

286 Corbin Owners Corp. v Zhovtis

2024 NY Slip Op 30343(U)

January 25, 2024

Supreme Court, Kings County

Docket Number: Index No. 15757/2014

Judge: Reginald A. Boddie

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This opinion is uncorrected and not selected for official publication.

At an IAS Commercial Term Part 12 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York on the 25th day of January 2024.

PRESENT:
Honorable Reginald A. Boddie
Justice, Supreme Court

-----X
286 Corbin Owners Corporation

Plaintiff,

Index No. 15757/2014

-against-

Cal. No. 1 MS 9

Yan Zhovtis and Yelena Weinstein

**Amended Decision &
Order**

Defendants.
-----X

The following e-filed papers read herein:
MS 9

NYSCEF Doc Nos.
207-232

Upon the foregoing papers, plaintiff's motion seeking an order (a) quashing the subpoena duces tecum dated November 8, 2023 ("Subpoena") in its entirety; (b) issuing a protective order from complying with the Subpoena; and (c) granting plaintiff's attorneys' fees, costs and disbursements associated with responding to the Subpoena and filing the instant motion, is decided as follows:

Background

Plaintiff is a co-op and owner of a building at 286 Corbin Place, Brooklyn, New York ("co-op"). Defendants are lessees of Unit 25 in this building and owner of the 925 shares allocated to it. The issue arose after defendants installed an air conditioning unit without the co-op board's consent. Plaintiff commenced this action asserting claims for injunctive relief, trespass, nuisance, and a license to enter defendants' property. After plaintiff initiated this action, defendant Yan

Zhovtis filed a derivative action alleging breach of fiduciary duty, waste, and negligence against the board members, seeking their removal and a new election. Defendants in the derivative action denied the allegations and asserted counterclaims for their attorneys' fees, costs, and expenses. Pursuant to a stipulation dated October 11, 2018, the two actions were joined for the purpose of discovery and trial. By Decision and Order dated November 23, 2020, this Court granted plaintiff's summary judgment motion to the extent that defendants were directed to remove the air conditioning unit and make the necessary repairs and restoration to the subject area of the building. This court also granted plaintiff's summary judgment on the issue of attorneys' fees and referred such matter to Special Referee Miriam Sunshine. Three hearings were held on July 10, 2023, August 15, 2023, and October 18, 2023. A fourth hearing was scheduled to be held on February 7, 2024. After the hearing on October 18, 2023, defendants served plaintiff the Subpoena requesting information on the law firm's time records for billing in the derivative action, on the ground that plaintiff may have improperly shifted billing from the derivative action to the billing of this action. By the instant motion filed on December 5, 2023, plaintiff seeks to quash the Subpoena.

Motion to quash

Plaintiff argues that there is no basis in fact or in law to serve the Subpoena. As a threshold matter, plaintiff objects to the Subpoena on the ground that no discovery via subpoena is available in a special referee part. Additionally, plaintiff argues that the records sought on the Subpoena are utterly irrelevant to the hearing for attorneys' fees. Plaintiff's attorney Michael Cohen ("Cohen") testified that his firm performed work for the two actions separately and correctly billed to each action. Plaintiff contends that nothing in Cohen's hearing testimony indicates a need warranting production of the law firm's time records for the derivative action.

Plaintiff asserts that defendants seek three categories of information for the two actions: correspondence between plaintiff's attorney and its insurance carrier, legal invoices issued by plaintiff's attorney and payments made by plaintiff. Plaintiff submits that the legal fees were paid by plaintiff itself, not by some third party or an insurance carrier on plaintiff's behalf, and that Cohen has no knowledge of any insurance carrier responsible for defending plaintiff. Plaintiff asserts that the invoices issued by its attorney for this action through the period of summary judgment sought under motion sequence five are already in evidence. Additionally, that Arthur Wiener (vice president of plaintiff) testified that he reviewed each bill before he approved them for payment. Plaintiff cites that it is well established as a matter of law that proof of payment is completely and utterly irrelevant to a proceeding to fix attorneys' fees, and the paid invoices are already in evidence as part of the ongoing hearing. Furthermore, plaintiff argues that the stipulation for a joint trial does not combine discovery and judgments of the two actions, and they are conducted separately.

In opposition, defendants assert that plaintiff does not contend that it does not possess the records, not that it would be burdensome to product them, justifying quashing the Subpoena or a protective order. Defendants argue that the records sought are necessary to determine if plaintiff properly divided the costs of depositions taken jointly for this action and the derivative action. Defendants submit that Cohen testified that he did not recall to what extent the fees were divided. Notably, that his billing records reflect questionable entries concerning the three depositions taken in the action. Specifically, that (a) deposition of Arthur Wiener was 4 hours and 47 minutes in length, and Cohen billed for 8 hours; (b) deposition of Robert Linder was 1 hour and 43 minutes in length, and Cohen billed for 4.3 hours; and (c) deposition of Yan Zhovtis was 4 hour and 4 minutes in length, and Cohen billed for 6.3 hours. Defendants argue that there is nothing overboard

or burdensome about the Subpoena as it simply requests billing records and related correspondence kept in the ordinary course of business, which are relevant to the determination of plaintiff's attorney fees. Moreover, defendants argue that Cohen's claim of no knowledge of any insurance carrier is not a legal basis in deeming such documents to be utterly irrelevant. Additionally, that plaintiff's argument that payment is completely and utterly irrelevant to a proceeding to fix attorneys' fees is not supported by legal authority. Furthermore, defendants argue that plaintiff's accusation of their frivolous conduct is baseless.

In reply, plaintiff disputes that there was improper billing for depositions, stating that defendant provided no substantial evidence or justification for these allegations. Plaintiff asserts that any additional time billed were for travel and breaks, which were consistent across all depositions. Additionally, that the firm's billing was appropriately reviewed and approved. Plaintiff emphasizes that the Subpoena's broad request for various documents, including correspondence with insurance carriers and comprehensive time records from the derivative action, is speculative and unnecessary for determining reasonable attorney's fees.

Discussion

Generally, the standard to be applied on a motion to quash a subpoena duces tecum is whether the requested information is utterly irrelevant to any proper inquiry *County of Suffolk v Kennedy*, 211 AD3d 937 [2d Dept 2022]. A party or nonparty moving to quash a subpoena has the initial burden of establishing either that the requested disclosure is utterly irrelevant to the action or that the futility of the process to uncover anything legitimate is inevitable or obvious (*id.*).

Here, defendants sought information and documents for the two actions regarding the insurance of plaintiff's attorney, legal invoices issued to plaintiff by its attorney and plaintiff's payments on the invoices. Plaintiff sustains its initial burden to demonstrate that the insurance

information and plaintiff's payments on the invoices are utterly irrelevant. However, plaintiff fails to sustain the burden to demonstrate that legal invoices sought for the two actions are utterly irrelevant because the issue centers around plaintiff's counsel's billing for the two related cases, which may have overlapping discovery, such as depositions. Therefore, plaintiff's motion to quash is granted to the extent that the information sought regarding insurance and plaintiff's payments are quashed. Plaintiff shall comply with the remaining Subpoena by producing the legal invoices related to the derivative action within 30 days.

ENTER:

RAB

Honorable Reginald A. Boddie
Justice, Supreme Court

HON. REGINALD A. BODDIE
J.S.C.