Payne, would know about any sidewalk defect and plaintiff's accident. (Defendant's Notice of Motion, Exhibit B, at ¶ 7.) Freedman's affidavit in support of defendant's motion is nearly identical to DeGidio's affidavit. Freedman states the following: "I have no personal knowledge of plaintiff's . . . accident . . . . [or] of any alleged sidewalk defect at the accident location. . . ." (Defendant's Notice of Motion, Exhibit A, at ¶¶ 4-5.) He states that he has "no personal knowledge of any sidewalk repair to the specific location of plaintiff's accident at issue. . . ." (Defendant's Notice of Motion, Exhibit A, at ¶ 6.)

Both Freedman and DeGidio state that Payne is employed "by Maxwell-Kates, Inc. as the property manager of Ruppert Housing." (Defendant's Notice of Motion, Exhibit A, at ¶ 7; Exhibit B, at ¶ 6.) Both state that Payne's office is located on defendant's premises; they state that Payne's job is to oversee defendant's property. (Defendant's Notice of Motion, Exhibit A, at

¶ 8; Exhibit B, at ¶ 7.) They also state that no other Maxwell-Kates employee would have any additional personal knowledge about plaintiff's accident or any alleged sidewalk defects on the property. (Defendant's Notice of Motion, Exhibit A, at ¶ 8; Exhibit B, at ¶ 7.)

The court relies on DeGidio's and Freedman's affidavits. They do not know about plaintiff's accident or about any sidewalk defect. DeGidio and Freedman have no information to offer. Their EBT testimonies are not material and necessary. Other than what Payne testified at her EBT, no other Maxwell Kates employee has additional information to offer. This court grants a protective order denying plaintiff an EBT of Maxwell Kates, Freedman, and DeGidio.

Plaintiff's remaining arguments are unpersuasive and unavailing.

Accordingly, it is

ORDERED that defendant's motion is denied in part and granted in part: Defendant's motion to quash under CPLR 2304 is denied; defendant's motion under CPLR 3103 is granted in that this court grants a protective order preventing plaintiff from deposing Maxwell Kates, Inc., Robert Freedman, or Eugene DeGidio; and it is further

ORDERED that defendant serve a copy of this decision and order on plaintiff with notice of entry; and it is further

ORDERED that the parties appear for a conference on December 7, 2016, at 10:00 a.m. in Part 7, Room 583, at 111 Centre Street.

Dated: October 24, 2016

J.S.C.

HON. GERALD LEBOVITS
J.S.C.