

Henbest v City of New York

2022 NY Slip Op 34414(U)

December 19, 2022

Supreme Court, New York County

Docket Number: Index No. 155651/2020

Judge: Leslie A. Stroth

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LESLIE A. STROTH PART 52

Justice

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INDEX NO. 155651/2020

ERIC HENBEST,

MOTION DATE 10/06/2022

Plaintiff,

MOTION SEQ. NO. 003

- v -

THE CITY OF NEW YORK, NYC DEPARTMENT OF HOMELESS SERVICES, TENRIT STUDIOS, INC., TENRIT STUDIOS LLC, AGUILA INC., UNIVERSAL PROTECTION SERVICE LLC A/K/A UNIVERSAL PROTECTION SERVICE LP D/B/A ALLIED UNIVERSAL SECURITY SERVICES,

DECISION + ORDER ON MOTION

Defendant.

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TENRIT STUDIOS, INC., TENRIT STUDIOS LLC

Third-Party Index No. 595255/2021

Plaintiff,

-against-

AGUILA, INC.

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 70, 71, 72, 73, 74, 75

were read on this motion to/for SUBPOENA

This action arises out of personal injuries sustained by plaintiff in an alleged slip and fall accident on May 19, 2019 at the Parkview Hotel Homeless Shelter. Specifically, plaintiff alleges that he fell from a fire escape due to a defect in same.

Defendants/third-party plaintiffs Tenrit Studios, Inc. and Tenrit Studios LLC d/b/a the Parkview Hotel (together, Parkview) brings the instant motion for an order issuing two non-party witness subpoenas upon Emergency Medical Technician (EMT) Awilda Gomez and EMT Steed Rawl. Plaintiff cross-moves for a protective order.

Parkview asserts that reports were exchanged with regard to the subject accident which contain contradictory information – namely, whether plaintiff fell from the fire escape or jumped from a window, leading to his injuries. As such, Parkview seeks to depose EMTs who responded to the accident, EMTs Gomez and Rawl. The Parkview Hotel maintains that both NYPD and FDNY require service of so-ordered subpoenas to produce their EMTs for deposition.

Plaintiff opposes and cross-moves pursuant to CPLR 3103 (a) for a protective order prohibiting Parkview from depositing EMTs Gomez and Rawl. Plaintiff argues that Parkview attempts to impermissibly “get around hearsay” by questioning EMTs who took notes of plaintiff’s comments. NYSCEF doc. no. 71 at ¶ 5. Plaintiff also argues that Parkview has not demonstrated the requisite “special circumstances” needed to obtain discovery from a non-party, citing *Tannenbaum v Tenenbaum*, 8 AD3d 360 (2d Dept 2004).

The scope of disclosure from non-parties is governed by CPLR 3101 (a) (4), which states that: “[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action...by any other person, upon notice stating the circumstances or reasons such disclosure is sought or required.” The “statute embodies the policy determination that liberal discovery encourages fair and effective resolution of disputes on the merits, minimizing the possibility for ambush and unfair surprise” *Forman v Henkin*, 30 NY3d 656, 661 (2018), quoting *Spectrum Sys. Intern. Corp. v Chem. Bank*, 78 NY2d 371, 376 (1991). However, upon a motion of any party, the Coty may make a protective order regarding the use of a discovery device in order to “prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person.” CPLR 3103.

Plaintiff’s counsel improperly relies on *Tannenbaum v Tenenbaum*, 8 AD3d 360 (2d Dept 2004). The Court in *Kooper v Kooper*, 74 AD3d 6, 16 (2d Dept 2010), *abrogated by Matter of*

Kapon v Koch, 23 NY3d 32 (2014) noted that the language relied upon by the *Tannenbaum* court in support of its decision was eliminated from CPLR 3103 (a) (4), and the Court could no longer apply the “special circumstances” standard set forth in *Tannenbaum*.¹ Rather, the appropriate standard for seeking non-party discovery is whether the material sought is “material and necessary.” *Matter of Kapon v Koch*, 23 NY3d 32, 11 NE3d 709 988NYS2d 559 (2014). The Court of Appeals has clearly held that CPLR 3101 (a) (4) “imposes 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.” *Id.*

Parkview has demonstrated that the testimony of EMTs Gomez and Rawl, as the responding EMTs to the incident at issue, is relevant and material to plaintiff’s personal injury action. Parkview need not demonstrate any special circumstances in its request to so-order subpoenas for EMTs Gomez and Rawl. Additionally, the Court notes that Parkview does not need a judicial or so-ordered subpoena to secure the testimony of the EMTs. CPLR 2302 gives authority to issue subpoenas without court order by the attorney of record to a party to an action.

Further, as EMTs Gomez and Rawl are employees of the City and the Fire Department of New York City (FDNY), they would be represented by Corporation Counsel, who is already apprised of the facts that constitute plaintiff’s claim. As City employees with first-hand knowledge of plaintiff’s subsequent injuries, plaintiff has failed to demonstrate any undue expense, embarrassment, prejudice, disadvantage, or annoyance that would require a protective order pursuant to CPLR 3103.

¹ “On a motion to quash a subpoena duces tecum or for a protective order, in assessing whether the circumstances or reasons for a particular demand warrant discovery from a nonparty, those circumstances and reasons need not be shown to be ‘special circumstances.’” *Kooper v Kooper*, 74 AD3d 6, 16 (2d Dept 2010), *abrogated by Matter of Kapon v Koch*, 23 NY3d 32 (2014).

Accordingly, it is

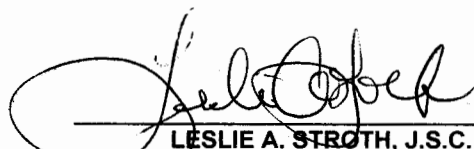
ORDERED that defendant Tenrit Studios, Inc. and Tenrit Studios LLC d/b/a the Parkview Hotel's motion is granted; and it is further

ORDERED that Tenrit Studios, Inc. and Tenrit Studios LLC d/b/a the Parkview Hotel shall file updated subpoenas of EMT Awilda Gomez and EMT Steed Rawl to NYSCEF within 30 days of the date of this order; and it is further

ORDERED that upon such filing, Tenrit Studios, Inc. and Tenrit Studios LLC d/b/a the Parkview Hotel shall e-mail a courtesy copy to the Court at riwohl@nycourts.gov.

The foregoing constitutes the decision and order of the Court.

12/19/2022
DATE


LESLIE A. STROTH, J.S.C.

CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION

APPLICATION: GRANTED DENIED GRANTED IN PART OTHER

CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE