

Real World Holdings LLC v 393 W. Broadway Corp.
2021 NY Slip Op 31092(U)
April 6, 2021
Supreme Court, New York County
Docket Number: 160732/2015
Judge: Carol R. Edmead
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PRESENT: HON. CAROL R. EDMEAD PART IAS MOTION 35EFM

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INDEX NO. 160732/2015

MOTION DATE 06/03/2020

MOTION SEQ. NO. 010

- v -

**DECISION + ORDER ON
MOTION**

Defendant.

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

Upon the foregoing documents, it is

ORDERED that Defendants' application for an order preemptively precluding Plaintiff from serving further subpoena on Dia is denied. However, no further modifications of the existing Fourth Subpoena shall be submitted. It is further

ORDERED that counsel for Defendants shall serve a copy of this order with notice of entry on all parties within 10 days of entry.

MEMORANDUM DECISION

In a case involving a dispute in a cooperative building between a proprietary leaseholder and the building, Defendants seek a protective order pursuant to CPLR §3103(a) quashing the fourth subpoena (the “Fourth Subpoena”) served by Plaintiff upon non-party Dia Art Foundation (“Dia”) and prohibiting Plaintiff from serving any further subpoenas on Dia (Motion Seq. 010).

Plaintiff opposes the motion in its entirety and seeks an award of costs and expenses, including reasonable attorney’s fees, in connection with this motion.

BACKGROUND

This motion relates to the fourth subpoena served upon non-party Dia, the owner of a commercial unit in a cooperative building that is the subject of this proceeding and the largest shareholder in the building’s cooperative corporation, Defendant 393 West Broadway Corporation.¹

Plaintiff served its first two subpoenas on Dia on, respectively, February 22, 2017 and July 26, 2017 (NYSCEF doc Nos. 305, 306). Plaintiff objected to Dia’s production in response to the second subpoena on the ground that Dia only produced documents between 2016 and 2019. Plaintiff accordingly served a third subpoena seeking documents from prior to 2016. The third subpoena was quashed as overly broad by Order dated February 18, 2020 (NYSCEF doc No. 316). The Court directed Plaintiff to revise the third subpoena (*id.*).

¹ For a detailed background of the history of this proceeding, see this Court’s prior Decision and Order on Motion Seq. 004 (NYSCEF doc No. 158).

On March 9, 2020, Plaintiff served the Fourth Subpoena, a revised version of the third subpoena, that is the subject of the instant motion (NYSCEF doc No. 337).

On March 20, 2020², Defendants moved for an order quashing the Fourth Subpoena and preemptively prohibiting Plaintiff from serving further subpoenas on Dia. Defendants argue that while some of the improper demands made in the third subpoena were removed, many of them were replaced with demands which were either equally overbroad or sought documents entirely irrelevant to this litigation (NYSCEF doc No. 335). Counsel for Dia also separately submitted an opposition wherein he averred that Dia has already produced 20,000 pages in response to Plaintiff's first two subpoenas and, as a non-party, should not bear the cost and expense of producing additional documents (NYSCEF doc No. 385).

In opposition, Plaintiff argues that the revised Fourth Subpoena is proper and not overbroad, and Defendants do not have a valid basis for moving to quash as they have not met their burden of establishing that the documents sought are wholly irrelevant (NYSCEF doc No. 342). Plaintiff also seeks an award of reasonable attorney's fees incurred in connection with this motion.

DISCUSSION

A subpoena duces tecum cannot be used as a discovery device or fishing expedition (*Mestel & Co., Inc. v. Smythe Masterson & Judd, Inc.*, 215 A.D.2d 329, 627 N.Y.S.2d 37 [1st Dept 1995]). Its purpose is to compel the production of specific documents that are relevant and material to the factual issues in a pending proceeding (*Matter of Terry D.*, 81 N.Y.2d 1042, 601

² Defendant's motion was not formally filed until June 3, 2020 due to the temporary restrictions on filing caused by the COVID-19 pandemic.

N.Y.S.2d 453 [1993]). The standard for a motion to quash is whether the requested information is utterly irrelevant to any proper inquiry (*Ayubo v. Eastman Kodak Co., Inc.*, 158 A.D.2d 641, 551 N.Y.S.2d 944 [2nd Dept 1990]; *Fitzsimmons v. Gottlieb*, NYLJ, April 16, 1992, at 25, col 1 [App Term 1st Dept]).

The Court has conducted a thorough review of the sixteen demands in the Fourth Subpoena and has determined that some demands are overly broad and must be quashed, some are proper and relevant to Plaintiff's various causes of action in this proceeding, and some are overbroad as written but are proper subject to the Court's revisions. The Court declines to grant a preemptive order precluding Plaintiff from serving further subpoenas on Dia but notes that there will be no further modifications of the demands in the Fourth Subpoena to the extent such modifications are not outlined in this decision. The Court also declines to grant Plaintiff an award of costs and attorneys' fees in connection with this motion given that Defendants had a reasonable basis to seek an order quashing many of the demands in the Fourth Subpoena.

Regarding Dia's argument that as a non-party, it should not bear the significant cost and expense of time that will be required for the below document production, the Court notes that while Dia is not a party to this proceeding, Dia's Director of Operations, James Schaeufele, is a named Defendant (NYSCEF doc No. 332 at 14). Dia owns a commercial unit in a cooperative building that is the subject of this proceeding and is the largest shareholder in the building's cooperative corporation, Defendant 393 West Broadway Corporation. Mr. Schaeufele is also Dia's representative on the Corporation's Board of Directors (NYSCEF. To the degree that Mr. Schaeufele utilized his professional accounts and resources to either store documents or send and receive communications that are related to the causes of actions in this proceeding, such documents or communications are directly related to Defendants' production. Therefore, while

Dia is not a named Defendant, Plaintiff may compel it to provide information as part of Defendants' overall production; Dia is not entitled to the benefit of being an absolutely independent non-party with the possession of information.

The demands apply to the time period of January 1, 2008 through January 1, 2016 and January 1, 2019 to the date of Dia's response, a time span that Defendants deem "abusive" (NYSCEF doc No. 335 at 4). However, January 2008 is the commencement of the relevant time period here as Plaintiff closed on the apartment that is the subject of this proceeding in January 2008 (NYSCEF doc No. 256, ¶ 26). The request for documents from January 1, 2019 through the date of response is also appropriate given the various continuing developments in this active proceeding.

The Court notes that the Fourth Subpoena is directed only to "Dia Art Foundation," not any of its officers, directors, principals or owners, and defines "you" and "your" as Dia. Accordingly, the use of "you" and "your" in all demands refers only to Dia as an entity.

As follows is the Court's explanations and Orders with respect to each of the demands in the Fourth Subpoena.

Demand #1

- **As in the Fourth Subpoena:** Any documents or communications that relate to Plaintiff as a Shareholder, or to Plaintiff's planned or proposed renovation, or other work done or proposed to be done in Plaintiff's Apartment or on the Private Roof.
- **Court's Revision:** None
- **Plaintiff's Justification:** Relates to Causes of Action Nos. 1, 2, 3, and 4: relevant to how Plaintiff (and/or its members) is treated differently than other shareholders; relates to claims of animosity towards Plaintiff that inform the coop's refusal to allow renovation and attempt to force Plaintiff out; relates to claims of bad faith behavior of Defendants; decisions that were not valid exercises of business judgment; and actions of Individual Defendants resulting in breach of fiduciary duty. **[The Court agrees; this request is relevant to Plaintiff's causes of action and not overbroad]**
- **Defendants' Opposition:** Impermissibly overbroad

- **Order:** It is hereby ordered that Dia is directed to produce any documents or communications in its possession or control responsive to Demand #1 to the extent not previously produced.

Demand #2

- **As in the Fourth Subpoena:** Any documents or communications that refer or relate to Heidi Messer, Stephen Messer or Tad Martin.
- **Court's Revision:** None
- **Plaintiff's Justification:** Relates to Causes of Action Nos. 1, 2, and 3: relevant to claims of animosity towards members of Plaintiff that inform the coop's refusal to allow renovation and attempt to force Plaintiff out; relates to how members of Plaintiff are treated differently than other shareholders. **[The Court agrees; the individuals named are members of Plaintiff and the request is not overbroad]**
- **Defendants' Opposition:** Impermissibly overbroad
- **Order:** It is hereby ordered that Dia is directed to produce any documents or communications in its possession or control responsive to Demand #2 to the extent not previously produced.

Demand #3

- **As in the Fourth Subpoena:** Any documents or communications between you and any member of the Board relating to renovations done or proposed to be done in your unit.
- **Court's Revision:** None
- **Plaintiff's Justification:** Relates to Causes of Action Nos. 1, 2, 3, and 4: relevant to how Plaintiff (and/or its members) is treated differently than other shareholders; Relevant to claims of animosity towards Plaintiff (and/or its members) that inform the coop's refusal to allow renovation and attempt to force Plaintiff out. **[The Court agrees; this is relevant to Plaintiff's causes of action]**
- **Defendants' Opposition:** Impermissibly overbroad
- **Order:** It is hereby ordered that Dia is directed to produce any documents or communications in its possession or control responsive to Demand #3 to the extent not previously produced.

Demand #4

- **As in the Fourth Subpoena:** Any documents or communications that relate to the Roof Purchase Agreement, including any documents or communications that relate to the Shares issued by the Corporation pursuant to the Roof Purchase Agreement for the Private Roof.
- **Court's Revision:** None
- **Plaintiff's Justification:** The information sought may have relevance beyond the sole issue of overissuance; any discussions with Dia regarding the Roof Purchase Agreement may also relate to why Defendants have refused to approve Plaintiff's renovation, treated Plaintiff differently, and for five years now refused to correct the overissuance. They may demonstrate bad faith and may evidence attempts at self-dealing and a breach of fiduciary duties, among other things, conduct called out by Plaintiff, which is also alleged to

contribute to Defendants' retaliation. **[The Court agrees; this is relevant to Plaintiff's specific claims]**

- **Defendants' Opposition:** The overissuance of shares claim has already been fully briefed and is before the Special Referee for determination. There is no rational basis to continue any further discovery on a matter that is awaiting a determination on its merits.
- **Order:** It is hereby ordered that Dia is directed to produce any documents or communications in its possession or control responsive to Demand #4 to the extent not previously produced.

Demand #5

- **As in the Fourth Subpoena:** Any documents or communications that relate to any proposal, discussion or consideration regarding the purchase, by anyone, of the Private Roof, Plaintiff's Apartment, or the Shares associated with either or both.
- **Court's Revision:** Demand Stricken
- **Plaintiff's Justification:** Relates to Causes of Action Nos. 6, 7, and 8: relevant to rights of Plaintiff with respect to the Private Roof; relates to claims that the coop failed to properly authorize the Roof shares represented in Stock Certificate No. 83, resulting in overissue and nullity.
- **Defendants' Opposition:** This demand is vague, ambiguous and does not purport to relate to any claim in this litigation, as it apparently seeks documents related to the purchase of Plaintiff's apartment after Plaintiff's purchase. **[The Court agrees; "proposal," "discussion," "consideration" and "purchase by anyone" are all impermissibly vague and broad]**
- **Order:** It is hereby ordered that Demand #5 is quashed.

Demand #6

- **As in the Fourth Subpoena:** Any documents or communications that discuss or relate to the condition of the Common Roof, or to any work done or proposed to be done on the Common Roof.
- **Court's Revision:** Demand Stricken
- **Plaintiff's Justification:** Such documents are potentially directly relevant to claims of retaliation in this case, based on Plaintiff's refusal to assist or participate in the unlawful roof work, and to Defendants' refusal to approve Plaintiff's renovation, the core of this case. They also relate to bad faith and other issues, regardless of whether the fiduciary duty claims have been dismissed in the derivative case. The Common Roof work is relevant to this case in ways different from its relevance to the derivative case.
- **Defendants' Opposition:** There are no claims related to the Common Roof in this matter, and the claims related to the condition of the Common Roof within the derivative suit were dismissed by this Court's order, dated December 13, 2019 **[The Court agrees; the claims have been dismissed and Plaintiff's contention that the documents may be "potentially" relevant is insufficient]**
- **Order:** It is hereby ordered that Demand #6 is quashed.

Demand #7

- **As in the Fourth Subpoena:** Any documents or communications that discuss or relate to the condition of the Private Roof, or to any work done or proposed to be done on the Private Roof
- **Court's Revision:** None
- **Plaintiff's Justification:** Relates to Causes of Action Nos. 4, 6, 9, and 15: relevant to rights of Plaintiff with respect to the Private Roof; relates to claims that the coop had failed to fulfill its obligations with respect to the replacement or resurfacing of the Private Roof.; relates to claims that the coop has improperly conditioned approval of Plaintiff's proposed renovation plans upon shareholder approval, contrary to ¶ 8.6 of the Proprietary Lease; relates to claims that coop's bad faith refusal to allow Private Roof renovations constitutes conversion of the Private Roof's square footage. **[The Court agrees; this is relevant to Plaintiff's causes of action]**
- **Defendants' Opposition:** Impermissibly overbroad
- **Order:** It is hereby ordered that Dia is directed to produce any documents or communications in its possession or control responsive to Demand #7 to the extent not previously produced.

Demand #8

- **As in the Fourth Subpoena:** Any documents that constitute or relate to records of any Board or Shareholder meetings, including resolutions, decisions, elections, notices, minutes (and drafts of same), and email correspondence from, to, or among any of the Board directors relating to any of the above.
- **Court's Revision:** None
- **Plaintiff's Justification:** Relates to all Causes of Action: relevant to how Plaintiff (and/or its members) is treated differently than other shareholders; relates to claims of animosity towards Plaintiff that inform the coop's refusal to allow renovation and attempt to force Plaintiff out; relates to claims of bad faith behavior of Individual Defendants; decisions that were not valid exercises of business judgment; and actions of Individual Defendants resulting in breach of fiduciary duty. **[The Court agrees; this is relevant to Plaintiff's causes of action]**
- **Defendants' Opposition:** Impermissibly overbroad
- **Order:** It is hereby ordered that Dia is directed to produce any documents or communications in its possession or control responsive to Demand #8 to the extent not previously produced.

Demand #9

- **As in the Fourth Subpoena:** Any documents relating to any contracts or RFP's for work performed or contemplated to be performed, at, in or on the Building, including your unit, and specifically including any renovations of any apartments or commercial spaces in the Building.
- **Court's Revision:** Any documents relating to any contracts or RFP's for work performed in your unit.
- **Plaintiff's Justification:** Relates to Causes of Action Nos.1, 2, 3, 4, 9, 13, 16, 17, and 22: relevant to differential treatment and the bad faith conduct of the Defendants; relates to claims that the coop had failed to fulfill its obligations with respect to the replacement or resurfacing of the Private Roof; relates to conduct of contractors hired by the coop in

accessing the Apartment and Private Roof without permission and failing to conduct proper asbestos remediation; relates to claims that coop had hired unqualified contractors who had previously performed illegal work on the Common Roof and had stolen property from Plaintiff **[The Court agrees only to the extent of work performed in Dia's unit.**

"Contemplated to be performed" is overly vague; "In or on the building" is overbroad; "any renovations of any apartments or commercial spaces in the Building" is overly broad and too distant in relationship to the issues in this case]

- **Defendants' Opposition:** Impermissibly overbroad
- **Order:** It is hereby ordered that Dia is directed to produce any documents or communications in its possession or control responsive to Demand #9 as revised by the Court to the extent not previously produced.

Demand #10

- **As in the Fourth Subpoena:** Any documents or communications specifically relating to any workers, contractors, subcontractors, or consultants, who worked on or in the Building, including work done or proposed to be done regarding electrical service, elevators, fire alarms, asbestos testing or removal, or water damage, and including any communications between defendant James Schaeffele and any such workers, contractors, subcontractors or consultants.
- **Court's Revision:** Demand Stricken
- **Plaintiff's Justification:** Relates to Causes of Action Nos. 9, 13, 16, and 17: relevant to the bad faith conduct of the Defendants; relates to claims that the coop had failed to fulfill its obligations with respect to the replacement or resurfacing of the Private Roof; relates to conduct of contractors hired by the coop in accessing the Apartment and Private Roof without permission and failing to conduct proper asbestos remediation; relates to the claim that Defendants are responsible for the conduct of contractors.
- **Defendants' Opposition:** Demand seeks documents which are not relevant to the claims in this matter; to wit: the Building's elevators, fire alarms, asbestos in the Building (outside of Plaintiff's apartment) and any water damage in the Building (outside of Plaintiff's apartment). **[The Court agrees; "any/any such workers, subcontractors or consultants" is overly broad, "on or in the Building" is overly broad and vague]**
- **Order:** It is hereby ordered that Demand #10 is quashed.

Demand #11

- **As in the Fourth Subpoena:** Any documents or communications relating to the Certificate of Occupancy of the Building (the "CofO"), including any proposed or considered changes to the CofO.
- **Court's Revision:** Demand Stricken
- **Plaintiff's Justification:** Relates to Causes of Action 1, 2, 15: relevant to differential treatment in relation to special favors given to Board members in allowing financial advantageous changes to the CofO to their benefit.
- **Defendants' Opposition:** Impermissibly overbroad **[The Court agrees; this is overbroad and speculative]**
- **Order:** It is hereby ordered that Demand #11 is quashed.

Demand #12

- **As in the Fourth Subpoena:** Any documents or communications relating to the termination of any proprietary lease(s), or to any proposal or threat to do so.
- **Court's Revision:** Demand Stricken
- **Plaintiff's Justification:** Relates to Causes of Action Nos. 5, 6, 9, 10, 11, and 12: relevant to Plaintiff's claims that coop breached the Proprietary Lease and Defendants threatened to terminate the lease upon Plaintiff's refusal to pay for illegal work on the Common Roof; relates to claims that the coop has breached the quiet enjoyment clause set forth in ¶ 5.5 of the amended Proprietary Lease; relates to claims that coop breached the Proprietary Lease by refusing to permit Plaintiff to raise its Private Roof to comply with city code; relates to claims that the coop has improperly conditioned approval of Plaintiff's proposed renovation plans upon shareholder approval, contrary to ¶ 8.6 of the Proprietary Lease.
- **Defendants' Opposition:** Impermissibly overbroad [**The Court agrees; this is overbroad and not sufficiently related to Plaintiff's causes of action**]
- **Order:** It is hereby ordered that Demand #12 is quashed.

Demand #13

- **As in the Fourth Subpoena:** Any proprietary leases, including yours, and including all drafts and amendments to same.
- **Court's Revision:** Demand Stricken
- **Plaintiff's Justification:** No specific justification given
- **Defendants' Opposition:** Impermissibly overbroad [**The Court agrees; this is overbroad and not sufficiently related to Plaintiff's causes of action**]
- **Order:** It is hereby ordered that Demand #13 is quashed.

Demand #14

- **As in the Fourth Subpoena:** Any documents or communications relating to the Building's policies on subletting, including subleases or other agreements with subtenants.
- **Court's Revision:** Demand Stricken
- **Plaintiff's Justification:** The request for documents related to subletting are directly relevant to claims of differential or discriminatory treatment of shareholders favoring Board members and are thus relevant to practically every aspect of this case.
- **Defendants' Opposition:** There are no claims in this litigation related to subletting. [**The Court agrees; this is overbroad and not sufficiently related to Plaintiff's causes of action**]
- **Order:** It is hereby ordered that Demand #14 is quashed.

Demand #15

- **As in the Fourth Subpoena:** Any documents or communications between or among you and any other person relating to any litigation or contemplated litigation between Plaintiff and the Corporation or any of its Board members, including this lawsuit.
- **Court's Revision:** Any documents or communications between or among you and any other person relating to any litigation or contemplated litigation between Plaintiff and the

Corporation or any of its Board members, including this lawsuit, to the extent such documents or communications are not protected by Attorney-Client privilege.

- **Plaintiff's Justification:** No specific justification given [The Court finds this demand is proper to the extent the materials are not subject to Attorney-Client privilege]
- **Defendants' Opposition:** Impermissibly overbroad
- **Order:** It is hereby ordered that Dia is directed to produce any documents or communications in its possession or control responsive to Demand #15 as revised by the Court to the extent not previously produced.

Demand #16

- **As in the Fourth Subpoena:** Any documents or communications relating to allocations of upgraded electrical service, costs of such work, and any payments for any such work.
- **Court's Revision:** None
- **Plaintiff's Justification:** Relates to Cause of Action No. 3: relevant to how Plaintiff (and/or its members) is treated differently than other shareholders, relates to claims that coop Board had caused upgrades, including electrical work, to be done in the Building that benefitted them solely or disproportionately, while imposing unequal and improper charges against Plaintiff to finance such electrical work [The Court agrees; this is relevant to Plaintiff's claim regarding the electrical work]
- **Defendants' Opposition:** Impermissibly overbroad
- **Order:** It is hereby ordered that Dia is directed to produce any documents or communications in its possession or control responsive to Demand #16 to the extent not previously produced.

CONCLUSION

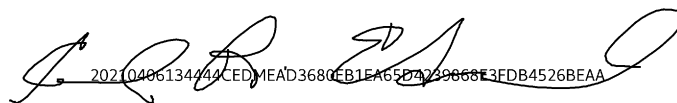
Based on the foregoing, it is hereby

ORDERED that Defendants' application for a protective order pursuant to CPLR §3103(a) quashing the fourth subpoena (the "Fourth Subpoena") served by Plaintiff upon non-party Dia Art Foundation ("Dia") (Motion. Seq. 010) is resolved in accordance with the Orders delineated below; and it is further

ORDERED that Defendants' application for an order preemptively precluding Plaintiff from serving further subpoena on Dia is denied. However, no further modifications of the existing Fourth Subpoena shall be submitted. It is further

ORDERED that Plaintiff's application for an award of costs and expenses, including reasonable attorney's fees incurred in connection with this motion is denied; and it is further

ORDERED that counsel for Defendants shall serve a copy of this order with notice of entry on all parties within 10 days of entry.


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DATE

CHECK ONE:

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CASE DISPOSED

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GRANTED

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DENIED

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SETTLE ORDER

☐

INCLUDES TRANSFER/REASSIGN

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NON-FINAL DISPOSITION

☐

GRANTED IN PART

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SUBMIT ORDER

☐

FIDUCIARY APPOINTMENT

☒

OTHER

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REFERENCE

APPLICATION:

CHECK IF APPROPRIATE:

CAROL R. EDMAD, J.S.C.