

Berg v Chelsea Hotel Owner, LLC

2025 NY Slip Op 33185(U)

August 20, 2025

Supreme Court, New York County

Docket Number: Index No. 654748/2020

Judge: Lynn R. Kotler

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER PART 08

Justice

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JONATHAN BERG, SUSAN BERG,
Plaintiff,

- v -

CHELSEA HOTEL OWNER, LLC, SIR CHELSEA LLC, IRA
DRUKIER (A/K/A IRA DRUCKIER),
Defendant.

INDEX NO. 654748/2020

MOTION DATE 11/22/2024,
12/02/2024,
12/11/2024

MOTION SEQ. NO. 005 006

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 253, 254, 257, 258, 259, 260, 261, 267, 276, 277, 281, 283, 286, 288, 293

were read on this motion to/for DISCOVERY

The following e-filed documents, listed by NYSCEF document number (Motion 006) 244, 245, 246, 247, 248, 249, 250, 251, 252, 255, 256, 262, 263, 264, 265, 266, 268, 275, 278, 279, 280, 284, 287, 289, 294

were read on this motion to/for SUBPOENA

In motion sequence 5, Defendant Chelsea Hotel Owner, LLC ("CHO" or "defendant") moves to compel plaintiffs Jonathan Berg and Susan Berg (collectively "plaintiffs" or "Bergs") to "provide the relevant discovery described in further detail below within fourteen days" or to "preclud[e] Plaintiffs from relying upon evidence or argument at trial that they have refused to search for or produce." Plaintiffs oppose the motion, arguing that: it is improper because the Chelsea Hotel cases are not consolidated; they have not refused to search for or produce any relevant evidence; and the motion is not accompanied by "the requisite good faith affirmation pursuant to 22 NYCRR 202.7[.]"

In motion sequence 6, Defendant CHO requests that this court “so-order” a subpoena for non-party New York City Department of Buildings. Both plaintiff and non-party NYC oppose the motion.

The motions are consolidated for a single disposition in this one single decision/order.

This is a five-year-old case where some discovery has taken place. It is unnecessary to recite the case history, as the parties and the court are well-aware of the alleged facts.

MOTION SEQUENCE 5

Since 2022, the court has “so ordered” six (6) discovery stipulations: May 18, 2022, May 9, 2023, December 8, 2023, March 7, 2024, June 20, 2024, and September 3, 2024, all containing the same language except for the discovery deadline date.

Defendant has sent plaintiff deficiency letters dated December 19, 2023 and June 28, 2024 outlining the ongoing deficiencies in plaintiff’s interrogatory responses and document production of plaintiffs.

The parties have held two (2) meet-and-confer calls on January 19 and January 22, 2024. All agreed-upon discovery deadlines have come and gone. In an email dated February 16, 2024, which memorialized the January meet-and-confer calls, plaintiffs agreed to cure the following deficiencies: “i. searching for and producing documents related to their claimed damages for out-of-pocket expenses and supplementing related interrogatory responses; ii. reproducing photos and videos with their metadata; iii. producing all missing attachments to previously produced documents; iv. providing available records regarding alleged smoke inhalation experienced by Jonathan Berg; and v. providing a privilege log for all documents withheld or redacted on the basis of privilege.”

Subsequently, in an email dated October 1, 2024, defendant requested documents concerning Jonathan Berg's claim, during his deposition, that he is undergoing PTSD treatment; all documents and communications concerning NYC DOB Violation No. 34879375H including communications from Leah Donaldson; and documents and communications regarding *Berg et al. v. Chelsea*, index number 115978/10.

Plaintiffs have also failed to supplement interrogatory responses for the following interrogatories: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 23 and Druckier Interrogatory No. 10.

As noted, the parties executed six (6) discovery stipulations over a three-year time period, participated in two meet-and-confers in January 2024, and communicated via email in February 2024 regarding outstanding discovery and a final deficiency letter dated June 28, 2024 prior to filing the instant motion. The discovery sought by defendant, consisting of responses to document demands and a supplemental interrogatory response, is simple and straightforward. There is, however, no indication in the record before the court that plaintiffs have even attempted to supplement their discovery responses to cure the deficiencies identified by defendant.

An affidavit regarding the unavailability of documents that are the subject of a discovery order must document a thorough search conducted in good faith, and should include details such as "where the subject records were likely to be kept, what efforts, if any, were made to preserve them, whether such records were routinely destroyed, [and] whether a search [was] conducted in every location where the records were likely to be found" (*Jackson v City of New York*, 185 AD2d 768, 770 [1st Dept. 1992]).

Here, the affidavit submitted by Susan Berg contains absolutely no specific information regarding the search(es) she conducted or any relevant information as to the discovery requests.

In fact, Susan Berg's affidavit is exactly the same as the Jobe, Poss, Carlson and Caster affidavits except for the person's signature. Moreover, there is no affidavit from plaintiff Jonathan Berg that he conducted any search for any responsive document. The Berg affidavit lacks any relevant information regarding where, when, or what was searched, or any indication of how plaintiff Susan Berg conducted the search(es). This type of gamesmanship, which is nothing more than a poorly designed strategy to thwart defendant's discovery efforts, impairs the efficient functioning of the courts and the adjudication of claims.

Furthermore, defendant issued subpoenas dated September 23, 2023 to non-parties Emmanuel Jean-Baptiste, Rita Barros, Martine Barrat, Ed Hamilton, Deborah Martin, and Drew Straub. To date, no documents have been produced. As such, non-parties Emmanuel Jean-Baptiste, Rita Barros, Martine Barrat, Ed Hamilton, Deborah Martin, and Drew Straub are directed to produce documents responsive to said subpoenas within thirty (30) days from the date of this decision/order.

MOTION SEQUENCE 6

Defendant CHO requests that this court "so-order" a subpoena "to establish facts that support Defendants' defenses and CHO's Counterclaims...that are material and necessary". Plaintiffs oppose the motion and argue that the documents sought by defendant are unnecessary and that defendant is in possession of these documents. Non-party NYC opposes the motion and argues that defendant fails to meet the special circumstances standard, that defendant could get the documents from plaintiffs, that the subpoena is overbroad and not relevant or material.

The court disagrees with plaintiff and non-party NYC. The purpose of a judicial subpoena duces tecum is to compel the production of specific documents that are relevant and material to facts at issue in a pending judicial proceeding (*Figueroa v. 2289 3rd Ave. Realty*

Corp., 2021 NY Slip Op 30539(U)[Sup.Ct, NY County 2021]). Defendant requests the following: documents and communications concerning New York City Department of Buildings Violation No. 34879375H, including all communications among DOB personnel (including Leah Donaldson) and Jonathan Berg, Susan Berg, and/ or Bennett Fradkin, including or among jb@jberg.com, susan@jberg.com, srb222w23@gmail.com, and bennett@fradkinmcalpin.com and all documents and communications concerning Berg et al. v. Chelsea 23 St. Corp., Index No. 115978/2010 (N.Y. Cty.). The requested documents are material and relevant to defendant's defenses and CHO's counterclaims. The court disagrees with non-party NYC argument that defendant can obtain these documents from plaintiffs. If that were the case, then there would be no need for the court to "so-order" the subpoena.

Based on the foregoing, defendant's motion sequence 5 and 6 are granted to the following extent:

- 1) Plaintiffs shall supplement their respective responses to defendant's discovery requests, more specifically Plaintiff shall provide/respond to the following: "i. searching for and producing documents related to their claimed damages for out-of-pocket expenses and supplementing related interrogatory responses; ii. reproducing photos and videos with their metadata; iii. producing all missing attachments to previously produced documents; iv. providing available records regarding alleged smoke inhalation experienced by Jonathan Berg; and v. providing a privilege log for all documents withheld or redacted on the basis of privilege."
- 2) Plaintiffs shall provide/respond to the following requests: Jonathan Berg's claim, during his deposition, that he is undergoing PTSD treatment; all documents and communications concerning NYC DOB Violation No. 34879375H including

communications from Leah Donaldson; and documents and communications regarding Berg et a l. v. Chelsea, index number 115978/10.

- 3) Plaintiffs shall supplement their responses to defendant's Interrogatories Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 23 and Druckier Interrogatory No. 10.
- 4) Non-parties Emmanuel Jean-Baptiste, Rita Barros, Martine Barrat, Ed Hamilton, Deborah Martin, and Drew Straub are directed to produced documents responsive to said subpoenas dated September 23, 2023 within 30 days from the date of this decision/order.

The balance of defendant's motion for sanctions is denied.

Accordingly, it is hereby

ORDERED that defendant's motion sequence 5 is granted to the extent that, within thirty (30) days of the date of this order; 1) Plaintiffs shall supplement their respective responses to defendant's discovery requests, more specifically Plaintiff shall provide/respond to the following: "i. searching for and producing documents related to their claimed damages for out-of-pocket expenses and supplementing related interrogatory responses; ii. reproducing photos and videos with their metadata; iii. producing all missing attachments to previously produced documents; iv. providing available records regarding alleged smoke inhalation experienced by Jonathan Berg; and v. providing a privilege log for all documents withheld or redacted on the basis of privilege."; 2) Plaintiffs shall provide/respond to the following requests: Jonathan Berg's claim, during his deposition, that he is undergoing PTSD treatment; all documents and communications concerning NYC DOB Violation No. 34879375H including communications from Leah Donaldson; and documents and communications regarding Berg et a l. v. Chelsea, index number 115978/10; 3) Plaintiffs shall supplement their responses to defendant's

