

Shannon Contr. LLC v Equinox Fitness 92nd St.
2018 NY Slip Op 33211(U)
December 12, 2018
Supreme Court, New York County
Docket Number: 155975/2018
Judge: Robert D. Kalish
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ROBERT D. KALISH PART IAS MOTION 29EFM

Justice

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SHANNON CONTRACTING LLC,
Plaintiff,
- v -

EQUINOX FITNESS 92ND STREET, INC., EQUINOX HOLDINGS,
INC., ECLIPSE DEVELOPMENT, INC.,
Defendant.

INDEX NO. 155975/2018
MOTION DATE 12/12/2018
MOTION SEQ. NO. 001 002 003
004 005 006

DECISION, ORDER AND
JUDGMENT

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14,
40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 58, 60

were read on this motion to/for SUBPOENA

The following e-filed documents, listed by NYSCEF document number (Motion 002) 15, 16, 17, 24, 61

were read on this motion to/for MISCELLANEOUS

The following e-filed documents, listed by NYSCEF document number (Motion 003) 18, 19, 20, 21, 22,
23

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 004) 28, 29, 30, 31, 32,
33, 34, 35, 36, 37, 38, 39, 54, 55, 56, 57, 59, 62, 63, 64, 65

were read on this motion to/for DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 005) 66, 67, 68, 69, 70,
71, 72, 73, 74, 75, 76, 77, 87, 88, 89, 90, 91, 92, 93, 94, 95, 104, 105, 106

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 006) 78, 79, 80, 81, 82,
83, 84, 85, 86, 96, 97, 98, 99, 100, 101, 102, 103

were read on this motion to/for DISMISSAL

Upon the foregoing documents and after hearing oral argument, based on the
reasons stated in the record of oral argument before this Court on December 12,
2018 ("December 12, 2018 Transcript") and for the reasons stated herein the
petition is dismissed:

BACKGROUND

Petitioner Shannon Contracting is litigating an arbitration with Respondents Equinox Fitness 92nd Street Inc., et al., regarding alleged construction defects created during the construction of an Equinox Fitness club located at 205 East 92nd Street, NY, NY. The hearing in this arbitration is scheduled for April 8-12, 2019.

Pursuant to CPLR 2308 (a), 3102 (c) and 7505, Petitioner seeks documents and depositions from six non-parties to the arbitration and this petition (the “non-parties”) that Petitioner states were either sub-contractors, manufacturers and providers on the underlying 92nd Street construction project that is the subject of the arbitration. The six non-parties are:

1. United Stone and Tile, LLC (“United Stone”);
2. United Specialty Insurance Company (“USIC”)
3. Village Plumbing & Heating, Inc (“Village Plumbing”)
4. Taj Marble & Stone, Inc. (“Taj Marble”)
5. Lactcrete International, Inc. (“Lactcrete”)
6. Nemo Tile Company (“Nemo”)

Although neither parties to this petition or to the arbitration, some of the above six entities are parties to a declaratory judgment action titled *Shannon Contracting v United Stone & Tile, LLC*, No. 657456/2017 (“DJ Action”). The RJI in the DJ Action was filed on October 10, 2018, and a preliminary conference has not yet been scheduled.

The six non-parties move to intervene and dismiss arguing that Petitioner has not met the burden for obtaining disclosure pursuant to CPLR 3102 (c) and that Petitioner is just trying to “short circuit” discovery in the DJ Action.

DISCUSSION

As a general rule, court-ordered disclosure in aid of an arbitration is available only upon a showing of “extraordinary circumstances.” (*Application of Moock*, 99 AD2d 1003, 1004 [1st Dept 1984].) The rationale is that since the parties have chosen an arbitral, rather than judicial, tribunal for their case, they should ordinarily seek their disclosure before the arbitrators. (*See e.g. Hooper v Motor Veh. Acc. Indem. Corp.*, 42 Misc 2d 446, 447 [Sup Ct, NY County 1963] [Schweitzer, J.] [“The draftsmen of the new procedural statute and rules were

aware of the *Katz* decision, and implicitly endorsed it, noting that ‘The matter of disclosure is better handled directly between the parties in the arbitration rather than through resort to the courts.’”].)

However, when parties to the arbitration have stipulated among themselves to the scope of discovery, courts have been more inclined to grant orders requiring the agreed-upon discovery. This situation often comes into play when the parties mutually seek discovery from a non-party who possesses information critical to their dispute. (*See e.g. In re ACE Am. Ins. Co.*, 6 Misc 3d 1005(A) [Sup Ct, NY County 2004] [Abdus-Salaam, J.] [denying motion to quash by non-party on ground that non-party has not shown that it will not “suffer unreasonable annoyance or expense by appearing for depositions and also testifying at the arbitration proceeding]; *Textron, Inc. v Unisys Corp.*, 138 Misc 2d 124, 126 [Sup Ct, NY County 1987] [holding that where arbitration parties agree to the sought-after discovery of the non-party, “the party seeking the non-party witness need only show a legitimate basis for the requested examination”]; *cf. Sigmond v Bd. of Managers of Parc Vendome Condominium*, 99 AD3d 554 [1st Dept 2012] [“The court properly quashed the subpoenas served by respondent on nonparty Bright Horizons because the parties did not stipulate to conduct discovery of Bright Horizons”].)

Here, Petitioner has not provided any proof that the requested non-party discovery is sought by all parties to the arbitration and has been stipulated to. Rather, at oral argument, counsel for Equinox Respondents stated that they neither opposed nor supported the request for the discovery, and, at this point, the Equinox Respondents simply wanted to move forward with the arbitration.

As such, the question is whether Petitioner has shown extraordinary circumstances to merit this Court ordering non-party discovery pursuant to the underlying arbitration. Petitioner has shown no such extraordinary circumstances. That Petitioner wants certain discovery that it may have been entitled to in a judicial forum does not constitute an extraordinary circumstance.

In addition, traditionally an arbitration party seeks to obtain court-ordered discovery *after* attempting to obtain such via subpoena pursuant to the arbitration, and the target of the subpoena has refused to provide the discovery. (*Travelers Indem. Co. v United Diagnostic Imaging, P.C.*, 73 AD3d 791, 792 [2d Dept 2010] [dismissing petition and stating that “petitioner can potentially obtain the requested disclosure in the context of those [arbitration] proceedings” and “[t]he first step is to serve the subpoena, and then the subpoenaed party can move to quash before the

arbitrator”].) Here, however, Petitioner has made no attempt to obtain discovery through the arbitration, and none of the non-parties have been served with subpoenas. As such, the petition is premature and there is no actual controversy for this Court to adjudicate—rather, this petition has been brought in the expectation that there will be a controversy.¹

Accordingly, the petition is dismissed.

CONCLUSION

Accordingly, for the forgoing reasons and for those stated in the December 12, 2018 Transcript, it is

ORDERED and ADJUDGED that the petition is dismissed, and the Clerk is directed to enter judgment accordingly; and it is

ORDERED that the motions to intervene and dismiss (Seq. 002-006) are deemed academic; and it is further

ORDERED that non-party intervenor United Specialty Insurance Company shall purchase a copy of the December 12, 2018 Transcript and serve a copy of this short form order together with the December 12, 2018 Transcript with order notice upon entry upon the Clerk of the Court within thirty (30) days of receiving the December 12, 2018 Transcript; and it is further

ORDERED that the instant short form order, together with the December 12, 2018 Transcript, constitutes the decision, order and judgment of this Court.

12/12/2018
DATE

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION

APPLICATION: GRANTED DENIED GRANTED IN PART OTHER

CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE

Robert D. Kalish
HON. ROBERT D. KALISH
J.S.C.

¹ While it is true that a refusal to respond to an arbitration subpoena does not immediately expose the subpoenaed party to contempt—as a judicial subpoena does—this is not a reason to preemptively involve this Court prior to the subpoena even being served. (See generally *Reuters Ltd. v Dow Jones Telerate, Inc.*, 231 AD2d 337, 341 [1st Dept 1997].)