

<b>255 Butler Assoc. LLC v 255 Butler LLC</b>
2020 NY Slip Op 32888(U)
August 31, 2020
Supreme Court, Kings County
Docket Number: 511560/15
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8  
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255 BUTLER ASSOCIATES LLC,  
Plaintiff, Decision and order

- against - Index No. 511560/15

255 BUTLER LLC,  
Defendant, August 31, 2020

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved seeking to compel compliance with various subpoenas served upon third parties pursuant to CPLR §2308. The defendants have opposed the motion. Papers were submitted by all the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

As previously recorded, this lawsuit concerns a lease agreement entered into between the plaintiff tenant and defendant landlord concerning land and a building located at 255 Butler Street in Kings County. Originally, the plaintiff intended to build a hotel on the property but then changed for a multi-unit office space. The defendant landlord consented to the change. Thus, in July 2015 the tenant requested the landlord execute a Subordination, Non-Disturbance and Attornment Agreement [SNDA] guaranteeing not to evict the sub-tenants in the event the plaintiff defaulted or the tenant's lease was terminated. On July 27, 2015 the landlord served a notice to cure and on September 11, 2015 served a notice of termination. The plaintiff

commenced a lawsuit against the defendant alleging the notice to cure and notice of termination were pretextual and were issued in bad faith. On October 24, 2019 the court granted summary judgement on the first cause of action for a declaratory judgement finding that no event of default existed under the lease. The plaintiff is pursuing two remaining causes of action, namely a breach of good faith and fair dealing and a breach of the covenant of quiet enjoyment. In support of those claims the plaintiff now seeks information from an entity called Idea Nuova which is owned and managed by Ariel, Nathan, Solomon and Benjamin Akkad, the defendants in this lawsuit. Specifically, the plaintiff seeks information whether the Akkads, in a different real estate transaction with similar facts, provided an SNDA, acknowledging the pervasive customary practice of such documents. The defendant opposes the motion on the grounds, essentially, that the request is not relevant.

#### Conclusions of Law

In Kapon v. Koch, 23 NY3d 32, 988 NYS2d 559 [2d Dept., 2014] the court held that third party subpoenas may be served whenever the information sought is 'material and necessary' "of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity" (id). The court noted that "so long as the

disclosure sought is relevant to the prosecution or defense of an action, it must be provided by the nonparty" (id). Thus, "disclosure from a nonparty requires no more than a showing that the requested information is relevant to the prosecution or defense of the action" (see, Bianchi v. Galster Management Corp., 131 AD3d 558, 15 NYS3d 189 [2d Dept., 2015], CPLR §3103(a)). A party seeking to vacate or quash a third party subpoena has a burden establishing the information is "utterly irrelevant" or "the futility of the process to uncover anything legitimate is inevitable or obvious" (Anheuser-Busch Inc., v. Abrams, 71 NY2d 327, 525 NYS2d 816 [1988]).

The tenants assert that when the defendant became aware of the proposed leases to the subtenant Wework, they contrived pretextual defaults so they could terminate the lease and then deal directly with Wework themselves. Those actions, argues the plaintiff, essentially put them out of business. The plaintiff now seeks information where another entity owned by the Akkad's executed an SNDA in favor of the subtenant in a different transaction. Thus, they seek "a copy of the Ground Lease and all documents and communications as to the SNDA" (see, Affirmation in Support of Motion to Compel, ¶19). The basis for the request is to demonstrate that the Akkads were aware of the "commercially ubiquitousness" (id. at ¶24) of providing such SNDAs. However, even if they were aware of such practice, it is admitted that

there was no such requirement in this case. Thus, the existence of an SNDA in one instance or the pervasive use of them in general does not mean they are required in every case and the defendants in this case cannot be accused of any wrongdoing even if they utilized such SNDAs in the past.

Moreover, and more significantly, the failure to permit an SNDA, by itself, in this case, does not establish the defendants did anything improper. Rather, the crux of plaintiff's claim is that the defendants failed to execute an SNDA so they could undermine the plaintiff's potential contract with Wework and capitalize on the potential tenant base themselves. Whether the defendants utilized SNDAs in other transactions has no bearing on that specific allegation at all. The plaintiff asserts the structure of the transaction in this case is identical to the Idea Nuova transaction where in both cases there was a landlord, a prime tenant and then a subtenant. However, the mere similarity of structure has no other relevance to this case. The plaintiff argues that defendants knowledge of their own practices of providing SNDAs in identical transactions "is a proper subject of discovery" (see, Reply Affirmation §7). First, the knowledge of the defendants practices can be inquired of the defendants during discovery and does not require production of the actual documents in another transaction. Moreover, engaging in permissible albeit different conduct in one transaction has no

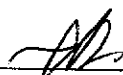
relevance to the same party engaging in permissible and different conduct in another transaction. This is particularly relevant where there is no allegation against the Akkads in other transactions that they refused to provide SNDAs to undermine the tenants ability to lease the space as contended in this case.

Therefore, the subpoenas sought have no relevance to any issues in this case. Consequently, the motion seeking to compel the documents pursuant to the subpoenas is denied.

So ordered.

ENTER:

DATED: August 31, 2020  
Brooklyn N.Y.

  
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Hon. Leon Ruchelsman  
JSC