

Skole v Wooster Owners, Inc.
2018 NY Slip Op 32821(U)
November 2, 2018
Supreme Court, New York County
Docket Number: 150612/2014
Judge: Kelly A. O'Neill Levy
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KELLY O'NEILL LEVY
JSC

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19

-----X

STACEY SKOLE,

Plaintiff,

- v -

WOOSTER OWNERS, INC. and ORSID REALTY CORP.,

Defendants.

INDEX NO. 150612/2014

MOTION DATE 10/03/2018

MOTION SEQ. NO. 003

DECISION AND ORDER

-----X

ORSID REALTY CORP.,

Third-Party Plaintiff,

- v -

GREAT PACIFIC IRON WORKS d/b/a PATAGONIA,

Third-Party Defendant.

-----X

WOOSTER OWNERS, INC.,

Second Third-Party Plaintiff,

- v -

GREAT PACIFIC IRON WORKS d/b/a PATAGONIA,

Second Third-Party Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 139, 140

were read on this motion to/for QUASH SUBPOENA

HON. KELLY O'NEILL LEVY:

This is an action where the plaintiff alleges that she has suffered hearing loss because of mold exposure. Defendant Orsid Realty Corp. (hereinafter, Orsid) moves, pursuant to CPLR §§ 2304 and 3101, for a protective order to quash: (a) twelve non-party subpoenas duces tecum

served on various contractors who performed work at a co-defendant's premises (hereinafter, the non-party subpoenas) [Non-Party Subpoenas (ex. C to the Ellsayed aff.)], (b) a subpoena ad testificandum served on a former Orsid employee and non-party, Judy Goldstein (hereinafter, the Goldstein subpoena) [Goldstein Subpoena (ex. A to the Ellsayed aff.)], and (c) a supplemental demand for documents and things dated May 15, 2018 (hereinafter, the supplemental demand) [Plaintiff's Post-EBT Notice for Discovery & Inspection (ex. B to the Ellsayed aff.)].

Plaintiff Stacey Skole opposes and cross-moves for an order (a) denying the underlying motion seeking a protective order to quash the non-party subpoenas, the Goldstein subpoena, and the supplemental demand, (b) pursuant to CPLR § 3124, compelling Orsid to respond to plaintiff's May 15, 2018 discovery demands, (c) pursuant to CPLR § 3124, compelling the deposition of Judy Goldstein, (d) pursuant to CPLR §§ 3124, 3126, and 8303-a, sanctioning Orsid's counsel due to counsel's alleged discovery abuses and tampering with non-party witnesses and discovery obligations, and (e) pursuant to CPLR §§ 3124 and 3126, compelling Orsid's counsel to produce all letters sent to non-parties advising them to not comply with the subpoenas and further directing Orsid's counsel to withdraw said letters. Orsid opposes.

BACKGROUND

Plaintiff's allegations pertain to injuries sustained after her continuous toxic exposure while working at the premises located at 101 Wooster Street in Manhattan (hereinafter, the premises), a mixed-use building owned by defendant Wooster Owners, Inc. (hereinafter, Wooster) and managed by Orsid. Plaintiff alleges that she was caused to be exposed to mold and other harmful and dangerous substances and toxins while she was employed by third-party defendant Great Pacific Iron Works d/b/a Patagonia (hereinafter, Patagonia). Patagonia was a

commercial tenant and subleased the first floor and a portion of the basement of the premises.

The adjoining portion of the basement remained under the control of Wooster and Orsid.

Plaintiff alleges that there were various structural and ventilation related defects and conditions, along with allegations pertaining to failure to maintain, repair, and correct harmful and hazardous conditions, all of which caused, created, and contributed mold and other related toxins to exist, to permeate, and to remain at the premises for the period from on or about August 3, 2004, up to and including February 14, 2013. Plaintiff asserts that the defective and harmful conditions included the long-standing leaks within the basement, the ventilation related issues within the basement, or lack thereof, the long-standing obnoxious odors permeating throughout the premises, and the presence of mold within the basement of the premises [Plaintiff tr. (ex. G to the Ellsayed aff.)]. Plaintiff submits authenticated photographs depicting mold on the floor and walls within the basement boiler room [Photographs (ex. H to the Ellsayed aff.)], a mold report conducted by non-party Hygiene Technologies International, Inc., abatement suggestions, and further photographs of the mold [Mold Report and Photographs (ex. I to the Ellsayed aff.)].

The non-party subpoenas were served upon contractors that performed related work within the basement during the period at issue, identified by invoices produced by Orsid [Invoices and Reports (ex. D & E to the Ellsayed aff.)]. Many of the invoices are addressed to non-party Judy Goldstein, a former Orsid employee. The witnesses that Orsid had already produced for depositions had no knowledge or information relevant to the period at issue. Ms. Goldstein is noted as present on a majority of the board meeting minutes, particularly during meetings where issues relating to the structural defects and other related conditions at the premises were discussed and assigned to Ms. Goldstein to handle [Minutes (ex. D to the Ellsayed aff.)]. Orsid's disclosures demonstrate that Ms. Goldstein was responsible for hiring various

contractors to fix, repair, and address complaints and conditions within the basement, including water leaks, boiler steam issues, maintenance, and cleaning related concerns (*id.*).

On May 15, 2018, plaintiff served the non-party subpoenas, the Goldstein subpoena, and the supplemental demand. At a court conference on May 16, 2018, plaintiff requested for the court to direct Orsid to respond to the supplemental demand and further sought the court to direct the non-party deposition of Ms. Goldstein. Orsid's counsel did not object. Accordingly, the court directed the non-party deposition of Ms. Goldstein to be held on June 18, 2018, in accordance with the subpoena served by plaintiff, and further directed Orsid to respond to plaintiff's post-deposition demands within 45 days [May 16, 2018 Order (ex. L to the Ellsayed aff.)]. Ms. Goldstein has not objected to appearing for her deposition.

DISCUSSION

Motion to Quash

A motion to quash a subpoena "should be granted '[o]nly where the futility of the process to uncover anything legitimate is inevitable or obvious' ...or where the information sought is 'utterly irrelevant to any proper inquiry.'" *Kapon v. Koch*, 23 N.Y.3d 32, 35 (2014) (quoting *Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d 327, 331-32 [1988]). The person or entity being subpoenaed bears the burden of establishing that the materials sought are utterly irrelevant. *See Velez v. Hunts Point Multi-Service Center, Inc.*, 29 A.D.3d 104, 112 (1st Dep't 2006) (internal citation omitted).

Orsid asserts that the companies subpoenaed by plaintiff performed work in the residential portion of the building, not in the commercial portion in which plaintiff worked, and none of the companies performed mold testing or any mold-related work. Orsid further asserts that the information sought has already been received in the form of either documentary evidence

regarding the contractors' work, through invoices or through depositions of Orsid employees. Orsid contends that the non-party subpoenas are not limited in time or scope and fail to give the non-parties any notice about the allegations in the complaint or what is being sought. Orsid argues that the Goldstein subpoena is nothing more than a fishing expedition through which plaintiff hopes that some relevant information will be ascertained. Orsid asserts that it has already provided information about each of the projects in the supplemental demand and that none of the contractors listed in the supplemental demand have relevant information.

Plaintiff asserts that the discovery sought is neither irrelevant nor privileged. Plaintiff contends that the work pertaining to defects and hazardous conditions within the basement during the relevant period are of the utmost relevance. Plaintiff further claims that the mold and toxic substances in the air did not make a distinction as to the residential or commercial portion of the building, as air contaminants and toxic conditions can spread throughout a building. Plaintiff argues that Orsid's motion is untimely, as it failed to move within the 20-day deadline mandated by CPLR § 3122, from the date of service of the post-deposition demands or the court conference date. Plaintiff also seeks an order sanctioning counsel for Orsid, due to its discovery abuses and improper tampering with non-party witnesses. Plaintiff presents a May 30, 2018 letter from Orsid's counsel to The Metro Group, Inc. (hereinafter, Metro Group), a non-party, directing Metro Group not to respond to the subpoena served by plaintiff, stating "... your obligation to comply with the subpoena is suspended pending the determination of the motion" [Letter to Metro Group (ex. E to the Ellsayed aff.)]. The instant motion was filed on June 12, 2018, after the date of the letter. Plaintiff's counsel was never served a copy of the letter.

Since the court directed Orsid to respond to plaintiff's post-deposition demands within 45 days of the court conference of May 16, 2018 and despite the 20-day deadline to make such a motion in accordance with CPLR § 3122, the court will consider the motions on their merits.

The information sought in the non-party subpoenas, the Goldstein subpoena, and the supplemental demand are all relevant to this action. Orsid has failed to meet its burden of proof that the discovery sought is utterly irrelevant and the documents and testimony plaintiff seeks are material and necessary to its claims and defenses.

The information sought in the non-party subpoenas are relevant, as it relates to work pertaining to defects and hazardous conditions within the basement, which could spread to any portion of the building. The non-party subpoenas were served upon contractors who performed related work within the basement during the period at issue. The non-party subpoenas were issued to contractors identified by invoices produced by Orsid.

Ms. Goldstein's testimony is also relevant. Ms. Goldstein is noted as present on a majority of the board meeting minutes, particularly during meetings where issues relating to the structural defects and other related conditions at the premises were discussed and assigned to Ms. Goldstein to handle. Orsid's disclosures demonstrate that Ms. Goldstein, the manager of the premises from at least 2003 up to 2011-2012, was responsible for hiring various contractors to fix, repair, and address complaints and conditions within the basement, including water leaks, boiler steam issues, maintenance, and cleaning related concerns.

The information sought in the supplemental demand is relevant, as there is no credible distinction between the residential and commercial portions of the premises, as there is no evidence presented that the alleged mold and toxic substances in the air could make such a distinction.

Thus, the court denies Orsid's motion for a protective order to quash the non-party subpoenas, the Goldstein subpoena, and the supplemental demand and grants the branches of plaintiff's cross-motion seeking to deny Orsid's motion to quash, to compel Orsid's compliance with the non-party subpoenas and supplemental demand, and to compel the deposition of Judy Goldstein.

Cross-Motion for Sanctions

Orsid's letter to Metro Group, dated May 30, 2018, advised Metro Group that Orsid will move to quash the subpoena prior to the deadline referenced in the subpoena. Orsid filed the instant motion on June 12, 2018. Notably, plaintiff's counsel was never served a copy of the letter to Metro Group or any other letter sent by Orsid to the subpoenaed non-party contractors. The court cannot condone Orsid's failure to notify plaintiff's counsel that it sent such a letter to the subpoenaed non-parties. However, this conduct does not rise to the level of a monetary sanction. Orsid's counsel need not produce letters sent to the non-party contractors, as they were directed to answer the non-party subpoenas.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED, that Defendant Orsid Realty Corp.'s motion, pursuant to CPLR §§ 2304 and 3101, for a protective order to quash twelve non-party subpoenas duces tecum served on various contractors who performed work at a co-defendant's premises, a subpoena ad testificandum served on a former Orsid employee, Judy Goldstein, and a supplemental demand for documents and things dated May 15, 2018 is denied; and it is further

ORDERED, that the branch of Plaintiff Stacey Skole's cross-motion for an order denying the underlying motion seeking a protective order is granted; and it is further

ORDERED, that the branch of Plaintiff Stacey Skole's cross-motion for an order, pursuant to CPLR § 3124, compelling Orsid to respond to plaintiff's May 15, 2018 discovery demands is granted; and it is further

ORDERED, that the branch of Plaintiff Stacey Skole's cross-motion for an order, pursuant to CPLR § 3124, compelling the deposition of Judy Goldstein is granted; and it is further

ORDERED, that the branch of Plaintiff Stacey Skole's cross-motion for an order, pursuant to CPLR §§ 3124, 3126, and 8303-a, sanctioning counsel for Orsid due to counsel's discovery abuses is denied; and it is further

ORDERED, that the branch of Plaintiff Stacey Skole's cross-motion for an order, pursuant to CPLR §§ 3124 and 3126, compelling Orsid's counsel to produce all letters sent to non-parties advising them to not comply with the subpoenas is denied; and it is further

ORDERED, that non-parties Poler Contracting, Inc., Midtown Preservation Architecture & Engineering, P.C., The Metro Group, Inc., Buckmiller Automatic Sprinkler Corp., R&R Home Repairs, Inc., Fred Smith Plumbing & Heating Company, Manhattan Boiler & Equipment Corp., Marlande Heating Corp., Petro, Quality Cleaning Corp., Melone Architects, and Cosmic Fischer either produce the requested non-privileged documents sought in the May 15, 2018 subpoenas so as to be received on or before November 28, 2018, or, should they not have any of the requested documents or should they not exist, they shall provide an affidavit from a knowledgeable representative as to the searches conducted and the results reached; and it is further

ORDERED, that the deposition of non-party Judy Goldstein shall be held on or before December 12, 2018; and it is further

ORDERED, that Defendant Orsid Realty Corp. either produce the requested non-privileged documents sought in Plaintiff's Post-EBT Notice for Discovery & Inspection dated May 15, 2018 so as to be received on or before November 28, 2018, or, should it not have any of the requested documents or should they not exist, Defendant Orsid Realty Corp. shall provide an affidavit from a knowledgeable representative as to the searches conducted and the results reached; and it is further

ORDERED, that the status conference currently scheduled for November 14, 2018 is adjourned to December 19, 2018.

This constitutes the decision and order of the court.

11-2-18
DATE

Kelly O'Neill Levy
KELLY O'NEILL LEVY, J.S.C.
KELLY O'NEILL LEVY
JSC

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED			<input type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE