City of New York v Tominovic
2020 NY Slip Op 31656(U)
January 21, 2020
Supreme Court, Queens County
Docket Number: 710662/19
Judge: Kevin J. Kerrigan

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

The City of New York, X INDEX NO.710662/19

Plaintiffs,

MOTION SEQ. NO. 2

- against -

Elvis Tominovic, Romina Tominovic, Loreta Tominovic, Franko Tominovic, Sanja(a/k/a Sanya) Colic, Suzana Colic, Dragan Mavra, Neo Panayiotou, Ress Services Inc., 31-27 14 Street Realty LLC, 47-15 28 Avenue Realty LLC, 47-15 28 Avenue Realty LLC, Istra Jazz Inc., R&S Living Inc., and "John Doe" and "Jane Doe" et.al.,

MOTION DATE: 11/25/19

Defendants.
X

The following papers EF numbered below read on this motion by defendant Elvis Tominovic and related parties for an order quashing a subpoena duces tecum directed to nonparty Airbnb

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	143-148
Answering Affidavits - Exhibits	150-154
Reply Affidavits	169

Upon the foregoing papers, it is ordered that the motion is granted without prejudice to the service of another subpoena proper in scope and in form.

I. The Plaintiff City's Allegations

The plaintiff city alleges the following:

Beginning in 2015 or earlier, the eight individual and five corporate defendants have advertised about and rented accommodations for illegal, short-term periods (less than thirty days). The defendants have conducted their illegal activities in 36 buildings, 25 of which are multiple dwellings. The defendants have created 28 separate Airbnb host accounts, have accepted over 20,000 illegal short-term rental reservations, and have generated over $5,000,000 in revenue.

From 2015 through 2019, the defendants advertised illegal short-term rentals through approximately 211 Airbnb listings, and these advertisements disclose neither the illegality of these transient accommodations nor their safety hazards. These advertisements make the accommodations seem desirable, and they do not disclose that hundreds of reviews from guests complain about poor or hostile communication with the defendants, a lack of heat and hot water, uncleanliness, poor maintenance, and overcrowded and unsafe situations. The advertisements do not mention that the defendants have charged as much as $95 in cleaning fees.

Despite the city's enforcement efforts, the defendants' illegal short-term rental transactions through Airbnb have increased significantly over time. The New York City Department of Buildings (DOB) and the New York City Fire Department (FDNY) have issued dozens of violation notices and administrative orders, including DOB peremptory vacate orders on three of the buildings operated by the defendants. None of the twelve subject buildings used by the defendants for illegal short-term rentals have required safety features for short-term rentals such as fire alarms, automatic sprinklers, and two means of fire-proof egress on each floor. Despite 59 notices of violation and 11 illegal transient advertising summonses, the city has failed to put a stop to the defendants' illegal activity. Moreover, the illegal rentals have created problems for permanent residents, and since 2015 DOB has received approximately 31 citizen complaints of illegal transient use of twelve buildings operated by the defendants.

II. The Complaint

The first cause of action is for violation of the New York City Consumer Protection Law [Administrative Code of the City of New York §20-700 et seq]. The second cause of action is for violation of Multiple Dwelling Law §§4(8)(a) and 121. The third cause of action is for an injunction pursuant to General City Law §20(22). The fourth cause of action is for an injunction to prohibit a public nuisance.

III. The Challenged Subpoena

The plaintiff issued its first subpoena to Airbnb on February 7, 2019, and it concerned hosts and/or buildings that the plaintiff identified as being within the City of New York. Airbnb complied with the subpoena, about whose issuance the defendants were unaware. On July 2, 2019 Airbnb sent a cease and desist letter to 58 Airbnb hosts and disabled all of their accounts and listings for allegedly violating the company's terms of service.

The plaintiff subsequently issued a subpoena duces tecum to Airbnb dated August 8, 2019. Defendant Elvis Tominovic and related parties (collectively the Tominovic defendants) object to the scope of the subpoena on the ground that the while the plaintiff's causes of action concern activities occurring within the City of New York, the subpoena demands the production of documents without regard to where the hosts and listings are located. For example, paragraph 2 of Part 1 demands records pertaining to "all information supplied in connection with the creation or maintenance of each user identity, including but not limited to **** country, market, native currency ***." Paragraph 5 demands records related to each Airbnb reservation, including the country. Paragraph 7 of Part II demands records about "all information supplied in connection with the creation or maintenance of each user identity, including ** country, market, native currency ***."

IV. Discussion

CPLR 3101, " Scope of disclosure," provides in relevant part: "(a) Generally. There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by: ***(4) any other person, upon notice stating the circumstances or reasons such disclosure is sought or required." (*See*, *TD Bank, N.A. v. 126 Spruce St., LLC*, 143 AD3d 885 [2nd Dept. 2016].)

CPLR § 2304, " Motion to quash, fix conditions or modify," provides in relevant part: "A motion to quash, fix conditions or modify a subpoena shall be made promptly in the court in which the subpoena is returnable." (*See, Klein Varble & Associates, P.C. v. DeCrescenzo*, 119 AD3d 655 [2nd Dept 2014].) "A motion to quash or vacate, of course, is the proper and exclusive vehicle to challenge the validity of a subpoena or the jurisdiction of the issuing authority ***." (*Brunswick Hosp. Center, Inc. v. Hynes*, 52 NY2d 333, 339 [1981].)

" An application 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." (*Anheuser-Busch, Inc. v. Abrams*, 71 NY2d 327, 331–32 [1988] [internal quotation marks and citations omitted]; *Tech. Multi Sources, S.A. v. Stack Glob. Holdings, Inc.*, 44 AD3d 931 [2nd Dept 2007].)

In regard to deposition subpoenas, "the witness, in moving to quash, must establish either 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.' Should the witness meet this burden, the subpoenaing party must then establish that the discovery sought is 'material and necessary' to ** the prosecution or defense of an action, i.e., that it is relevant." (*Kapon v. Koch*, 23 NY3d 32, 34; [2014]; *Ferolito v. Arizona Beverages USA, LLC*, 119 AD3d 642 [2nd Dept 2014].)

It is true that the validity of the August 8, 2019 subpoena is to be tested by the relevancy of the documents sought, not their quantity. (*See*, *Evergreen Ass'n, Inc. v. Schneiderman*, 153 AD3d 87 [2nd Dept . 2017].) Unfortunately for the city, the challenged subpoena is not only sweeping in its scope, but overly broad as well. As the Tominovic defendants correctly argue, the challenged subpoena seeks records pertaining to matters outside the bounds of New York City while the complaint alleges causes of action relating only to New York City. In the case at bar, as in *Airbnb, Inc. v. Schneiderman*, (44 Misc.3d 351[Sup. Ct. 2014]), where petitioner Airbnb successfully made an application to quash a subpoena served pursuant to an investigation by the Attorney General relating to petitioner's New York State client-renters, the subpoena must be quashed. The court stated in *Schneiderman* : "The Multiple Dwelling Law provides that its application is to 'cities with a population of three hundred twenty-five thousand or more' (though other cities, towns or villages ** may adopt the provisions of the law) (Multiple Dwelling Law § 3 [1]). The subpoena, however, is not limited to New York City hosts or those who reside in cities, towns or villages that have adopted the Multiple Dwelling Law, nor is it limited to rentals of less than 30 days." (*Airbnb, Inc. v. Schneiderman, supra, 358.)* In the case at bar, by reading the subpoena in light of the relevant statutes and regulations, as the Schneiderman court did, it may be seen that the subpoena is overly broad.

In opposition, the city failed to establish that all of the records sought are material and necessary to the prosecution or defense of this action. (*See*, (*Kapon v. Koch. supra*; *Ferolito v. Arizona Beverages USA, LLC, supra*.)

The Tominovic defendants also correctly argue that the subpoena is defective because it fails to state "the circumstances or reasons such disclosure is sought or required." (*See*, CPLR 3101(a)(4); *Kapon v. Koch, supra* 34, ["We conclude that the

subpoenaing party must first sufficiently state the 'circumstances or reasons' underlying the subpoena (either on the face of the subpoena itself or in a notice accompanying it)"];*Gandham v. Gandham*, 170 AD3d 964, 966 [2nd Dept. 2019] [subpoena quashed for failure to comply with notice requirement].)

Accordingly, the motion is granted to the extent that the challenged subpoena is quashed without prejudice to plaintiff serving, should it so choose, another subpoena proper in scope and form.

Dated: January 21, 2020

KEVIN J. KERRIGAN, J.S.C.