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Brookes v 157th St. Assoc., LLC
2022 NY Slip Op 50507(U)
Decided on June 14, 2022
Supreme Court, New York County
Rosado, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on June 14, 2022

Supreme Court, New York County

**Colin Brookes, CELIA HATTON, RAVENNA LIPCHIK,
KAREN POLESHUCK, MAX JACOB, ISAAC HAYWARD,
Plaintiff,**

against

157th Street Associates, LLC, Defendant.

Index No. 160664/2020

Mary V. Rosado, J.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 43, 44, 45, 46, 47, 48, 49 were read on this motion to/for SUBPOENA DUCES TECUM.

Upon the foregoing documents and after hearing oral argument on May 26, 2022, in which Diana Jarvis, Esq. and John Maher, Esq. appeared for the plaintiffs and Vladimir Favilukis, Esq. appeared for the defendant, this motion is granted as follows.

FACTUAL & PROCEDURAL BACKGROUND

Plaintiffs' filed their Complaint on December 9, 2020, alleging that the defendant illegally and fraudulently deregulated the plaintiffs' apartments and overcharged plaintiffs'

rent. Defendant filed its answer on February 26, 2021 denying plaintiff's allegations. On October 5, 2021, plaintiffs filed a proposed subpoena to be served on the Department of Housing and Community Renewal ("DHCR") seeking multiple categories of documents, including the "rent roll" for the building located at 602 West 157th Street, New York, NY ("the property"). In a letter to the Court, Plaintiff asserted that the subpoenaed documents were necessary to clear up discrepancies in the rent registration history of the apartments at issue based on the discovery [*2]produced by defendant. The subpoena was signed by Justice Alexander Tisch on October 7, 2021.

Defendant filed a letter to the Court on October 7, 2021 arguing that the subpoena plaintiffs wished to serve on DHCR was fatally defective for failing to comply with CPLR § 2307. Defendant asserted that plaintiffs' subpoena did not provide the twenty-four hours' notice to DHCR as required by CPLR § 2307.

On October 12, 2021, plaintiffs filed a notice of motion to serve a subpoena *duces tecum* on DHCR. Plaintiffs asserted that they needed to obtain the rent roll records from DHCR via a subpoena *duces tecum* because the DHCR records are exempt from disclosure via New York's Freedom of Information Law, the DHCR records will contain relevant information as to whether plaintiffs' units were exempt from rent regulation due to "substantial rehabilitation" and to obtain necessary information to calculate damages.

On October 29, 2021, defendant filed an opposition to plaintiffs' motion. Defendant asserted that the plaintiffs' motion must be denied because it fails to comply with the procedural and substantive requirements of CPLR §§ 2307 and 3101. Defendant argued that there is no evidence in the record that plaintiffs' motion was ever served on DHCR and therefore did not comply with the notice requirement under CPLR § 2307. Defendant also argued that plaintiff failed to comply with CPLR §3101 which requires that a non-party subpoena state on its face or within the accompanying notice the circumstances or reasons for the subpoena. Defendant further argued that the plaintiffs were impermissibly using a non-party subpoena to circumvent the discovery process. Finally, Defendant argued that the subpoena demands are overbroad and seeks information that is irrelevant, noting that more limited and narrowed records of the plaintiffs' respective units are freely obtainable from DHCR by the plaintiffs without the need for a subpoena.

On November 17, 2021, plaintiffs filed a reply to defendant's opposition. In plaintiffs' reply, they provided evidence that DHCR was given the necessary notice on October 12, 2021. Counsel for plaintiffs asserted that Roderick Walters, a Supervising Attorney at DHCR

had received the subpoena, would not oppose it, and would produce the requested records. Plaintiffs also argue that binding precedent establishes that they are entitled to see the complete DHCR rent roll for the property at issue in order to establish their remedies and to see if the defendant engaged in sufficient substantive rehabilitation to deregulate the apartments at issue ([Regina Metro. Co., LLC v. New York State Div. of Hous. & Community Renewal](#), 35 NY3d 332).

On March 30, 2022, plaintiffs filed a letter to the Court presenting to the Court new and binding legal precedent in *Ioannou v. 1. BK Street Corp.* 2022 NY Slip. Op. 02089 [1st Dept. 2022] to supplement the record.

APPLICABLE STANDARD

The scope of discovery in New York is broad, and discovery from a non-party should be directed when the party seeking discovery demonstrates that the disclosure sought is material and necessary in resolving the issues presented by the case. *Forman v Henkin*, 70 NY3d 656 [2018]. The statute governing the scope of discovery embodies the Legislature's policy determination that liberal discovery encourages fair and effective resolution of disputes on the merits, minimizing the possibility for ambush and unfair surprise. *Id.*; see also CPLR §3101(a).

A subpoena duces tecum may be issued to compel the production of specific documents that are relevant and material to facts at issue in a pending judicial proceeding. *Matter of Terry D.*, 81 NY2d 1042, 1044 [1993]. A motion to quash a subpoena duces tecum should be granted only [*3] where the materials sought are utterly irrelevant to any proper inquiry. *New Hampshire Ins. Co. v Varda, Inc.*, 261 AD2d 135 [1st Dept. 1999]; *Matter of Reuters Ltd. V Dow Jones Telerate*, 231 AD2d 337 [1997].

A nonparty subpoena duces tecum must give notice stating the circumstances or reasons disclosure is sought or required. [Velez v. Hunts Point Multi-Service Center, Inc.](#), 29 AD3d 104 [1st Dept. 2006]; CPLR § 3101. However, if a nonparty, from whom discovery is sought, does not object to a lack of notice or object to the circumstances or reasons such disclosure is sought or required, the notice requirement is, in effect, waived. [Velez v. Hunts Point Multi-Service Center, Inc.](#), 29 AD3d 104 [1st Dept. 2006]. "The burden of establishing that the requested documents and records are utterly irrelevant is on the person being subpoenaed." *Ioannou v. 1 BK Street Corp.*, 2022 NY Slip Op. 02089 [1st Dept. 2022]; *Gertz v. Richards*, 233AD2d 366 [2d Dept. 1996].

The First Department has also noted that the purpose of the amendments to CPLR § 3120 was to take the issue of compliance out of the courts as much as possible and to place the burden on the parties and nonparties involved to work out their differences. *Velez* at 12. In *Velez*, which similarly involved a dispute over whether a subpoena complied with the notice requirement of CPLR § 3101, the Court found that "the simple and better solution would to have been for the objecting party to notify the party issuing the subpoenas of the defect and allow the party issuing the subpoena to serve a new subpoena with the requisite notice rather than burden their clients and the courts with the time and expense of litigating the issue of the form of the subpoenas." *Id.*

ANALYSIS

Defendant and non-party DHCR have not satisfied their burden of establishing that the subpoenaed documents or records are "utterly irrelevant." Given the allegations in plaintiffs' complaint, the information sought in plaintiffs' subpoena is relevant to proving their claim. Moreover, the documents requested will help ascertain when and if the apartments ever became deregulated, and if they were always regulated, at what date did the rent charged become illegal. It has been frequently held by the First Department that in a claim alleging a fraudulent scheme to deregulate multiple apartments in a building, rent rolls sought in the subpoena such as the one in the case at bar are to be considered relevant. *Ioannou v. 1 BK Street Corp.*, 163 N.Y.S.3d 398 (Mem), [1st Dept. 2022]; [435 Cent. Park W. Tenant Assn. v. Park Front Apartments, LLC](#), 183 AD3d 509 [1st Dept. 2020]; [Gersten v. 56 7th Ave. LLC](#), 88 AD3d 189 [1st Dept. 2011], *appeal withdrawn*, 18 NY3d 954 [2012].

Perhaps even more compelling, the subpoenaed party has not objected to the relevance of the subpoenaed documents. In fact, the record indicates that counsel for DHCR, who has been in receipt of the subpoena at issue since at least October 20, 2021, stated he has no objections and was willing to send all requested records to plaintiffs. If a nonparty, from whom discovery is sought, does not object to a lack of notice or object to the circumstances or reasons such disclosure is sought or required, the notice requirement is, in effect, waived. [Velez v. Hunts Point Multi-Service Center, Inc.](#), 29 AD3d 104 [1st Dept. 2006]. Therefore, defendant's opposition to plaintiffs' subpoena to DHCR is without merit on both procedural and substantive grounds.

Accordingly, it is

ORDERED that plaintiffs' motion to issue a subpoena *duces tecum* to DHCR is granted;

and it is further

ORDERED that plaintiffs' are directed to submit a proposed subpoena *duces tecum* to the Court within 10 days; and it is further

ORDERED that within 30 days of entry, plaintiffs' attorney shall serve a copy of this Order with Notice of Entry upon defendant.

This constitutes the decision and order of the Court.

DATE 6/14/2022

HON. MARY V. ROSADO, J.S.C.

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