

Impact Car Park, LLC v Mutual Redevelopment Houses, Inc.
2021 NY Slip Op 30950(U)
March 26, 2021
Supreme Court, New York County
Docket Number: 653591/2019
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM-----X
IMPACT CAR PARK, LLCINDEX NO. 653591/2019

Plaintiff,

MOTION DATE 12/23/2020

- v -

MUTUAL REDEVELOPMENT HOUSES, INC.,

MOTION SEQ. NO. 003

Defendant.

**DECISION + ORDER ON
MOTION**-----X
HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 117, 118, 119, 120, 121, 122, 123, 124

were read on this motion to

COMPEL.

Plaintiff Impact Car Park, LLC (“Plaintiff”) moves to compel non-party Energy Efficient Lighting Design, LLC (“EELD”), pursuant to CPLR 3120 and 3124, to comply with the *subpoena duces tecum* served upon it on February 10, 2020 (the “Subpoena”), and for an award of damages and costs under CPLR 2308 due to EELD’s failure to comply. For the reasons set forth below, Plaintiff’s unopposed motion is granted.

A. EELD Must Comply with the Subpoena

The CPLR provides that “[t]here 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” (CPLR 3101; *Matter of Kapon v Koch*, 23 NY3d 32, 36 [2014]). “The words ‘material and necessary’ as used in section 3101 must ‘be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by

sharpening the issues and reducing delay and prolixity” (*Kapon*, 23 NY3d at 38, *quoting Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]).

Non-parties are subject to the same obligation as parties to provide “full disclosure of all matter material and necessary in the prosecution or defense of an action.” There is “no requirement,” when seeking disclosure from a non-party, “that the subpoenaing party demonstrate that it cannot obtain the requested disclosure from any other source” (*Kapon*, 23 NY3d at 38). “[S]o long as the disclosure sought is relevant to the prosecution or defense of an action, it must be provided by the nonparty” (*id.*; *see, e.g., State ex rel. Murray v Baumslag*, 134 AD3d 451, 452 [1st Dept 2015] [granting motion to compel subpoena against non-party where non-party “failed to establish 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’”]). And “the burden of establishing that the requested documents and records are utterly irrelevant is on the person being subpoenaed” (*Velez v Hunts Point Multi-Serv. Ctr., Inc.*, 29 AD3d 104, 112 [1st Dept 2006]; *see Kapon*, 23 NY3d at 39 [“It is the one moving to vacate the subpoena who has the burden of establishing that the subpoena should be vacated under such circumstances”]).

Here, the Subpoena seeks relevant information. This case arises out of a Notice to Cure served upon Plaintiff by Defendant Mutual Redevelopment Houses, Inc. (“Defendant”), the owner of the subject premises, claiming that a storage room in the parking garage operated by Plaintiffs was unauthorized and therefore constituted a breach of the parties’ lease (Affirmation of Peter S. Dawson [“Dawson Aff.”] ¶3). Plaintiff then commenced this action for a declaratory judgment, a *Yellowstone* injunction, specific performance of the lease, breach of the covenant of good faith and fair dealing, and attorneys’ fees (*id.*). Essentially, Plaintiff alleges that Defendant seized on the storage room – which, according to Plaintiff, has existed in plain sight for years –

as pretext to oust Plaintiff from the premises (*id.* ¶4). At a hearing on Plaintiff's application for a *Yellowstone* injunction, however, Defendant's former General Manager, Brendan Keany, testified that Defendant only learned of the storage room in May 2019 (*id.* ¶5). Keany also claimed, in an accompanying affidavit, that Plaintiff's assertion that Defendant was previously aware of the storage room was "absurd" (*id.*; see NYSCEF 44 ¶15 ["[A]ny claim by Ull that Mutual was 'aware' of the space is absurd."])).

The Subpoena seeks to buttress Plaintiff's argument that Defendant knew about the storage room prior to May 2019. Specifically, Plaintiff claims that EELD previously performed lighting work in the storage room at Defendant's behest (*id.* ¶¶5-6). Accordingly, the Subpoena requests documents and communications from EELD concerning such alleged work, including communications between EELD and Defendant (*see* Subpoena at 1 [NYSCEF 119]). The Subpoena describes to EELD the "circumstances or reasons such disclosure is sought," as required by CPLR 3101 (*id.* at 2). Because Plaintiff has demonstrated the relevance of the information sought by the Subpoena – while EELD, as noted, has failed to file any opposition to this motion – Plaintiff's motion to compel is granted.

B. EELD's Conduct is Sanctionable

EELD's conduct in failing to comply with the Subpoena, and failing to identify any grounds for its non-compliance, warrants imposition of sanctions. EELD acknowledged receipt of the Subpoena in March 2020 and even negotiated an extension of the deadline to produce responsive documents (Dawson Aff. ¶¶7-8). But EELD has since failed to produce any documents and did not respond to repeated emails from Plaintiffs' counsel about the status of EELD's compliance (*id.* ¶¶8, 11). As a result, over a year after the Subpoena was served, EELD still has not produced a single document in response, forcing Plaintiff to file the instant motion.

The remedy for failing to comply with a judicial subpoena¹ is set out in CPLR 2308 [a] (emphasis supplied):

[f]ailure to comply with a subpoena issued by a judge, clerk or officer of the court shall be punishable as a contempt of court. If the witness is a party the court may also strike his or her pleadings. A subpoenaed person shall also be liable to the person on whose behalf the subpoena was issued for a penalty not exceeding one hundred fifty dollars and damages sustained by reason of the failure to comply.

The statute thereby identifies two forms of sanctions applicable to a non-party that disregards an attorney-issued subpoena – “contempt of court” (*Ling v Sans Souci Owners Corp.*, 187 AD3d 755 [2d Dept 2020] [“a subpoena seeking the production of documents or testimony relating to a pending action, which has been served upon a nonparty, may be enforced through the power of contempt”]), and “also” a \$150 penalty plus damages sustained by reason of the failure to comply (*Essa Realty Corp. v J. Thomas Realty Corp.*, 31 Misc 3d 1235(A) [Sup Ct, New York County 2011] [holding non-party in contempt under CPLR 2308 [a] and imposing \$150 penalty]).

The Court therefore finds EELD in contempt of court. As for the amount of the sanction, “Judiciary Law § 773 permits recovery of attorney’s fees from the offending party by a party aggrieved by the contemptuous conduct” (*Schwartz v Schwartz*, 79 AD3d 1006, 1010 [2d Dept 2010]; *Koegler v Amrally*, 68 Misc 3d 1204(A) [Sup Ct, New York County 2020] [“Failure to

¹ The relevant statutory provision here is CPLR 2308 [a], and not, as Plaintiff suggests, CPLR 2308 [b]. The latter applies only to non-judicial subpoenas. “Because the subpoena was issued by an officer of the court – namely, plaintiff’s counsel – [the subpoena] was a judicial subpoena, and therefore CPLR 2308(b)(1) . . . [is] inapplicable” (*Douglas Elliman, LLC v TWP Real Estate, LLC*, 189 AD3d 614, 614 [1st Dept 2020]; *People v Zilberman*, 297 AD2d 517, 517 [1st Dept 2002] [noting that “appropriate remedy for failure to comply with an attorney-issued subpoena” is CPLR 2308[a]]; see Patrick M. Connors, Practice Commentaries, CPLR 2308 [“The ‘officer of the court’ includes the attorney in the case, who issued the subpoena, and subdivision (a) may be regarded as embracing any subpoena returnable to a court or being used in connection with a judicial proceeding.”])).

comply will result in a finding of contempt, including but not limited to the recovery of attorney's fees"]; *see* Judiciary Law § 773 [permitting "a fine . . . sufficient to indemnify the aggrieved party"])). Plaintiff is entitled to recover the costs and expenses, including reasonable attorneys' fees, it incurred in pursuing this motion.

In addition, EELD is liable to Plaintiff for the statutory penalty under CPLR 2308 [a], in the amount of \$150.

* * * *

Accordingly, it is

ORDERED that Plaintiff's motion is GRANTED; it is further

ORDERED that non-party EELD shall comply with the Subpoena within 14 days from service of this order with notice of entry; it is further

ORDERED that, as a penalty for EELD's contempt of court, EELD shall pay Plaintiff the amount of costs and expenses, including reasonable attorneys' fees, it incurred in bringing this motion; it is further

ORDERED that Plaintiff submit a bill of costs within 30 days of this order; it is further

ORDERED that, as a penalty for non-compliance with a judicial subpoena under CPLR 2308 [a], EELD shall pay Plaintiff in the amount of \$150; it is further

ORDERED that payment of this penalty shall be delivered to counsel for Plaintiff and written proof of such payment shall be provided to the Clerk of Part 3 within 30 days after service of a copy of this order with notice of entry; it is further

ORDERED that, in the event that timely payment is not made, the Clerk of the Court, upon service upon him of a copy of this order with notice of entry and an affirmation or affidavit

reciting the fact of such non-payment, shall enter a judgment in favor of the Plaintiff and against EELD in the aforesaid sum; and it is further

ORDERED that proof of payment shall be provided to the Clerk of the Part and such service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh).

This constitutes the Decision and Order of the Court.

3/26/2021

DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

☐

CASE DISPOSED

☒

GRANTED

☐

DENIED

☐

SETTLE ORDER

☐

INCLUDES TRANSFER/REASSIGN

☒

NON-FINAL DISPOSITION

☐

GRANTED IN PART

☐

OTHER

☐

SUBMIT ORDER

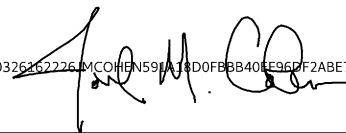
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FIDUCIARY APPOINTMENT

☐

REFERENCE

20210326162226 JMC01EN591A13D0FB8B40E96DF2ABE7F25E629



JOEL M. COHEN, J.S.C.