

**44-45 Broadway Leasing Co., LLC v 45th St.  
Hospitality Partners, LLC**

2022 NY Slip Op 32602(U)

July 28, 2022

Supreme Court, New York County

Docket Number: Index No. 652816/2016

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 41

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44-45 BROADWAY LEASING CO., LLC,

Plaintiff

Index No. 652816/2016

- against -

DECISION AND ORDER

45TH ST. HOSPITALITY PARTNERS, LLC, and  
SHELDON FIREMAN,

Defendants

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LUCY BILLINGS, J.S.C.:

I. INTRODUCTION

A key issue in this action is the necessary and reasonable expenses plaintiff incurred to cure an alleged breach by defendant 45th St. Hospitality Partners, LLC, of a lease provision requiring 45th St. Hospitality to remove fixtures from the leased restaurant premises at the end of 45th Street Hospitality's tenancy. Defendants contend that plaintiff landlord planned a substantial alteration of the leased premises after 45th Street Hospitality's tenancy ended, so that plaintiff's costs to remove fixtures was minimal. Only in support of plaintiff's motion for summary judgment, after the note of issue, did plaintiff identify nonparty S. Ventor Consulting, LLC (SVC), as the contractor that carried out the removal of the tenant's fixtures, rather than plaintiff itself, as it had indicated in its answers to interrogatories.

Defendants seek to ascertain whether the compensation that plaintiff claims it paid to SVC to remove the fixtures was in fact for that work and whether that compensation was reasonable.

II. DEFENDANTS' MOTION TO COMPEL POST-NOTE OF ISSUE DISCLOSURE

Defendants move to compel SVC to produce documents in compliance with defendants' subpoena served February 7, 2022, or provide an affidavit that SVC has searched diligently for responsive documents and found none and to produce a designated witness knowledgeable about the documents and the subjects specified in the subpoena. C.P.L.R. §§ 2308(b)(1), 3106, 3124; 22 N.Y.C.R.R. § 202.21(d). In the event of SVC's noncompliance, defendants move to vacate the note of issue or impose penalties on plaintiff, not SVC. C.P.L.R. §§ 2308(b)(1), 3126(2) and (3); 22 N.Y.C.R.R. § 202.21(e). Defendants also seek to serve a subpoena on SVC's subcontractors identified in the deposition of SVC already conducted and their related documents. C.P.L.R. §§ 2303(a), 3106, 3111; 22 N.Y.C.R.R. § 202.21(d).

The parties' stipulation dated February 2, 2022, largely governs defendants' requested relief. The stipulation provided that:

Defendants shall be permitted to take a one-day (7 hours) deposition upon oral examination of S. Vantor Consulting LLC ("SVC") in accordance with a subpoena to be served by Defendants' counsel upon Plaintiffs' [sic] counsel [who also represents SVC] by e-mail ("the SVC Deposition"). Defendants may make an application to the Court for additional time should Defendants believe it is necessary.

. . . .

Upon completion of the SVC Deposition, discovery is complete. Either party may make an application to the Court for additional discovery that either party believes is necessary as a result of the SVC Deposition.

Aff. of Jarred Kassenoff Ex. B ¶¶ 1, 4. The subpoena sought SVC's designee knowledgeable about its work at the leased premises after defendants surrendered possession, C.P.L.R. § 3106, 22 N.Y.C.R.R. § 202.20-d(f), and sought related categories of documents, such as bids, estimates, subcontracts, and payments for the removal work. C.P.L.R. § 3111.

Between service of the subpoena and March 18, 2022, when SVC produced its designee Steven Ventor for its deposition, neither SVC nor plaintiff requested defendants to withdraw or modify the subpoena or moved to quash, to modify, or for a protective order against the subpoena, C.P.L.R. §§ 2304, 3103(a), 3122(a)(1), nor did SVC produce any documents before or at the deposition. The "subpoena" specified in the stipulation, Kassenoff Aff. Ex. B ¶ 1, reasonably encompassed any deposition subpoena for which the law provides, such as C.P.L.R. § 3111. In any event, to the extent that SVC or plaintiff claims otherwise, it has waived such an objection by its inaction. Demurjian v. Demurjian, 184 A.D.3d 505, 505 (1st Dep't 2020); Khatskevich v. Victor, 184 A.D.3d 504, 504-505 (1st Dep't 2020). See Worldview Entertainment Holdings, Inc. v. Woodrow, 204 A.D.3d 629, 630 (1st Dep't 2022).

Defendants contend that SVC's deposition was of limited use without any of its business records and without Ventor having

reviewed any of SVC's records or familiarized himself with information known or reasonably available to SVC, in compliance with 22 N.Y.C.R.R. § 202.20-d(f). While defendants' subpoena did not advise nonparty SVC of its duty to designate a witness, 22 N.Y.C.R.R. § 202.20-d(e), as 22 N.Y.C.R.R. § 202.20-d(c) and(d) prescribe, since SVC did designate a witness, and neither SVC nor plaintiff complains of this omission in the subpoena, this omission is academic. 22 N.Y.C.R.R. § 202.20-d did not require defendants to advise SVC of its designee's duty to "testify about information known or reasonably available to the entity" for this provision to bind SVC. 22 N.Y.C.R.R. § 202.20-d(f).

Ventor did not, however, answer defendants' questions regarding the rates charged for the removal work, rates charged for comparable demolition, how many hours of labor were required for the removal work, the volume of refuse, or the costs for disposal of refuse or for permits. Neither SVC nor plaintiff suggests that none of these answers was known or reasonably available to SVC. Inquiries into these subjects surely were relevant to whether the work and expenses incurred were necessary and reasonable.

### III. THE REMEDIES

Although neither SVC nor plaintiff disputes the above rendition of Ventor's deposition, defendants nonetheless used the full seven hours allotted for it, suggesting it was not

completely useless. Therefore defendants have shown they need either more time to depose Vantor after he has reviewed SVC's business records and familiarized himself with information known or reasonably available to SVC, 22 N.Y.C.R.R. § 202.20-d(f); Kassenoff Aff. Ex. B ¶ 1, or to depose another designee of SVC who has done so, Kassenoff Aff. Ex. B ¶ 4, but the court limits this follow-up deposition to four hours exclusive of colloquy. Even if the "subpoena" specified in the stipulation, id. ¶ 1, did not encompass a subpoena for documents pursuant to C.P.L.R. § 3111, Vantor's lack of recollection without SVC's records has shown that defendants need those records to depose SVC meaningfully. Kassenoff Aff. Ex. B ¶ 4.

Vantor's deposition revealed that SVC subcontracted the removal work to two identified subcontractors, but Vantor did not answer whether SVC solicited bids or entered written subcontracts for the work, how SVC paid the subcontractors, from what bank account, or through what bookkeeping system: again, inquiries relevant to what expenses were incurred and whether they were reasonable. Therefore Vantor's deposition also has shown that defendants need to obtain records from and depose the two identified subcontractors. Id.

Each further remedy defendants seek, vacating the note of issue, dismissing the complaint, or precluding plaintiff from offering evidence, if SVC further fails to produce the documents

specified in the February 2022 subpoena, is a penalty against plaintiff, not against the non-compliant nonparty, SVC. C.P.L.R. § 3126(2) and (3); 22 N.Y.C.R.R. § 202.21(e). C.P.L.R. § 3126 specifically applies to "any party, or a person who at the time a deposition is taken . . . is an officer, director, member, employee or agent of a party or otherwise under a party's control." Even defendants' protestations about plaintiff's and SVC's close relationship and unity of interest, none which suggests any unlawful conduct, do not charge that SVC is under plaintiff's control. SVC was not a party to and bound by the February 2022 stipulation, nor do defendants claim a violation of the stipulation in any event. C.P.L.R. § 2308(a) would permit dismissal of the complaint only if the subpoena were issued by the court to plaintiff.

Defendants' remedy for SVC's disobedience of the February 2022 subpoena was a monetary penalty, damages, or imprisonment. C.P.L.R. § 2308(b)(1); N.Y. Jud. Law §§ 753(A)(5), 756. Their remedy for any disobedience of this order granting their motion against SVC, which does bind SVC, is a motion for contempt. N.Y. Jud. Law §§ 753(A)(1), 756.

#### IV. CONCLUSION

For the reasons explained above, the court grants the following relief and otherwise denies defendants' motion. Within 20 days after entry of this order, SVC shall produce the

documents that defendants' subpoena dated February 7, 2022, demanded, C.P.L.R. §§ 3111, 3120(2), and, within 14 days after production of the documents, produce a witness who has reviewed the documents and is prepared to authenticate them, lay a business record foundation for any business records, C.P.L.R. § 4518(a), and explain the documents. C.P.L.R. § 3124; 22 N.Y.C.R.R. §§ 202.20-d(f), 202.21(d); Kassenoff Aff. Ex. B ¶¶ 1, 4. The deposition shall be limited to four hours of questions and answers, exclusive of colloquy. Defendants consent that, to the extent the subpoenaed documents duplicate documents plaintiff already has produced, SVC may respond by identifying those responsive documents previously produced and specifying when plaintiff produced them.

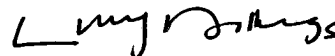
Within 10 days after completing SVC's deposition, defendants may serve a subpoena pursuant to C.P.L.R. §§ 3107 and 3111 on each of the two subcontractors Steven Ventor identified: Castle Demolition and a business owned or operated by persons named Diaz and Lopez. C.P.L.R. § 3124; 22 N.Y.C.R.R. § 202.21(d); Kassenoff Aff. Ex. B ¶ 4. Each subcontractor's deposition shall be limited to seven hours in total, inclusive of questions, answers, and colloquy. Defendants shall complete the subcontractors' depositions within 30 days after completing SVC's deposition.

Even if, as a result of this further disclosure, defendants believe yet more disclosure is necessary, the court will not

permit more disclosure absent the parties' stipulation. The parties also may stipulate to modify any of the time frames or contents of the disclosure permitted above.

Plaintiff's main concern in opposition to defendants' motion is that further disclosure will postpone the trial of this action. The parties shall appear for a pretrial conference via video October 11, 2022, at 9:30 a.m. and for a nonjury trial in person November 9, 2022, at 10:00 a.m. at 71 Thomas Street, Room 204, New York County.

DATED: July 28, 2022



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LUCY BILLINGS, J.S.C.

**LUCY BILLINGS**  
J.S.C