

Quinn v Dean N. Assoc.
2017 NY Slip Op 31207(U)
June 5, 2017
Supreme Court, New York County
Docket Number: 156264/2015
Judge: Jeffrey K. Oing
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

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PATRICK N. QUINN, Individually and
on behalf of all Class A Limited
Partners of DEAN NORTH ASSOCIATES,

Plaintiffs,

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-against-

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DEAN NORTH ASSOCIATES, SYLVESTER
LEAKS, CENTRAL BROOKLYN URBAN
DEVELOPMENT CORPORATION, ESSEX
REALTY CORP., and SHINDA MANAGEMENT
CORPORATION,

DECISION AND ORDER

Defendants.

-----x
JEFFREY K. OING, J.:

Relief Sought

Defendant Shinda Management Corporation ("Shinda") moves, pursuant to CPLR 2304, to quash and/or vacate the subpoena duces tecum and ad testificandum issued by plaintiff, Patrick N. Quinn, to William Greenspan, Esq. ("Greenspan"), a partner at Shinda's law firm, Baker Greenspan & Bernstein ("BGB"), as well as to Robin Lane Corp. ("Robin Lane"), an entity controlled by Greenspan. Because the subpoena appears to be directed at Greenspan in his capacity as principal of Robin Lane, the Court will refer to Robin Lane and Greenspan, together, as "Greenspan."

Shinda further moves, pursuant to CPLR 3101(a)(4), to quash and/or vacate said subpoena on the ground that it is facially defective and, pursuant to CPLR 3103(a), for a protective order denying and/or preventing plaintiff or any party from taking the

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non-party deposition of Greenspan on the ground that the subpoena is designed to cause unreasonable annoyance, expense, embarrassment or other prejudice.

Background

Defendant Dean North Associates, a limited partnership, was formed for the purpose of acquiring and operating a residential property located at 1061-67 Dean Street, Brooklyn, New York (the "Property") (Compl., ¶ 9).

Plaintiff alleges that on or about December 30, 1983 he was admitted as a Class A Limited Partner in Dean North Associates with an ownership of a 9.89% interest (subsequently increased to a 9.9% interest), but that since his admission Dean North Associates' general partners -- defendants Sylvester Leaks, Central Brooklyn Urban Development Corp. ("CBUDC"), and Essex Realty Corp. ("Essex Realty") -- and defendant Shinda have: (1) wrongfully caused the transfer of profits allocable to plaintiff's 9.9% interest in Dean North Associates to themselves and/or their affiliates; and (2) refused to provide plaintiff with financial reports reflecting the operations of Dean North Associates or with any tax reporting forms reflecting the profits and/or losses attributable to plaintiff's interest in Dean North Associates (Compl., ¶¶ 13, 20-21, 30-31).

In his complaint, plaintiff seeks, inter alia, the appointment of a receiver for ^{3 of 15} Dean North Associates; an

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accounting of Dean North Associates' assets; the sale of Dean North Associates' assets, including the Property; the dissolution of Dean North Associates; and a judgment for the wrongful conversion of profits allocable to plaintiff's interest in Dean North Associates (Compl., ¶ 44).

Previously, in a consolidated Decision and Order dated November 2, 2016, this Court: (1) denied plaintiff's motion for partial summary judgment; (2) held as moot plaintiff's request for an Order directing defendants to produce state and federal tax forms; (3) denied plaintiff's motion to appoint a receiver; and (4) granted defendant Shinda's motion to amend its answer (NYSCEF Doc. No. 90).

Motion to Quash/Vacate

This motion to quash relates to a 2004 loan, entitled the "Promissory Note & Agreement," dated February 26, 2004 (the "Note"), made between Leaks, Robin Lane and Dean North Apartments, a limited partnership listed as owning the apartments located at 1061 Dean Street, Brooklyn, NY (NYSCEF Doc. No. 97). During discovery, counsel for defendants Dean North Associates, Leaks and CBUDC exchanged with plaintiff a copy of the Note, which, consisted of a loan of \$18,524.71, made by Robin Lane to Leaks in his individual capacity and in his capacity as a "General Partner" of Dean North Apartments (Id.). Greenspan signed the Note on behalf of Robin Lane in his capacity as its

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president. The stated reason for the loan was Dean North Apartments' need for "an infusion of cash in the amount of \$18,524.71" (Id.).

The Note was signed only by Greenspan and Leaks, however Shinda, who had recently entered into a ten-year "Management Agreement" with Dean North Apartments, was also listed as agreeing to the loan (Id.). The relevant terms of the loan are as follows: (1) Dean North Apartments agreed to carry the infusion of the loan for Leaks in his capacity as its general partner; (2) Leaks agreed to pay the total sum of the loan, plus 6% interest, to Robin Lane which became due one year from February 9, 2004; and (3) in the event of Leaks' default on the loan Leaks agreed to sell "all of his right, title and interest as General Partner" of Dean North Apartments to Robin Lane for the sum of \$100,000 (Id., § 2a).

Through his subpoena, plaintiff seeks all documents relating to the Note, all other documents listed on an affixed "Schedule A," and Greenspan's deposition (the "subpoena") (NYSCEF Doc. No. 96). A portion of the documents plaintiff seeks are those relating to "Dean," defined by plaintiff as "[D]ean North Associates, a New York limited partnership, including its general partners, also known as Dean North Apartments"¹ (Id., p. 5, ¶

¹In accordance with this definition, plaintiff's counsel appears to use Dean North Associates interchangeably with Dean North Apartments and, as a result, does not distinguish the two

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11). The documents requested include, among others, "[a]ll communications, including emails, instant messages, letters and/or notes by, between or among [Greenspan, Robin Lane or any of their Agents], on the one hand, and any one or more of the [d]efendants on the other hand, relating to ... :"
1) Dean; 2) the 2004 Management Agreement with Shinda; 3) the HUD Certification; 4) any business between Greenspan or Robin Lane and any of the defendants; 5) the operation, management or valuation of the Property; 6) the admission and identities of Class A Limited Partners of Dean; 7) the identity, withdrawal and/or admission of General Partners of Dean; 9) the Certificate of Limited partnership and its amended versions; 10) the Mortgage; 11) distributions of profits from Dean to its partners; and 12) tax reporting forms (Id., pp. 6-8).

Contentions

On its motion to quash, Shinda argues the Note is irrelevant to the case at bar, and that Greenspan has little memory of and no documentation for this 2004 loan (Bernstein Affirm., ¶ 29). Shinda asserts, and Greenspan affirms, that both Robin Lane and Greenspan destroyed, in the normal course of business, any documentation regarding the loan (Id., ¶ 30; Greenspan Affirm., ¶¶ 5-6). Further, Shinda argues the loan is irrelevant as it was made to Dean North Apartments, not a named defendant in this

entities in his motion papers.

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action, whose relationship to defendant Dean North Associates is unknown to Shinda's counsel (Bernstein Affirm., ¶ 30). Shinda concludes that plaintiff's actions in subpoenaing Greenspan constitute a "blatant fishing expedition" and that the information plaintiff seeks is too broad, resulting in a potential breach of attorney-client privilege (Bernstein Affirm., ¶¶ 2, 45-52). In his supporting affirmation, Greenspan concurs, stating: "[t]he only knowledge I have of the underlying transactions involving plaintiff Quinn and Dean North Associates is information I have learned in this litigation as counsel for my client, Shinda Management. That information is protected by attorney-client privilege" (Greenspan Affirm., ¶ 10).

Shinda also argues that plaintiff is attempting to deprive it of its choice of counsel as it claims that plaintiff will soon move to disqualify BGB as Shinda's counsel on the basis of Greenspan being a necessary witness. This attempt, Shinda argues, is against public policy, as courts recognize that using a subpoena on an opposing party's counsel as a litigation tactic creates a chilling effect on communications between attorney and client. Lastly, Shinda argues that plaintiff's subpoena is facially defective as it does not contain the mandatory heightened notice requirement for third-party witnesses pursuant to CPLR 3101(a)(4).

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In opposition, plaintiff contends that he is entitled to review Dean North Associates' books and records and as a result, may review loans involving Leaks, a former general partner of Dean North Associates (Biancone Affirm., ¶ 14). Plaintiff argues that the Robin Lane transaction falls within the scope of the complaint's underlying allegations of mismanagement and withholding of benefits to plaintiff, and that because the loan included a contingent right to acquire an interest in Dean North Associates, it is relevant to this case where a partnership interest is disputed in an entity that owns/operates the Property. As a result, plaintiff argues he is entitled to "probe Greenspan's memory" as to this transaction and any other transactions involving Dean North Associates and/or Leaks (Id., ¶¶ 15-16).

Plaintiff also argues that Greenspan waived his right to bring non-substantive objections to the subpoena, because Bernstein, who was authorized to accept service of the subpoena, failed to assert in a timely fashion that the subpoena is facially defective for lack of the requisite "circumstances and reasons" provision. Regardless, plaintiff contends the subpoena is not facially defective because, at the time of its service, Greenspan was already aware of -- and did not need to be notified of -- the circumstances surrounding this matter.

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Discussion

Timeliness of the Objections

Shinda waived its right to object to the facial deficiency of the subpoena because it did not timely object on that basis before making the instant motion to quash. Pursuant to CPLR 3122(a)(1), if a party or non-party on whom the subpoena is served has an objection he or she must inform the subpoenaing party with "[r]easonable particularity the reasons for each objection" prior to making a motion to the Court (CPLR 3122[a]; Rubino v 330 Madison Co., LLC, 39 Misc 3d 450, 452-453 [Sup Ct, NY County 2013] [internal quotations omitted]).

Here, although Shinda's counsel requested plaintiff withdraw the subpoena prior to making this motion, he did so only on the basis of attorney-client privilege, and/or attorney work product, and/or documents created in contemplation of litigation (NYSCEF Doc. No. 107). To the extent that Shinda's counsel advised plaintiff's counsel that, "[t]he balance of the subpoena will be addressed in the motion to quash," he failed to state with "reasonable particularity" any form of alleged facial defect prior to making the instant motion (Id.). In any event, even if the objections were timely and not waived, for the reasons that follow, the supposed facial deficiency would still be insufficient to quash this subpoena.

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Notice/Facial Deficiency

CPLR 3101(a)(4) allows parties to seek discovery from non-parties of all material and necessary information by service of a subpoena that sufficiently states, on its face or in an accompanying notice, the "circumstances or reasons" for the requested disclosure (Matter of Kapon v Koch, 23 NY3d 32, 36 [2014]). This heightened notice requirement is mandated "[b]ecause a non-party is likely to be less cognizant of the issues in pending litigation than a party" (Id.). It is "[m]eant to apprise a stranger to the litigation the 'circumstances or reasons' why the requested disclosure was sought or required" (Id. at 39). Here, although Greenspan is technically a non-party, the heightened notice requirement for his subpoena is not warranted. The record demonstrates that the information set forth in the subpoena provided sufficient notice to Greenspan to apprise him of the "circumstances or reasons" why the requested disclosure is being sought. Plainly, the subpoena served upon Greenspan demonstrates that "[t]he notice served the function intended by the legislature: it gave sufficient information to challenge the subpoena[] on a motion to quash" (Matter of Kapon, 23 NY3d 32, 39 [2014]). Here, sufficient notice is evidenced by the fact that counsel for Shinda was able to raise its objections of privilege and/or work-product prior to making this motion. In any event, Greenspan, a lawyer at ^{10 of 15} defendant's law firm, is no

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"stranger" to the disputed transactions that are the subject matter of this litigation.

Relevancy

Where the Court finds a subpoena to be facially adequate, on a motion to quash a subpoena, the moving party then bears the burden of establishing that the discovery sought is "utterly irrelevant" to the action or that the "futility of the process to uncover anything legitimate is inevitable or obvious" (Kapon, supra, 23 NY3d at 38-39 [internal quotations and citations omitted]). Only if the moving party meets this burden does the burden shift to the subpoenaing party to establish that the information sought is "material and necessary," which the Court of Appeals has defined as "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity" (Id. at 38 [internal quotations and citations omitted]). Thus, if the material sought is relevant to the prosecution or defense of an action, the subpoenaed non-party witness must provide such information (Id.). The passage of time and a witness's sworn denial of any relevant knowledge is not sufficient to establish that the discovery sought is "utterly irrelevant" or that the "futility of the process to uncover anything legitimate is inevitable or obvious" (Menkes v Beth Abraham Health Servs., 120 AD3d 408, 409 [1st Dept

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2014]). The standard for relevancy under the CPLR is a broad one (CPLR 3101).

To satisfy its burden, as the moving party challenging the subpoena, Shinda relies on the fact that the borrower of the Note was Dean North Apartments, a non-party in this case. Shinda's lack of knowledge regarding the connection between defendant Dean North Associates and non-party Dean North Apartments, however, is not sufficient to establish that the subpoena is utterly irrelevant. The record demonstrates that there is clearly a relationship between the two limited partnerships evidenced by the fact that: (1) Leaks was a general partner in both entities; (2) Shinda was the management company for both partnerships; and (3) both entities appear to, or have in the past, owned and/or operated the entirety of the Property.² Thus, there may be a nexus between the 2004 Note and the Property, which plaintiff alleges to have an ownership interest in by virtue of his partnership in Dean North Associates. As noted, the passage of time from the time of the loan transaction and the fact that Greenspan and Robin Lane lack any documentation for, or memory

² Defendant Dean North Associates operated the apartments at 1061-67 Dean Street, Brooklyn, New York. Dean North Apartments is listed in the 2004 loan agreement as operating the apartments at 1061 Dean Street, Brooklyn, NY. As of 2011, Dean North Apartments is listed as operating the apartments at 1061-1067 Dean Street, Brooklyn, NY (NYSCEF Doc. No. 53).

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of, the loan is not sufficient to establish that the loan is utterly irrelevant. Plaintiff is entitled to test Greenspan's claimed lack of memory under oath. Under these circumstances, Shinda has not met its burden of demonstrating that the information sought regarding the 2004 loan is utterly irrelevant.

Attorney-Client Privilege

There are limitations, however, as to what relevant material is discoverable, and under CPLR 3101(b) privileged material, including material protected under the attorney-client privilege, is absolutely immune from disclosure (Matter of Stenovich v Wachtell, Lipton, Rosen & Katz, 195 Misc 2d 99, 104 [Sup Ct, NY County 2003]; see Spectrum Sys. Intl. Corp. v Chemical Bank, 78 NY2d 371 [1991]). "The oldest evidentiary privilege recognized at common law, the attorney-client privilege fosters the open dialogue between lawyer and client that is deemed essential to effective representation" (NAMA Holdings, LLC v Greenberg Traurig LLP, 133 AD3d 46, 52 [1st Dept 2015] [internal quotations and citations omitted]). The privilege, codified in CPLR 4503(a), ensures that persons seeking legal advice may confide fully and freely in their attorney, knowing that their confidences will not be exposed (Id.). As a result, to determine if material is protected pursuant to the attorney-client privilege, "[t]he critical inquiry is whether, viewing a lawyer's communication in

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its full content and context, it was made in order to render legal advice or services to the client" (Spectrum Sys., supra, 78 NY2d at 379). Attorney-client privilege is not limitless and it should "[n]ot be used as a device to shield discoverable information" (Id.).

A subpoena duces tecum may be vacated on the basis of attorney client or work product privilege in cases where the documents sought are deemed to be protected (Matter of Empire Wine & Spirits LLC v Colon, 145 AD3d 1157 [3d Dept 2016]). In that regard, if Greenspan asserts this privilege, this Court directs that he produce to plaintiff a privilege log for such documents. Afterwards, plaintiff may, if it is so advised, seek production of these purportedly privileged documents by way of a motion. When testimony is sought pursuant to a subpoena ad testificandum, however, "[a] claim of privilege cannot be asserted until the witness appears before the requisite tribunal and is presented with a question that implicates protected information" (Id. at 1158, citing Matter of Holmes v Winter, 22 NY3d 300, 319 [2013] [internal quotation marks and citations omitted]). If at the time of Greenspan's deposition he believes a question requires an answer that touches upon the attorney-client privilege, he may object accordingly.

Accordingly, it is hereby

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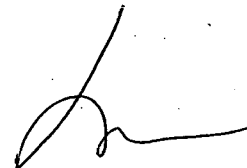
ORDERED that defendant Shinda Management Corporation's motion, pursuant to CPLR 2304, to quash and/or vacate the subpoena duces tecum and ad testificandum served upon William Greenspan, Esq. and Robin Lane Corp. is denied; and it is further

ORDERED that defendant Shinda Management Corporation's motion, pursuant to CPLR 3101(a)(4), to quash and/or vacate said subpoena on the grounds that it is facially defective and, pursuant to CPLR 3103(a), for a protective order denying and/or preventing plaintiff or any party from taking the non-party deposition of Greenspan on the ground that the subpoena is designed to cause unreasonable annoyance, expense, embarrassment and other prejudice, is denied; and it is further

ORDERED that William Greenspan, Esq., and Robin Lane Corporation comply with the subpoena duces tecum and ad testificandum according to mutually agreed upon dates and times.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 6/5/17



HON. JEFFREY K. OING, J.S.C.