Newmark & Co. Real Estate, Inc. v Manhattan Motorcars, Inc.
2022 NY Slip Op 33849(U)
November 3, 2022
Supreme Court, Kings County
Docket Number: Index No. 515078/2019
Judge: Leon Ruchelsman
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FILED: KINGS COUNTY CLERK 11/14/2022 09:04 AM INDEX NO. 515078/2019
NYSCEF DOC. NO. 84 RECEIVED NYSCEF: 11/14/2022

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8
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NEWMARK & COMPANY REAL ESTATE, INC.
d/b/a NEWMARK KNIGHT FRANK,
Plaintiffs, Decision and order

- against - Index No. 515078/2019

MANHATTAN MOTORCARS, INC. and MMC
BROOKLYN LLC,
Defendants, November 3, 2022
---x
PRESENT: HON. LEON RUCHELSMAN

The defendants have moved seeking to quash subpoenas and deposition notices served upon third parties pursuant to CPLR §2304 and for a protective order. The defendants have also moved seeking to dismiss the complaint pursuant to CPLR §3211 on the grounds it fails to allege any causes of action. The plaintiff opposes the motions. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

According to the Complaint the defendant engaged the plaintiff, a real estate brokerage firm, to find them a suitable location for a car dealership. A location was found at 2875 Flatbush Avenue in Kings County which was owned by bankrupt Toys R Us. A lease was proposed and following edits by the defendant the lease was presented to Toys R Us on March 13, 2018. However, Toys R Us informed the plaintiff that as part of the bankruptcy the premises would be sold at an auction and therefore the lease was not possible. Thus, the plaintiff devised a plan wherein an

entity called Jenel Management Corp., would bid for the property at the bankruptcy auction and then lease the premises to the defendant. After some negotiations Jenel refused to participate in the bid and the defendant purchased the property through its own affiliate on August 28, 2018 for a price of $14.150 million. The plaintiff invoiced the defendant for $707,500 as a brokerage commission which defendant refused to pay. This lawsuit was then commenced and alleges causes of action for breach of contract, tortious interference, breach of implied covenant of good faith and fair dealing, quantum meruit and unjust enrichment.

The parties commenced discovery and depositions were held of the principals of the plaintiff and the defendant. A notice of deposition was served upon Steven Cohn Esq., defendant's counsel seeking information in his role as "advisor and representative agent" of the defendant concerning the purchase of the property (see, Subpoena ad Testificandum, June 23, 2022 [NYSCEF Doc. No. 58]). The defendants now move seeking to quash the subpoena and a protective order no such deposition of defendant's counsel should take place. The plaintiff opposes the motion arguing that Mr. Cohn's role as counsel to the defendants does not shield him from appearing for a deposition.

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).

Concerning subpoenas served upon opposing counsel, such subpoenas are proper, and the attorney cannot assert any privilege, only if the attorney was not acting as counsel in the transaction but was acting as the role of negotiator or some other corporate capacity (Vanderbilt Brookland LLC v. Vanderbilt Myrtle Inc., 2016 WL 7423819 [Supreme Court Kings County 2016]). In Vanderbilt (supra) counsel for the defendant could not shield herself from depositions relying on the attorney client privilege. The court explained counsel's dealings were "conducted in her capacity as the authorized corporate representative of Vanderbilt Myrtle" and not as counsel providing any legal advice (id). In this case, the issue is whether the plaintiff is entitled to any real estate commission. As noted the subpoena merely states in conclusory fashion that the testimony of Mr. Cohn "is material and necessary based upon the claims set forth in the above entitled action" without explaining the nature of the necessity (supra). In opposition to the motion

the plaintiff expands upon that necessity. The plaintiff explains that "the deposition testimony of Mr. Cohn will be useful to the prosecution of Newmark's claims in this case, and reason requires he testify under oath during discovery. Plaintiff seeks to depose Mr. Cohn about his personal knowledge of material facts. He is a fact witness and therefore not immune from deposition. It may be that Mr. Cohn's bad advice caused Defendants to wrongfully withhold payment of Newmark's commission, but through the Subpoena, Plaintiff does not seek disclosure of substantive legal advice (provided there is no waiver). Nor is there any genuine concern over privilege where Cohn is interfacing with the TRU trustee in connection with purchasing the Property. Plaintiff is entitled to depose Mr. Cohn about his role in the facts of the case including Defendants' acquisition of the Property. There is no legal basis to refuse Plaintiff that opportunity" (see, Memorandum in Opposition, page 11 [NYSCEF Doc. No. 67]).

The plaintiff fails to explain the role of Mr. Cohn and how such role was not that of counsel. The plaintiff's assertion that Mr. Cohn is a fact witness is a truism that without a demonstration the attorney client privilege is not applicable cannot require such deposition. Of course, every attorney is a fact witness and the dearth of cases permitting such disclosure highlights the infrequency of this request. Thus, the plaintiff

has failed to present any basis to conclude Mr. Cohn was not acting as counsel for the defendant.

The plaintiff further seeks to depose Mr. Cohn but to only ask factual questions, not any questions related to his role as counsel. That request is not governed by Vanderbilt (supra) wherein the individual is not counsel at all. This "appropriately rare" expedient, deposing an attorney to ask factual questions, is governed by Liberty Petroleum Realty LLC v. Gulf Oil L.P., 164 AD3d 401, 84 NYS3d 82 [1st Dept., 2018]). The court first noted that deposing opposing counsel is disfavored because such depositions are hardly calculated to "'assist preparation for trial by sharpening the issues and reducing delay and prolixity'" and because "the practice of calling opposing counsel as a witness at trial is [ ] offensive to our conception of the adversarial process" and because such depositions "raises at least the possibility of attorney disqualification" (id). The court did permit such depositions but only where the information sought is material and necessary and where there is good cause for such deposition and where the material cannot be obtained from other sources. In Liberty (supra) the plaintiffs, distributers of motor fuel to gas stations sued various gas stations on the grounds the gas stations ceased purchasing gas from plaintiffs and began purchasing from others and that such conduct amounted to tortious interference with franchise

agreements. The plaintiff served a subpoena on defendant's counsel seeking his deposition regarding the tortious interference claims. The court noted there was a likelihood the testimony was sought merely to disqualify counsel, the testimony was not relevant in any event and such testimony could involve privileged communications. The court remanded to a lower court to correct an erroneous burden shift which could have impacted the lower court's decision.

Considering that guidance, the plaintiff has failed to present any evidence why the testimony is material and relevant and in any event cannot be obtained from other sources. Mr. Cohn bears the initial burden demonstrating the information sought from him is not unique. Thus, the plaintiff requests the deposition of Mr. Cohn to inquire about three distinct factual scenarios. The first is Mr. Cohn's involvement regarding the defendant's decision to purchase the property at the bankruptcy auction. The plaintiff asserts they seek to question Mr. Cohn about the facts of such decision. However, Mr. Cohn has adequately asserted that he does not posses any unique information that cannot be discovered from other sources. In opposition, the plaintiff merely states that "Newmark worked to get MMC registered to be a qualified bidder for the auction. This included connecting the brokers in charge of the Auction (A&G Realty) with MMC and its counsel, Mr. Cohn. Newmark is entitled

to question Mr. Cohn under oath about these facts" (see, Memorandum in Opposition, page 13 [NYSCEF Doc. No. 67]). That does not establish any basis to seek such testimony from Mr. Cohn.

Next, the plaintiff seeks to question Mr. Cohn about the defendant's operating agreement and the true date the agreement became effective. However, that issue is not relevant to plaintiff's claim seeking a commission at all. There is no dispute the defendant is a viable entity and whether any commission is owed will not be affected by the operating agreement in any manner. Thus, Mr. Cohn has adequately presented evidence such request is not proper.

Lastly, to the extent Mr. Cohn attended the auction on behalf of defendant, there is no dispute the property was purchased by the defendant at the auction. The only issue that remains outstanding is whether the plaintiff is entitled to a commission. Mr. Cohn has presented sufficient evidence that his testimony is either not relevant or the same information can be obtained from other sources.

The plaintiff asserts that "because of his integral role in the transaction that created the commission, Mr. Cohn will certainly be a witness at trial" (see, Memorandum in Opposition, page 14 [NYSCEF Doc. No. 67]). Considering that position it is curious the plaintiff did not simply file a disqualification

motion on those grounds and instead sought to oppose the motion for a protective order. To the extent a disqualification motion will be filed, it will be considered at that time.

Therefore, based on the foregoing, the motion seeking a protective order and to quash the subpoenas served upon Mr. Cohn is granted.

So ordered.

ENTER:

DATED: November 3, 2022
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC