

<b>Clarke v Fifth Ave. Dev. Co., LLC</b>
2021 NY Slip Op 32331(U)
November 17, 2021
Supreme Court, New York County
Docket Number: Index No. 158986/2020
Judge: Barbara Jaffe
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE PART 12

*Justice*

-----X

IRENE CLARKE and LOUIS CLARKE,

Plaintiffs,

- v -

FIFTH AVE. DEVELOPMENT CO., LLC,  
PELICAN MANAGEMENT, INC., GOLDFARB  
PROPERTIES, CHRISTOPHER MILLER,

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 14-44  
were read on this motion for discovery.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 50-53  
were read on this motion for subpoena *duces tecum*.

In motion sequence one, plaintiffs move for an order compelling defendants to produce for deposition non-party Philip Goldfarb. Defendants oppose. In motion sequence two, plaintiffs move, without opposition, for a court-ordered subpoena *duces tecum* of the New York City Department of Buildings (DOB).

I. PERTINENT BACKGROUND

In their complaint, plaintiffs assert that they agreed to lease a residential apartment located on the sixth floor of a building located at 1160 Fifth Avenue in Manhattan, which defendant Fifth Ave. Development Co., LLC (Fifth Ave.) owns and is party to the lease. Defendant Pelican Management, Inc. (Pelican) is the managing agent of the building, defendant Goldfarb Properties is the beneficial owner of Fifth Ave., and defendant Christopher Miller is an employee of Goldfarb Properties.

Plaintiffs allege in their complaint that when they signed the lease, defendants failed to disclose their plan to replace the sole elevator servicing their apartment, and that while the elevator was being replaced, their apartment was uninhabitable for two months shortly into their lease term and in the midst of the COVID-19 pandemic. They assert causes of action for fraud, partial constructive eviction, breach of warranty of habitability, and denial of quiet enjoyment. (NYSCEF 2).

On March 5, 2021, plaintiffs moved for an order compelling defendants to respond to their first set of interrogatories and produce Goldfarb for deposition. (NYSCEF 14-16). Defendants opposed and cross-moved for an order compelling plaintiffs to respond to their discovery demands and appear for depositions. (NYSCEF 25-27). On May 20, 2021, the parties stipulated in their preliminary conference order that plaintiffs would hold their motion in abeyance, except for their request for an order requiring defendants to produce Goldfarb for deposition, and defendants withdrew their cross-motion. (NYSCEF 45).

On August 9, 2021, plaintiffs moved for a court-ordered subpoena *duces tecum* directed at the DOB for records relating to their complaint, including communications between the DOB and defendants concerning the building, filings made by defendants about the building, and documents concerning elevators in the building. (NYSCEF 50, 51). Plaintiffs attach the proposed subpoena. (NYSCEF 52).

## II. MOTION SEQUENCE ONE

### a. Contentions

Plaintiffs contend that defendants should be compelled to produce Goldfarb for deposition, as they properly served them with a notice of deposition. Defendants served no notice of objection nor did they move for a protective order, and have refused to discuss the matter.

(NYSCEF 15).

In response, defendants argue that corporate parties are entitled to designate which witness will appear on their behalf for deposition and that as Goldfarb is a managing member of Fifth Ave. and an officer of Pelican, and Goldfarb Properties is a “DBA for these companies,” it is their decision as to whether he should be produced for a deposition. (NYSCEF 26).

Plaintiffs reply that as they seek to depose Goldfarb, not as a representative of a corporate party, but as a non-party witness, defendants’ arguments are irrelevant. (NYSCEF 37).

#### b. Analysis

A corporation may generally designate which of its employees it will produce for deposition in the first instance. (*Faber v New York City Tr. Auth.*, 177 AD2d 321, 322 [1st Dept 1991]; *see eg Mercado v Alexander*, 227 AD2d 391 [2d Dept 1996] [applying same rule to corporate officers and directors]). Thus, a party seeking additional corporate depositions must demonstrate that the person initially deposed provided inadequate information or had insufficient knowledge, and that there is a substantial likelihood that the person sought for deposition possesses information material and necessary to the prosecution of the case. (*O’Brien v Vil. of Babylon*, 153 AD3d 547 [2d Dept 2017]).

Here, it is undisputed that Goldfarb is an officer, director, or employee of multiple corporate defendants. For the purposes of a deposition, “[a] person who was an officer, director, member or employee of a party at the time the deposition is taken qualifies as a ‘party’ rather than as a mere ‘witness’” (*Sammy v First American Title Ins. Co. of New York*, 2015 NY Slip Op 31337[U] [Sup Ct, Queens County 2015] [internal quotation marks and citation omitted]). Thus, that plaintiffs seek to depose Goldfarb as a non-party witness is of no moment, especially as they did not subpoena him, but served a notice of deposition on defendants.

3d Dept 2016] [trial court properly exercised discretion in imposing sanctions where the plaintiff failed to produce witness, move for a protective order or comply with CPLR 3106[d] by court ordered deadline]).

III. MOTION SEQUENCE TWO

A motion for a subpoena duces tecum “upon a library, or a department or bureau of a municipal corporation or of the state, or an officer thereof” must be made on at least one day’s notice to the person or governmental entity being subpoenaed unless the court orders otherwise. (CPLR 2307; Lombardo v Dormitory Auth. of State of New York, 47 Misc 3d 702, 704 [Sup Ct, Kings County 2015] [denying attempt to have court so order subpoenas duces tecum without applying by motion on notice to governmental entity]). As plaintiffs failed to provide such notice to the DOB, their motion is procedurally insufficient.

IV. CONCLUSION

In light of the foregoing, it is hereby

ORDERED, that plaintiffs’ motion to compel defendants to produce Goldfarb for deposition (mot. seq. one) is granted; it is further

ORDERED, that defendants produce Goldfarb for deposition with 30 days of the date of this order; and it is further

ORDERED, that plaintiffs’ motion for a subpoena duces tecum (mot seq. two) is denied.

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11/17/2021
DATE

Signature of Barbara Jaffe
BARBARA JAFFE, J.S.C.

CHECK ONE: [ ] CASE DISPOSED [ ] GRANTED [ ] DENIED [ ] NON-FINAL DISPOSITION [ ] GRANTED IN PART [ ] OTHER
APPLICATION: [ ] SETTLE ORDER [ ] SUBMIT ORDER
CHECK IF APPROPRIATE: [ ] INCLUDES TRANSFER/REASSIGN [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE