| **Hildene Capital Mgt., LLC v Bank of N.Y. Mellon** |
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| 2013 NY Slip Op 33181(U) |
| December 5, 2013 |
| Sup Ct, New York County |
| Docket Number: 650980/2010 |
| Judge: O. Peter Sherwood |
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD Justice PART 49

HILDENE CAPITAL MANAGEMENT, LLC, *et al.*,

Plaintiffs,

-against-

THE BANK OF NEW YORK MELLON, *et al.*,

Defendants.

INDEX NO. 650980/2010

MOTION DATE Oct. 8, 2013

MOTION SEQ. NO. 005

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to quash subpoenas

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | |
| Answering Affidavits — Exhibits | |
| Replying Affidavits | |

**Cross-Motion:** ☐ Yes ☑ No

Upon the foregoing papers, the motion of nonparties David T. McIndoe, Esq. and Mark W. Wickersham, Esq. for an order, pursuant to CPLR §§ 2304 and 3103, quashing subpoenas *Ad Testificandum* issued by plaintiffs and plaintiff-intervenor is decided in accordance with the accompanying Decision and Order.

Dated: December 5, 2013

O. PETER SHERWOOD, J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF NEW YORK: PART 49**

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**HILDENE CAPITAL MANAGEMENT, LLC, and HILDENE OPPORTUNITIES MASTER FUND, LTD., individually and derivatively,**

**Plaintiffs,**

**-against-**

**THE BANK OF NEW YORK MELLON, as Indenture Trustee and BIMINI CAPITAL MANAGEMENT, INC. ,**

**Defendants**

**and THE BANK OF NEW YORK MELLON, as Indenture Trustee,**

**Nominal Defendant.**

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**PREFERRED TERM SECURITIES XX. LTD.,**

**Plaintiff-Intervenor,**

**-against-**

**THE BANK OF NEW YORK MELLON, as Indenture Trustee and BIMINI CAPITAL MANAGEMENT, INC.,**

**Defendants.**

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**DECISION AND ORDER**

**Index No. 650980/2010**

**Mot. Seq. No. 005**

**O. PETER SHERWOOD, J.:**

Before the Court is a motion by non-parties, David T. McIndoe, Esq. and Mark W. Wickersham, Esq., for an order, pursuant to CPLR §§ 2304 and 3103, quashing subpoenas *Ad Testificandum* issued by Plaintiffs and Plaintiff-Intervenor (collectively "Hildene") on the ground that such non-party witnesses were deposed at great length in a previous case in the United States District Court for the Southern District of New York as to the facts and circumstances leading to the preparation of an October 2009 opinion letter concerning the transaction that underlies the instant case.

For the reasons that follow, the non-parties' motion to quash subpoenas is granted.

***Factual Background***

Preferred Term Securities XX, Ltd. ("PreTSL XX") was formed to issue and sell various tiers of notes to investors and to use the proceeds from those notes to purchase various assets known as "Collateral Securities". The securities PreTSL XX purchased were placed in trust pursuant to the Indenture with The Bank of New York Mellon ("BNYM") as Indenture Trustee (the "Indenture"). PreTSL XX is structured as a static CDO which does not allow for any trading of the Collateral Securities in the investment portfolio and through which a Collateral Security can only be sold or otherwise removed from the PreTSL XX Trust Estate under limited and narrowly prescribed circumstances pursuant to the express terms of the Indenture. The cash flow from the CDO collateral was to be used to make interest and principal payments to investors who bought PreTSL XX securities. Such securities were issued by PreTSL XX to investors in different tranches, or classes, representing different levels of risk, including the most senior notes, the mezzanine notes and the investor notes.

Among the collateral securities held by PreTSL XX were certain Trust Preferred Securities ("TruPS") issued by Bimini Capital Trust II ("Bimini Trust"). It was expected that the TruPS would provide regular income payments to PreTSL XX. The ability of Bimini Trust to make payments on its TruPS was based upon cash flow from residential mortgage-backed securities owned by defendant Bimini Capital Management, Inc. ("Bimini"), a publicly traded real estate investment trust ("REIT").

The deteriorating housing market in 2008 impaired Bimini Trust's ability to meet its ongoing payment obligations on the TruPS to PreTSL XX. In order to address that situation, Bimini made an offer to repurchase the TruPS held by PreTSL XX, with a par value of $24 million, at a discounted amount of $10.8 million in cash. Bimini's special counsel, Hunton & Williams LLP ("H&W"), prepared an internal memorandum (the "H&W Memo"), which led to the issuance of an opinion letter to BNYM stating that the Indenture Trustee was authorized to act at the direction of the Requisite Noteholders in taking action necessary to effectuate Bimini's offer (the "Opinion Letter"). The non-party witnesses, David T. McIndoe and Mark W. Wickersham, are, respectively, a former partner and an associate in H&W. BNYM, purportedly on the strength of the Opinion Letter issued by H&W, forwarded the tender offer to the Senior Noteholders for approval. On or

about October 21, 2009, BNYM received approval of over 90% of the Senior Noteholders consenting to Bimini repurchasing its TruPS, and the transaction was consummated.

In December 2009, shortly after Bimini's purchase of the TruPS closed, R. Davis Howe, a holder of Income Notes of PreTSL XX, commenced an action against BNYM and Bimini, titled *Howe v The Bank of New York Mellon et al.*, in the United States District Court for the Southern District of New York (the "Howe Action"), challenging the transaction. Howe alleged that the transfer of TruPS to Bimini violated the Indenture Agreement, caused losses in principal from the investment assets of PreTSL XX, and diminished the cash flow that otherwise would have inured to the benefit of PreTSL XX and its noteholders. In connection with the Howe Action, non-parties McIndoe and Wickersham and a third H&W witness were deposed for about 25 hours, resulting in over 1,000 pages of transcript. This was in addition to the production by H&W of over 31,000 pages of documents.

The present action was commenced by plaintiffs Hildene Capital Management LLC and Hildene Opportunities Master Fund, Ltd. ("Hildene"), who are Senior Note Holders governed by the terms of the Indenture, challenging the sale of TruPS to Bimini as violative of the terms of the Indenture.

On May 24, 2013, Hildene served a Subpoena *Duces Tecum* on H&W requested documents related to the H&W Memo and the Opinion Letter. Hildene's former counsel and H&W reached an agreement that the document production in the Howe Action was a sufficient response to the subpoena.

On or about July 17, 2013, Hildene notified H&W by email that it intended to depose Wickersham and McIndoe. In a responsive letter, dated August 5, 2013, H&W noted that the plaintiff in the Howe case had raised essentially identical allegations as those raised by Hildene in this action and that McIndoe and Wickersham, as well as a third H&W representative, all nonparties in the Howe Action, had been questioned extensively in regard to the circumstances leading to the Opinion Letter. H&W stated that it was having difficulty understanding what line of inquiry was overlooked during the depositions of the subject witnesses and objected to producing those witnesses without Hildene articulating what line of questioning it intended to pursue in such depositions that was omitted from the previous depositions. H&W asked Hildene to agree to certain conditions with

respect to the proposed depositions, namely: (1) define and limit the scope of the depositions; (2) limit the amount of time provided for questioning; and (3) reimburse McIndoe and Wickersham for their time.

In reply, Hildene, by counsel, refused to agree to H&W's proposed conditions, stating that Hildene was not a party to the Howe Action and, therefore, due process commanded that Hildene be provided with a full and fair opportunity to litigate their claims. However, Hildene's counsel averred that Hildene did not intend to cover areas that had already been sufficiently covered in the previous depositions or repeat questions that were asked before.

As no agreement was reached as to the scope of the proposed depositions or as to the other conditions Hildene proposed, on or about August 20, 2013, Hildene issued subpoenas *Ad Testificandum* to McIndoe and Wickersham. The subpoena identifies the reasons such depositions are sought by simply stating that "The testimony is material and necessary to the resolution of the issues in this action and is not reasonably available from any of the parties." (Robson Affirmation, Exhibit "E").

On or about September 11, 2013, counsel for McIndoe and Wickersham filed the instant motion for an order, pursuant to CPLR §§ 2304 and 3103, quashing the subpoenas *Ad Testificandum* issued by Hildene or, in the alternative, granting a protective order for the following relief: (1) require Hildene to identify the areas that have not been covered or questions that were not asked before during the depositions in the Howe Action; (2) limit the duration of Hildene's questioning; (3) require Hildene to compensate McIndoe and Wickersham for their time either at their usual client billing rate or some other hourly rate set by the court; and (4) permitting McIndoe and Wickersham to seek costs and sanctions to the extent that Hildene fails to adhere to any limitations imposed by the court.

***Discussion***

The threshold requirement for disclosure in New York civil actions is that the disclosure sought be "material and necessary in the prosecution or defense of an action" (CPLR § 3101 [a]). This principle is applicable to non-parties as well as parties (*see Kooper v Kooper,* 74 AD3d 6, 10 [2d Dept 2010]). However, a disclosure request directed to a nonparty is governed by principles in addition to those governing a party. CPLR § 3101 (a)(4) directs that a nonparty be given "notice

stating the circumstances or reasons such disclosure is sought or required" so as "to afford a nonparty who has no idea of the parties' dispute or a party affected by such request an opportunity to decide how to respond" (*Velez v Hunts Point Multi-Service Center, Inc.*, 29 AD3d 104, 110 [1st Dept 2006]).

Here, Hildene's subpoena appears to be facially defective as it does not state in any detail the circumstances or reasons the disclosure is sought other than to repeat the statutory language that it is "material and necessary" to the issues in the case. However, the Appellate Division, First Department, has allowed a party issuing a subpoena to cure any facial defect in a subpoena by submitting a showing of circumstances and reasons such disclosure is sought in its opposition to a motion to quash. In that regard, the determination of whether to quash a nonparty subpoena does not turn solely on whether the discovery sought is relevant. Rather, as the *Kooper* court opined "[m]ore than relevance and materiality is necessary to warrant disclosure from a nonparty" (*Kooper*, 74 AD3d at 17-18).

In opposition, Hildene asserts that it reached a stipulation with the other parties (to which McIndoe and Wickersham were not signatories), dated September 19, 2013, by which they agreed that all depositions in the Howe Action would be deemed admissible in the current litigation, and Hildene agreed to limit all depositions of individuals previously deposed in the Howe Action to no more than five hours and use good faith efforts to not ask questions that were adequately answered in the Howe Action (Pickhardt Affirmation in Opposition, Exhibit "7"). Hildene also notes that they agreed to incur the expense of traveling to Washington, D.C. to depose Mr. McIndoe and to Richmond, Virginia, to depose Mr. Wickersham (Robson Affirmation in Support, Exhibit "D"). Thus, Hildene contends that any burden upon the nonparty witnesses in appearing for depositions has been addressed and that reasonable accommodations have been proffered to mitigate any such burden.

In reply, the nonparties assert that the parties' stipulation reserves to Hildene unilateral discretion in determining what questions previously asked in the Hildene Action were adequately answered and, thus, renders such agreement meaningless as a protection. In any event, the nonparties contend that Hildene has not adequately explained the reason it needs to depose them as to "non-repetitive" questions.

The court finds Hildene's proffer in opposition to the motion to quash insufficient in the context of this case to cure the facial deficiency of their subpoenas. It does little to clarify the nature of the inquiry or narrow the scope for the proposed depositions. Thus, Hildene has failed to meet its burden of demonstrating the circumstances and reasons additional testimony from the nonparties is warranted. Moreover, Hildene has failed to show that the disclosure sought cannot be obtained from other sources (*see e.g., Menkes v Beth Abraham Servs.*, 89 AD3d 647 [1st Dept. 2011]; *Connolly v Napoli, Kaiser & Bern, LLP,* 81 AD3d 530 [1st Dept. 2011]; *Reich v Reich,* 36 AD3d 506 [1st Dept 2007]). Lastly, even assuming that Hildene met the foregoing requirements, this court has authority to issue a protective order in order to prevent abuse where the discovery request may cause "unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts." (CPLR § 3103 [a]). This court concludes upon balancing the competing interests that the discovery Hildene seeks constitutes an undue burden and expense on the responding nonparties.

***Conclusion***

Based upon the foregoing discussion, it is

**ORDERED** that the motion of nonparties David T. McIndoe, Esq. and Mark W. Wickersham, Esq. quashing subpoenas *Ad Testificandum* issued by plaintiffs and plaintiff-intervenor or, alternatively, issuing a protective order is **GRANTED** to the extent that the subpoenas served upon such nonparties are **QUASHED.**

This constitutes the decision and order of the court.

**DATED: December 5, 2013**

**ENTER,**

**O. PETER SHERWOOD**
**J.S.C.**