

Figueroa v 2289 3rd Ave Realty Corp.

2021 NY Slip Op 30539(U)

February 24, 2021

Supreme Court, New York County

Docket Number: 158900/2018

Judge: John J. Kelley

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOHN J. KELLEY PART IAS MOTION 56EFM

Justice

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LUIS FIGUEROA,

Plaintiff,

- v -

2289 3RD AVE REALTY CORP., AMSTERDAM
HOSPITALITY, LLC, 2291, LLC, and AGUILA, INC.

Defendants.

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The following e-filed documents, listed by NYSCEF document number 59, 60, 61, 62, 63, 64, 65, 66, 67, and 68 (Motion 002)

were read on this motion to/for COMPEL COMPLIANCE WITH SUBPOENA

In this action to recover damages for personal injuries, the defendants 2289 3rd Ave. Realty Corp., Amsterdam Hospitality, LLC, and 2291, LLC (collectively the 2289 defendants), move pursuant to CPLR 2308(b) to compel the New York City Department of Homeless Services (DHS) fully to comply with a judicial subpoena duces tecum dated October 16, 2020 and served upon it on October 19, 2020. The DHS does not oppose the motion. The motion is granted, and the DHS is directed to produce the requested documents in accordance herewith.

The plaintiff allegedly sustained injuries on January 5, 2018 at a shelter located in Manhattan, known as the Washington Shelter, when he slipped and fell in a bathroom/shower area at the premises. The shelter was, at the time, owned, operated, and managed by the 2289 defendants pursuant to a contract with the DHS, which provided some social work and recordkeeping services in connection with the operation of the shelter. At the time of his accident, the plaintiff was a resident of the Washington Shelter, and the DHS maintained records concerning his residency in that shelter, including documents respecting his complaints and medical needs and treatments. Since the date of the accident, the Washington Shelter

closed down, the plaintiff was moved to a different shelter, and the 2289 defendants sold or transferred their interest in subject premises.

In the course of discovery, the plaintiff explained that, while he resided in the Washington Shelter, the DHS interviewed him on numerous occasions about many issues, including how the accident occurred, the condition of the subject bathroom/shower prior to the accident, the nature and severity of the injuries that he sustained, and the permanency thereof. Despite the plaintiff's provision of numerous HIPAA-compliant authorizations permitting the 2289 defendants to obtain the relevant DHS records referable to the time he was a resident at the Washington Shelter, and the 2289 defendants' submission of the authorizations to the DHS, the DHS did not respond to the authorizations. On October 16, 2020, upon request of the 2289 defendants, this court issued a so-ordered judicial subpoena directed to the DHS, permitting the 2289 defendants to obtain "all records, office notes, handwritten notes, reports and any other records maintained in your file pertaining to plaintiff," as set forth in the authorization that accompanied the subpoena. The 2289 defendants served those documents upon the DHS on October 19, 2020, and the subpoena was made returnable on November 9, 2020. The DHS did not comply by that date. On November 18, 2020, the 2289 defendants sent a follow-up email to the DHS's subpoena/Freedom of Information Law unit, making a good-faith request to DHS that it comply with the subpoena.

Counsel for the 2289 defendants thereafter conducted an email correspondence over a period of several months with at least two DHS representatives concerning the production of documents in accordance with the subpoena and authorization. In response thereto, the DHS was able to locate and produce some responsive records, but only those that were referable to the time beginning with the plaintiff's residence at his current shelter. Although those records included documents that made reference to the plaintiff's accident at the Washington Shelter and many of his medical conditions during the time that he was a resident at the Washington Shelter, the DHS has yet to provide the documents generated by the DHS during the plaintiff's

residency at the Washington Shelter. All parties agree that the unproduced documents that remain in the DHS's possession are relevant and necessary to enable them to complete the plaintiff's deposition and proceed with the defendants' depositions.

CPLR 2307(a) provides, among other things, that

“[a] subpoena duces tecum to be served upon a library, or a *department* or bureau of a municipal corporation or of the state, or an officer thereof, requiring the production of any books, papers or other things, shall be issued by a justice of the supreme court in the district in which the book, paper or other thing is located or by a judge of the court in which an action for which it is required . . . Unless the court orders otherwise, a motion for such subpoena shall be made on at least one day's notice to the library, department, bureau or officer having custody of the book, document or other thing and the adverse party”

(emphasis added). “The purpose of a judicial subpoena duces tecum ‘is to compel the production of specific documents that are relevant and material to facts at issue in a pending judicial proceeding’” (*Matter of State Police Admin. Disciplinary Hearing on Apr. 27, 2004*, 13 AD3d 884, 885 [3d Dept 2004], quoting *People v Carpenter*, 240 AD2d 863, 864 [3d Dept 1997]; see *Matter of Terry D.*, 81 NY2d 1042, 1044 [1993]; *Velez v Hunts Point Multi-Serv. Ctr., Inc.*, 29 AD3d 104, 112 [1st Dept 2006]). However, “in general, the subpoena duces tecum may not be used for the purpose of discovery or to ascertain the existence of evidence” (*People v Gissendanner*, 48 NY2d 543, 551 [1979]). Here, despite the use of the phrase “all records” in the subpoena, the proposed request is not overbroad since it merely requests those records itemized in the accompanying authorization (see *Soho Generation v Tri-City Ins. Brokers*, 236 AD2d 276, 277 [1st Dept 1997]). Thus, it constitutes a proper request for specific, readily identifiable documents, relevant to the plaintiff's claims, that are in the DHS's possession.

A motion pursuant to CPLR 2308 is the proper procedure for compelling compliance with a subpoena that has been duly served upon a nonparty (see *Brown v Eimicke*, 144 AD2d 460, 461 [2d Dept 1988]). The court notes that although CPLR 2302(b) and 3120(4) provide that any motion for the issuance of a judicial subpoena duces tecum be made on at least one day's notice to the person having custody of the documents sought (see *Sanderson v New York City*

Tr. Auth., 2007 NY Slip Op 51382[U], 16 Misc 3d 1111[A] [Sup Ct, Kings County, Jul. 17, 2007]), the court may “order[] otherwise” (CPLR 2302[b]). Hence, there was no irregularity in the issuance of a judicial subpoena duces tecum here in the absence of one day’s notice. In any event, although the DHS had the right to move to quash the subpoena on the ground of insufficient notice (see *People v Doe*, 170 Misc 2d 454, 456 [Sup Ct, Monroe County 1996]), it did not avail itself of that procedure. Moreover, although the DHS also could have raised objections with respect to the sufficiency of the notice in the context of the instant motion to compel compliance (see *Friedman v Hi-Li Manor Home for Adults*, 42 NY2d 408, 413 [1977]), it failed to exercise that option as well. DHS’s failure to raise the issue, and its partial compliance with the subpoena, waives any objection it might have had to insufficient notice.

A non-judicial subpoena is one that is not returnable in court (see *Irizarry v New York City Police Dept.*, 260 AD2d 269 [1st Dept 1999]; *Matter of Cambridge Packing Co, Inc. v LaJaunie*, 2019 NY Slip Op 30689[U], 2019 NY Misc LEXIS 1210 [Sup Ct, N.Y. County, Mar. 18, 2019] [Kelley, J.]). A judicial subpoena, like the instant one, is one that is either issued by a court, or made returnable in court. Although there is no requirement that a party seeking to enforce a judicial subpoena move pursuant to CPLR 2308(b) to compel compliance with the subpoena before moving to hold the noncompliant entity in contempt pursuant to CPLR 2308(a) (see *Matter of Ling v Sans Souci Owners Corp.*, 187 AD3d 755, 756 [2d Dept 2020]), the 2289 defendants appropriately have elected to seek to compel compliance here prior to moving to hold the DHS in contempt.

In light of the foregoing, it is,

ORDERED that the motion to compel the New York City Department of Homeless Services fully to comply with the judicial subpoena duces tecum dated October 16, 2020 and served upon it on October 19, 2020 is granted, without opposition; and it is further,

ORDERED that, on or before March 1, 2021, the defendants 2289 3rd Ave. Realty Corp., Amsterdam Hospitality, LLC, and 2291, LLC, shall serve a copy of this order with notice

of entry upon the New York City Department of Homeless Services by email at sardarm@dss.nyc.gov and [schmeidler@dss.nyc.gov](mailto:schmeidler@ dss.nyc.gov) and by regular mail at 33 Beaver Street, 17th Floor, New York, New York 10004, and upon the New York City Corporation Counsel by email at ServiceECF@law.nyc.gov and by regular mail at 100 Church Street, New York, New York 10007; and it is further,

ORDERED that, on or before March 31, 2021, the New York City Department of Homeless Services shall produce and provide the defendants 2289 3rd Ave. Realty Corp., Amsterdam Hospitality, LLC, and 2291, LLC, with all records and documents responsive to the judicial subpoena duces tecum, dated October 16, 2020 and served upon it on October 19, 2020, including, but not limited to, records and documents referable to the residency of the plaintiff, Luis Figueroa, at the Washington Shelter that were generated at the Washington Shelter during the period of his residency thereat, in connection with, among other things, his January 5, 2018 accident, the condition of the shelter, and his physical and mental conditions while still a resident at that shelter; and it is further,

ORDERED that the failure of the New York City Department of Homeless Services to comply with this order may result in a finding that it is in civil contempt of court.

This constitutes the Decision and Order of the court.

2/24/2021
DATE


JOHN J. KELLY, J.S.C.

CHECK ONE:

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

APPLICATION:

CHECK IF APPROPRIATE: