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| Lima v Cleveland Arms Apt. Corp. |
| 2019 NY Slip Op 31682(U) |
| June 11, 2019 |
| Supreme Court, New York County |
| Docket Number: 158107/2015 |
| Judge: Kathryn E. Freed |
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

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INDEX NO. 158107/2015

JAMES LIMA,

Plaintiff,

MOTION SEQ. NO. 002

- v -

CLEVELAND ARMS APARTMENT CORPORATION, TIMOTHY
WRIGHT, ROCHELLE GUTMAN, JOSHUA LEVIN, LINDSAY
PITZER, and JILL RACKMILL,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 45, 46, 47, 48, 49, 50, 51

were read on this motion to/for COMPEL

In this action sounding, inter alia, in breach of fiduciary duty, plaintiff James Lima, individually and derivatively on behalf of the shareholders of the Cleveland Arms Apartment Corporation, moves to compel the depositions of defendant Timothy Wright and nonparty John Cummings. Defendants Cleveland Arms Apartment Corporation, Timothy Wright, Rochelle Gutman, Joshua Levin, Lindsay Pitzer and Jill Rackmill oppose the motion. After oral argument, and after a review of the parties' papers and the relevant statutes and case law, the motion is denied.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff James Lima owns the shares and proprietary lease appurtenant to a unit in defendant Cleveland Arms Apartment Corporation ("the co-op"). He alleges, inter alia, that: 1) the co-op mismanaged its finances and refused to provide him access to its books and records; 2)

when he complained about the foregoing, the co-op retaliated by commencing a summary holdover proceeding against him; 3) the co-op failed to perform necessary repairs to his apartment; and 4) the 2015 annual meeting of the co-op's shareholders did not comply with proper procedure.

During discovery, defendants disclosed information relevant to plaintiff's complaints. Specifically, defendants exchanged the co-op's books and records and produced the co-op's president, Benjamin Rubinstein, as well as a second Board member, Rochelle Deutsch (sued herein as Rochelle Gutman), to testify at depositions regarding issues relevant to the litigation. Plaintiff also obtained certain of the co-op's bank records by serving subpoenas on its banks.

On or about May 18, 2016, plaintiff served a notice of deposition on defendant Timothy Wright. Doc. 46. On or about May 25, 2016, plaintiff served a subpoena on nonparty John Cummings directing him to appear for deposition. Doc. 46. Despite the foregoing, neither Wright nor Cummings appeared for deposition.

Plaintiff now moves to compel Wright and Cummings to appear for depositions. The only explanation plaintiff sets forth for the need to depose either of these individuals is that Wright was president of the co-op's board at the time this action was commenced.

In opposition, defendants argue that the motion must be denied since plaintiff failed to submit an affirmation of good faith in support of the application. They further assert that Cummings should not be compelled to testify because the subpoena served on him failed to set forth the reasons why plaintiff sought his testimony. Further, defendants maintain that the subpoena served on Cummings was overbroad.

With respect to Wright, defendants similarly assert that the subpoena fails to set forth the reasons why his testimony is needed, especially given that other board members have testified

regarding the same subject matter. Additionally, defendants maintain that it would be an unnecessary hardship for Wright to fly to New York from Florida, where he currently resides, to appear to give superfluous deposition testimony in this matter.

LEGAL CONCLUSIONS:

The motion is denied in all respects. Initially, as defendants assert, plaintiff's counsel failed to comply with 22 NYCRR 202.7 by submitting an affirmation of good faith in support of the motion setting forth the time, place and nature of the consultations, if any, which he had with defendants' attorney in an attempt to resolve the issues raised by the motion prior to filing the instant application. 22 NYCRR 202.7(c); *Cashbamba v 1056 Bedford LLC*, ___ AD3d ___, 2019 Slip Op 03456 (1st Dept, May 2, 2019).

Even assuming, arguendo, that the motions were procedurally proper, that branch of plaintiff's motion seeking to compel Cummings to appear for a deposition would be denied. Although CPLR 3101(a)(4) provides that a plaintiff must notify a nonparty witness from whom it seeks discovery "the circumstances or reasons such disclosure is sought or required" (*Kapon v Koch*, 23 NY3d 32, 39 [2014]), such reasons were not set forth in the subpoena served on Cummings. The subpoena served on Cummings was also overbroad. *See Kapon v Koch*, 23 NY3d at 39; *Haron v Azoulay*, 132 AD3d 475 (1st Dept 2015). Moreover, the affirmation of plaintiff's counsel in support of the motion sets forth absolutely no basis for plaintiff's request to depose Cummings. Doc. 46.

If this motion had been procedurally proper, this Court would also have denied that branch of the same seeking to compel Wright's deposition. The party seeking disclosure must demonstrate that its discovery demand will result in the disclosure of relevant evidence or is

reasonably calculated to lead to the discovery of information bearing on the claims. *GS Plásticos Limitada v Bureau Veritas Consumer Prods. Servs., Inc.*, 112 AD3d 539 (1st Dept. 2013).

Plaintiff, who merely asserts that Wright was the co-op board's president at the time the action was commenced (Doc. 46 at par. 4), failed to make such a showing here. Additionally, it would be a hardship for Wright to come to New York from Florida simply to give testimony which is likely to be cumulative of that given by Rubinstein and Deutsch (Gutman). *See Honig v Edlill Realty Co.*, 282 AD2d 796 (3d Dept 1953).

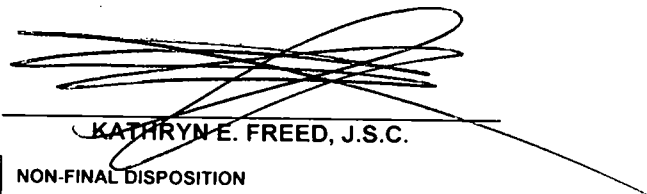
Therefore, in light of the foregoing, it is hereby:

ORDERED that plaintiff's motion is denied in all respects; and it is further

ORDERED that the parties are to appear for a previously scheduled status conference on September 10, 2019; and it is further

ORDERED that this constitutes the decision and order of the court.

6/11/2019
DATE


KATHRYN E. FREED, J.S.C.

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| CHECK ONE: | <input type="checkbox"/> CASE DISPOSED | <input checked="" type="checkbox"/> DENIED | <input checked="" type="checkbox"/> NON-FINAL DISPOSITION | |
| APPLICATION: | <input type="checkbox"/> GRANTED | | <input type="checkbox"/> GRANTED IN PART | <input type="checkbox"/> OTHER |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> SETTLE ORDER | | <input type="checkbox"/> SUBMIT ORDER | |
| | <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN | | <input type="checkbox"/> FIDUCIARY APPOINTMENT | <input type="checkbox"/> REFERENCE |