Smith v Nobiletti Bldrs. Inc.
2018 NY Slip Op 33645(U)
March 7, 2018
Supreme Court, Suffolk County
Docket Number: 613041/2016
Judge: Joseph Farneti

ORIGINAL

SHORT FORM ORDER **INDEX NO. 613041/2016**

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

MATTHEW J. SMITH,

Plaintiff,

-against-

NOBILETTI BUILDERS INC., MICHAEL NOBILETTI, HIGHLAND CONSTRUCTION, H&F LANDSCAPE DESIGN INC., PAUL BENNETT CONSTRUCTION, JAY'S DRYWALL, HUDSON RIVER MILLS, WATERMILL BUILDING SUPPLY, and DASH WINDOWS,

Defendants.

ORIG. RETURN DATE: SEPTEMBER 7, 2016
FINAL SUBMISSION DATE: DECEMBER 22, 2016
MTN. SEQ. #: 002
CROSS-MOTION: XMD

ORIG. RETURN DATE: DECEMBER 1, 2016
FINAL SUBMISSION DATE: DECEMBER 22, 2016
MTN. SEQ. #: 003
MOTION: MG

ORIG. RETURN DATE: NOVEMBER 10, 2016
FINAL SUBMISSION DATE: DECEMBER 22, 2016
MTN. SEQ. #: 004
MOTION: MD

ORIG. RETURN DATE: DECEMBER 15, 2016
FINAL SUBMISSION DATE: DECEMBER 22, 2016
MTN. SEQ. #: 005
MOTION: MD

ATTORNEY FOR PLAINTIFF:
KRIEGSMAN PC
279 MAIN STREET
SAG HARBOR, NEW YORK 11963
631-899-4826

ATTORNEY FOR DEFENDANTS NOBILETTI BUILDERS INC., MICHAEL NOBILETTI, HIGHLAND CONSTRUCTION, AND PAUL BENNETT CONSTRUCTION:
CONFORTI & WALLER, LLP
250 NORTH SEA ROAD
SOUTHAMPTON, NEW YORK 11968
631-232-1111

ATTORNEY FOR DEFENDANT DASH WINDOWS:
KARL SILVERBERG, ESQ.
320 CARLETON AVENUE - SUITE 6400
CENTRAL ISLIP, NEW YORK 11722
631-778-6077

ATTORNEY FOR NONPARTY
JASON SCHOMMER:
ADAM MILLER GROUP P.C.
2462 MAIN STREET - SUITE 7
P.O. BOX 1947
BRIDGEHAMPTON, NEW YORK 11932
631-537-1155

Upon the following papers numbered 1 to 22 read on this cross-motion and motions TO COMPEL ARBITRATION, TO COMPEL COMPLIANCE WITH SUBPOENAS, TO STAY DISCOVERY AND TO QUASH SUBPOENA: Notice of Cross-motion and supporting papers 1-3; Affirmation in Opposition 4; Memorandum of Law in Opposition 5; Reply Memorandum of Law 6; Notice of Motion and supporting papers 7-9; Reply Affirmation in Support 10; Notice of Motion and supporting papers 11-13; Affirmation in Opposition and supporting papers 14, 15; Memorandum of Law in Opposition 16; Notice of Motion and supporting papers 17-19; Memorandum of Law in Support 20; Affirmation in Opposition 21; Memorandum of Law in Opposition 22; it is,

ORDERED that this cross-motion (seq. #002) by defendants NOBILETTI BUILDERS INC. and MICHAEL NOBILETTI (collectively the "Nobiletti defendants") for an Order, pursuant to CPLR 7503, compelling arbitration, is hereby **DENIED** for the reasons set forth hereinafter. The Court has received opposition to this application from plaintiff MATTHEW J. SMITH; and it is further

ORDERED that this motion (seq. #003) by plaintiff for an Order, pursuant to CPLR 3124 and 2308, compelling third-parties, The Corcoran Group, John Greenwood, Marcos Ribeiro Brick & Stone, Inc., S&P Carting Service Inc., and T Gardella Plumbing & Heating Inc., to comply with plaintiff's subpoenas, is hereby **GRANTED** to the extent set forth hereinafter. The Court has not received opposition to this motion, save the motion at bar by the Nobiletti defendants to stay nonparty disclosure, and the motion at bar by nonparty Jason Schommer, a real estate broker with The Corcoran Group, to quash the subpoena served upon him; and it is further

ORDERED that this motion (seq. #004) by the Nobiletti defendants for an Order, pursuant to CPLR 3103, granting a protective Order staying all party and nonparty disclosure pending the Court's decision on the Nobiletti defendants' motion to compel arbitration, is hereby **DENIED** given the Court's ruling on the

motion to compel arbitration. The Court has received opposition to this application from plaintiff; and it is further

ORDERED that this motion (seq. #005) by nonparty Jason Schommer for an Order, pursuant to CPLR 2304, quashing the subpoena duces tecum dated September 14, 2016, served upon him by plaintiff and, pursuant to CPLR 3103, granting a protective Order with respect to the subpoena, is hereby **DENIED** for the reasons set forth hereinafter. The Court has received opposition to this application from plaintiff.

This action was commenced by the filing of a summons and verified complaint with the Suffolk County Clerk on August 19, 2016. An amended verified complaint dated November 23, 2016, was served and filed thereafter. The amended complaint contains eight causes of action against defendants, to wit: (1) breach of contract against the Nobiletti defendants; (2) breach of contract – good faith and fair dealing – against the Nobiletti defendants; (3) unjust enrichment against all defendants; (4) fraudulent inducement against the Nobiletti defendants; (5) fraud against the Nobiletti defendants; (6) fraud against the subcontractor defendants; (7) negligence against the Nobiletti defendants; and (8) alter ego/piercing the corporate veil against defendant MICHAEL NOBILETTI.

At the inception of the litigation on August 19, 2016, plaintiff moved by Order to Show Cause for preliminary injunctive relief. The Order to Show Cause was signed on that date, but the request for a temporary restraining Order was denied (Pastoressa, J.). That motion was subsequently withdrawn on October 27, 2016.

Plaintiff and defendant NOBILETTI BUILDERS INC. entered into an agreement whereby NOBILETTI BUILDERS INC., as general contractor, was to perform certain renovations to plaintiff's premises commonly known as 34 Jermain Avenue, Sag Harbor, New York, which plaintiff purchased in June of 2013. The arrangement was memorialized by a written agreement dated April 5, 2015, for the contract price of $1.25 million ("Contract"). Prior thereto, plaintiff alleges that he hired the Nobiletti defendants to replace an existing pool at the premises with a new pool. Plaintiff claims that the Nobiletti defendants originally estimated the cost of the pool to be $160,000, but that the job ultimately cost $380,000. Notwithstanding the foregoing, plaintiff entered into the Contract with the Nobiletti defendants to perform the renovations on the home. Plaintiff alleges that the work was never completed by the Nobiletti defendants despite the fact

that plaintiff paid the Nobiletti defendants over $2.5 million. The Nobiletti defendants allege that they have fully cooperated with plaintiff's efforts to obtain a Certificate of Occupancy, and have delivered all documents in their possession to plaintiff's attorney with respect thereto.

Plaintiff filed this action against the Nobiletti defendants and their subcontractors, alleging, among other things, that their faulty work damaged plaintiff's house. Plaintiff contends that his home remains unfinished and is "riddled" with defects. In addition, plaintiff contends that he has been defrauded of more than $750,000 by the defendants. Plaintiff claims that the defendants entered into a scheme to fraudulently inflate the bills for materials and work performed on plaintiff's home. The Nobiletti defendants counter that there is no non-hearsay evidence submitted by plaintiff to support his allegations regarding the existence of a "kick back" scheme between the Nobiletti defendants and the subcontractor co-defendants.

The Contract is a written instrument known as "AIA Document A101-2007 Standard Form of Agreement Between Owner and Contractor," which contains a provision for binding arbitration to resolve any claim arising thereunder. The Contract incorporates by reference the General Conditions contained in "AIA Document A201-2007." The Nobiletti defendants argue that by reason of the broad and inclusive language set forth in the arbitration clause of the Contract, all disputes are subject to mandatory arbitration. Thus, the Nobiletti defendants filed the instant motions to stay prosecution of this action and to compel arbitration in accordance with the provisions of the Contract and the General Conditions.

In opposition, plaintiff alleges that the Contract containing the arbitration provision is solely between plaintiff and defendant NOBILETTI BUILDERS INC. Neither Michael Nobiletti nor the remaining co-defendants are parties to the Contract and, therefore, are not subject to the arbitration clause. Additionally, plaintiff argues that General Business Law § 399-c renders the arbitration provision in the Contract illegal and unenforceable.

General Business Law § 399-c prohibits the use of mandatory arbitration clauses in contracts for the sale or purchase of "consumer goods" (*see* General Business Law § 399-c). The term "consumer goods" is defined by the statute as to mean "goods, wares, paid merchandise or services purchased or paid for by a consumer, the intended use or benefit of which is intended for the

personal, family or household purposes of such consumer" (General Business Law § 399-c [1] [b]). General Business Law § 399-c (1) (c) also defines the term "mandatory arbitration clause" as a provision "in a written contract for the sale or purchase of consumer goods which requires the parties to such contract to submit any controversy thereafter arising under such contract to arbitration prior to the commencement of any legal action."

Here, it is undisputed that the plaintiff-homeowner is a "consumer" as defined by the statute, and that the Contract, which requires binding arbitration of all disputes arsing thereunder, contains a "mandatory arbitration clause." It has been held by the Second Department that a contract for services to be performed in connection with the construction and/or renovation of a residence is considered a contract for the sale or purchase of "consumer goods" as that term is defined by the statute (*see Ragucci v Professional Constr. Servs.*, 25 AD3d 43 [2005]). As noted, the statute broadly defines "consumer goods" to include "services purchased or paid for by a consumer, the intended use or benefit of which is intended for the personal, family or household purposes of such consumer" (General Business Law § 399-c [1] [b]). The Nobiletti defendants unquestionably provided "services" to plaintiff in connection with the renovations at the premises, and these services were for plaintiff's personal and family use. Therefore, the subject arbitration clause in the Contract is prohibited by General Business Law § 399-c (*see Byrnes v Castaldi*, 72 AD3d 718 [2010]; *Ragucci*, 25 AD3d 43; *Schiffer v Slomin's, Inc.*, 48 Misc 3d 15 [App Term, 2d Dept 2015]).

Accordingly, the motion (seq. #002) by the Nobiletti defendants to compel arbitration, and the motion (seq. #004) by the Nobiletti defendants to stay all party and nonparty disclosure pending the Court's decision on the motion to compel arbitration, are both **DENIED**.

With respect to nonparty disclosure, on or about September 15, 2016, plaintiff served subpoenas upon The Corcoran Group, John Greenwood, Marcos Ribeiro Brick & Stone, Inc., S&P Carting Services, Inc., and T Gardella Plumbing & Heating Inc. (the "Third Parties"). The Third-Party subpoenas seek documents related to: (a) the Third Parties' work at plaintiff's home; (b) Third Party communications with the defendants; (c) bid, contracts, labor and materials provided; (d) payments made by the plaintiff, the Nobiletti defendants, or the Third Parties related to plaintiff's home; and (e) contracts, arrangements or conditions made as a prerequisite for plaintiff's home. Plaintiff argues that because of his allegations that the Nobiletti defendants "doctored" documents

and invoices in furtherance of a scheme to defraud plaintiff, the documents sought from the Third Parties may only be in possession of the Third Parties and, therefore, the Third Parties should be compelled to produce them. None of the Third Parties have opposed this motion except Jason Schommer, a real estate broker at The Corcoran Group ("Schommer"). Plaintiff has since withdrawn this motion as to S&P Carting Services Inc., and only seeks responses as to demands numbered 3 and 6 served upon John Greenwood of 84 Lumber.

Schommer filed the instant motion to quash the subpoena duces tecum dated September 14, 2016 ("Subpoena"), served upon him by plaintiff, arguing that he is not a party to the Contract, is not a builder or a tradesman, and has no contractual relationship with plaintiff. Schommer indicates that he was involved with the purchase when plaintiff acquired title to the house in June of 2013. Schommer alleges that plaintiff's amended complaint does not identify either directly or indirectly that Schommer had any involvement in the subject of the litigation nor any connection to the defendants and/or nonparty subpoenaed parties in any of its allegations. Therefore, Schommer seeks to quash the Subpoena.

CPLR 3101 (a) (4) provides that there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action by a nonparty "upon notice stating the circumstances or reasons such disclosure is sought or required" (CPLR 3101 [a] [4]). What is material and necessary is in the "sound discretion" of the trial court and includes "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Andon ex rel. Andon v 302-304 Mott Street Assocs.*, 94 NY2d 740 [2000], quoting *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403 [1968]). The Second Department has previously equated the catch-all provision of CPLR 3101 (a) (4) with the more stringent requirements of CPLR 3101 (d) (1) (iii), by requiring that the moving party show adequate special circumstances to warrant disclosure (*see Attinello v DeFilippis*, 22 AD3d 514 [2005]; *Lanzello v Lakritz*, 287 AD2d 601 [2001]; *Dioguardi v St. John's Riverside Hosp.*, 144 AD2d 333 [1988]). Special circumstances are shown by establishing that the information sought is not only relevant, but also cannot be obtained through other sources (*see Tannenbaum v Tenenbaum*, 8 AD3d 360 [2004]; *Murphy v Macarthur Holding B.*, 269 AD2d 507 [2000]). Whether "special circumstances" have been shown to exist in a particular case is a question committed to the sound discretion of the court to which the application for discovery is made (*see Brady v Ottaway Newspapers,*

63 NY2d 1031 [1984]; *Dioguardi v St. John's Riverside Hosp.*, 144 AD2d 333 [1988]).

Notwithstanding the foregoing, the Second Department has held that although many of its decisions continued to apply the "special circumstances" standard to obtain discovery from a nonparty despite the 1984 amendment to CPLR 3101 (a) (4) eliminating such language, "[w]e hereby disapprove the further application of the 'special circumstances' standard in this context. We, nevertheless, look behind that language in our cases and find underlying considerations which are appropriate and relevant to the trial court's exercise of its discretion in determining whether a request for discovery from a nonparty should go forward or be quashed" (*Kooper v Kooper*, 74 AD3d 6, 8 [2010]). The Second Department further held that "[w]e decline, here, to set forth a comprehensive list of circumstances or reasons which would be deemed sufficient to warrant discovery from a nonparty in every case. Circumstances necessarily vary from case to case" (*id.* at 17).

In *Matter of Kapon v Koch*, 23 NY3d 32 (2014), the Court of Appeals clarified the analysis with respect to disclosure from a nonparty:

> We conclude that the "material and necessary" standard adopted by the First and Fourth Departments is the appropriate one and is in keeping with this state's policy of liberal discovery. The words "material and necessary" as used in section 3101 must "be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406, 235 NE2d 430, 288 NYS2d 449 [1968]). Section 3101 (a) (4) imposes no requirement that the subpoenaing party demonstrate that it cannot obtain the requested disclosure from any other source. Thus, so long as the disclosure sought is relevant to the prosecution or defense of an action, it must be provided by the nonparty

(*Matter of Kapon*, 23 NY3d at 38).

Furthermore, a subpoena served on a nonparty is facially defective and unenforceable if it neither contains, nor is accompanied by a notice stating the circumstances or reasons such disclosure is sought or required (*see Needleman v Tornheim*, 88 AD3d 773 [2011]; *Kooper*, 74 AD3d 6; *Matter of American Express Prop. Cas. Co. v Vinci*, 63 AD3d 1055 [2009]; *Wolf v Wolf*, 300 AD2d 473 [2002]).

Initially, the Court finds that all of plaintiff's Third-Party subpoenas contain the requisite notice stating the circumstances or reasons such disclosure is sought or required from the Third Parties. Therefore, the subpoenas are facially sufficient. Next, the Court finds that Schommer's motion to quash is untimely as it was not "promptly" made, i.e., prior to the return date of the Subpoena, and plaintiff has raised this in opposition (*see* CPLR 2304; *Brunswick Hosp. Center, Inc. v Hynes*, 52 NY2d 333 [1981]; *Santangello v. People*, 38 NY2d 536 [1976]; *Angelo Capobianco, Inc. v Brentwood Union Free School Dist.*, 2009 NY Slip Op 32405[U] [Sup Ct, Suffolk County]). In any event, without passing on the merits of plaintiff's claims herein, the Court finds that the information sought by the subpoenas is "material and necessary" and relevant to the claims asserted in this action, as that term has been defined by the Court of Appeals (*see Kapon*, 23 NY3d at 38).

Accordingly, the motion (seq. #003) to compel compliance with the nonparty subpoenas served upon The Corcoran Group, John Greenwood (demands 3 and 6 only), Marcos Ribeiro Brick & Stone, Inc., and T Gardella Plumbing & Heating Inc., is hereby **GRANTED** to the extent that the aforementioned Third Parties shall comply with the subpoenas served upon them by plaintiff within thirty (30) days of service of the instant Order upon the Third Parties with notice of entry. Further, the motion (seq. #005) by Schommer to quash the Subpoena served upon him is **DENIED**.

The foregoing constitutes the decision and Order of the Court.

Dated: March 7, 2018

HON. JOSEPH FARNETI
Acting Justice Supreme Court

__X__ FINAL DISPOSITION **_____ NON-FINAL DISPOSITION**