

<b>Healy v Carriage House LLC</b>
2021 NY Slip Op 30961(U)
March 29, 2021
Supreme Court, New York County
Docket Number: 150133/2014
Judge: James E. d'Auguste
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. JAMES EDWARD D'AUGUSTE PART IAS MOTION 55EFM

*Justice*

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JOHN HEALY, VALERIA CALAFIORE- HEALY,

Plaintiff,  
- v -

CARRIAGE HOUSE LLC et al

Defendant.

INDEX NO. 150133/2014

MOTION DATE 09/24/2020

MOTION SEQ. NO. 006

**DECISION + ORDER  
ON MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 156, 157, 158, 159, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175

were read on this motion to/for QUASH SUBPOENA, FIX CONDITIONS.

On this motion, nonparties Clara Sokol (Sokol) and Amazon Realty Group, Inc. (Amazon Realty) (together, Amazon Realty) move, pursuant to CPLR 2304, for an order to quash a subpoena *duces tecum* and *ad testificandum* dated March 5, 2020 served upon them by plaintiffs John A. Healy and Valeria Calafiore Healy (Healy) (together, plaintiffs). Plaintiffs cross move, pursuant to CPLR 2308 and 3122, for an order to compel their compliance.

**BACKGROUND**

This action arises out of plaintiffs' purchase in 2011 of unit no. 8 in a condominium building located at 211-213 East 2nd Street, New York, New York (the Building) from defendant Carriage House LLC (Carriage House), the Building's sponsor (NY St Cts Elec Filing [NYSCEF] Doc No. 112, amended complaint, ¶¶ 7 and 12). Defendants John K. Lama and Christopher Lama are the sole principals or shareholders in defendant NY Urban Real Estate Services Inc. (NY Urban), the co-sponsor for plaintiffs' unit, and defendant NY Urban Real Estate Investments Inc. (together with Carriage House, defendants) (*id.*, ¶¶ 5-6 and 10). Plaintiffs allege that they have been unable to enjoy their unit due to repeated flooding and water leaks, poor workmanship and

use of inferior materials and installation (*id.*, ¶ 1). The purchase agreement required Carriage House and NY Urban, together as the “Seller,” to repair them (*id.*, ¶¶ 19 and 21-25). The amended complaint pleads causes of action for breach of contract, breach of warranty, violations of General Business Law §§ 349 and 350, alter ego/veil piercing, fraud, and fraudulent conveyance.

It is not disputed that plaintiffs are presently involved in four other actions with the Building, the Board of Managers of the Carriage House Condominium (the Board), and the Board’s officers or members concerning the Board’s legitimacy and access to plaintiffs’ unit for the purpose of service of other unit owners’ HVAC systems (NYSCEF Doc No. 159, Amazon Realty mem of law at 4-5). The other actions are: *Matter of Healy v Carriage House Condominium*, Sup Ct, NY County, index No. 160850/2017 (the 2017 Action); *Healy v Settle*, Sup Ct, NY County, index No. 160265/2018 (the 2018 Action); *Board of Managers of Carriage House Condominium v Healy*, Sup Ct, NY County, index No. 150491/2019 (the 2019 Action); and, *Healy v Settle*, Sup Ct, NY County, index No. 152620/2020. Decisions have been rendered on appeal in the 2017 Action and the 2019 Action (*see Matter of Healy v Carriage House Condominium*, 166 AD3d 518 [1st Dept 2018]; *Board of Mgrs. of Carriage House Condominium v Healy*, 190 AD3d 546 [1st Dept 2021]).

On March 5, 2020, plaintiffs served a subpoena *duces tecum* and *ad testificandum* upon “Amazon Realty Group, LLC / Clara Lokshin, also known as Clara Sokol”<sup>1</sup> (NYSCEF Doc No. 157, Eric C. Weissman [Weissman] affirmation, exhibit A at 3). In addition to testimony, plaintiffs seek documentary discovery for the period beginning January 1, 2017 to the present, as listed in

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<sup>1</sup> The “Certificate of Service” shows that Healy served the subpoena by mail upon counsel for the Board in the 2019 Action (NYSCEF Doc No. 157 at 2). The “Notice of Subpoenas” contains the caption and index number for the 2019 Action and lacks specific notice informing Amazon Realty why the disclosure was necessary (*id.* at 6). The subpoena itself, though, bears the correct caption and index number and contains a brief statement explaining that Amazon’s communications with plaintiffs and defendants.

schedule A annexed to the subpoena. The requested documents include the Building's financial records; correspondence from Matthew Settle, Tina Soares and David Hung to plaintiffs; documents regarding renovations, repairs or improvements of any unit or Building common element; correspondence from any unit owner seeking to coordinate or arrange service, repair or replacement of an air conditioning unit; documents disseminated to the unit owners after January 1, 2017 referencing alleged defects in the Building's common elements; documents referencing repairs of the elevators or boilers; and, documents related to repairs, renovations or improvements to the Building's common elements or individual units, among other items (*id.* at 5-7).

Amazon Realty moves to quash the subpoena on the ground that the discovery is irrelevant to the subject matter of the present action, which stems from plaintiffs' purchase of their unit. Sokol, Amazon Realty's sole member, avers that she has no personal knowledge about the Building's operations prior to September 2018, when Amazon Realty began serving as the Building's managing agent, and that she was not involved in creating the condominium or plaintiffs' purchase of their unit (NYSCEF Doc No. 158, Sokol aff, ¶¶ 1 and 3-4). Amazon Realty further argues that the documents sought all pertain to the 2018, 2019 and 2020 Actions.

Plaintiffs raise two procedural arguments in opposition. First, they contend that Amazon Realty failed to object to the subpoena as required by CPLR 3122 (a), and, therefore, any objections, except those for privilege, have been waived. Second, plaintiffs contend that Amazon Realty failed to engage in a good faith attempt to resolve the issues raised on this motion or tender a good faith affirmation as required by Uniform Rules for Court Courts (22 NYCRR) § 202.7 [a]. Plaintiffs also contend that the discovery is material to this action. They argue that this action concerns, in part, which entity bears responsibility for repairing the leaks in their unit, and that Sokol is directly involved, as evidenced in her recent emails on this issue (NYSCEF Doc No. 166,

Healy affirmation, exhibit 4 at 1). Plaintiffs further contend that Amazon Realty may be in possession of relevant information because at least one former managing agent for the Building transferred its documents to the new managing agent. An email from December 28, 2017 shows that Stacy J. Hammel of Merchants Properties, Inc., one of the Building's former managing agents, "gave every document including emails to a Blake at KG Properties when they took over" (NYSCEF Doc No. 169, Healy, exhibit 7 A 1).

In reply, Amazon Realty submits that none of the emails establish that it has any knowledge of events occurring before September 2018. It has no relationship with "KG Properties," and Sokol's email from May 2020 discussing an inspection of the plaintiffs' unit merely acknowledges the existence of this action. Amazon Realty also rejects plaintiffs' procedural arguments. It submits that CPLR 2304 does not require a nonparty to serve objections to a subpoena before serving a prompt motion to quash. Due to the coronavirus pandemic, filings in non-essential matters were temporarily suspended (NYSCEF Doc No. 172, Matthew A. Beyer [Beyer] affirmation, exhibit A at 1). Amazon Realty filed its motion on May 4, 2020, the same day the stay was lifted (NYSCEF Doc No. 173, Beyer affirmation, exhibit B at 1; NYSCEF Doc No. 156). Amazon Realty also rejects the contention that it should have filed a good faith affirmation because any pre-motion conference would have been futile.

### DISCUSSION

CPLR 3101 calls for the full disclosure of all evidence material and necessary in the prosecution or defense of an action (*see Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). "While discovery should be liberal, the information sought must be material and necessary, and meet a test of usefulness and reason" (*Leventhal v Bayside Cemetery*, 188 AD3d 604, 604 [1st Dept 2020] [internal quotation marks and citation omitted]). Under CPLR 3101 (a)

(4), a party may seek disclosure from a nonparty “upon notice stating the circumstances or reasons such disclosure is sought or required.”

CPLR 2304 provides, in relevant part, that “[a] motion to quash, fix conditions or modify a subpoena shall be made promptly in the court in which the subpoena is returnable. If the subpoena is not returnable in a court, a request to withdraw or modify the subpoena shall first be made to the person who issued it.” Additionally, “[a]n application to quash a subpoena [brought under CPLR 2304] should be granted ‘[o]nly where the futility of the process to uncover anything legitimate is inevitable or obvious’ ... or where the information sought is ‘utterly irrelevant to any proper inquiry’” (*Matter of Kapon v Koch*, 23 NY3d 32, 38 [2014], quoting *Anheuser-Busch, Inc. v Abrams*, 71 NY2d 327, 331-332 [1988]). The burden rests with the party subpoenaed to demonstrate that the discovery sought is utterly irrelevant (*see Velez v Hunts Point Multi-Serv. Ctr., Inc.*, 29 AD3d 104, 112 [1st Dept 2006]). Furthermore, the court may sua sponte issue a protective order under CPLR 3103 (a) (*see Bligen v Markland Estates*, 6 AD3d 371, 372 [2d Dept 2004]), especially where the discovery sought is overly broad or unduly burdensome (*see Arch Specialty Ins. Co. v HDI Gerling Am. Ins. Co.*, 2021 NY Slip Op 50036[U], \*2 [Sup Ct, NY County 2021], citing *Arch Ins. Co. v Delric Constr. Co.*, 174 AD3d 560, 561 [2d Dept 2019]).

As a preliminary matter, a good faith affirmation is not necessary on this application (*see Martin v Daily News, L.P.*, 2010 NY Slip Op 31039[U], \*4-5 [Sup Ct, NY County 2010]; *cf. Rubino v 330 Madison Co., LLC*, 39 Misc 3d 450, 453 [Sup Ct, NY County 2013]). The relevant portion of Uniform Rules for Court Courts (22 NYCRR) § 202.7 (a) reads:

“In addition, except as provided in subdivision (d) of this section, no motion shall be filed with the court unless there have been served and filed with the motion papers ... (2) with respect to a motion relating to disclosure or to a bill of particulars, an affirmation that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion.”

Reference to “counsel for the opposing party” implicates “an adversarial context and ... a subpoenaed non-party is not in an adversarial relationship with the subpoena’s issuer” (*Martin*, 2010 NY Slip Op 31039[U], \*5).

That said, Amazon Realty has failed to demonstrate that it complied with the procedures set forth in the CPLR for objecting to a nonparty subpoena. Counter to Amazon Realty’s position, a nonparty served with a subpoena under CPLR 3120 or 3121 “is required to object in writing within 20 days [of service], stating ‘with reasonable particularity the reasons for each objection’” (*Velez*, 29 AD3d at 110, quoting CPLR 3122 [a] [1]). Amazon Realty has not submitted a copy of its written objections on this motion (*see J.B. v M.G.*, 65 Misc 3d 1205[A], 2019 NY Slip Op 51510[U], \*19 [Sup Ct, NY County 2019], citing *Rubino v 330 Madison Co., LLC*, 39 Misc 3d 450, 453 [Sup Ct, NY County 2013]). Although Amazon Realty’s counsel apprised plaintiffs of its intention to file a motion to quash (NYSCEF Doc No. 174, Beyer affirmation, exhibit C at 1), the March 23, 2020 email does not set forth any objections with reasonable particularity (*see Quinn v Dean N. Assoc.*, 2017 NY Slip Op 31207[U], \*8 [Sup Ct, NY County 2017]).

Ordinarily, the failure to raise a timely objection with particularity constitutes a waiver of the objection, except for those for privilege or palpable impropriety (*see Khatskevich v Victor*, 184 AD3d 504, 505 [1st Dept 2020]). While Amazon Realty does not raise an objection based on privilege, it objects based on palpable impropriety. A discovery demand is palpably improper where it seeks irrelevant information or is overbroad or unduly burdensome (*see Asprou v Hellenic Orthodox Community of Astoria*, 185 AD3d 638, 640 [2d Dept 2020]). As such, Amazon Realty has not waived its right to raise an objection to the disclosure based on relevance.

Here, Amazon Realty has not met its burden of demonstrating that all of the requested documents and testimony are utterly irrelevant (*see Velez*, 29 AD3d at 112). A review of the

allegations in this action reveals that plaintiffs' complaints concern purported construction defects affecting their unit and misrepresentations about the financial condition of the Building, especially the Building's "potential obligations to repair several of the condominium's 'common elements'" (NYSCEF Doc No. 112, ¶¶ 14-15). Sokol avers that she has no knowledge about the Building's operations prior to September 2018 (NYSCEF Doc 158, ¶ 3), but, significantly, she does not state whether Amazon Realty is in possession of documents responsive to the subpoena.

Several categories of documents pertain to plaintiffs' claims against defendants in this action relating to the Building's financial condition and any purported construction defects at the time of the sale, and are relevant. For instance, item no. 1, subparts four, seven and eight, seek financial records and statements for the Building and records related to repairs or improvements to any unit or the Building's common elements performed by the Building. Item nos. 6, 7, 8 and 9, which seek records related to the air conditioning systems, water leaks and common elements, are also relevant.

However, the balance of the items requested are utterly irrelevant to plaintiffs' claims in this action. Item nos. 2, 3, 4 and 5 in schedule A seek the production of all notices Amazon Realty or the Board "claim to have sent [to plaintiffs and] ... the means by which ... the notice was sent"; receipts and records of expenses incurred in the mailing or sending the notices; all records "reflecting, memorializing, summarizing, describing or referring to any meeting or discussion relating to and/or involving the Carriage House Condominium"; and, invoices Amazon Realty or the Board claim to have delivered to plaintiffs (NYSCEF Doc No. 157 at 6). In addition, six of the 9 subparts in item no. 1 seek records unrelated to this action. The first three subparts request records from three Board member regarding or mentioning either plaintiff or their unit. The fifth seeks all records of "any proceedings, deliberations, resolutions, meetings, notices or other

activities (including actions by written consent)” by the Board (NYSCEF Doc No. 157 at 5). The sixth seeks all records, including notices, voting records, ballots and meeting minutes “reflecting, memorializing, summarizing, describing or referring to any proceedings, deliberations, resolutions, meetings, notices or other actions (by written consent or otherwise) of the unit owners of [the Building]” (*id.*). The ninth seeks all records relating to any insurance claims “for any purpose” for the Building (*id.* at 6). Amazon Realty has demonstrated that these records do not bear on plaintiffs’ claims of construction defects and fraudulent conveyance against defendants in this action. Plaintiffs, in response, fail to establish the material relevance of these categories of documents. While some of the material responsive to these requests may be relevant, the requests, as stated in the subpoena, are too overbroad and burdensome. “Where discovery demands are overbroad, ‘the appropriate remedy is to vacate the entire demand rather than to prune it’” (*Bennett v State Farm Fire & Cas. Co.*, 189 AD3d 749, 750 [2d Dept 2020] [citation omitted]; *accord Lerner v 300 W. 17th St. Hous. Dev. Fund Corp.*, 232 AD2d 249, 250 [1st Dept 1996]).

Lastly, the branch of the cross motion seeking Amazon Realty’s nonparty deposition is granted. Though Sokol avers that she has no knowledge of the Building’s operations prior to September 2018, she may have knowledge concerning the Building’s efforts to remedy the water leaks in plaintiffs’ unit and whether any work pertaining to common elements stem from alleged construction defects. Given the current coronavirus pandemic, the parties are urged to come to a mutually agreeable procedure for conducting the deposition in a manner safe for all those attending, which may include holding the deposition remotely by videoconference.

Accordingly, it is

ORDERED that the motion brought by nonparties Clara Sokol and Amazon Realty Group, Inc. to quash a subpoena *duces tecum* and *ad testificandum* dated March 5, 2020 served by


plaintiffs John A. Healy and Valeria Calafiore Healy (motion sequence no. 006) is granted to the extent that nonparties Clara Sokol and Amazon Realty Group, Inc. shall not produce material response to item no. 1, subparts one, two, three, five, six and nine, and item nos. 2, 3, 4 and 5 in schedule A annexed to the subpoena; and it is further

ORDERED that the cross motion of plaintiffs John A. Healy and Valeria Calafiore Healy to compel nonparties Clara Sokol and Amazon Realty Group, Inc. to comply with the subpoena *duces tecum* and *ad testificandum* dated March 5, 2020 (motion sequence no. 006) is granted to the extent nonparties Clara Sokol and Amazon Realty Group, Inc. shall comply with item no. 1, subparts four, seven and eight, and item nos. 5, 7, 8 and 9 in schedule A annexed to the subpoena; and it is further

ORDERED that within 30 days after service of this order with notice of entry, nonparties Clara Sokol and Amazon Realty Group, Inc. shall furnish plaintiffs with material responsive to item no. 1, subparts four, seven and eight, and item nos. 5, 7, 8 and 9 in schedule A; and it is further

ORDERED that 45 days after service of this order with notice of entry, nonparty Clara Sokol shall appear for a deposition; and it is further

ORDERED that the parties and nonparties Clara Sokol and Amazon Realty Group, Inc. shall mutually agree to a date, time and location for the deposition and to a procedure for conducting the deposition in a manner that is safe for all of those in attendance.

<u>3/29/2021</u> DATE					 _____ JAMES EDWARD D'AUGUSTE, J.S.C.			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	