

<b>Wermuth v Mamaroneck Towers LP</b>
2018 NY Slip Op 34375(U)
July 30, 2018
Supreme Court, Westchester County
Docket Number: Index No. 69270/2016
Judge: Joan B. Lefkowitz
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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER-COMPLIANCE PART

-----X  
ESTHER WERMUTH,

Plaintiff,

-against-

MAMARONECK TOWERS LP,

Defendant.  
-----X

**DECISION and ORDER**

**Index No. 69270/2016**

**Seq. No. 2**

LEFKOWITZ, J.

The following papers were read on plaintiff's motion for an order, inter alia, compelling nonparties Griffon Associates, Griffins Landscaping and Rich DiViCento to comply with certain subpoenas and produce documents and witnesses to be deposed, and for such other and further relief as this court deems just and proper.

Order to Show Cause; Affirmation in Support; Exhibits 1 through 9  
Affidavits of Service, filed June 1, 2018 (NYSCEF Doc. No. 97)

Upon the foregoing papers and proceedings held herein, this motion is determined as follows:

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff as a result of a trip and fall incident which occurred on the sidewalk adjacent to the premises owned by defendant located at 233 Halstead Avenue, in Mamaroneck, New York. Plaintiff contends that she tripped on a "sunken flagstone." Plaintiff argues that defendant had an ongoing renovation at the premises, including the installation of a new drainage system and replacement of a cement patio area abutting the sidewalk. Plaintiff served the nonparty Griffon Associates (hereinafter Griffon) with a subpoena on November 7, 2017, for records related to the renovation project. In response to the subpoena, Griffon provided a copy of a contract between it and nonparty Griffins Landscaping. Griffon also provided copies of blueprints for the front patio area. Thereafter, plaintiff attempted to serve a subpoena on Griffins Landscaping and "Rich Doe."

Presently plaintiff seeks an order compelling the nonparties to comply with the subpoenas and produce witnesses to appear for depositions. Defendant has not filed any written submissions.

Pursuant to CPLR 3101(a), a party is entitled to "full disclosure of all matter material and

necessary in the prosecution or defense of an action.” The phrase “material and necessary” is “to 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. The test is one of usefulness and reason” (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968] [internal quotation marks omitted]). To obtain nonparty discovery, a party must only show that the nonparty discovery is “material and necessary” to the prosecution or defense of the action (*see Matter of Kapon v Koch*, 23 NY3d 32 [2014]).

It is well-settled that the method of service provided for in an order to show cause is jurisdictional in nature and must be strictly complied with (*see El Greco Soc of Visual Arts, Inc. v Diamantidis*, 47 AD3d 929 [2d Dept 2008]; *Stern v Garfinkle*, 22 AD3d 694, 694-695 [2d Dept 2005]). Further, where the court orders service by a particular date, “all components of service must be accomplished by that date” and if not the application must be denied (*El Greco Soc of Visual Arts, Inc. v Diamantidis*, 47 AD3d at 929 [five days late]; *Matter of Sorli v Coveney*, 51 NY2d 713 [1980] [one day late]; *Matter of Phillips v Sanfilippo*, 306 AD2d 954 [2003] [one day late]; *see U.S. Bank Nat. Assn v Feliciano*, 103 AD3d 791 [2d Dept 2013]).

Here, insofar as the action is the subject of e-filing, the court directed that service upon defendants, who consented to e-filing, was not necessary as the Order to Show Cause would be filed on the NYSCEF website by the court. However, with respect to the nonparties Griffon and Griffin’s Landscaping, the court directed movant to serve the Order to Show Cause and all supporting papers by personal service pursuant to CPLR 311 on or before April 18, 2018. With respect to nonparty Richard DiVicento, this court directed, pursuant to CPLR 308(1) or (2) on or before April 18, 2018 as well. Movant was further directed to file proof of service on the NYSCEF website on or before April 27, 2018.

On June 1, 2018, five weeks after the April 27, 2018 date required in the Order to Show Cause and one business day before the return date of this motion, movant uploaded to the NYSCEF website affidavits of service. The affidavits provided that the Order to Show Cause alone—without mention of service of any of the supporting papers— was served on each of the nonparties on April 19, 2018, one day later than the date service was required to be effectuated in the Order to Show Cause. Accordingly, where service was not timely completed in compliance with the provisions of the order to show cause, the motion must be denied (*see U.S. Bank Nat. Assn v Feliciano*, 103 AD3d at 791; *El Greco Soc of Visual Arts, Inc. v Diamantidis*, 47 AD3d at 929-30; *see also Matter of Sorli v Coveney*, 51 NY2d at 714; *Matter of Phillips v Sanfilippo*, 306 AD2d at 954). Further, even if this Court were to overlook the fact that service was untimely, movant also failed to timely file the proofs of service on the NYSCEF website. The Order to Show cause required all proof of service to be filed on or before April 27, 2018. Plaintiff failed to do so and did not file the affidavits until five weeks later on June 1, 2018, which was also on the eve of the return date of this motion. Also, notable is the fact that the untimely affidavits of service are all undated as also is the notary’s jurat. Further, other than an undecipherable signature at the bottom of each affidavit, the identity of the affiant is unknown. Moreover, each of the untimely filed affidavits of service indicates that only the Order to Show Cause was filed on each nonparty without any of the supporting papers. Insofar as movant failed to timely serve

the nonparties and further failed to timely file the requisite proof of service upon the nonparties, as specifically directed by the court, it is not clear that any of the nonparties have been given proper notice of this motion and the basis for it since, at best, only service of the order to show cause was attempted. Accordingly, the record before this court does not contain any evidence establishing that the nonparties were timely or properly served in compliance with the provisions of the Order to Show Cause as was directed by this Court (*El Greco Soc of Visual Arts, Inc. v Diamantidis*, 47 AD3d at 929-30).

Lastly, even if this Court were to overlook the fact that the nonparties were neither timely nor properly served, the subpoenas themselves were all facially defective and unenforceable because they neither contained nor were accompanied by a notice setting forth "the circumstances or reasons such disclosure is sought or required" as required by the statute (CPLR 3101 [a][4]; *Knitwork Productions Corp. v Helfat*, 234 AD2d 345 [2d Dept 1996]; *DeStefano v Mt Health Clubs, Inc.*, 220 AD2d 331 [2d Dept 1995]). A subpoenaing party must establish compliance with the notice requirement of CPLR 3101(a)(4) which requires 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'" (*Matter of Kapon v Koch*, 23 NY3d 32, 39 [2013]).<sup>1</sup> Therefore, for all these reasons, the motion must be denied.

In view of the foregoing, it is hereby

ORDERED that the plaintiff's motion is denied; and it is further

ORDERED that plaintiff shall serve a copy of the order with notice of entry within ten days of its entry; and it is further

ORDERED that counsel shall appear for a conference in the Compliance Part, Courtroom 800, on August 16, 2018, at 9:30 A.M.; and it is further

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York

July 30, 2018

  
HON. JOAN B. LEFKOWITZ, J.S.C.

<sup>1</sup>It also should be noted that each of the three subpoenas states that it was witnessed by the Hon. Mary Smith, J.S.C. While Justice Smith entered a Decision & Order on the defendant's summary judgment motion, none of the three subpoenas was so-ordered by Justice Smith nor has Justice Smith presided over any of the discovery issues in this action.

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