

NCG Real Estate LLC v 515 W. 29th St. Owner LLC

2016 NY Slip Op 33046(U)

July 15, 2016

Supreme Court, New York County

Docket Number: 653810/13

Judge: Ellen M. Coin

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: COIN
Justice

PART 63

*NCG REAL ESTATE
-v-
575 WEST 29 ST OWNER*

INDEX NO. 653810/13
MOTION DATE 3/16/16
MOTION SEQ. NO. 11

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

| | | |
|--|-------|--------------|
| Notice of Motion/Order to Show Cause — Affidavits — Exhibits | _____ | No(s). _____ |
| Answering Affidavits — Exhibits | _____ | No(s). _____ |
| Replying Affidavits | _____ | No(s). _____ |

Upon the foregoing papers, it is ordered that this motion is *decided in accordance with the memorandum decision and order annexed hereto.*

This constitutes the decision and order of the court.

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

Dated: 7/15/16

EC, J.S.C.

HON. ELLEN M. COIN

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 63

-----X
NCG REAL ESTATE LLC T/B/A
NATHANIEL CHRISTIAN GROUP and
NATHANIEL CHRISTIAN,

Plaintiffs,

Index No. 653810/13

-against-

DECISION

515 WEST 29TH STREET OWNER LLC,
BAUHOUSE GROUP LLC, ANTARES
INVESTMENT PARTNERS LLC,
ANTARES REAL ESTATE SERVICES, LLC,
JOSEPH P. BENINATI, CHRISTOPHER
JONES and DANIEL LEE,

Defendants.

-----X
ELLEN COIN, J.:

In this action for brokerage commissions, plaintiffs NCG Real Estate LLC t/b/a Nathaniel Christian Group and Nathaniel Christian (Christian) (collectively, plaintiffs) move, by order to show cause, to hold nonparty Eiseman Levine Lehrhaupt & Kakoyiannis (ELLK), defendants' attorney, in contempt for failure to comply with a subpoena.

ELLK and defendants 515 West 29th Street Owner LLC, Bauhouse Group LLC, Antares Investment Partners LLC, Antares Real Estate Services, LLC, Joseph P. Beninati (Beninati), Christopher Jones (Jones) and Daniel Lee (Lee) (collectively, defendants) cross-move for an order: 1) imposing sanctions on plaintiffs or their counsel; 2) striking certain statements from the record; 3) compelling the production of discovery material; and 4) granting a protective order which vacates or quashes the subpoena.

BACKGROUND

Plaintiffs commenced this action to recover unpaid brokerage commissions. Defendants answered the complaint and asserted a counterclaim for breach of contract on the ground that Christian breached an alleged oral agreement to make Beninati, Lee and Jones ten percent equity owners in a venture technology company called Picshare, Inc. (Picshare), a company Christian owned.

Thereafter, Picshare commenced an action against Beninati, Jones and Lee¹ (the related action) alleging that Beninati, Jones, and Lee's counterclaim in this action tortiously interfered with Picshare's business and its opportunity to raise capital and solicit investors.

In connection with the counterclaim in this action, defendants submitted, as exhibit 5, an email purportedly sent by Christian to Beninati and Lee on August 4, 2012.

It stated:

“Thanks again for taking the time to meet with me in regard to Picshare I am meeting with the lawyers on Wed you recommended and I look forward to our partnership - I am meeting with a friend Marc Lederer from Sun Capital Partners on Monday . . He is the real deal a good friend.

Anyway to get that one pager ready by Monday - please let me know”

(Castro affirmation, exhibit D [the modified email]).

According to ELLK, unbeknownst to it, the email that was submitted as exhibit 5 was a modified version of the August 4, 2012 email that Christian sent to Beninati

¹ *Picshare, Inc. v Joseph P. Beninati, Christopher Jones and Daniel Lee*, Index No. 651798/14.

(Levine affirmation, ¶ 19). Beninati states that he modified Christian's August 4, 2012 email (the original email) before he sent it to ELLK, to express his "interpretation or understanding of an email from [Christian]" and that the modified email was intended for attorneys' eyes only (Castro aff, exhibit G, ¶ 5). It is ELLK and defendants' position that the modified email was filed inadvertently (Levine affirmation, ¶¶ 18, 19; Castro affirmation, exhibit G, ¶¶ 5, 6).

It is undisputed that Christian's original August 4, 2012 email stated:

"Thanks again for taking the time to meet with me in regard to Picshare I am meeting with the lawyers on Wed you recommended, but more importantly - I am meeting with a friend Marc Leder from Sun Capital Partners on Monday. He is the real deal a good friend.

Anyway to get that one pager ready by Monday - please let me know"

(Castro affirmation, exhibit D).

ELLK states that on March 14, 2014, promptly after it was advised that it had incorrectly submitted the modified email as exhibit 5, it made a motion to correct the answer by replacing the modified email in exhibit 5 with the original email (Levine affirmation, ¶ 20). That motion was granted without opposition (*id.*, exhibit 5). At the May 28, 2014 oral argument of that motion, the court stated, "Plaintiff does not oppose the instant motion, so the Court is going to grant that. And since Plaintiff has a copy of Exhibit 5 as originally filed [the modified email], it will be able to depose Defendants regarding the difference in the original and the [modified] versions, thus it will suffer no prejudice from the substitution" (Castro affirmation dated Feb. 15, 2016, exhibit H at 2).

Thereafter, plaintiffs sought discovery from defendants concerning, among other things, the modified email (*id.*, exhibit 6, ¶ 21²). Defendants objected to plaintiffs' request on the ground that the request: 1) was overbroad and unduly burdensome; 2) sought documents that were not material and necessary; and 3) sought documents protected by attorney-client privilege. In addition, ELLK provided plaintiffs with privilege logs, identifying the documents concerning the modified email that were not produced on the basis of attorney-client privilege (*see* CPLR 3122 [b]).

On January 11, 2016, plaintiffs served nonparty ELLK with a subpoena duces tecum ad testificandum. That subpoena, which is the subject of the instant motion, demands that ELLK produce all correspondence between ELLK and the defendants regarding the modified email and the ultimate correction and refile of the original email (Castro affirmation, exhibit A).

On January 21, 2016, ELLK served plaintiffs with a response to the subpoena, which objected to the document demand, and which stated, with particularity, the reasons for each of its objections (*see* CPLR 3122 [a]); Castro affirmation, exhibit I).

Thereafter, on February 15, 2016, plaintiffs filed this motion for civil contempt on the ground that ELLK deliberately failed and refused to answer the January 11, 2016 subpoena.

² Paragraph 21 in plaintiffs' amended demand for production of documents requests, "[a]ll documents and communications concerning the Defendants' August 4th Altered Email submitted as Exhibit 5 in the Defendants Answer and Counterclaims filed November 25th 2013 and verified by Daniel Lee" (Levine affirmation, Exhibit 6).

CONTENTIONS

In support of the motion for contempt, and in opposition to the cross motion for sanctions, plaintiffs argue that ELLK failed to move for an order quashing the subpoena pursuant to CPLR 2304 (a) which, they contend, was the exclusive procedure to challenge the subpoena, and that, because ELLK failed to timely move to quash, it should be held in contempt until it complies with the subpoena.

Plaintiffs also argue that defendants waived their claims to attorney-client privilege regarding the modified email by putting the subject matter of the allegedly privileged communication at issue in the litigation and that even if defendants did not waive the privilege, they have failed to establish that the correspondence or documents concerning the modified email are entitled to protection.

As to the cross motion for sanctions, plaintiffs have attached certain correspondence with the district attorney's office as evidence that there is an ongoing investigation by that office regarding the modified email, and they take the position that pursuant to the CPLR and case law, they properly filed this contempt motion for ELLK's failure to respond to the subpoena.

In opposition to the contempt motion and in support of their cross motion for sanctions, ELLK and defendants argue that ELLK's deposition and document production was noticed pursuant to Article 31 of the CPLR and that they properly objected to the subpoena pursuant to CPLR 3122 (a). It is ELLK and defendants' position that plaintiffs should have made a motion to compel production of the documents rather than moving for contempt; that plaintiffs are not entitled to correspondence regarding the modified email because it is protected by attorney-client privilege; and that plaintiffs' assertions

that defendants are the subject of a current investigation by the district attorney are false and should be stricken from the record..

In addition, ELLK and defendants seek a protective order, pursuant to CPLR 3103, quashing the subpoena because it seeks privileged material; defendants have not waived their privilege, and ELLK cannot be compelled to testify against its clients.

DISCUSSION

CPLR 3101 (a) 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.

“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. 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 the 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 If the party seeking the disclosure is not interested in taking a deposition, but merely wants a nonparty witness to produce for discovery and inspection a paper or other tangible item in his possession, the remedy is an outright subpoena under CPLR 3120”

(Velez v HuntsPoint Multi-Serv. Ctr., Inc., 29 AD3d 104, 108-109 [1st Dept 2006][internal quotation marks and citations omitted]).

In this case, the subpoena merely states that it is being issued pursuant to Article 31 of the CPLR – it does not specify whether plaintiffs are interested in ELLK’s production of documents in connection with its deposition or whether their goal is primarily the production of documents. “[W]hile subpoenas issued pursuant to CPLR

3111 and 3120 are apparently still used interchangeably by many attorneys, they have different purposes and there are differences in the response required of the subpoenaed person” (*id.*, at 110).

“CPLR 3103 provides for a protective order that can be used to limit, condition or regulate the disclosure device used, while CPLR 2304 provides for a motion to quash, fix conditions or modify a subpoena. However, a nonparty served with a CPLR 3120 subpoena is required to object in writing within 20 days, stating ‘with reasonable particularity the reasons for each objection:’ (CPLR 3122 [a]). In such case, the burden then falls upon the party serving the subpoena to move pursuant CPLR 3124 or 2308 (b) to compel compliance with the subpoena”

(*id.*).

Here, a review of plaintiffs’ prior discovery demands reveals that plaintiffs’ primary goal has been to compel the production of documents concerning the modified August 4, 2012 email.³ To date, plaintiffs have not sought depositions of any of the defendants in this action or in the related action. Therefore, even though the subpoena issued to ELLK appears to demand an appearance and the production of documents, ELLK was not incorrect in responding to the subpoena as though it was issued pursuant to CPLR 3120. Indeed, ELLK’s CPLR 3122 (a) response first addresses plaintiffs’ document demands and states that, to the extent that the subpoena seeks the production of documents, it is objectionable because it requests material protected by attorney-client privilege and the requests seek material already demanded from the parties which has

³

Plaintiffs’ prior discovery demands include: a) first request for production in this action dated May 30, 2014 (Levine affirmation, Exhibit 6, Request 21) ; b) demand for discovery and inspection in the related action dated June 7, 2015 (*id.*, exhibit 7, Requests 13-18); c) October 7, 2015 subpoena issued to Microsoft Corp. (*id.*, Exhibit 8); d) October 7, 2015 subpoena issued to Apple Inc. (*id.*, Exhibit 9).

been objected to on the basis of attorney-client privilege. ELLK also objects to the demand for its deposition on the grounds that it cannot be compelled to testify against its client and on the basis of confidentiality, and demands that the subpoena be withdrawn (Castro affirmation, exhibit I).

In *Rubino v 330 Madison Co., LLC* (39 Misc 3d 450,452 [Sup Ct, NY County 2013]), the court held that in accordance with CPLR 3122, “the recipient of the subpoena is first required to provide his or her objections to the discovery . . . in a response to the party seeking such discovery, rather than to the court in a motion for a protective order (see Connors, Practice Commentaries McKinney’s Cons Laws of NY, Book 7B, CPLR C31122.1)”. Thereafter, if the parties cannot resolve their dispute privately, “*it is the party who served the...subpoena* who must bring the dispute to the court” by moving for a protective order (see Connors, 2013 Supplementary Practice Commentaries to CPLR 2304 McKinney’s Cons Laws of NY Book 7B, CPLR C2304:4 “Non-Judicial Subpoena: Request to Withdraw or Modify” [(t)he provisions in CPLR 3122 relied upon by the *Rubino* court appear to serve as an alternative to ‘promptly’ moving under CPLR 2304 to quash the subpoena”; see also *HL Artt LLC v Pickard*, 40 Misc 3d 1237[A], 2013 NY Slip Op 51467[U] * 2 [Sup Ct, NY County 2013]).

Consistent with the foregoing, ELLK timely and properly responded to plaintiffs’ subpoena by serving a particularized response outlining its objections (Castro affirmation, exhibit I). By serving this reponse on plaintiffs, ELLK fully complied with its obligation to respond to the subpoena (see *Velez*, 29 AD3d at 110). Thus, plaintiffs cannot demonstrate that ELLK disobeyed the subpoena, an essential element of a motion for contempt (see *Matter of Attonito v Maldonado*, 3 AD3d 415, 418 [1st Dept 2004] [“to

find that a party is in civil contempt, a lawful judicial order expressing an unequivocal mandate must have been in effect and disobeyed . . . and it must be demonstrated that its failure to comply therewith prejudiced the rights of a party to the litigation” (internal quotation marks and citation omitted)).

Accordingly, plaintiffs’ motion for an order holding ELLK in civil contempt for failing to respond to the January 11, 2016 subpoena is denied.

Because plaintiffs have not moved to compel discovery pursuant to CPLR 3124 or 2308 (b) (*see Velez*, 29 AD3d at 111), the court need not address their additional arguments. Moreover, as noted in this court’s May 29, 2014 decision on the record, plaintiffs are able to depose defendants regarding the difference between the original and modified emails; so they will suffer no prejudice.

ELLK and defendants’ cross motion for: 1) sanctions; 2) to strike objectionable material from the record; and 3) for a protective order is denied.⁴

As to the request for sanctions, a court, in its discretion, may award sanctions if it determines that a party’s conduct is frivolous, which is defined in Uniform Rules for Trial Courts (22 NYCRR) 130-1.1 [c] as completely without merit in law or undertaken primarily to harass or injure another or asserts material factual statements that are false.

Although ELLK and defendants contend that the contempt motion is frivolous because it is without merit in law, it appears that the law is still somewhat unsettled regarding the proper response to a subpoena duces tecum ad testificandum (*see Velez*, 29

⁴ The branch of the cross motion that seeks documents responsive to defendants’ February 10, 2014 and July 10, 2014 discovery demands was granted to the extent indicated in the decision and order of this court dated June 2, 2016 (motion sequence 10).

AD3d 104, 111 and the discussion supra regarding contempt). Plaintiffs did not indicate on the face of the subpoena whether the subpoena was being served pursuant to CPLR 3111 or 3120, and because objections to disclosure devices under these rules require different responses, neither plaintiffs nor defendants responded inappropriately.

In addition, in support of their claims that there is an ongoing criminal investigation, plaintiffs have submitted evidence that demonstrates that the New York County District Attorney's Office appears to be investigating the circumstances surrounding the modified exhibit 5 (Christian reply aff, exhibits B, C, D, E, F). Accordingly, it does not appear that the allegations regarding the investigation are patently false.

The branch of the cross motion that seeks a protective order is moot. If plaintiffs desire to pursue discovery against this nonparty, they are required to make a motion to compel pursuant to CPLR 2308 (b) or 3124.

Accordingly, it is ORDERED that the motion for contempt brought by plaintiffs NCG Real Estate LLC t/b/a Nathaniel Christian Group and Nathaniel Christian is denied in its entirety; and it is further

ORDERED that the cross motion of defendants 515 West 29th Street Owner LLC, Bauhouse Group LLC, Antares Investment Partners LLC. Antares Real Estate Services, LLC, Joseph P. Beninati, Christopher Jones and Daniel Lee for sanctions and other relief is denied.

Dated: July 15, 2016

ENTER:



A.J.S.C.

HON. ELLEN M. COIN