

Sell It Social LLC v IGS Realty Co., LP
2018 NY Slip Op 30891(U)
May 4, 2018
Supreme Court, New York County
Docket Number: 652775/2017
Judge: Gerald Lebovits
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7

-----X
SELL IT SOCIAL LLC,

Plaintiff,

-against-

Index No.: 652775/2017

DECISION/ORDER

Motion Seq. No. 001

IGS REALTY CO.,

Defendant.

-----X

IGS REALTY CO., LP

(Sued incorrectly herein as IGS Realty Co.),

Defendant/Third-Party Plaintiff,

-against-

PETER STILER and HEATH WOLFSON,

Third-Party Defendants.

-----X

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing the motion of defendant/third-party plaintiff IGS Realty Co. for an order quashing a subpoena duces tecum or, in the alternative, granting a protective order, and imposing sanctions, pursuant to 22 NYCRR 130-1.1 (a) - (d).

Papers	Numbered
Defendant's Notice of Motion and Affirmation in Support.....	19, 20
Plaintiff's Affirmation and Brief in Opposition.....	29, 30
Defendant's Affirmation in Reply.....	38

Law Office of Gregory Sheindlin, PLLC, New York (Gregory Sheindlin, Esq.), for defendant.
Archer & Greiner, PC, New York (Michael S. Horn, Esq.), for plaintiff and third-party defendants.

Gerald Lebovits, J.:

In this landlord-tenant action for breach of express contract provisions and implied covenants, conversion, fraudulent inducement, unjust enrichment, and waiver, plaintiff Sell It Social LLC, the tenant, alleges that IGS Realty Co., the landlord, intentionally withheld material information regarding the loss of an Industrial and Commercial Incentive Program (ICIP) tax

exemption to prevent plaintiff from exercising its one-time right to terminate the lease. Plaintiff also alleges that IGS Realty unilaterally improperly converted plaintiff's \$37,000 security deposit originally deposited in an escrow account maintained at nonparty Alma Bank. Plaintiff alleges that IGS Realty converted the security deposit to pay additional rent purportedly owed by plaintiff, as the result of the loss of the ICP tax exemption. In the complaint, plaintiff seeks to recover \$37,000, together with prejudgment interest, attorney fees, costs, and expenses.

IGS Realty served an answer with affirmative defenses and counterclaims and impleaded third-party defendants Peter Stiler and Health Wolfson, plaintiff's owners and operators and the personal guarantors of plaintiff's lease obligations. In the counterclaims and third-party action complaint, IGS Realty seeks to recover \$34,137.43 in unpaid rent, together with 1.8% monthly interest accruing from February 20, 2017, and attorney fees, costs, and expenses.

IGS Realty now moves under CPLR 2304 to quash the subpoena duces tecum served by plaintiff on Alma Bank in which plaintiff demands production of bank records relating to IGS Realty's bank and investment accounts, or, in the alternative, under CPLR 3103, for a protective order, on the grounds that the subpoena violates CPLR 3101 (a) (4) because it does not include a statement regarding the circumstances or reasons that such disclosure is required and that the scope of the demand is overbroad.

In opposition, plaintiff and third-party defendants contend that the demanded discovery is necessary to trace the various locations of the subject security deposit funds allegedly improperly withdrawn from the escrow account. They contend that the discovery is also needed to demonstrate that IGS Realty co-mingled the subject funds with its funds in violation of General Obligations Law (GOL) § 7-103; to calculate the amount of tax related to plaintiff's leased space paid by IGS Realty; to demonstrate that plaintiff paid IGS Realty in accordance with the lease terms; and to calculate IGS Realty's damages demanded in the counterclaims.

Under CPLR 3101 (a) (4), a party may obtain discovery from a nonparty upon notice stating the circumstances or reasons such disclosure is sought or required (*Kondratick v Orthodox Church in Am.*, 73 AD3d 708, 709 [2d Dept 2010]). There is "no requirement that the subpoenaing party demonstrate that it cannot obtain the required disclosure from any other source, . . . so long as the disclosure sought is relevant to the prosecution or defense of any action, it must be provided by the nonparty" (*Matter of Kapon v Koch*, 23 NY3d 32, 38 [2014]; CPLR 3101 [a] [4]).

The scope of discovery in New York is broad, and discovery from a non-party should be directed when the party seeking the discovery demonstrates that the disclosure sought is "material and necessary" (CPLR 3101 [a] [4]). Material and necessary information has been defined as information that will "assist preparation for trial by sharpening the issues and reducing delay The test is one of usefulness and reason" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]; *Matter of Kapon*, 23 NY3d at 37-38).

A motion to quash a subpoena on relevancy grounds will be granted upon a showing that the materials sought are utterly irrelevant to the issues raised (*Matter of Kapon*, 23 NY3d at 39; *Musey v 425 E. 86 Apts. Corp.*, 154 AD3d 401, 404 [1st Dept 2017]). The party seeking to quash bears the burden of establishing that the demanded documents are utterly irrelevant to the issues raised in the action (*Velez v Hunts Point Multi-Serv. Ctr., Inc.*, 29 AD3d 104, 112 [1st Dept 2006]).

“It is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims” (*Foster v Herbert Slepoy Corp.*, 74 AD3d 1139, 1140 [2d Dept 2010] [internal quotation marks and citation omitted]).

On February 5, 2018, plaintiff and third-party defendants jointly served on Alma Bank a notice with subpoena duces tecum, dated February 2, 2018, and returnable March 2, 2018. In that subpoena, they demanded that Alma Bank produce “[a]ny and all documents related to any bank accounts, checking accounts, and/or investment accounts held by IGS Realty ... [and] bank account applications, signature cards, bank accounts and/or records related to any escrow money held on behalf of IGS Realty ... from 2010 to present” (subpoena, Schedule “A” [1], [2]). They also demanded that Alma Bank produce “[a]ny and all bank records, statements, applications, signature cards, powers of attorney, checks related to the bank account referenced in” a 2017 Tax Statement annexed to the subpoena (*id.*, Schedule “A” [3]; *see* subpoena, Schedule “A” [4]).

Contrary to IGS Realty’s contention, the subpoena complies with CPLR 3101 (a) (4). The subpoena identifies the lawsuit, and includes a statement that “[t]he documents are being sought in furtherance of the defense and litigation position of the requesting party” (subpoena at 2).

The subpoena also identifies the documents sought with reasonable particularity. The subpoena includes a description of the escrow account and lists the account number. Annexed to the subpoena is an income tax document issued by Alma Bank to IGS Realty listing the account number of the escrow account (*see* Alma Bank 2017 Form 1099-INT: Interest Income).

IGS Realty has failed to demonstrate any unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice would occur, as the result of an order to produce the documents demanded, inasmuch as Alma Bank has not objected to the subpoena (*see Velez v Hunts Point Multi-Serv. Ctr. Inc.*, 29 AD3d at 109-110; CPLR 3103 [a]).

The subpoena is enforceable, in part. Some of the documentation demanded is relevant, material, and necessary, while some of it is not. Plaintiff’s claims arise, in part, out of allegations that IGS Realty converted plaintiff’s security deposit (*see* complaint ¶¶ 23-26). IGS Realty admits that it possesses the subject security deposit funds, that the funds are in the bank account identified by Alma Bank in an income tax document issued to IGS Realty, and states that it has no objection to providing records confirming its possession (*see* Sheindlin affirmation, ¶ 18; Defendant/Third-Party Plaintiff’s Response to Notice to Admit ¶¶ 1, 2; *see also* 2017 Form 1099-

INT: Interest Income). IGS Realty also denies that it withdrew the subject funds from the escrow account (see Defendant/Third-Party Plaintiff's Response to Notice to Admit ¶ 5).

Plaintiff also alleges that IGS Realty improperly co-mingled the escrowed funds with its own funds, in violation of GOL § 7-103 (see complaint ¶¶ 23-26). In relevant part, GOL § 7-103 changes the legal relationship between a landlord and tenant to that of a trustee relationship, and imposes upon the landlord a duty not to co-mingle the security deposit with its own funds (see *Matter of Perfection Tech. Servs. Press [Cherno-Dalecar Realty Corp.]*, 22 AD2d 352, 354 [2d Dept 1965]). Based on these allegations, plaintiff is entitled to documents and information tracing the locations of the subject security deposit funds.

Therefore, the subpoena is proper and enforceable to the extent that plaintiff and third-party defendants seek documents and information directly relating to the opening, maintenance, and closing of the escrow account in which the subject security deposit funds were deposited and held, and to the subsequent transfer, if any, of such funds from the escrow account, beginning on the date that plaintiff paid IGS Realty the subject security deposit to the present.

The motion to quash is granted to the extent that, in the subpoena, plaintiff and third-party defendants seek documents and information outside those parameters, such as IGS Realty's checking and investment account documents. IGS Realty and Alma Bank may redact out irrelevant information from the documents produced.

That branch of the motion for sanctions equal to reasonable legal fees, costs, and disbursements incurred in moving to quash a frivolous subpoena is denied. Conduct may only be found frivolous, and, therefore, sanctionable, where "it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law" (22 NYCRR § 130-1.1 [c] [1]). Although plaintiff's arguments in opposition to the motion were not persuasive, they were not so completely without merit so as to be frivolous, as that word is defined by 22 NYCRR § 130-1.1 (see *Lewis v Stiles*, 158 AD2d 589, 590-591 [2d Dept 1990]).

Accordingly, it is

ORDERED that the motion to quash is granted to the extent that the subpoena demands documents and information unrelated to the security deposit funds paid by plaintiff to defendant and deposited into an escrow account at nonparty Alma Bank, and is otherwise denied; and it is further

ORDERED that the parties are required to appear for a compliance conference on

NYSCEF DOC. NO. 68

RECEIVED NYSCEF: 05/10/2018

May 9, 2018, at 11:00 am, at 60 Centre Street, room 345.

Dated: May 4, 2018


J.S.C.
HON. GERALD LEBOVITS
J.S.C.