

**JLJ Capital LLC v Churchill Real Estate Holdings
LLC**

2023 NY Slip Op 32512(U)

July 19, 2023

Supreme Court, New York County

Docket Number: Index No. 656966/2022

Judge: Margaret Chan

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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JLJ CAPITAL LLC

Plaintiff,

- v -

CHURCHILL REAL ESTATE HOLDINGS LLC,

Defendant.

INDEX NO. 656966/2022

MOTION DATE N/A

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

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HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 86, 87, 88, 89, 90, 91, 92, 93, 94

were read on this motion to/for DISCOVERY

Plaintiff JLJ Capital LLC moves by order to show cause to compel non-party Infinity Land Services (the Title Company) to respond to the subpoena dated April 10, 2023, that plaintiff had served on the Title Company. Defendant Churchill Real Estate Holdings LLC opposes and cross-moves for a protective order to quash that subpoena as well as another subpoena plaintiff served on non-party Marathon Real Estate Debt Fund L.P. Plaintiff opposes defendant’s cross-motion.

Background

In the complaint, plaintiff explains:

On or about June 7, 2018, pursuant to a certain mezzanine promissory note and mezzanine loan agreement, [defendant], as lender, loaned the principal sum of \$20,000,000.00 to 257-263 W 34th Mezz LLC, a New York limited liability company (‘Borrower’). Pursuant to the mezzanine loan agreement, Borrower was permitted to use the proceeds of the loan to provide funding for the property known as and located at 263 West 34th Street, New York, NY (the ‘Property’). . . . [I]n consideration for a payment by [plaintiff] of four million dollars (\$4,000,000.00), Plaintiff acquired a twenty percent (20%) interest in the mezzanine loan.

(NYSCEF # 2 – Unredacted Complaint, ¶’s 8-13.)

The complaint further explains that the parties documented plaintiff’s investment via a participation agreement, which terms give plaintiff “the right to inspect [defendant’s] books and records relating to the mezzanine loan ‘for the

purpose of inspection, examination, audit” (NYSCEF # 2, ¶ 1). In this action, plaintiff “seeks to conduct an audit of [defendant]s management of the funding . . . including . . . whether the loan was oversubscribed or undersubscribed, and whether loan proceeds have been distributed properly” (*id.*).

Plaintiff now seeks an order requiring the Title Company “to fully respond to the subpoena served on April 10, 2023” (NYSCEF # 58 – MOL at 1). The subpoena itself sets forth one bullet item under “Documents Demanded”: “The closing disclosure and/or settlement statement by Infinity Land Services regarding the June 2019 closing (referred to as File Number IL8768) by Borrower 257- 263 W 34th Street LLC on three (3) loans from Marathon Real Estate Debt Fund L.P. related to a real estate development project located at and known as 257-263 West 34th Street, New York, New York” (NYSCEF # 61 – Subpoena at 3). Full response to the subpoena, according to plaintiff, means “producing an accurate and complete copy of the fully executed closing disclosure and/or settlement statement (which should include the closing binder, the signed sources and uses statement, the signed title, the disbursements list, and transmittals for disbursements)” (NYSCEF # 58 at 1).

Following the entry into the participation agreement, around August of 2021, plaintiff “requested certain books and records necessary to perform an audit of [defendant’s] management of the funding and proceeds relating to the mezzanine loan” (NYSCEF # 58 at 3). Plaintiff charges defendant with “failing to respond in any manner for several months [until] February 16, 2022 [when defendant] provided certain limited documentations . . . consisting of the senior loan documents regarding the senior loan by Marathon Real Estate Debt Fund, L.P. . . . and a single document entitled ‘34th Title Policy’ regarding a refinance” (NYSCEF # 2, ¶ 19).

Plaintiff asserts that “the purpose of the subpoena is to allow JLJ Capital to ‘test the trust, accuracy and completeness’ of Churchill’s limited production, including the document entitled ‘34th Title Policy.’” (*id.* at 5, quoting *Hamilton Partners, L.P. v Highland Capital Mgt., L.P.*, 2016 WL 612233 at *6 [Del Ch 2016]).

Plaintiff notes that in response to the subpoena, “the Title Company failed to produce a full and complete copy of the closing disclosure and/or settlement statement regarding the refinance. Instead, the Title Company, which did not raise any objections to the subpoena, produced a single document entitled ‘Detailed Sources and Uses: 263 West 34th Street’ ” (NYSCEF # 58 at 6-7). Plaintiff adds:

A sources and uses statement is a pre-closing document that indicates where capital will come from (i.e. the sources) and what the capital will be used for (i.e. the uses). It is not a reflection of how the proceeds were disbursed, but is effectively an agreement between the lender and borrower pre-closing as to where the funds are coming from and how the proceeds will be disbursed. To make matters worse, a copy that is not signed by the parties is simply a non-binding draft that provides no reliable information at all. To be clear, the Title Company did not produce a disbursement list, the signed title, transmittals for

disbursements, or any of the other documents that would traditionally make up a closing disclosure and/or settlement statement. Indeed, the production does not include the '34th Title Policy' that was provided by Churchill or anything even remotely similar.

(*Id.* at 7.)

In opposition to plaintiff's order to show cause, and in support of its cross-motion to quash, defendant objects to the relevance of the subpoena on the Title Company and indicates that plaintiff also subpoenaed, on June 5, 2023, information from non-party Marathon Real Estate Debt Fund L.P. (NYSCEF # 79 – Marathon Subpoena). Defendant argues that plaintiff "cannot justify seeking the requested documents as a basis to test the veracity of information previously provided by" defendant (NYSCEF # 82 – Opp at 9). Defendant also distinguishes "the cases where the courts allowed duplicative discovery to test the accuracy of documents produced" to this situation where "the parties had negotiated narrowed discovery requests based on the issues raised in the" pleadings (NYSCEF # 82 at 11).

Responding to defendant's cross-motion, plaintiff argues that defendant lacks standing to challenge either subpoena. Plaintiff posits: "The general rule is that a party has standing to move to quash a non-party subpoena or to obtain a protective order only if the party has a proprietary interest in the documents sought or if the documents contain privileged communications" (NYSCEF # 88 at 5). Plaintiff continues: defendant "has no standing to challenge either of the subpoenas as [defendant] itself was not a party to the 2019 refinance. . . . Moreover, even if [defendant] was the Borrower, the cross-motion challenging the Marathon subpoena would fail for lack of standing. New York courts. . . have consistently held that even a bank customer has no standing to challenge a third-party subpoena" (NYSCEF # 88 at 5-6).

Plaintiff reiterates why the subpoenas are relevant: "As part of its pre-litigation limited production in response to the books and records demand, Churchill produced a document entitled '34th Title Policy,' bearing the logo of Infinity Land Services, which purports to be a closing disclosure and settlement statement listing the disbursement of the proceeds. . . . Having produced this document, [defendant] acknowledges that the document, and the 2019 refinance, are material and relevant" (*id.* at 8). And plaintiff argues that defendant's cross-motion is procedurally defective as it is allegedly untimely and did not meet the requirements of CPLR 2304 (*id.* at 11-12).

In reply, defendant maintains that "[g]iven the complete lack of relevance of the requested documents, it is evident that [plaintiff] is using the Infinity and Marathon Subpoenas as an attempt to circumvent this litigation to obtain the underlying documents legitimately withheld by [defendant] in the first place" (NYSCEF # 94 at 1-2). Defendant denies it lacks standing because it is "a party to this civil litigation where the nonparty Subpoenas were sought" (*id.* at 5-6). Alternatively, defendant notes that the court still has the power to enter a

protective order even if defendant lacks standing (*id.* at 8 citing CPLR 3103). Finally, defendant disputes that its cross-motion is untimely or defective.

Discussion

CPLR 3101 (a) provides that “[t]here shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action.” The words “material and necessary” are “liberally interpreted to require disclosure, upon request, of any facts bearing on a controversy which will assist in sharpening the issue at trial” (*Roman Catholic Church of Good Shepherd v Tempco Sys.*, 202 AD2d 257, 258 [1st Dept 1994]). Disclosure is thus not limited to “evidence directly related to the issues in the pleadings” (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 408 [1968]). At the same time, “unlimited disclosure is not permitted” (*Harris v Pathmark, Inc.*, 48 AD3d 631, 632 [2d Dept 2008]); *see also* Preamble to Rule 11 of the Commercial Division [“It is important that counsel’s discovery requests . . . are both proportional and reasonable in light of the complexity of the case and the amount of proof that is required for the cause of action”)].

A subpoena duces tecum “may not be used for the purpose of discovery or to ascertain the existence of evidence,” but rather “its purpose is to compel the production of specific documents that are relevant and material to facts at issue in a pending judicial proceeding” (*Matter of Terry D.*, 81 NY2d 1042, 1044 [1993] [quotation marks omitted]). One seeking to compel a non-party to comply with a subpoena need not “demonstrate that it cannot obtain the requested disclosure from any other source [S]o long as the disclosure sought is relevant to the prosecution or defense of an action, it must be provided by the nonparty” (*Matter of Kapon v Koch*, 23 NY3d 32, 38 [2014]).

Plaintiff’s Order to Show Cause

The court declines to sign plaintiff’s order to show cause. Initially, the court notes that plaintiff’s order to show cause is limited to only the Title Company subpoena. The court observes that both the Title Company and the Marathon subpoenas pertain to the closing disclosure and settlement statement respecting the Borrower 257-263 W 34th Street LLC on three loans from Marathon, except that the Marathon Subpoena more specifically identifies the closing disclosure and settlement statement as “including, but not limited, to the closing binder, the signed sources and uses statement, the signed title, the disbursements list, and transmittals for disbursements” (NYSCEF # 79 at 3).

By conference order dated April 26, 2023, in response to the letter briefing on the Title Company subpoena and defendant’s request to move to quash (NYSCEF # 26 at 3), the court observed that “the subpoena does appear to be narrowly tailored to seek relevant information for this action as pled” but that permission to move to quash was not necessary (NYSCEF # 30). This observation was informed by plaintiff’s letter statement that the subpoena “seeks discovery from Infinity Land Services of the original and correct copy of the 34th Title Policy” (NYSCEF # 29 – Apr 24, 2023 letter of plaintiff at 2). In stating that the subpoena appeared to be

narrowly tailored, the court did not ultimately determine the issue, nor did it have before it plaintiff's present claim that the reach of the subpoena should extend to "the closing binder, the signed sources and uses statement, the signed title, the disbursements list, and transmittals for disbursements" (NYSCEF # 58 at 1).

The present record demonstrates the impermissibly broad nature of plaintiff's demand for disclosure, which apparently was vaguely worded to the point that plaintiff clarifies the reach extends to "the closing binder, the signed sources and uses statement, the signed title, the disbursements list, and transmittals for disbursements" (NYSCEF # 58 at 1). Nor does plaintiff otherwise demonstrate why the sought production is not utterly irrelevant to plaintiff's complaint charging defendant with violation of its books and records rights.

Defendant's Cross-Motion to Quash

Defendant's cross-motion to quash is denied. "A person other than one to whom a subpoena is directed has standing to move to quash the subpoena where he or she has a proprietary interest in the subject documents or where they involve privileged communications" (*Matter of Radio Drama Network, Inc.*, 214 AD3d 461, 463 [1st Dept 2023] quoting *Matter of Hyatt v State Franchise Tax Bd.*, 105 AD3d 186, 194-95 [2d Dept 2013]). Defendant does not argue that the information sought by the subpoenas is defendant's proprietary or privileged information; rather, it basis its standing on being "a party to this civil litigation" (NYSCEF # 94 at 5-6), but that is insufficient. The court declines defendant's invitation to exercise its inherent power to enter a protective order.

Conclusion

In light of the foregoing, it is

ORDERED that plaintiff JLJ Capital LLC's motion by order to show cause to compel non-party Infinity Land Services to respond to a subpoena dated April 10, 2023 is denied; and it is further

ORDERED that defendant Churchill Real Estate Holdings LLC's cross-motion for a protective order to quash the subpoena served by plaintiff on Infinity Land Services dated April 10, 2023 and the subpoena served by plaintiff on Marathon Real Estate Debt Fund L.P. dated June 5, 2023 is denied.

07/19/2023
DATE


MARGARET CHAN, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> SUBMIT ORDER	
			<input type="checkbox"/> FIDUCIARY APPOINTMENT	