

<b>Reyes v 4 Herriot Place</b>
2018 NY Slip Op 33900(U)
September 26, 2018
Supreme Court, Westchester County
Docket Number: 63025/2017
Judge: Joan B. Lefkowitz
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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER : COMPLIANCE PART

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JOEL REYES,

*Plaintiff,*

DECISION AND ORDER

*-against-*

Index No. 63025/2017

4 HERRIOT PLACE,

Motion Seq. No. 2

*Defendant.*

Motion Ret. Date: 9.26.2017

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LEFKOWITZ, J.

The following papers were read on this unopposed application by defendant for an order permitting defendant to obtain additional discovery including, but not limited to the non-party deposition of Paul Coccozza, Esq., among others and for such other and further relief as this Court deems just and proper in addition to costs, attorney’s fees and disbursements in this action:

Order to Show Cause, Affidavit in Support, Exhibits A-T, Affidavit of Service.

Upon the foregoing papers and the proceedings held on September 26, 2018, this motion is determined as follows:

This action sounding in specific performance was commenced by the filing of a summons and complaint on August 25, 2017 in which plaintiff requests that defendant be compelled to specifically perform a contract of sale for certain real property located at 310 New Main Street *a/k/a* 4 Herriot Place, Yonkers, New York, or, in the alternative, be awarded damages in the amount of \$1,060,000 together with the costs and disbursements of this action. Issue was joined by the filing of defendant’s answer with counter-claims on October 11, 2017.<sup>1</sup>

Defendant claims it must have the opportunity to depose and obtain documentation from all

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<sup>1</sup>The counter-claim in relevant part asserts that because plaintiff failed to include a “time of the essence” provision in the contract of sale, defendant is entitled to retain the \$180,000 down payment. By decision and order of this Court dated July 12, 2018 (Everett, J), defendant was granted leave to amend its answer to assert two additional counter-claims in which it contends it is entitled to recover an additional \$300,000 originating from an agreed-upon \$300,000 lease cancellation fee. NYSCEF Doc. No. 29. However, it does not appear that such amended complaint was filed.

relevant non-parties in the subject transaction to determine if plaintiff was, in fact, ready, willing and able to purchase the subject real property as he has alleged in his complaint.

Defendant avers that he has previously conducted depositions of plaintiff's son, Valente Reyes (who defendant asserts "handled" the transaction for plaintiff, among others), the title company representative, Michele Russo and David DeMilia, the Senior Vice President of Tompkins Mahopac Bank. However, as a result of the discovery exchanged thus far and the examinations before trial previously held, defendant insists he requires the deposition of the plaintiff-purchaser's attorney, Paul Coccozza, Esq., the bank's attorney, Robert Chanis, Esq., the loan committee members and the underwriters for Tompkins Mahopac Bank. He additionally requests an order requiring non-party Senior Vice President David DeMilia to respond to a notice of discovery and inspection previously served on July 27, 2018.

Analysis:

As a preliminary matter, CPLR 2214(c) provides in relevant part that "[t]he moving party shall furnish all papers not already in the possession of the court necessary to the consideration of the questions involved" (see *Reyes v Eleftheria Rest. Corp.*, 162 AD3d 808 [2d Dept 2018]; *Deutsche Bank Natl. Trust Co. v Hounnou*, 147 AD3d 814 [2d Dept 2017]; *Aquatic Pool & Spa Servs., Inc. v WN Weaver4 St., LLC*, 2012 NY Slip Op 33811(U) [Sup Ct West Co]; *Specialized Realty Servs., LLC v Maikisch*, 2012 NY Slip Op 33743(U) [Sup Ct Orange Co]; *Kayel v El-Bab*, 2011 NY Slip Op 31522(U) [Sup Ct Suffolk Co]; *Bellofatto v Bellofatto*, 8 Misc 3d 1019(A) [Sup Ct Putnam Co 2005]). In this instance, although defendant has provided copies of some exhibits, it has attached only two pages of an appraisal report for the Court's review. The absence of sufficient motion papers is reason enough for denial of the defendant's motion (see *Roberts v Roberts*, 159 AD3d 932 [2d Dept 2018]; *Homar v American Home Mtge. Acceptance, Inc.*, 2012 NY Slip Op 33724(U) [Sup Ct Orange Co 2012]).

Moreover, the NYSCEF Discovery Briefing Schedule issued by this Court limited defendant's application to seek to compel the deposition of Paul Coccozza only.<sup>2</sup> The additional relief now sought by defendant in the instant order to show cause was not authorized pursuant to the DCM Protocol, as revised effective February 23, 2018.

Turning to the application by defense counsel to take the deposition of plaintiff-purchaser's counsel, Paul Coccozza, Esq., pursuant to CPLR 3101(a), a party is entitled to "full disclosure of all matter material and necessary in the prosecution or defense of an action." The phrase "material and necessary" is "to 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. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968] [internal quotation marks omitted]). To obtain nonparty discovery, a party seeking disclosure from a non-party witness requires no more than a showing that the requested information

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<sup>2</sup>NYSCEF Doc. No. 32.

is “material and necessary” to the prosecution or defense of an action (*see* CPLR 3101(a)(4); *Kapon v Koch*, 23 NY3d 332 [2014]; *Alumil Fabrication, Inc., v F.A. Alpine Window Mfg., Corp.*, 151 AD3d 667 [2d Dept 2017]).

Defense counsel maintains that plaintiff must be able to show he was ready, willing and able to perform the contract of sale between July 27, 2017 and on or before September 15, 2017. He states that plaintiff-purchaser believed he was purchasing commercial real property located at 310 New Main Street *a/k/a* 4 Herriot Place, Yonkers, New York and 137 School Street, Yonkers, New York which includes a loading dock that attaches to the commercial premises and allows the second floor tenants to have access to the property. However, defendant asserts that 137 School Street, Yonkers, New York is a separate parcel and is not included in the description in the contract of sale.

Defendant asserts that although the contract provides only for the sale of 310 New Main Street *a/k/a* 4 Herriot Place, Yonkers, New York, the title report lists two properties to be conveyed to the plaintiff-purchaser: 310 New Main Street *a/k/a* 4 Herriot Place, Yonkers, New York and 137 School Street, Yonkers, New York. Defense counsel alleges that due to the request of plaintiff-purchaser’s attorney, Paul Coccozza, Esq., the 137 School Street parcel was added onto the title report and intended to be part of the transaction.

When defense counsel deposed a representative from the title company, Michele Russo, she testified that she did not know when the 137 School Street parcel was added onto the title report. Moreover, defendant claims that the title company was not prepared to close title as maintained by plaintiff-purchaser as the title company did not have the two mortgage payoff amounts nor did it have a water bill nor had the judgments been “cleared” nor had a fire department search been conducted, among other things.

Defense counsel posits that since Mr. Coccozza requested that the 137 School Street parcel be added to the transaction, he should be deposed so defendant can understand why such additional parcel was added to the title report although it is not included in the contract of sale, in addition to other information.

In light of the foregoing, defendant has established that the information he seeks from Paul Coccozza, Esq. may be material and necessary to the defense of this action. Where the person to be examined is not a party or a person who at the time of taking the deposition is an officer, director, member or employee of a party, he or she must be served with a subpoena (*see* CPLR 3106[b]). In his affirmation in support of the application herein, affiant stated that by subpoena, he obtained the deposition of Michele Russo, a First American Title employee and attendant documentation.<sup>3</sup> Defense counsel also issued a nonparty subpoena to David M. DeMilia, the Senior Vice President of Tompkins Mahopac National Bank to appear for a deposition and produce certain documents.<sup>4</sup>

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<sup>3</sup>Affirmation in support, page 5, paras. 25, 26, 27, 28, 33, 34, 36, 37.

<sup>4</sup>Affirmation in support, page 7, paras. 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54.

In this instance however, it does not appear from the moving papers that defense counsel has served Mr. Coccozza with a nonparty subpoena as required by statute.

To the extent defendant requests an order allowing it to take the depositions of non-parties Robert Chanis, Esq., attorney for Tompkins Mahopac Bank, the loan committee members of Tompkins Mahopac Bank and the underwriters of Tompkins Mahopac Bank, and following such depositions, permitting defendant to engage in post-deposition document discovery of non-parties, such application must be denied. Defendant has not complied with *Kapon*, 23 NY3d 332 insofar as he has failed to articulate any basis that the information he seeks from these non-parties (some identified and some not) may be material and necessary nor have such non-parties been provided with notice thereof.

With regard to defendant's application for an order compelling non-party Tompkins Mahopac Bank to respond to its notice of discovery and inspection dated July 27, 2018, defendant advised the Court at oral argument that non-party, Tompkins Mahopac Bank, has complied with all outstanding discovery demands.

Accordingly, it is

ORDERED that, the branch of defendant's motion seeking an order to obtain the non-party deposition of Paul Coccozza, Esq. is granted to the extent that the non-party subpoena must be served upon non-party Paul Coccozza, Esq. on or before October 10, 2018 or such non-party deposition shall be deemed waived; and it is further

ORDERED that, the branch of defendant's motion seeking an order compelling non-party Tompkins Mahopac Bank to respond to its notice of discovery and inspection dated July 27, 2018 is denied as moot; and it is further

ORDERED that, all other branches of defendant's motion are denied; and it is further

ORDERED that, all parties are directed to appear for a conference in the Compliance Part, Courtroom 800, on October 24, 2018, at 9:30 a.m.; and it is further

ORDERED that, defendant shall serve a copy of this order with notice of entry upon plaintiff, non-party Paul Coccozza, Esq., counsel for non-party Tompkins Mahopac Bank, within ten (10) days of entry.

DATED: White Plains, New York  
September 26, 2018

  
HON. JOAN B. LEFKOWITZ, J.S.C.

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