**Etkin v Sherwood 21 Assoc., LLC**

2021 NY Slip Op 30372(U)

February 4, 2021

Supreme Court, New York County

Docket Number: 652122/2017

Judge: Nancy M. Bannon

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 42
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WILLIAM ETKIN,

Plaintiff,

DECISION AND ORDER

- v - Index No. 652122/2017

SHERWOOD 21 ASSOCIATES, LLC, THE BOARD OF MANAGERS OF THE 500 WEST 21ST STREET CONDOMINIUM, MOT SEQ 007

Defendants.
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**NANCY M. BANNON, J.:**

## I. INTRODUCTION

The plaintiff, William Etkin, commenced this action seeking, *inter alia*, damages for allegedly defective or scratched windows in the Manhattan condominium unit he purchased in 2014. On or about February 13, 2020, Etkin served eight subpoenas seeking documents relating to the windows and to depose eight parties. Defendant Sherwood 21 Associates, LLC (Sherwood), the condominium sponsor, and non-party Kohn Pedersen Fox Associates (KPF), the architect for the condominium, jointly move pursuant to CPLR 2304 to quash the subpoenas and pursuant to CPLR 3103 for a protective order prohibiting disclosure of the information sought therein, and sanctions against Etkin for frivolous conduct in serving the subpoenas. Etkin opposes the motion and, without a proper cross-motion, requests that the movants pay his costs for having to oppose this motion. The

motion is granted to the extent that the subpoenas are quashed, and otherwise denied without prejudice. Etkin's request for sanctions is denied.

## II. BACKGROUND

By a purchase agreement dated May 9, 2014, Etkin purchased Unit 7A of the newly constructed condominium building located at 500 West 21st Street in Manhattan. Etkin purchased the condominium through defendant Sherwood, the sponsor for the condominium's offering plan. On June 11, 2015 the purchase of the condominium closed. At the time of closing, Etkin inspected the unit and claims that he noticed the scratched windows and added them to a punch list of items that required correction.

In his complaint, Etkin alleges that 56 of the 64 windows in the unit were so scratched prior to moving in that he could not see out of them and that, pursuant to the terms of the condominium's offering plan, incorporated by reference into the contract of sale, Sherwood was required to repair or replace them and has refused to do so, thus breaching the agreement.

Etkin also alleged a cause of action for breach of fiduciary duty against The Board of Managers of the 500 West 21st Street Condominium (the Board) on the grounds that they had a duty to alert any prospective purchaser of the scratched windows and remedy the issue. That cause of action was dismissed by the

court by order dated June 11, 2018. The dismissal was affirmed by the Appellate Division, First Department, by order dated October 3, 2019. See Etkin v Sherwood 21 Assocs., LLC, 176 AD3d 442 (1st Dept. 2019).

During discovery, Etkin repeatedly claimed that Sherwood failed to turn over documents responsive to his requests regarding, *inter alia*, the cause of the scratched windows and the extent of the scratched windows throughout the entire condominium building. Sherwood claims that it has provided all responsive documents relating to the windows in its possession. Sherwood made the same accusations against Etkin, who also denied holding back any discovery.

By an order dated October 3, 2018, the court granted a motion by Etkin to compel discovery to the extent of directing Sherwoood to provide "any documents in its possession concerning any windows in the subject building that were reported by the unit owner or any other person to be scratched and/or were repaired or replaced for that reason, to the extent not already provided, or, if no such documents are found, submit an affidavit stating that none were found and setting forth the efforts made to locate such documents; and the motion is otherwise denied without prejudice." (MOT SEQ 002). By an affidavit of employee Jason Roth dated November 12, 2018,

Sherwood described the searches conducted and represented that no documents were found. Etkin subsequently moved to renew that motion to compel claiming Sherwood did not comply with the order, and Sherwood cross-moved to strike the complaint on the ground that Etkin failed to provide discovery (MOT SEQ 006). In April 2020, the parties stipulated to withdraw both motions. No further discovery motion was made by Etkin.

The last discovery conference order issued by the court, dated December 18, 2019, directs discovery to be completed on or before March 28, 2020, and notes that Etkin had not complied with a prior orders dated September 13, 2018 and October 3, 2018. No extension of the Note of Issue date was given as the prior Note of Issue deadline, January 31, 2019, passed without excuse for not completing discovery. Etkin never moved to extend the Note of Issue deadline, leaving the complaint subject to dismissal under CPLR 3126 or 3216. Discovery, commenced in 2017, was thus to be closed as of March 2020.

Etkin nonetheless served the subject subpoenas in February 2020. All eight subpoenas seek seven categories of documents:

1. All documents and all communications (including, but not limited to, communications with Sherwood or the Board) concerning the Building's windows, including but not limited to documents concerning the purchase, design, condition, construction, installation, replacement, maintenance, source, cleaning, materials, and form of the

windows, complaints, issues and concerns about the windows, and defects to or scratches on the windows.

2. All documents and all communications (including, but not limited to, communications with Sherwood or the Board) concerning any defect or damage (including, without limitation, scratches) with regard to the Building's windows.
3. All documents and all communications (including, but not limited to, communications with Sherwood or the Board) concerning any claim(s), complaint(s) or demand(s), including without limitation with respect to insurance or indemnification, made by or against any party with respect to the Building's windows.
4. All documents and all communications (including, but not limited to, communications with Sherwood or the Board) concerning any payments, reimbursement or any other form of compensation paid to or received by any party with respect to the Building's windows or concerning whether to seek or to make any such payment.
5. All documents and all communications (including, but not limited to, communications with Sherwood or the Board) concerning any work done to repair or replace any of the Building's windows or concerning whether to undertake such work.
6. All communications (including, but not limited to, communications with Sherwood or the Board) concerning Unit 7A.
7. All communications (including, but not limited to, communications with Sherwood or the Board) concerning Etkin.

Along with KPF, these subpoenas were served on non-parties (i) Landesbank Hessen-Theuringen Girozentral, the bank that financed the construction of the condominium, (ii) GACE Consulting Engineers, the structural engineer for the project, (iii) Cosentini Associates, the contractor that installed the electrical, plumbing, and mechanicals in the condominium, (iv) Starr Associates, Sherwood's counsel who wrote the offering plan for the condominium and represented Sherwood at closing, (v)

Corcoran Sunshine Marketing Group, the firm that marketed the condominium, (vi) Howard Zimmerman Architects, PC, an architectural firm retained to consult on the construction of the condominium's roof, and (vii) Tracee Holden, the condominium's residential property manager.

Sherwood and KPF seek to quash the subpoenas on the grounds that the requests are overbroad, harassing, and are made of parties that would not have any relevant information. Sherwood and KPF further argue that the subpoenas seek disclosure that is related not to the breach of contract claim against Sherwood but to Etkin's cause of action for breach of fiduciary duty against the defendant Board, which was dismissed. Sherwood seeks to quash the subpoena served on Tracee Holden on the additional ground that she is an employee of Sherwood, and any further subpoena of Sherwood's employees requires leave of court.

In support of their motion, Sherwood and KPF submit the subject subpoenas and the affidavit of Lloyd Sigal, a principal at KPF, in which he avers that the requested production would be overly burdensome and would not provide any information relevant to the alleged scratches on the windows in Etkin's condominium unit. Sherwood and KPF also submit an affirmation from defendants' counsel averring that the seven other subpoenaed parties would not have any relevant information to provide.

In response, Etkin argues that the information sought in the subpoenas i) is not overly broad and is necessary because the defendants have failed to provide him with discovery relating to the scratched windows, maintaining that no such documents exist, and ii) is relevant to Etkin's surviving claims that there was a building-wide defect that the defendants were required to repair or disclose prior to sale of the condominium. Etkin further argues that his subpoena of Tracee Holder is proper because he was previously told by counsel for the defendants that Holder was not an employee of Sherwood, and thus would need to be subpoenaed to testify.

## III. DISCUSSION

### A. Motion to Quash Subpoenas

The Court of Appeals in Kapon v Koch, 23 NY3d 32 (2014), held that a subpoenaing party has the initial burden of demonstrating a need for the disclosure, and must sufficiently state the "circumstances or reasons" that support disclosure. Kapon, supra at 32. Such notice is required to provide a third-party with enough information to apprise a stranger to the litigation the 'circumstances or reasons' why the requested disclosure was sought or required." Id. at 39. The discovery sought must be "material and necessary." Id at 36; see CPLR 3101(a). A subpoena that demands "any" and "all" documents are

overbroad since it may encompass some materials that are be privileged or "clearly irrelevant." Grotallio v Soft Drink Leasing Corp., 97 AD2d at 383 (1st Dept. 1983). The determination of whether discovery sought is appropriate rests within the sound discretion of the trial court. See Kapon v Koch, supra. Further, where the requests are palpably overbroad, neither the subpoenaed party nor the court is required to prune the requests to "cull the good from the bad." Grotallio v Soft Drink Leasing Corp., supra at 383, quoting People v Doe, 39 AD2d 869, 870.

It is also well settled that a subpoena must not be used as a tool of harassment or for a proverbial "fishing expedition to ascertain the existence of evidence." Reuters Ltd. v Dow Jones Telerate, Inc., 231 AD2d 337, 342 (1st Dept. 1997); see Law Firm of Ravi Batra, P.C. v Rabinowich, 77 AD3d 532 (1st Dept. 2010). A motion to quash a subpoena will be granted when the futility of uncovering anything legitimate is obvious, or the information sought is, "utterly irrelevant to any proper inquiry." Kapon v Koch, supra at 38 [internal citations omitted]. The burden of establishing the information sought is irrelevant or futile, is on the non-party being subpoenaed. See Velez v Hunts Point Multi-Serv. Ctr., Inc., 29 AD3d 104 (1st Dept. 2006).

Here, Etkin has failed to meet his burden and Sherwood and KPF have demonstrated entitlement to an order quashing the subpoenas. The discovery sought is not "material and necessary" to Etkin's complaint - the only remaining cause of action relating to the condominium's windows is the cause of action for breach of contract. As previously stated, according to Etkin, Sherwood refused to repair or replace the scratched windows despite having a contractual obligation. The only discovery relevant to such a cause of action is the condominium's offering plan and purchase agreement and any provision therein requiring Sherwood to repair the windows, any proof as to whether the windows were repaired and any damages sustained by Etkin.

As correctly noted by Sherwood and KPF, Etkin's subpoenas relate to his personal belief and continuing accusation that Sherwood engaged in some sort of fraud or conspiracy to sell the various units in the building and avoid repairing the windows until the contractual period in which to bring any claim for repairs or replacement expired. Indeed, on their face, the subject subpoenas appear to be seeking discovery merely to explore and support these fraud claims. However, the operative complaint does not allege any cause of action relating to these allegations. Thus, the subpoenas must be quashed as the sought discovery is nothing more than a "fishing expedition to ascertain the existence of evidence." Reuters Ltd. v Dow Jones

Telerate, Inc., supra; see also Matter of Terry D., 81 NY2d 1042 (1993).

The subpoenas are also overbroad as written as they each seek "*[a]ll* documents and *all* communications (including, but not limited to, communications with Sherwood or the Board) concerning the Building's windows," failing to specify with any precision the records sought. See Grotallio v Soft Drink Leasing Corp., supra. Etkin is also seeking disclosure from individuals and entities without demonstrating any reasonable basis to believe they would possess information relevant to his own scratched windows. These parties include the bank that financed the construction of the condominium, the contractor who installed the electrical, plumbing, and mechanicals in the condominium, and an architectural firm retained to consult on the construction of the condominium's roof. In that regard, the court notes that in its order of October 3, 2018, it directed Sherwoood to produce, *inter alia,* all documents is its possession concerning any windows in the building that were reported by a unit owner or any other person to have scratches or defects or set forth its efforts to locate them and represent that none were found. Sherwood complied with the latter.

In opposition, Etkin makes no persuasive argument warranting denial of the motion to quash. Again, whether there

may have been other units in the building with scratched windows has no bearing on Etkin's cause of action alleging that Sherwood failed to replace or repair the windows in his unit pursuant to the terms of the purchase agreement.

As correctly argued by Sherwood and KPF, Etkin has not demonstrated entitlement to a deposition of Tracee Holder, who appears to be an employee of Sherwood's managing agent. That Etkin disbelieves Sherwood's sworn representation that it has no further relevant documentsto produce does not relax the rules for subpoenas so as to allow those served here. To the extent Etkin identifies Holder as a further witness for Sherwood, he has not made a detailed showing demonstrating the necessity for taking such deposition. See Alexopoulos v. Metro. Transp. Auth., 37 AD3d 232 (1st Dept. 2007); Hayden v City of New York, 26 AD3d 262 (1st Dept. 2006); Colicchio by Colicchio v City of New York, 181 AD2d 528 (1st Dept. 1992).

Any further relief in the form of a protective order pursuant to CPLR 3103 sought by Sherwood and KPF is denied without prejudice. A protective order is intended to "prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts." CPLR 3103. As the subject subpoenas are quashed, and the Sherwood and KPF do not identify any other current effort by Etkin seeking the same

discovery, a protective order is unnecessary. Nonetheless, the plaintiff is cautioned to abide all directives of this order and guide himself accordingly.

B. Sanctions Applications

Both Etkin and Sherwood/KPF seek monetary sanctions. Sherwood and KPF maintain that Etkin served the subpoenas in bad faith. Etkin asserts that the motion to quash is meritless. 22 NYCRR 130-1.1(a) provides in part that the court, "in its discretion, may award to any party or attorney in any civil action ... costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct..." Frivolous conduct includes conduct that is completely without merit in law and is undertaken primarily to harass or maliciously injure another. See 22 NYCRR 130-1.1(c). Applying this standard, neither party establishes their entitlement to sanctions. Etkin's conduct in serving the subject subpoenas borders on frivolous, particularly in light of the protracted disclosure history of this case and the nature and timing of the subpoenas. Furthermore, Etkin's inexplicable counter request for the costs of opposing a meritorious motion to quash which he himself occasioned also borders on frivolous, and not just because it is procedurally improper. However, the court declines to impose costs or other sanctions at this juncture.

## IV. CONCLUSION

Accordingly, it is hereby,

ORDERED that the motion of defendant Sherwood 21 Associates, LLC and non-party Kohn Pedersen Fox Associates pursuant to CPLR 2304 and 3103 seeking to quash the subpoenas served by the plaintiff on Kohn Pedersen Fox Associates, Landesbank Hessen-Theuringen Girozentral, GACE Consulting Engineers, Cosentini Associates, Starr Associates, Corcoran Sunshine Marketing Group, Howard Zimmerman Architects, PC, and Tracee Holden on or about February 13, 2020 is granted, and the subpoenaed parties need not produce the requested documents or appear for a deposition; and the motion is otherwise denied without prejudice, and it is further

ORDERED that the application of plaintiff William Etkin for sanctions is denied.

This constitutes the Decision and Order of the court.

Dated: February 4, 2021

NANCY M. BANNON, J.S.C.
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