SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

----------X

J.T. MAGEN & COMPANY INC. (COUNTERCLAIM-DEFENDANT),

Plaintiff,

- v -

NISSAN NORTH AMERICA, INC.,GEORGETOWN ELEVENTH AVENUE OWNERS, LLC (COUNTERCLAIM PLAINTIFF) (CROSSCLAIM-PLAINTIFF), PHILADELPHIA INDEMNITY INSURANCE COMPANY, GARY FLOM, VEN NILVA,

Defendants.

----------X

INDEX NO. 160497/2017

MOTION DATE 02/18/2020

MOTION SEQ. NO. 007

DECISION + ORDER ON MOTION

NISSAN NORTH AMERICA, INC.

Plaintiff,

-against-

ACIM NY, LLC, ALIM MY, LLC

Defendant.

----------X

Third-Party
Index No. 596017/2018

GEORGETOWN ELEVENTH AVENUE OWNERS, LLC (COUNTERCLAIM PLAINTIFF) (CROSSCLAIM-PLAINTIFF)

Plaintiff,

-against-

MISTRAL ARCHITECTURAL METAL & GLASS, INC., F.R.P. SHEET METAL CONTRACTING CORP.

Defendants.

----------X

Second Third-Party
Index No. 596014/2018

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 007) 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 482, 483, 484, 485, 486, 487, 488, 489, 499, 500

were read on this motion for PROTECTIVE ORDER.

This case stems from a construction project to renovate automobile dealerships at 787 Eleventh Avenue in Manhattan (the "Project"). Plaintiff / Counterclaim Defendant J.T. Magen & Company Inc. ("J.T. Magen"), a construction company, brought this action to foreclose on a mechanic's lien for work that it allegedly performed on the premises. But Defendant / Counterclaim Plaintiff Georgetown Eleventh Avenue Owners, LLC ("Georgetown"), which owned the premises and leased the space to tenants, questions the validity of J.T. Magen's mechanic's lien. Among other things, Georgetown alleges that J.T. Magen willfully exaggerated the lien amount and conspired with one of Georgetown's tenants, BICOM, to defraud Georgetown of millions of dollars by submitting knowingly false documentation about the construction work. On December 11, 2019, the Court denied J.T. Magen's motion for summary judgment, identifying numerous fact issues surrounding J.T. Magen's claims and Defendants' various affirmative defenses and counterclaims (*see* NYSCEF 464). Discovery is ongoing.

Now, as part of discovery, J.T. Magen seeks to depose Adam Flatto, the President and CEO of The Georgetown Company, LLC ("TGC"), an affiliate of Georgetown (NYSCEF 471 ¶¶1, 5 [Flatto Aff.]). Georgetown moves for a protective order, arguing that Mr. Flatto was not involved in the day-to-day business of the Project, and that taking his deposition, as an "apex witness," amounts to little more than harassment (*see generally* NYSCEF 480 [Georgetown Mem. of Law]). In response, J.T. Magen points to dozens of Project emails obtained in discovery that copy or reference Mr. Flatto, in addition to Mr. Flatto's presence at multiple Project meetings, his signature on key documents, and his discussions with another key individual.

For the reasons set forth below, Georgetown's motion is denied.

DISCUSSION

The CPLR instructs "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by . . . a party, [. . .]." And "[t]he words, 'material and necessary', are . . . to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial," so "[t]he test is one of usefulness and reason" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968] [citation omitted]). "This statute embodies the policy determination that liberal discovery encourages fair and effective resolution of disputes on the merits, minimizing the possibility for ambush and unfair surprise" (*Spectrum Sys. Intern. Corp. v Chem. Bank*, 78 NY2d 371, 376 [1991]).

In order to "prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person," however, the Court may "make a protective order denying, limiting, conditioning or regulating the use of any disclosure device" (CPLR 3103[a]). To that end, senior corporate executives with no discernible personal involvement in a dispute, other than by virtue of heading the corporation named in the lawsuit, should not be deposed absent a showing that he or she "uniquely possesses relevant information that renders his [or her] deposition necessary" *Rosenhaus Real Estate, LLC v S.A.C. Capital Mgmt., Inc.*, 100 AD3d 512, 512–13 [1st Dept. 2012] [granting protective order for CEO of hedge fund]; *see Boutique Fabrice, Inc. v Bergdorf Goodman, Inc.*, 129 AD2d 529, 530 [1st Dept 1987] [CEO of Bergdorf Goodman]; *Broadband Commc'ns Inc. v Home Box Office, Inc.*, 157 AD2d 479, 480 [1st Dept. 1990] [CEO of HBO]).

At the same time, high-ranking officials are "not exempt . . . from a deposition based solely on their title or position in a company or organization . . . and, because principles relating

to apex witness[es] are in tension with the broad availability of discovery, it is important to excuse a witness from giving testimony only in compelling circumstances" (*Alaverdi v Bui*, No. 159549/2017, 2019 WL 5680390, at *3 [Sup Ct NY County 2019]) [citing *Chevron Corp v Donziger*, 11 Civ.0691, 2013 WL 1896932 [SDNY 2013]; *see Alexopoulos v Metro. Transp. Auth.*, 37 AD3d 232, 233 [1st Dept. 2007] [granting motion to compel depositions of a Transit Authority director and vice president]; *see also Naftchi v New York Univ. Med. Ctr.*, 172 FRD 130, 132 [SDNY 1997] [noting, in federal context, that "it is exceedingly difficult to demonstrate an appropriate basis for an order barring the taking of a deposition . . . [n]or, in ordinary circumstances, does it matter that the proposed witness is a busy person or professes lack of knowledge of the matters at issue, as the party seeking the discovery is entitled to test the asserted lack of knowledge"]).

Here, J.T. Magen has made a sufficient showing that Mr. Flatto uniquely possesses at least some relevant information pertaining to critical fact disputes in this case. For context, one important fact issue concerns the process through which Georgetown released money to tenants, like BICOM, to reimburse them for expenses incurred in renovating the car dealerships. To receive this "tenant improvement allowance" ("TIA") from Georgetown, BICOM needed to meet certain conditions, including the submission of an unconditional lien waiver purportedly verifying that J.T. Magen was fully paid the amount reflected in the lien waiver. Georgetown alleges that J.T. Magen conspired with BICOM to defraud Georgetown by submitting false lien waivers and other documents, thus inducing Georgetown to release TIA money to which BICOM and J.T. Magen were not entitled (*see* NYSCEF 401 [Georgetown Opp. to S.J.]). J.T. Magen, for its part, contends that "Georgetown knew that [J.T. Magen] had not been paid the full amount reflected in the lien waiver" and therefore could not have justifiably relied on it to release TIA

money (NYSCEF 436 at 3 [J.T. Magen Reply Mem. of Law in Supp. of S.J.]). As the Court noted in denying J.T. Magen's motion for summary judgment, the TIA process in place for the Project is one of several issues on which the factual record warrants further development (NYSCEF 464 at 67).

And that is where Mr. Flatto enters the picture: although he delegated day-to-day supervision of the Project to subordinates (NYSCEF 471 ¶9 [Flatto Aff.]), discovery to date suggests that Mr. Flatto maintained some personal involvement with the TIA process and other tenant matters throughout. Mr. Flatto appears in, or was referred to, on dozens of emails concerning the Project between December 2015 and March 2017 (*see* NYSCEF 487 [Tabibi Aff. Ex. E]). These emails include discussions about the TIA and specific requisitions; direct exchanges between Mr. Flatto and Gary Flom, BICOM's principal, about "a possible partnership"; and information from Georgetown personnel and others about the progress of the Project (*id.*). Further, Mr. Flatto attended Project meetings, and was "update[d] . . . regularly on various matters, not just related to the BICOM project, but the entire project from [Georgetown's] financing to tenant inquiries, to the status of TI payments" (NYSCEF 484 at 106-107 [Jonathan Schmerin Deposition Tr.]). Mr. Flatto was also the signatory on Georgetown's lease with BICOM (NYSCEF 483). Moreover, for at least some aspects of the Project, Mr. Flatto may be in unique possession of information, including his direct communications with Mr. Flom and to the extent he can testify about events that his subordinates could not recall at their own depositions.

Granted, as a CEO in charge of shepherding multiple projects at multiple sites, Mr. Flatto's involvement in this particular Project may have been limited. But clearly, he was involved. And that separates this case from the line of other cases, cited by Georgetown, in

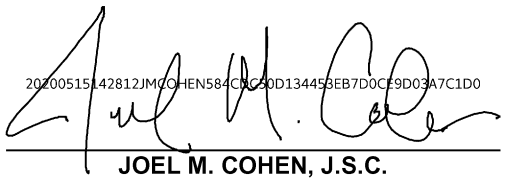
which courts have shielded high-ranking officials whose involvement with a particular dispute was undisputedly speculative, tangential, or non-existent (*see Broadband Commc'ns Inc. v Home Box Office, Inc.*, 157 AD2d 479, 480 [1st Dept. 1990] [granting protective order where CEO "denied any . . . involvement" with relevant agreement and plaintiff failed to show that executive "participated materially in the negotiation of, or the decision to terminate, the [relevant] agreement"]; *Rosenhaus Real Estate, LLC v S.A.C. Capital Mgmt., Inc.*, 100 AD3d 512, 512–13 [1st Dept. 2012] [CEO's "lack of involvement in the underlying transaction is undisputed, and plaintiff's assertion that he possesses relevant information is entirely speculative"]; *Boutique Fabrice, Inc. v Bergdorf Goodman, Inc.*, 129 AD2d 529, 530 [1st Dept. 1987] ["Plaintiffs have made no attempt to rebut the showing made in [executive's] affidavit . . . that he had absolutely no connection whatever with the events germane to this lawsuit."]; *Wo Yee Hing Realty, Corp. v Stern*, 74 AD3d 469, 469–70 [1st Dept. 2010] [blocking deposition of one of three corporate principals where other two principals had testified that he "was not involved in the transaction"]; *Saieh by Saieh v Demetro*, 201 AD2d 477, 477 [2d Dept. 1994] [denying motion to compel deposition of high-ranking official because movant "failed to establish that [the official] had *any personal knowledge* of the information sought"] [emphasis added]).

In sum, J.T. Magen is entitled to test, with evidence of Mr. Flatto's communications in hand, Mr. Flatto's assertion that he possesses "no unique, non-duplicative knowledge relevant to the claims or defenses in this action" (NYSCEF 471 ¶12).

Therefore, it is:

ORDERED that Georgetown's motion for a protective order is DENIED.

This constitutes the Decision and Order of the Court.



5/15/2020
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE