

Minkin v Board of Directors of the Cortlandt Ridge Homeowners Assoc., Inc.

2013 NY Slip Op 34166(U)

June 24, 2013

Supreme Court, Westchester County

Docket Number: 3235/11

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

FILED AND ENTERED
ON 6-25 2013
WESTCHESTER COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

GREGG MINKIN and CONNIE MINKIN,

Plaintiffs,

-against-

BOARD OF DIRECTORS OF THE CORTLANDT
RIDGE HOMEOWNERS ASSOCIATION, INC., and
McGRATH MANAGEMENT SERVICES, INC.,

Defendants.

-----X
LEFKOWITZ, J.

Index No. 3235/11
Motion Date: June 24, 2013
Seq. No. 4

FILED
JUN 25 2013
TIMOTHY C. IDAN
COUNTY CLERK
COUNTY OF WESTCHESTER

The following papers numbered 1 to 27 were read on this motion by plaintiffs for an order to compel defendants to provide to them certain, enumerated documents that are still outstanding and to compel non-parties Michelle McGovern (hereinafter to be referred to as McGovern) and Elements Landscaping (hereinafter to be referred to as Elements), to comply with the respective subpoenas served on each of them.

Amended Order to Show Cause	1
Good Faith Affidavit and Affirmation in Support	2-3
Exhibits A-W	4-26
Affirmation in Opposition	27

Upon the foregoing papers and upon oral argument heard on June 24, 2013, the motion is determined as follows:

This action was commenced on or about January 24, 2011. Plaintiffs own a private home in the Cortlandt Ridge Community in Cortlandt Manor, New York (hereinafter to be referred to as the Community). Defendants are the Board of Directors of the Cortlandt Ridge Homeowners Association, Inc. (hereinafter to be referred to as the Board) and McGrath Management Services Inc. (hereinafter to be referred to as McGrath), the management company for the Community. The Community is comprised of private homes and condominiums.

Plaintiffs allege that the Board is authorized to maintain condominium property and common areas but not homeowners' private property. Plaintiffs further allege that defendants have breached their fiduciary duties by taking from the homeowners their right to maintain their private property and forcing them to pay for services of landscapers hired by defendants. Plaintiffs also allege that defendants breached their fiduciary duties and engaged in a scheme of self-dealing and fraud because members of the Board and McGrath's owner, Hussein

Khoder, have had substantial work performed on their private property by the companies that they are awarding landscaping contracts to and that in so doing they are forcing the private homeowners to pay. Plaintiffs allege that defendants breached their fiduciary duty by retaliating against them for their refusal to go along with this scheme. Plaintiffs allege that defendants improperly charged their account for about \$ 50,000.

Plaintiffs also allege that in 2010 and 2011, defendants awarded lucrative landscaping contracts for the Community to Elements and that they improperly forced private homeowners to use its services. Plaintiffs further allege that Elements performed substantial work on Board members' private property. Plaintiffs served Elements with a subpoena duces tecum on or about April 8, 2013. Element has not responded to the subpoena nor moved for a protective order¹.

Plaintiffs allege that non-party, Board member, William Solander (hereinafter to be referred to as Solander), had massive work performed on his private property by Elements and McKinney's Landscaping. Plaintiffs served a subpoena on Solander on or about April 18, 2012. The subpoena included requests for the production of documents relating to work performed by landscapers the Board hired to service the Community and which (plaintiffs allege) the Board forced private homeowners to use. Solander failed to respond to the subpoena or to move for a protective order. By letter dated May 18, 2012, defense counsel informed plaintiffs' counsel that it was improper to proceed with a subpoena insofar as he was seeking information from Solander (and other Board members) in his official capacity as a Board member. Plaintiffs' counsel now states that as a result of that letter, he did not seek to enforce the subpoena at that time but rather sought to obtain the requested documents through party discovery. Plaintiffs admit that defendants produced some documents relating to work performed by Elements on Solander's front and side yards. After Solander's deposition, plaintiffs served their Second Post-Deposition Notice for Discovery and Inspection that included a demand for documents that were not previously produced and that related to work identified by Solander as being performed on his private property².

On January 13, 2013, plaintiffs served upon defendants a First Post-Deposition Notice for Discovery and Inspection. Demand 4 sought all documents relating to McKinney's Landscaping performing services including but not limited to planting trees and constructing a patio on Hussein Khoder's private property. Demand 6 sought all documents relating to

¹The Court notes that plaintiffs have failed to include a complete copy of the subpoena duces tecum served on Elements. Excluded from the record submitted on this motion is Rider A of the subpoena; that is, the list of requested documents.

²The Court notes that although in their Order to Show Cause plaintiffs seek to compel compliance with subpoenas served on Elements and McGovern, in their counsel's supporting affirmation, the documents requested by subpoenas served on Elements and Solander, only, are discussed.

Requests for Approvals submitted by any single-family homeowner that included planting of tree(s) on the homeowner's front yard. Demand 8 sought all documents relating to Requests for Approval submitted by Solander for work performed in his yard. Document 9 sought all documents relating to Requests for Approval submitted by McGovern, for work performed in her backyard. Finally, Demand 11 sought a copy of the full ledger of plaintiffs' account.

On February 23, 2013 plaintiffs served upon defendants a Second Post-Deposition Notice for Discovery and Inspection. Demand 1 sought unredacted copies of all attorney billing statements that have been included in plaintiffs' account. Demand 2 sought all documents including but not limited to contracts, drawings, blue prints, invoices, estimates, quotes, bids, receipts, checks and bank statements, relating to design services provided by Kurt Dapson,, Hudson Valley Landscaping and/or Elements to Solander. Demand 3 sought all documents including but not limited to contracts, drawings, blue prints, invoices, estimates, quotes, bids, receipts, checks and bank statements, relating to design services provided by McKinney's Landscaping to Solander. Demand 4 sought all documents relating to estimates or quotes received by Solander from any person or entity for any work performed on his property by Elements including but not limited to planting trees planting bushes constructing walls constructing walkways and/or constructing stairways. Demand 5 sought all documents relating to estimates or quotes received by Solander from any person or entity for any work performed on his property by McKinney's Landscaping including but not limited to planting trees, planting bushes, constructing walls constructing walkways and/or constructing stairways. Demand 6 sought all documents including but not limited to invoices, estimates, quotes, bids, receipts, checks and bank statements relating to the installation of exterior lights on Solander's property. Demand 7 sought all documents including but not limited to contracts, drawings, blue prints, invoices, estimates, quotes, bids, receipts, checks and bank statements relating to the replacement of sod on Solander's property.

In its Compliance Conference Order dated January 25, 2013, this Court (Lefkowitz, J.), directed defendants to serve responses to plaintiffs' post-depositions demands on or before March 20, 2013. Defendants served their responses on or about March 21, 2013. Regarding the First Post-Deposition Notice, defendants responded that Demands 6, 8, and 9 were not relevant to the issues in this matter. Defendants stated that they would comply with Demand 11. Regarding Demand 4, defendants noted that neither McKinney's Landscaping nor Khoder were defendants in this action and that the demand was improperly addressed to them. Regarding the Second Post-Deposition Notice, defendants responded that Demand 1 had been complied with to the extent that they had provided redacted copies of the billing statements. Defendants stated that they hired attorneys to file and prosecute an action for arrears on plaintiffs' account and to provide advise regarding plaintiffs' complaints regarding landscaping fees. Defendants asserted that unredacted copies are immune under attorney-client privilege. Regarding Demands 2-7 defendants noted that the request was improper as none of the individuals or companies referred to therein are defendants.

Plaintiffs are presently moving for an order compelling defendants to fully comply

with their post-deposition discovery requests. They assert that all of the requested documents are material and necessary to their claims and that they are properly discoverable³. In discussing the attorney fees charged to their account, plaintiffs allege that defendants have repeatedly billed their account for legal fees defendants incurred without providing any details of the work performed or why defendants are charging their account for those fees. Plaintiffs note that the governing documents of the Community provide for only two specific reasons when a homeowner can be charged attorneys' fees, neither of which is applicable in their case. Plaintiffs seek production of the legal bills charged to their account with only redactions being limited to attorney-client privileged communications. Plaintiffs request the Court to make an in camera inspection of the entries to determine whether indeed their disclosure actually reveals attorney-client privilege.

Defendants oppose the motion. They assert that the information requested by plaintiffs is not relevant to the issues in this case. Notwithstanding this, defendants state that they will provide the requested documents to the extent such documents exist and are available to them. Defendants will also provide documents and/or information sought in the non-party subpoenas to the extent that such documents are made available to defendants. Lastly, defendants agree to produce copies of their attorney billing statements on plaintiffs' account, redacted to the extent necessary to preserve attorney-client privilege.

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action." The phrase "material and necessary" is "to 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. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). Unlimited disclosure, however, is not required and the rules provide that the court may issue a protective order denying, limiting conditioning or regulating the use of any disclosure device to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts (*Accent Collections v Cappelli Enter., Inc.*, 84 AD3d 1283 [2d Dept 2011]). The supervision of discovery is within the sound discretion of the court (*Bernardis v Town of Islip*, 95 AD3d 1050 [2d Dept 2012]).

CPLR 3120 provides in pertinent part that after commencement of an action, any party may serve on any person a subpoena duces tecum. A party seeking disclosure from a nonparty pursuant to CPLR 3101(a)(4) must demonstrate the nonparty discovery sought is material and necessary and must state the circumstances or reasons warranting discovery from such nonparty witness (*Kondratick v Orthodox Church in America*, 73 AD3d 708 [2d Dept

³Although plaintiffs' counsel states in his affirmation that plaintiffs seek an order compelling non-parties Elements, Khoder, Solander and McGovern to produce documents requested in subpoenas served upon them, he only discusses Elements and Solander in his affirmation in support of this motion.

2010]; *Tenore v Tenore*, 45 AD3d 571 [2d Dept 2007]; *Smith v Moore*, 31 AD3d 628 [2d Dept 2006]; *Matter of Lutz v Goldstone*, 31 AD3d 449 [2d Dept 2006]). Discovery from a nonparty will not be directed where the disclosure can be obtained from sources other than the nonparty (see *Cotton v Cotton*, 91 AD3d 697 [2d Dept 2012]; *Kooper v Kooper*, 74 AD3d 6, 16-17 [2d Dept 2010]). “As a matter of policy, nonparties ordinarily should not be burdened with responding to subpoenas for lawsuits in which they have no stake or interest unless the particular circumstances of the case require their involvement” (*Kooper v Kooper*, 74 AD3d at 18).

The Court takes note that defendants have stated that they will, in good faith, provide the requested documents not yet provided and as set forth in plaintiffs’ two Post-Deposition Notices for Discovery and Inspection. Regarding the attorney billing statements that are in dispute herein, the Court notes, as both plaintiffs and defendants have conceded, that redacted copies have been provided. An inspection of Exhibit D shows that some legal fees incurred by defendants were billed to plaintiffs in October, 2012 and November, 2012. Exhibit P contains the invoice from defense counsel to defendants regarding plaintiffs’ present lawsuit. The dates therein indicate that all legal fees that were charged were for work performed on defendants’ behalf after this action was commenced and the caption thereof indicates that the legal fees relate to this lawsuit.

Upon examination of the Rider appended to the subpoenas served on McGovern and Solander, the Court finds it would be unduly burdensome to them to comply with producing the requested documents contained therein. Furthermore, several of the requested documents (identically set forth in both the subpoenas) are likely available to one or both defendants (1(c)(d), 3, 4, 6, 7, 8, 9), or plaintiffs (5). The Court notes that defendants have agreed to provide documents and information requested therein to the extent such documents are made available to them.

In light of the foregoing it is:

ORDERED that the branch of plaintiffs’ motion seeking an order to compel discovery from defendants is granted only to the extent that if defendants already have not provided to plaintiffs the following documents, they do so on or before July 1, 2013: the documents set forth as Demands 4, 6, 8, 9, and 11 (a full copy of plaintiffs’ actual ledger) in plaintiffs’ Post-Deposition Notice for Discovery and Inspection dated January 13, 2013, and documents 2-7 set forth in plaintiffs’ Second Post-Deposition Notice for Discovery and Inspection dated February 28, 2013; and it is further,

ORDERED that if these documents cannot be provided, defendants are directed to provide, on or before July 1, 2013, an affidavit detailing why they are not available to defendants, and what attempts were made to locate them; and it is further,

ORDERED that defendants provide, on or before July 1, 2013, a detailed affidavit, stating the reason(s) for charging legal fees (for each entry date) to plaintiffs’ account

including, if appropriate, that plaintiffs' account was charged for legal fees incurred by defendants in defending this action; and it is further,

ORDERED that to the extent that defendants already have not provided to plaintiffs the following documents they do so on or before July 1, 2013: documents set forth in the non-party subpoenas of McGovern and Solander as follows: 1(c) (d) , 3, 4, 5, 6, 7, 8, 9; and it is further,

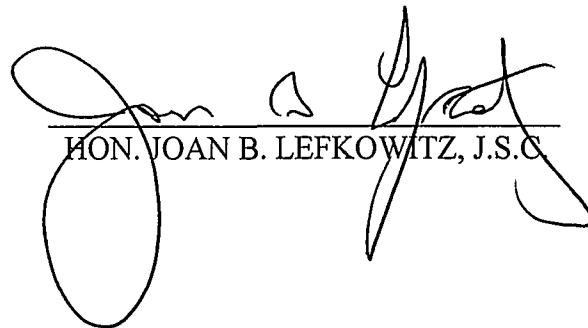
ORDERED that if these (subpoenaed) documents cannot be provided, defendants are directed to provide, on or before July 1, 2013, an affidavit detailing why they are not available to defendants, and what attempts were made to locate them; and it is further,

ORDERED that the branch of plaintiff's motion seeking an order directing non-parties to comply with the respective subpoena duces tecum served upon each of them is denied; and it is further,

ORDERED that plaintiffs serve a copy of this order with notice of entry upon defendants and all non-parties they served with a subpoena duces tecum; and it is further,

ORDERED that all parties are directed to appear for a conference in the Compliance Part, Room 800, on July 15, 2013, at 9:30 A.M.

Dated: White Plains, New York
June 24, 2013



HON. JOAN B. LEFKOWITZ, J.S.C.

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