

Pedrez v People of the State of New York

2019 NY Slip Op 30387(U)

February 19, 2019

Supreme Court, New York County

Docket Number: 157303/2018

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM

Justice

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DIANE MARRERO PEDREZ,
Petitioner,

- v -

PEOPLE OF THE STATE OF NEW YORK, BY
BARBARA D. UNDERWOOD,

Respondent.

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INDEX NO. 157303/2018
MOTION DATE
MOTION SEQ. NO. 01

DECISION AND JUDGMENT

Petitioner moves pursuant to CPLR 403(d) and 2304 for an order quashing a subpoena duces tecum and subpoena ad testificandum on the grounds that respondent's use of it is harassing, that it seeks documents unrelated to the vindication of a public interest, that the information was previously provided, and that it constitutes a pretext for respondent's retaliation against her. Alternatively, she seeks the imposition of reasonable conditions limiting the scope of the response and asks that respondent's attempt at a second deposition of her be denied. (NYSCEF 1). Respondent opposes.

I. THE SUBPOENA (NYSCEF 4)

Respondent seeks:

- (1) documents sufficient to show all consideration received by an estate for the sale of the estate's interest in the subject building;
(2) documents concerning the estate's distribution of proceeds from the sale of its interest in the building;
(3) all bank account statements, including copies of checks issued from each account, for accounts held by petitioner in her capacity as executor of the estate, from July 1, 2017 to the present;
(4) all bank account statements, including copies of issued checks, held by petitioner in her personal capacity from July 1, 2017 to the present;
(5) documents sufficient to identify the names and addresses of the heirs of the deceased;
(6) all communications between petitioner and the deceased's heirs concerning the estate's business, including but not limited to the distribution of funds received by the estate after the building's sale;
(7) all documents submitted by petitioner to the Social Security Administration concerning her income and assets from July 1, 2017 to the present; and

- (8) all documents submitted to the New York City Housing Authority concerning petitioner's income and assets from July 1, 2017 to the present.

The subpoena was served on petitioner by substitute service on June 20, 2018 and required the production of documents by July 6, 2018 and petitioner's deposition on July 27, 2018. (NYSCEF 18).

According to respondent, after service of the subpoena, the parties agreed to a 30-day extension of time for petitioner to respond to it, until August 6, 2018. In lieu of a response, petitioner moves to quash it. (NYSCEF 21).

II. PETITION (NYSCEF 1-10)

By order to show cause and petition filed on August 6, 2018, petitioner argues that in seeking documents concerning matters unrelated to the respondent's investigation into the harassment of rent-stabilized tenants and failure to maintain the building in a safe condition, respondent's subpoena seeks irrelevant information in violation of her privacy rights and those of the estate. She also maintains that she had fully complied with an earlier subpoena. To the extent that respondent has expanded the earlier investigation, petitioner asks that the instant subpoena be narrowly tailored to require production of only those documents that directly relate to the expanded investigation, and not permit respondent to depose her a second time.

Claiming that her personal finances and interactions with the Social Security Administration and the New York City Housing Authority are off limits, petitioner argues that respondent has no justification for seeking such documentation and claims that respondent has no right to depose her with every expansion of the investigation, nor may it use the subpoena to retaliate against her for not settling the earlier case, as did an associate of hers (NYSCEF 8).

III. ANSWER, AFFIRMATION, AND MEMORANDUM OF LAW IN OPPOSITION (NYSCEF 15, 16, 21)

In its answer, respondent denies the salient facts set forth in the petition and interposes as affirmative defenses that pursuant to CPLR 2304, the petition is untimely and that petitioner waived her objections to it. By counterclaim, it seeks an award of its costs in responding to the motion and a penalty for failing to comply with the subpoena, each amount not exceeding \$50. (NYSCEF 15).

Respondent alleges that petitioner, the executor and beneficiary of the estate that held a 50 percent interest in the building, sold the building in August 2017 via illegal means, thereby requiring that she disgorge the profits of her illegal acts pursuant to Executive Law § 63(12). It claims that its investigation is now focused on whether and to what extent the estate and petitioner unlawfully profited from tenant harassment, housing discrimination, and the illegal eviction of tenants that gave rise to the initial investigation, which subjects are directly related to the initial investigation. Moreover, while respondent acknowledges that petitioner had furnished some responsive documents including the contract of sale of the building, it did not produce documentation concerning the consideration received or the distribution of proceeds to the heirs

of the estate, and as those documents were not extant in May 2017 when it issued the first subpoena, it properly seeks them now. Respondent denies that the subpoena is harassing and asserts that petitioner does not overcome the presumption of good faith that the subpoena was issued in furtherance of its investigative responsibilities. (NYSCEF 21).

In the assurance of discontinuance dated May 10, 2018, and offered by petitioner as evidence of the alleged retaliation, respondent observes, petitioner's associate admits to and implicates petitioner in violations of various state and municipal laws in connection with the alleged tenant harassment and discrimination. (NYSCEF 16, 21).

IV. ANALYSIS

Pursuant to CPLR 2304, a motion to quash, fix conditions, or modify a subpoena shall be made promptly in the court in which the subpoena is returnable. A motion to quash must be made before the return date in the subpoena. (*Santangelo v People*, 38 NY2d 536 [1976]; *Cherfas v Wolf*, 20 Misc 3d 1118[A], 2008 NY Slip Op 51397[U] [Sup Ct, Kings County 2008]; Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C2304:3 ["it would be a futility to make the motion returnable after the return date prescribed by the subpoena itself"].

As petitioner moved to quash the subpoena the same day of the agreed-upon deadline to respond, she failed to move promptly. (*See e.g., Securities Settlement Corp. v Johnpoll*, 128 AD2d 429 [1st Dept 1987], *app dismissed* 70 NY2d 693 [motion to quash made three days before deposition date set forth in subpoena and made returnable on deposition date untimely]). Petitioner thus fails to establish her compliance with CPLR 2304.

In any event, in the earlier case, petitioner is accused of harassing tenants in the building in order to evict them and charge higher rents and/or to sell the building at a higher price, and the building has now been sold and the estate, of which petitioner is the executor, has received the sale profits. If respondent proves in that case that petitioner acted illegally, respondent may seek an order directing restitution and damages. (NY Executive Law § 63[12]). Thus, given respondent's broad investigatory powers (*Free Market Environmental Law Clinic v Attorney General of New York*, 159 AD3d 467 [1st Dept 2018]), and as the documents sought in the subpoena relate to its investigation into petitioner's harassment of tenants and possible remedies related to such harassment, petitioner fails to establish that the subpoena must be quashed (*Matter of La Bella Creole Intl., S.A. v Attorney-General*, 10 NY2d 192 [1961] [courts will not quash subpoena issued by Attorney General unless it request documents irrelevant to any proper inquiry or it is inevitable or obvious that it would not uncover anything legitimate]; *People ex rel Cuomo v Marcus Garvey Nursing Home, Inc.*, 57 AD3d 201 [1st Dept 2008] [same]).

Pursuant to CPLR 2308(b), if a person fails to comply with a subpoena not returnable in court, the issuer may move to compel compliance, and if the court finds that the subpoena was authorized, it must order compliance and may impose costs, a penalty, and damages sustained by reason of the failure to comply. While respondent seeks costs in its counterclaim here, it never moved for an order compelling petitioner to comply with the subpoena, and is therefore not entitled to relief pursuant to CPLR 2308(b). (*See* Patrick M. Connors, Practice Commentaries,

McKinney's Cons Laws of NY, CPLR C2308:6 [disobedience of non-judicial subpoena requires court application to compel compliance, which results in court order, and "only then will disobedience support sanctions"]).

V. CONCLUSION

Accordingly, it is hereby

ORDERED and ADJUDGED, that the petition is denied and the proceeding is dismissed.

2/19/2019
DATE


BARBARA JAFFE, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION

APPLICATION:

SETTLE ORDER

GRANTED IN PART

OTHER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

SUBMIT ORDER

FIDUCIARY APPOINTMENT

REFERENCE