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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER
Justice

PART 15

Index Number : 106778/2011
MANGANARO, THOMAS
vs.
NEW YORK CONVENTION CENTER
SEQUENCE NUMBER : 001
QUASH SUBPOENA, FIX CONDITIONS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to ____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1 - 3

Answering Affidavits — Exhibits _____ | No(s). 4

Replying Affidavits _____ | No(s). 5

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED
JUN 22 2012
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 6/19/12

_____, J.S.C.
HON. EILEEN A. RAKOWER

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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THOMAS MANGANARO,

Index No.
106778-11

DECISION AND ORDER

Plaintiff,

- against -

Mot. Seq. 01

NEW YORK CONVENTION CENTER DEVELOPMENT CORPORATION, THE NIELSEN COMPANY (US), LLC, FREEMAN DECORATING SERVICES, INC., and FREEMAN DECORATING CO.,

Defendants.

----------X

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff Thomas Manganaro commenced this action on June 10, 2011 to recover for personal injuries allegedly sustained on July 29, 2009 at the Jacob Javits Convention Center ("Javits Center") as a result of a workplace accident. The Nielsen Company (US), LLC ("Nielsen"), had leased a portion of the Javits Center from the New York Convention Center Operating Authority ("NYCCOA") for the purposes of putting on a trade show. Nielsen contracted with defendants Freeman Decorating Services, Inc., and Freeman Decorating Co. (collectively, "Freeman") to assemble and take down the booths from which exhibitors on the show floor would operate. Freeman hired plaintiff, a nominal employee of the NYCCOA.

Federal Insurance Company ("Federal"), Nielsen's liability insurer and a non party, brings this motion pursuant to CPLR §2304 and 3103 for an order quashing the Subpoena Duces Tecum served on Federal by Freeman on March 7, 2012 and for a protective order. In support of its motion, Federal submits the affirmation of its counsel Thomas J. Cirone, Esq. Nielsen has submitted an affirmation of its counsel Joseph Varvaro in support of Federal's motion to quash. Freeman opposes. In support of its opposition, Freeman submits the affirmation and reply affirmation of its counsel Russell G. Tisman, Esq.

Prior to plaintiff's commencement of this action, by letter dated February 22, 2011, John J. Nasta, a Casualty Litigation Examiner for Federal, demanded that Freeman and its insurers defend and indemnify Nielsen. In the letter, Nasta, on Nielsen's behalf, asserted that Freeman had a "contractual obligation" to "procure insurance" on behalf of Nielsen and demanded that Freeman or its carrier defend, insure and indemnify Nielsen. According to Nasta, Nielsen was entitled to contractual protection because "our investigation has concluded that the alleging (sic) injury was sustained as a direct result of work performed by and on behalf of Freeman" and "this loss and resulting damages occurred out of control and operation of any and all work performed by or on behalf of Nielsen." Freeman did not accept the tender, and plaintiff subsequently commenced this action three months later on or around June 10, 2011. In its answer to plaintiff's Complaint, Nielsen asserted a cross-claim for contractual indemnification against Freeman and a cross-claim for breach of contract for failure to procure insurance on its behalf.

The Subpoena contains ten document documents relating to Freeman's files concerning the accident and the claims. Since its issuance of the Subpoena, Freeman has limited its scope and seeks only the following documents: "(I) the non-privileged materials which formed the basis for a contractually-based tender which John Nasta, purporting to act on behalf of Nielsen, made on March [sic] 22, 2011 at a time when, by his own admission, there was no litigation, and Nielsen was unrepresented and (ii) documents related to when Nielsen learned of Mr. Manganaro's incident, and when, if at all, they placed Freeman and its carrier on notice."

CPLR §2304 authorizes a non-party seeking to challenge a subpoena to move to quash or vacate it. Under CPLR §3103, a Court may issue a protective order to protect "any person from whom discovery is sought" from "unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice." The party moving for a protective order bears the burden of demonstrating that the disclosure sought is improper, and must offer more than conclusory assertions that the requested disclosure is overbroad or unduly burdensome. (*See Sage Realty Corp. v. Proskauer Rose, L.L.P.*, 251 A.D.2d 35, 40 [1st Dept. 1998]).

CPLR §3101(a) generally provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." The Court of Appeals has held that the term "material and necessary" is to be given a liberal interpretation in favor of the disclosure of "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity," and that "[t]he test is one of usefulness and reason" (*Allen v. Cromwell-*

Collier Publishing Co., 21 N.Y.2d 403, 406 [1968]). CPLR §3101(a)(4) governs non-party disclosure obligations, and states, in relevant part, that non-party disclosure is only available "upon notice stating the circumstances or reasons such disclosure is sought or required." (*See also In re New York County DES Litigation*, 171 A.D.2d 119, 575 N.Y.S.2d 19 [1st Dept 1991]).

CPLR §3101(b) and (c) protect "privileged" and "work product of an attorney" from disclosure. CPLR §3101(d)(2) provides that "materials otherwise discoverable under subdivision (a) of this section and prepared in anticipation of litigation or for trial by or for another party, or by or for that other party's representative (including an attorney, a consultant, surety, indemnitor, insurer, or agent), may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means."

Federal asserts the Subpoena "is facially deficient, overly broad and seeks information protected from disclosure by the Kandel-Feingold Rule, CPLR 3101(b), (c), and (d)(2) and applicable law." In *Kandel v. Toucher*, 22 A.D. 2d 513 (1st Dept 1965), plaintiff sued to recover damages for personal injuries sustained while a passenger in defendant's motor vehicle. The defendant's insurer defended the action. There, the defendant appealed from an order denying his motion for a protective order with respect to plaintiff's demand for a copy of "the accident report and statements, photographs, diagrams, etc., relating to the accident made prior to the commencement of this action." The Appellate Division reversed the trial court's denial, holding that "[t]he material sought is material prepared for litigation" and is protected from disclosure under CPLR §3010(d) or as work product under subdivision ©. The Second Department employed a similar analysis in *Feingold v. Lewis*, 22 A.D. 3d 447 (2d Dept. 1965), when reviewing the trial court's grant of a protective order with respect to defendant/insured's written statement to his insurer in preparation for litigation.

Freeman asserts that the Kandel-Feingold Rule does not apply. Freeman states that the documents sought "are material and necessary to their defense against contractually-based cross-claims asserted by [Nielsen] that Freeman has not been able to obtain directly from the parties or otherwise" and are not protected by an attorney-client privilege and do not constitute attorney work product or material prepared in anticipation of litigation. Freeman states that it sent Nielsen document demands requesting documents concerning the tender made by Federal on Nielsen's behalf that supported Federal's allegation that its "investigation has concluded that the alleging

[sic]] injury was sustained as a direct result of work performed by and on behalf of Freeman." However, Nielsen responded that "the documents requested are not under the control of the defendant herein."

Freeman has limited the scope of the Subpoena and seeks the following documents: "(i) the non-privileged materials which formed the basis for a contractually-based tender which John Nasta, purporting to act on behalf of Nielsen, made on February 22, 2011 at a time when, by his own admission, there was no litigation, and Nielsen was unrepresented and (ii) documents related to when Nielsen learned of Mr. Manganaro's incident, and when, if at all, they placed Freeman and its carrier on notice." Federal contends that the modified demands still seek materials that are protected by the Kandel-Feingold Rule, the attorney client privilege, and as material prepared in anticipation of litigation.

Federal also contends that the documents sought by Freeman are not relevant as the Nielsen's claim is based on contractual indemnification pursuant to the parties' agreement and the relevant contract has been produced. Federal contends that when Nielsen "first learned" of plaintiff's accident and put Freeman "on notice" is not relevant to the issue of whether the indemnity contract between Nielsen and Freeman obligates Freeman to defend and indemnify Nielsen for the accident or whether Freeman breached its alleged contract to procure insurance. However, Nielsen, the party that asserted the cross-claims against Freeman, did not object to similar demands propounded by Nielsen based on relevancy. Rather, Nielsen objected on the basis that responsive documents were not in its possession. Furthermore, the Court notes that Federal's objection to production based on privilege or work product is belied by the fact that at plaintiff's deposition Nielsen's counsel presented and had marked seven photographs that purportedly depicted the condition of the workplace. Based on the opposition affidavit submitted by Freeman's counsel, when asked at the deposition why these documents had not been previously produced despite Freeman's request, Nielsen's counsel responded that they were located in the "claims file."

Wherefore, it is hereby,

ORDERED that Federal's motion to quash the subpoena duces tecum and for a protective order is denied, and it is further

ORDERED that Federal is directed to produce the responsive documents or alternatively to provide them to Nielsen so that Nielsen can supplement its discovery responses and produce them to Freeman within twenty (20) days of notice of entry of

this Order.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: 6/19/12

EILEEN A. RAKOWER, J.S.C.