SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD **PART** IAS MOTION 35EFM

Justice

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RICHARD LYONS, JODY LYONS,

Plaintiff,

- v -

NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION, NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE COMPTROLLER OF THE CITY OF NEW YORK

Defendant.

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INDEX NO. 160496/2015

MOTION DATE 12/28/2020

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103

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

Upon the foregoing documents, it is hereby

ORDERED that Defendants' application (Mot. Seq. 003) for an order: (i) quashing and vacating the non-party Judicial Subpoena Duces Tecums dated November 11, 2019 and September 3, 2020 directed to Obrascon Huarte Lain USA; and (ii) granting a protective order denying Plaintiff the right to depose non-party OHL is moot; and it is further

ORDERED that Plaintiff's application (Mot. Seq. 003) for this Court to "So-Order" the proposed subpoenas attached to his Cross-Motion (NYSCEF doc No. 89) is denied; and it is further

ORDERED that counsel for Defendants shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on counsel for all parties.

MEMORANDUM DECISION

In this Labor Law action, Defendants New York City Economic Development Corporation ("NYCEDC") and the City of New York (the "City") seek an order (i) quashing and vacating the non-party Judicial Subpoena Duces Tecums dated November 11, 2019 and September 3, 2020 (the collectively the "2019/2020 Subpoenas") directed to nonparty Obrascon Huarte Lain USA ("OHL"); and (ii) granting a protective order denying Plaintiff the right to depose an OHL witness.

Plaintiff cross-moves for the Court to "So-Order" two new subpoenas (the "Proposed Subpoenas") directing the production of certain construction and project records maintained by OHL and the deposition of an OHL witness.

BACKGROUND FACTS

This action arose out of the Staten Island Siphon Project (the "Project") involving the construction of a subaqueous water siphon. Defendants hired nonparties OHL and Tully Construction Co, working together in a joint venture, as the general contractor for the Project.

On September 4, 2014, Plaintiff Richard Lyons, a Chief Survey Engineer for OHL, was injured when the steel mesh he was walking on "gave way [] jamm[ing his] right knee and causing [him] to fall."

Plaintiff ties the failure of the steel mesh with poor resource allocation. In particular, he alleges that "[t]here was a point where the project was being delayed, and some corners were being cut." (NYSCEF doc No. 92, p. 46) Plaintiff believes that, as the project went on, OHL began using a less thick steel wire, and that the use of this cheaper material led to the walkway failing, causing his accident (*Id.*).

On October 14, 2015, Plaintiff commenced this proceeding against Defendants, alleging claims for common law negligence and Labor Law §§ 200 and 241 (6).[1] Additionally, Jody Lyons, Plaintiff's wife, brought a derivative claim for loss of consortium.

The Instant Motion

On November 21, 2019, OHL received the subpoena dated November 11, 2019. Counsel for Plaintiff and Defendants, however, failed to agree on the scope of discovery. Subsequently, OHL was served with the subpoena dated September 3, 2020.

On December 28, 2020, Defendants filed the instant motion seeking to quash the 2019/2020 Subpoenas for being facially defective and for not providing the circumstances for which disclosure was sought (NYSCEF doc No. 69).

In response, Plaintiff acknowledged that the 2019/2020 Subpoenas "were inadvertently not served upon defendants and may therefore be technically insufficient." (NYSCEF doc No. 85, ¶ 6). Thus, Plaintiff withdrew the 2019/2020 Subpoenas, rendering Defendants' motion to quash them moot.

However, Plaintiff now cross-moves to "So-Order" the two new Proposed Subpoenas which direct: (i) Mr. Kevin Cremins ("Mr. Cremins") of OHL to appear for a deposition (*see* NYSCEF doc No. 89, p 2); and (ii) the "Records Custodian" of OHL to appear for a deposition or, in lieu of such appearance, to produce copies of documents set forth in the Proposed Subpoenas (*Id.*, p. 5-7).

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[1] In an Order dated June 14, 2018, this Court granted the branches of Defendants' motion (Mot. Seq. 002) for summary judgment dismissing Plaintiff's common law negligence and Labor Law §200 causes of action, but denied the branch of Defendants' motion for summary judgment dismissing Plaintiff's Labor Law §241(6) cause of action (see NYSCEF doc No. 53). Upon appeal, the First Department modified said order to deny Defendants' motion in its entirety as premature, with leave to renew upon completion of discovery (*see Lyons v New York City Economic Dev. Corp.*, 182 Ad3d 499 [1st Dept 2020]).

In support of his cross-motion, Plaintiff alleges that OHL "executed the day-to-day responsibilities of building the tunnel and creating construction records regarding the daily work done, problems encountered and materials used, [including employing] site safety personnel and supervisors who were present on the [P]roject every day." (NYSCEF doc No. 87, ¶ 9)

Defendants oppose, arguing that the Proposed Subpoenas are facially defective; that Plaintiff seeks relief pursuant to inapplicable CPLR provisions; and the Proposed Subpoenas are being improperly used as a substitute to pretrial discovery and are nothing but a fishing expedition.

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 [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 [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 [2nd Dept 1990]; *Fitzsimmons v. Gottlieb*, NYLJ, April 16, 1992, at 25, col 1 [App Term 1st Dept]).

Alleged Facial Deficiencies of the Proposed Subpoenas

Defendants first argue that the Proposed Subpoenas are facially defective because they do not comply with CPLR §§ 2103(e) and CPLR 3107 which require notice to counsel and twenty days-notice of taking oral questions (*see* NYSCEF doc No. 99, ¶¶7-8).

Here, Defendants aver that the Proposed Subpoenas are not accompanied by a notice to counsel and do not contain the dates for when the sought documents are to be produced or when the sought deposition is to be held (*Id.*)

Plaintiff counters that Defendants' argument is "meaningless and improper" as it "reflects a total lack of understanding of how the subpoena "so ordering process works." (NYSCEF doc

No. 101, ¶5). According to Plaintiff, the requirement that a subpoena contain a notice to counsel and precise dates for when documents are to be produced "only apply to subpoenas that have been served." (*Id.*; emphasis in original) Here, Plaintiff emphasizes that the Proposed Subpoenas "have not yet been served "so ordered" and subsequently served." (*Id.*)

Under the CPLR, where the person to be deposed is not a party, he or she must be served with a subpoena at least twenty days before the date of examination unless the court orders otherwise (CPLR 3106 (b); *Velez v Hunts Point Multi-Serv. Ctr., Inc.*, 29 AD3d 104 [1st Dept 2006]). A notice to depose shall also be served to each party appearing in the action and such notice "shall be in writing, stating the time and place for taking the deposition." (CPLR 3107) Where production of "books, papers and other things" is also sought in conjunction with his or her deposition, the subpoena "should describe the items sought and be certain to make the subpoena unambiguous, requiring both attendance by the recipient and production of the item" (CPLR 3111; *Velez,* 29 AD3d 104). However, if the party seeking the disclosure is not seeking a deposition, but merely wants a nonparty witness to produce documents, papers or other tangible item in his or her possession, the remedy is service of a subpoena "specify[ing] the time" when production is required "which shall be not less than twenty days after service…" (CPLR 3120; *Velez,* 29 AD3d 104, *citing* Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3111:1).

Here, the Proposed Subpoenas are facially deficient as they are not dated and accompanied by notice to counsel as required under CPLR 3106 (b), 3107 and 3120 quoted above. Plaintiff justifies the deficiency by arguing that the Proposed Subpoenas have not yet been served. While not expressly articulated, what Plaintiff is saying is that he will supply the missing dates and provide the notice to counsel after this Court approves the Proposed Subpoenas. This Court rejects

Plaintiff's approach. Plaintiff could not expect this Court to "So-Order" facially deficient drafts, especially considering that they suffer from the very same defects as the 2019/2020 Subpoenas originally challenged by Defendants in this instant motion. Plaintiff should have included all the information required to be put on a subpoena in the first instance, lest it be subject to a challenge for facial insufficiency (*see e.g.*, *Matter of Kapon v Koch*, 23 NY3d 32 [2014][Where the Court held the "subpoenaing party should state, either on the face of the subpoena or in a notice accompanying it, "the circumstances or reasons such disclosure is sought or required"…in the first instance, lest it be subject to a challenge for facial insufficiency."]). This Court cannot simply approve Plaintiff's deficient drafts and hope that Plaintiff will supply all the required information and accompanying papers upon their service.

Alleged Improper CPLR Provisions

Defendants next argue that the mechanism by which Plaintiff seeks to have this Court "So-Order" the Proposed Subpoenas is improper since CPLR §§ 2307 and 3120(4) apply only to: (i) service of subpoena on a "library, or a department or bureau of a municipal corporation or of the state, or an officer thereof" which OHL is not; and (ii) "production of any books, papers or other things" and therefore do not govern the relief seeking testimony from an OHL witness.

Plaintiff does not dispute that he cites inapplicable CPLR provisions to support his application, but insists that Defendants' argument is a mere "form over substance" argument (NYSCEF doc No. 101, ¶ 13). Plaintiff also avers that this Court may still "So-Order" the Proposed Subpoenas "as this Court has broad, inherent subpoena powers." (*Id.*, ¶ 14) Citing to the case of *State Supreme Court Officers Ass'n v State Unified Court Sys.* (2 Misc 3d 960 [Sup Ct 2004]), Plaintiff argues that "Supreme Court jurisdiction exists to entertain subpoenas applications." (*Id.*)

This Court finds that Defendants are correct that Plaintiff cannot invoke this Court's intervention on the basis of CPLR §§ 2307 and 3120(4). These provisions contemplate judicial intervention in issuing subpoenas intended for a library, department or bureau of a municipal corporation, or of the state or an officer thereof. This is clearly not the case here.

The case cited to by Plaintiff is inapposite. *State Supreme Court Officers Ass'n* stands for the proposition that the Supreme Court has jurisdiction to issue subpoenas in administrative proceedings where the administrative body's statutory grant of subpoena power also invoked regulations under the CPLR.

In any event, despite the general subpoenaing authority granted to courts under CPLR 2302(a) and Jud. Law § 2-b, this Court is not inclined to entertain Plaintiff's application. Under CPLR § 2302 (a), Plaintiff's attorney of record could issue the Proposed Subpoenas without this Court's intervention. More importantly, this Court notes that the Proposed Subpoenas are intended to be served upon a nonparty who, under CPLR 3122 (a), has the right to object thereto (CPLR 3122 [a]). As OHL is a nonparty to this action, it will be deprived of its statutory right to object to the discovery sought by Plaintiff if this Court proceeds to "So-Order" the Proposed Subpoenas without hearing OHL's side.

Alleged Improper Pre-Trial Discovery and Fishing Expedition

The Court now turns to Defendants' argument that the Proposed Subpoenas are being used as an improper substitute for pre-trial discovery and are a fishing expedition (NYSCEF doc No. 99, ¶¶13-17). In support, Defendants cite to the cases of *Law Firm of Ravi Batra P.C. v Rabinowich* (77 AD3d 532 [1st Dept 2010]).

The case of *Ravi Batra* involved an action commenced by Plaintiff to recover attorney's fees from defendant who was Plaintiff's former client. Plaintiff was granted a default judgment

and the case was referred to hearing on the issue of damages. After the hearing had commenced, defendant issued a subpoena, seeking "copies of all retainer agreements signed by Defendant, memoranda, records, copies of the Defendant's file, and all other evidences and writings, which you have in your custody or power related to the Defendant." Plaintiff moved to quash the subpoena but the motion court denied the same. In reversing the motion court, the First Department held as follows:

> It was error to "permit a defaulting defendant to conduct discovery of the plaintiff in preparation for an appearance at inquest" Indeed, while defendant is entitled to contest damages and to offer proof on that issue, "by virtue of [her] default, defendant is not entitled to discovery from plaintiff on th[e] issue[]". Nor may a subpoena be "used as a substitute for pretrial discovery".
> Further, inasmuch as defendant defaulted and thus cannot challenge the validity of plaintiff's retaining lien on the file, and defendant has not posted a bond, it was error to order the turnover of any portion of the file. It is only where there is no outstanding claim for unpaid legal fees that a client "presumptively" has access to its file.
> In any event, the subpoena was over-broad as it sought all documents related to defendant and did not differentiate between materials maintained by plaintiff in its representation of defendant with those maintained and prepared in anticipation of and during this action. Moreover, a subpoena duces tecum "may not be used for the purpose of discovery or to ascertain the existence of evidence" and a subpoena should be quashed when the subpoena is being used for a fishing expedition to ascertain the existence of evidence. However, this does not eliminate the obligation for plaintiff to ensure that his file is available for inspection either by the referee or the defendant during the inquest.

The case of *Ravi Batra* is distinguishable from this case as it does not involve nonparty subpoenas. More importantly, the holding in *Ravi Batra* that a subpoena may not be "used as a substitute for pretrial discovery" was made in view of defendant's own default, causing him to lose the opportunity to conduct pretrial discovery prior to the hearing on the issue of damages. Thus, citing the case of *Soho Generation v Tri-City Ins. Brokers* (236 AD 276 [1st Dept 1997]) which disallowed discovery on the **eve of the trial**, the *Ravi Batra* Court likewise disallowed discovery as the pretrial stage had already passed and the hearing on the issue of damages had already

commenced. This is not the case here. Finally, while the *Ravi Batra* court held that "a subpoena should be quashed when the subpoena is being used for a fishing expedition to ascertain the existence of evidence", Defendants do not explain how that is true for Plaintiff who is seeking evidence in light of his own testimony and not on the basis of mere speculations or hypotheticals.

Defendants also argue in passing that "even if some of the requests within a subpoena could be considered relevant, it is not the role of the Court to "cull the good from the bad." (NYSCEF doc No. 99. ¶15). As this Court is denying Plaintiff's cross-motion to "So-Order" the Proposed Subpoenas, this Court finds no reason to address this argument.

Appropriateness of Nonparty Discovery

In their opposition to Plaintiff's cross-motion, Defendants close with the argument that "plaintiffs have demanded the requested documentation and Defendants have clearly responded to these demands. As such, the non-party Judicial Subpoena Duces Tecums directed to OHL USA are improper and should be quashed, and Defendants are entitled to a protective order." (NYSCEF doc No. 99, ¶ 17)

This Court considers this argument by Defendants as an objection to Plaintiff's right to seek discovery from a nonparty on the basis that Plaintiff already sought the same documents from Defendants. This Court finds Defendants' argument to have no merit.

First, Defendants are correct that some of the documents set forth in the Proposed Subpoenas were previously sought from Defendants. In particular, Plaintiff previously sought from Defendants minutes of safety meetings, documents relating to the purchase of steel mesh used for the Project walkway and incident/accident reports relating to Plaintiff's accident (*see* NYSCEF doc No. 80). However, Defendants themselves admitted that they were not able to provide these documents to Plaintiff. In their Motion to Quash (NYSCEF doc No. 69), Defendants stated that

they responded to Plaintiff's demand for documents, indicating that Defendants "were not in possession of (1) fact witnesses or statement of fact witnesses; (2) photographs, motion pictures, or videotapes of plaintiff; (3) sketches, drawings, diagrams and blueprints of the scene of incident relating to the scene of the accident; (4) copies of any statements obtained from witnesses to the accident; (5) any citations for any applicable building code, industrial code or OSHA regulation concerning the accident; (6) copies of any citations for violations of any building code, New York State labor code, OSHA regulation which refers, relates or concerns the construction of the premises; (7) all documents received from the workers' compensation carrier; (8) daily reports concerning construction of the premises where the accident happened from April 1, 2104 through April 1, 2015; (9) any and all safety minutes for any safety meetings which occurred between July 2014 through November 2014; (10) safety materials, safety packages, safety manuals provided to any workers at the premises who were working on September 4, 2014;" "(11) documents which refer, relate, or concern the decision to purchase two different gage steel meshes to serve as a walkway for the Staten Island Water Siphon Project; (12) all invoices for any and all steel mesh used as a walkway during construction of the Staten Island Water Siphon Project; and (13) safety meeting minutes and daily reports concerning at the premises where the accident happened which were generated between September 4, 2103 and September 4, 2014." Defendants cite to no authority prohibiting Plaintiff from seeking from OHL the documents that Defendants were not able to produce.

Second, regardless of whether Plaintiff sought and received the documents from Defendants, Plaintiff has a right to seek any "material and necessary" documents from a nonparty like OHL. In the *Matter of Kapon v Koch* (23 NY3d 32 [2014]), the Court of Appeals held that there is "no requirement that the subpoenaing party demonstrate that it cannot obtain the requested

disclosure from any other source. Thus, so long as the disclosure sought is relevant to the prosecution or defense of an action, it must be provided by the nonparty." In so holding, the Court of Appeals rejected the practice of the Second and Third Departments of quashing a subpoena if "the party issuing the subpoena has failed to show that the disclosure sought cannot be obtained from sources other than the nonparty, and properly denied when the party has shown that the evidence cannot be obtained from other sources." Following *Kapon*, Plaintiff is not required to show that he cannot obtain the requested disclosure from Defendants before he can be allowed to seek the same from nonparty OHL.

On the basis of the foregoing, there should be no legal impediment for Plaintiff's counsel to later issue CPLR-compliant subpoenas to OHL seeking the documents Plaintiff failed to obtain from Defendants.

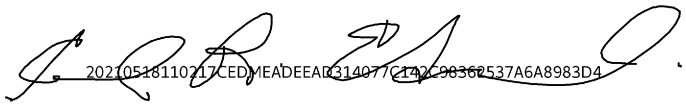
CONCLUSION

Based on the foregoing, it is hereby

ORDERED that Defendants' application (Mot. Seq. 003) for an order: (i) quashing and vacating the non-party Judicial Subpoena Duces Tecums dated November 11, 2019 and September 3, 2020 directed to Obrascon Huarte Lain USA; and (ii) granting a protective order denying Plaintiff the right to depose non-party OHL is moot; and it is further

ORDERED that Plaintiff's application (Mot. Seq. 003) for this Court to "So-Order" the proposed subpoenas attached to his Cross-Motion (NYSCEF doc No. 89) is denied; and it is further

ORDERED that counsel for Defendants shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on counsel for all parties.



5/18/2021
DATE

CAROL R. EDMEAD, J.S.C.

CHECK ONE:		CASE DISPOSED		x	NON-FINAL DISPOSITION		
		GRANTED	DENIED		GRANTED IN PART	x	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE