

**Encalada v CPS1 Realty LP**

2014 NY Slip Op 31475(U)

June 5, 2014

Sup Ct, New York County

Docket Number: 104782/2007

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

BARBARA JAFFE

PRESENT: \_\_\_\_\_ J.S.C.  
Justice

PART 12

Index Number : 104782/2007  
ENCALADA, ANGEL  
vs.  
CPS 1 REALTY  
SEQUENCE NUMBER : 008  
QUASH SUBPOENA, FIX CONDITIONS

INDEX NO. 104782/07  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 008

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for Quash Subpoena

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s) \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s) \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ | No(s) \_\_\_\_\_

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

DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER

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

FILED

JUN 10 2014

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 6/5/14

\_\_\_\_\_, J.S.C.

BARBARA JAFFE

- 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 : IAS PART 12

-----X  
ANGEL ENCALADA and MARTA ENCALADA,

Plaintiffs,

- against -

Index No. 104782/2007

Mot. seq. no. 008

**DECISION AND ORDER**

CPS1 REALTY LP, CPS 1 REALTY GP LLC, EL-AD  
PROPERTIES NY LLC, TISHMAN CONSTRUCTION  
CORPORATION OF NEW YORK and R.P. BRENNAN  
GENERAL CONTRACTORS & BUILDERS, INC.,

Defendants.

-----X  
CPS 1 REALTY LP, CPS 1 REALTY GP LLC, EL-AD  
PROPERTIES NY LLC, TISHMAN CONSTRUCTION  
CORPORATION OF NEW YORK and R.P. BRENNAN  
GENERAL CONTRACTORS & BUILDERS, INC.,

Third-Party Plaintiffs,

-against-

**FILED**

JUN 10 2014

COUNTY CLERK'S OFFICE  
NEW YORK

WALDORF HOLDING CORPORATION,

Third-Party Defendant.

-----X  
BARBARA JAFFE, J.:

**For third-party plaintiffs:**

Matthew Stabile, Esq.  
Frenkel Lambert *et al.*  
1 Whitehall St., 20<sup>th</sup> fl.  
New York, NY 10004.  
212-344-3100

**For third-party defendant:**

Howard B. Cohen, Esq.  
The Deiorio Law Group, PLLC  
800 Westchester Ave., Ste. S-608  
Rye Brook, New York 10573  
914-696-5555

Third-party defendant Waldorf moves for an order quashing third-party plaintiffs' subpoena to Sterling National Bank, suppressing and ordering the return of the items provided, and precluding their use. Third-party plaintiffs oppose.

## I. BACKGROUND

By summons and complaint dated January 18, 2007, third-party plaintiffs commenced this action seeking indemnification from Waldorf for losses arising from a personal injury action brought by plaintiffs Angel Encalada and Marta Encalada. (Affirmation of Howard B. Cohen, Esq., dated Oct. 3, 2013 [Cohen Aff.], Exh. C). By order dated May 11, 2009, another justice of this court granted third-party plaintiffs' motion for a default judgment on all of their causes of action, and on September 9, 2011, a judgment of \$479,126.70 was entered against Waldorf. By decision and order dated July 19, 2013, I denied Waldorf's motion to vacate the default judgment. (*Id.*, Exh. D). On August 16, 2013, Waldorf filed a notice of its appeal of my order. (*Id.*).

Thereafter, third-party plaintiffs, without providing notice to Waldorf, served Sterling with what it called an information subpoena, dated August 19, 2013, asking whether Waldorf had provided it with a financial statement, and, if so, "[w]hat assets are disclosed therein (or in the alternative supply a copy thereof)?" By response dated September 12, 2013, Sterling produced a financial statement of Waldorf which includes financial information relating to three nonparties. (Cohen Aff., Exh. A).

## II. CONTENTIONS

Waldorf contends that third-party plaintiffs' request for a document in an information subpoena and their failure to provide notice of it were improper and warrant preclusion of Sterling's response. (Cohen Aff.). Third-party plaintiffs deny any obligation to notify Waldorf of the subpoena, as Waldorf is no longer a party. While they did not specifically request information concerning nonparties, third-party plaintiffs maintain that the information is relevant to the enforcement of the judgment. (Affirmation and Memorandum of Law of Matthew Stabile, Esq.,

[\* 4]  
dated Dec. 23, 2013).

In reply, Waldorf asserts that as it filed a notice of appeal, the action still pends, and thus, pursuant to CPLR 2303, it was entitled to notice of the subpoena. It also maintains that third-party plaintiffs' allegation that it is closely related to the nonparties is too vague to establish relevance of the information relating to the nonparties. (Reply Affirmation, dated Jan. 16, 2014).

### III. ANALYSIS

#### A. Failure to notify Waldorf

Article 52 of the CPLR governs the enforcement of money judgments. Pursuant to CPLR 5223, a judgment creditor seeking to enforce a money judgment may subpoena any person from entry of the judgment up until its satisfaction or vacatur. (*See also* David D. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, CPLR 5223). A judgment creditor may subpoena a person to appear for a deposition (CPLR 5224[a][1]), to produce records (CPLR 5224[a][2] [subpoena *duces tecum*]), and to answer questions (CPLR 5224[a][3] [information subpoena]). Neither CPLR 5223 nor CPLR 5224 requires that the judgment debtor be notified of the subpoena. (*Compare* CPLR 2303[a] ["A copy of any subpoena duces tecum served in a pending civil judicial proceeding shall also be served . . . on each party who has appeared in the civil judicial proceeding so that it is received by such parties promptly after service on the witness and before the production of books, papers or other things."], and CPLR 3120[3] ["The party issuing a subpoena duces tecum as provided hereinabove shall at the same time serve a copy of the subpoena upon all other parties and, within five days of compliance therewith, in whole or in part, give to each party notice that the items produced in response thereto are available for inspection and copying, specifying the time and place thereof."]).

As the discovery provisions of Article 52 govern here, there is no basis for reading into them the notice requirement of CPLR 2303(a). (McKinney's Statutes § 74 ["A court cannot by implication supply in a statute a provision which it is reasonable to suppose the Legislature intended intentionally to omit; and the failure of the Legislature to include a matter within the scope of an act may be construed as an indication that its exclusion was intended."]; 3A West's McKinney's Forms Civil Practice Law and Rules § 8:262 [CPLR 2303(a) inapplicable to postjudgment enforcement]; *Commonwealth of the Northern Mariana Islands v Canadian Imperial Bank of Commerce*, 21 NY3d 55, 62 [2013] ["we cannot read into the statute that which was specifically omitted by the legislature"]; 36 Siegel's Practice Review 2 [Sept 1995] [due process requirements generally apply prejudgment; once defendant has lost on merits, "his day in court is over"]; *cf Goldman & Greenbaum, P.C. v McKay*, Sup Ct, New York County, October 4, 2004, Feinman, J., index No. 0600452/95 [observing that sponsor to amendment of CPLR 2303(a) requiring notice to all parties exempted from it subpoenas issued to enforce judgments; otherwise finding action not pending postjudgment]; *ITT Commercial Finance Corp. v Bailey*, 166 Misc 2d 24, 26-27 [Sup Ct, Chautauqua County 1995] [motion to prohibit defendant from attending postjudgment deposition granted; judgment debtor has no right to intervene in postjudgment discovery]). And, given the notice provisions otherwise set forth in Article 52 (*see e.g.* CPLR 5226-27), the Legislature's failure to include a notice requirement in CPLR 5223 and 5224 indicates that the omission was intentional.

As CPLR 2303(a) has no relevance here, neither does Waldorf's appeal of my July 19, 2013 decision and order. And, whether the subpoena issued here constitutes an information subpoena or a subpoena *duces tecum*, is also irrelevant.

### B. Motion to quash

A motion to quash a subpoena is governed by CPLR 2304. Given New York's policy of liberal discovery, the movant bears the burden of showing that the material responsive to the subpoena is utterly irrelevant, or that the futility of uncovering anything legitimate is inevitable or obvious. (*Kapon v Koch*, \_\_\_ NE3d \_\_\_, 2014 NY Slip Op 02327, \*4-5 [2014], at \*5; *Tech. Multi Sources, S.A. v Stack Global Holdings, Inc.*, 44 AD3d 931, 932 [2d Dept 2007]; *Velez v Hunts Point Multi-Serv. Ctr. Inc.*, 29 AD3d 104, 112 [1<sup>st</sup> Dept 2006]). And, it is contrary to public policy to frustrate efforts to enforce a judgment. (*U.S. Bank Nat. Ass'n v APP Intern. Fin. Co.*, 100 AD3d 179, 183 [1<sup>st</sup> Dept 2012]).

Pursuant to CPLR 5223, a creditor may discover "all matter relevant to the satisfaction of the judgment." The judgment creditor is entitled to broad disclosure from entities with knowledge of the debtor's property. (*Id.*; *Gryphon Dom. VI, LLC v GBR Info. Services, Inc.*, 29 AD3d 392, 393 [1<sup>st</sup> Dept 2006]).

Here, Waldorf makes no showing that the financial statement provided by Sterling in response to the subpoena is irrelevant or not otherwise subject to disclosure. That the statement contains information concerning other entities does not sustain Waldorf's burden. (*See Practice Commentaries, CPLR 5223* [joint income tax filing discoverable even if one spouse is debtor]; *Tech. Multi Sources*, 44 AD3d at 932-33 [motion to quash postjudgment subpoena served on business sharing ownership, management, and address with judgment debtor properly denied]).

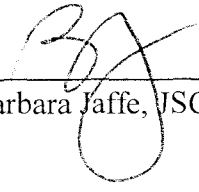
### IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that third party-defendant Waldorf Holding Corporation's motion to quash

\* 7]  
third-party plaintiffs' subpoena dated August 19, 2013 is denied in its entirety.

ENTER:

  
\_\_\_\_\_  
Barbara Jaffe, JSC

DATED: June 5, 2014  
New York, New York

**FILED**

JUN 10 2014

COUNTY CLERK'S OFFICE  
NEW YORK