

Golden Ox Realty LLC v Board of Mgrs. of Colden Garden Condominium, Inc.
2018 NY Slip Op 32385(U)
September 20, 2018
Supreme Court, New York County
Docket Number: 159693/2014
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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GOLDEN OX REALTY LLC,

Index No. 159693/2014

Plaintiff

- against -

DECISION AND ORDER

BOARD OF MANAGERS OF COLDEN GARDEN
CONDOMINIUM, INC. a/k/a COLDEN GARDEN
CONDOMINIUM, DAVID LIN, and JOHN DOES
1-6,

Defendants
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LUCY BILLINGS, J.S.C.:

Defendants, the Board of Managers of a condominium building and its Board President, move (1) to quash plaintiff's subpoena for a deposition and production of documents by nonparty Brian Yuen, a condominium unit owner and former Board President, and (2) for a protective order against his deposition and production of documents. C.P.L.R. §§ 2304, 3103(a). Plaintiff owns several commercial units in the condominium, operates a child care center there, and claims that defendant Board falsely notified the New York City Department of Buildings that plaintiff had converted one of its units from a medical office to a child care facility without the condominium's authorization. Plaintiff maintains that the condominium Board approved plaintiff's renovations converting the unit from a medical office to a child care facility in 2009. Plaintiff also claims that, insofar as the Board acted adversely to plaintiff, the Board was constituted in violation of the condominium's by-laws, because elections to

Board offices were not held in accordance with the by-laws during 2011 through 2014.

The subpoena and accompanying deposition notice that plaintiff served notify the witness simply that "the witness is in possession of information which is relevant to the claims at issue in this lawsuit." Aff. of Manu L. Davidson Ex. A, at 2, 4. C.P.L.R. § 3101(a)(4) specifies that plaintiff must notify a nonparty witness from whom it seeks disclosure of "the circumstances or reasons such disclosure is sought or required," Kapon v. Koch, 23 N.Y.3d 32, 39 (2014), because the nonparty is entitled to know the parties' claims or defenses to which the nonparty's disclosure may be relevant. Id. at 37, 39; Ledonne v. Orsid Realty Corp., 83 A.D.3d 598, 599 (1st Dep't 2011); Reyes v. Riverside Park Community (Stage I), Inc., 47 A.D.3d 599, 599-600 (1st Dep't 2008); Velez v. Hunts Point Multi-Serv. Ctr., Inc., 29 A.D.3d 104, 110 (1st Dep't 2006).

Plaintiff's deposition notice and subpoena do not specify why Yuen's testimony and the documents demanded of him are relevant to the claims or defenses in this action and thus fail to satisfy the threshold showing required by C.P.L.R. § 3101(a)(4). Plaintiff did specify, however, in opposing defendants' motion, the claims and defenses to which Yuen's potential testimony and the documents demanded are relevant and how. Velez v. Hunts Point Multi-Serv. Ctr., Inc., 29 A.D.3d at 111. Yuen has been a unit owner and resident in the building over 20 years, was involved in the condominium's formation, and

was the Board's first President. Since then, as disclosed by defendants' production of Board minutes and emails to Yuen, he has attended many Board meetings, been involved with the Board and the condominium's operations, and influenced the Board's actions during the periods and relating to issues relevant to plaintiff's claims.

Plaintiff further explains that, because defendants have not located the Board minutes for 2009, plaintiff must rely on the recollection of persons familiar with the Board's meetings, communications, and actions and the condominium's business during that year critical to plaintiff's claims. Plaintiff's specification of the documents sought from Yuen also sheds light on how they and his testimony are relevant to its claims: documents concerning the converted unit and any entity, including Red Apple Child Development Center, affiliated with the unit, related to the renovations and use of the unit or the certificate of occupancy for the unit since 2009.

The attendance by plaintiff's owner at Board meetings on relevant issues during the relevant periods and his competence to testify about those meetings does not negate plaintiff's entitlement to call an uninterested corroborating witness. Insofar as Yuen's affidavit denies his involvement with the Board and the condominium's operations or his influence on the Board's actions relating to the relevant issues during the relevant periods, plaintiff is entitled to cross-examine him on the veracity of his affidavit and test that denial.

The applicable standard is simply whether plaintiff's demands may lead to relevant evidence regarding its claims or defendants' defenses, evidence that supports or negates plaintiff's claims or that supports or negates defendants' defenses. C.P.L.R. § 3101(a); Forman v. Henkin, 30 N.Y.3d 656, 661 (2018); SNI/SI Networks LLC v. DIRECTV, LLC, 132 A.D.3d 616, 617 (1st Dep't 2015); Matter of Steam Pipe Explosion at 41st St. & Lexington Ave., 127 A.D.3d 554, 555 (1st Dep't 2015), not whether plaintiff has shown it is likely to uncover evidence that supports its claims or negates defendants' defenses. Moreover,

New York discovery rules do not condition a party's receipt of disclosure on a showing that the items the party seeks actually do exist; rather, the request need only be appropriately tailored and reasonably calculated to yield relevant information. . . . In many if not most instances, a party seeking disclosure will not be able to demonstrate that items it has not yet obtained contain material evidence.

Forman v. Henkin, 30 N.Y.3d at 66. Plaintiff's requests to Yuen for disclosure meet this standard. Most importantly for purposes of this motion, Yuen's affidavit reveals that he is aware of the "circumstances or reasons" his deposition and documents are sought. C.P.L.R. § 3101(a)(4); Kapon v. Koch, 23 N.Y.3d at 39.

Finally, since defendants do not show that they or Yuen ever notified plaintiff of the need for an explanation why his deposition and documents were sought or why this evidence is relevant to this action's claims or defenses, nor have defendants shown any prejudice from plaintiff's later explanation, they have waived C.P.L.R. § 3101(a)(4)'s extra requirement applicable to nonparties. Velez v. Hunts Point Multi-Serv. Ctr., Inc., 29

A.D.3d at 112. For this reason and the reasons explained above, and because the testimony and documents sought bear directly on plaintiff's claims in this action and do not duplicate other disclosure obtained by plaintiff, C.P.L.R. § 3124; Kapon v. Koch, 23 N.Y.3d at 37; Velez v. Hunts Point Multi-Serv. Ctr., Inc., 29 A.D.3d at 112-13, the court denies defendants' motion (1) to quash plaintiff's subpoena for disclosure from Yuen and (2) for a protective order against that disclosure, on the following conditions. C.P.L.R. §§ 2304, 3103(a).

By October 1, 2018, plaintiff shall tender Yuen's witness fees and travel expenses for his deposition to defendants' attorney, C.P.L.R. § 2303(a), and serve this order with notice of entry on Yuen by personal service. Yuen shall appear for his deposition and produce the documents demanded in plaintiff's subpoena at the office of plaintiff's attorney, Enrico DeMarco Esq., 118-21 Queens Boulevard, Suite 603, Forest Hills, New York 11375, by November 20, 2018, unless the parties agree to a later date. Plaintiff shall notify Yuen of the specific date and time agreed by the parties at least 20 days in advance of the date. C.P.L.R. § 3107.

DATED: September 20, 2018



LUCY BILLINGS, J.S.C.

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