Matter of Live Centre Tenants Association

OATH Index No. 834/05, mem. dec. (Mar. 2, 2006)
[Loft Bd. Dkt. No. TR-0761; 237, 239, 241-45, 247-49 Centre Street, 187 Lafayette Street, 403-05, 407 Broome Street, N.Y, N.Y.]

Respondent's motion to permit testimony via telephone during the hearing is granted. Petitioner's motion to extend the deadline for exchange of discovery to the day of trial denied. Judge imposes sanctions upon petitioner's counsel for improperly issuing attorney subpoenas during the course of this proceeding.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
LIVE CENTRE TENANTS ASSOCIATION
Petitioner

MEMORANDUM DECISION

KARA J. MILLER, *Administrative Law Judge*

This coverage application was filed by Live Centre Tenants Association ("petitioner") requesting a finding that seven buildings, owned by A. Trenkmann Estate, Inc. ("respondent"), located on Centre, Broome and Lafayette Streets constituted a horizontal multiple dwelling ("HMD") and that their units should be covered under Article 7-C of the Multiple Dwelling Law ("MDL" "Loft Law"). The hearing was bifurcated. The first phase of the hearing to determine which of the buildings comprised an HMD has been completed. The second phase of the hearing to determine whether the units are covered under the Loft Law will be held on March 13, through March 16, 2006.

This memorandum decision is in response to three procedural issues that were discussed during a forty-five minute telephone conference held on February 28, 2006, between myself, Arthur Rhine, Esq., on behalf of the petitioner, and Ron Kaplan, Esq., representing the respondent. During the conference, which was made a part of the record, I made rulings on two of the issues presented regarding the attendance of witnesses and discovery, and reserved decision on the third issue regarding subpoenas.

The first procedural issue discussed concerned respondent's request to have three non-party witnesses testify via speaker phone. Mr. Kaplan explained that two of the witnesses, a mother and daughter, live in Maryland. The mother is elderly and infirm. She has indicated to him that traveling to New York to testify at this proceeding would be quite onerous. The daughter is her mother's caregiver, making it difficult for her to leave her mother alone. The third witness lives in Suffolk County, New York and suffers from a knee ailment. In addition, she is a caregiver for both her ailing husband and her daughter, who is stricken with multiple sclerosis. Mr. Kaplan acknowledged that while it is possible to arrange for this witness to appear in person, it would be very difficult and inconvenient for the witness.

Mr. Rhine objected to telephonic testimony, arguing that it would be more difficult to cross-examine the witnesses and will impede my ability to make credibility findings. While cross-examination may be more difficult, it is not impossible. With respect to my credibility assessment, I will take into consideration that the witness is not present in the courtroom and give the testimony the proper weight it deserves. Overall, I do not find that petitioner will be prejudiced by having three non-party witnesses testify via speaker phone. Accordingly, respondent's motion to permit telephonic testimony for these three witnesses is granted.

The second issue concerned petitioner's request to extend the discovery schedule. The second phase of this proceeding had been adjourned the day before trial at petitioner's request to allow David Blancuzzi, an alleged window period tenant, currently living in Indiana, to testify at the hearing. Owing to the inconvenience caused by this last minute adjournment request, I directed Mr. Rhine to provide an offer of proof that the witness was unavailable and needed to retrieve documents that would be pertinent to his testimony. After receiving the offer of proof, I granted petitioner's motion for an adjournment, permitted petitioner's to expand their list of window period tenants and extended the deadline for discovery until the close of business on February 27, 2006. I specifically informed both attorneys that the production of all documents sought in discovery must be completed by February 27, 2006, and stressed to Mr. Rhine that this includes any documents that Mr. Blancuzzi had to retrieve from a storage facility in New Jersey.

Two weeks after I made my ruling, and while I was out of the office, Mr. Rhine sent correspondence asserting that Mr. Blancuzzi was unable to come to New York to retrieve the documents prior to the day before trial. In addition, he stated that it would be impossible for

someone else to search for the documents in his stead. As a result, Mr. Rhine requested an extension of the discovery deadline and that he be permitted to submit the documents to Mr. Kaplan on the day of trial. Mr. Kaplan strenuously objected to the late submission of these documents, asserted that it was highly prejudicial to his client and requested that I preclude the admission of any documents not exchanged by the deadline.

It is necessary to note that the discovery deadline had been extended until February 27, 2006, as an accommodation to petitioner's adjournment request and expansion of the list of window period tenants. This delay necessitated an extension of the discovery process by four weeks, sufficient time for Mr. Blancuzzi to retrieve his documents. This schedule was not complied with. Accordingly, petitioner's request to further extend the deadline for the exchange of documents until the day of trial is denied.

Finally, I reserved decision with respect to the third procedural issue regarding the issuance of attorney subpoenas. Pursuant to section 1-43 of this tribunal's rules of practice, subpoenas may be issued only by the administrative law judge upon application or *sua sponte*. A request for a subpoena must be served on the administrative law judge with proof of service of the request on the party's adversary. The adversary then has 24 hours to submit objections to the issuance of the subpoena. *See* 48 RCNY § 1-43 (Lexis 2006).

During the first phase of this proceeding, Mr. Rhine issued an attorney subpoena to a witness not on the witness list without notice to either this tribunal or his adversary. This was in clear violation of the OATH rule. Mr. Rhine was admonished both on and off the record about his improper issuance of the subpoena and was directed to comply with the practice rules of this tribunal (Tr. 171-173). In contravention of my directive and this tribunal's rules of practice, Mr. Rhine or a member of his office, issued two attorney subpoenas for two witnesses to appear at the second phase of this proceeding, once again without notice to either this tribunal or his adversary.

During the February 28, 2006 conference call, I provided Mr. Rhine with an opportunity to be heard on this matter. He acknowledged that his partner, Martin Silberman, Esq., issued an attorney subpoena to Peter Turner and Sharon Klein. Mr. Rhine asserted that his partner was unaware of my prior admonishment and argued that I had given him permission to issue attorney subpoenas during the first phase of this proceeding. Mr. Rhine's justification that it was not he, but his partner who issued the subpoena is without merit.

Both Mr. Rhine and his partner have appeared before this tribunal on numerous occasions. Pursuant to section 1-11 of OATH's rules of practice, the filing of a notice of appearance with this tribunal constitutes a representation that the person appearing has read and is familiar with the tribunal's rules of practice. *See* 48 RCNY § 1-11(d), as amended (http://www.nyc.gov/html/oath/html/rule_amendments.html). Regardless, of whether Mr. Silberman was aware of my prior admonishment, the issuance of these subpoenas by Mr. Rhine's firm was in violation of section 1-43 of OATH's rules of practice, which both Mr. Rhine and his partner are required to be familiar with in order to practice before this tribunal. Furthermore, Mr. Rhine's other assertion that I gave him permission to issue a subpoena is erroneous, given the context that I was admonishing him for doing so. Even taking my statements out of context, nothing that I said could be construed as a waiver of OATH's rules of practice.

I therefore find that Mr. Rhine's failure to comply with the discovery deadline and his repeated violation of OATH's subpoena rule merits a sanction. *See* 48 RCNY §§ 1-13(e) and 1-33(e), as amended (http://www.nyc.gov/html/oath/html/rule_amendments.html). Any documents that were not exchanged by the close of business on February 27, 2006, will be precluded at trial. *See Bd. of Education v. Butler*, OATH Index No. 554/93, mem. dec. (May 24, 2993). Further, Mr. Rhine is required to communicate in writing with all of the witnesses to whom he has improperly issued attorney subpoenas for their appearance at the second phase of this proceeding. He is to inform these witnesses that he improperly issued the subpoena in violation of this tribunal's rules of practice and that the recipient is entitled to disregard it.

Should Mr. Rhine still seek to call these individuals as witnesses, he may submit a subpoena request to me in accordance with section 1-43. Since Mr. Rhine has been admonished previously for *ex parte* communication by not serving documents on this tribunal and his adversary in the same manner, any request for a subpoena must be served on this tribunal by hand together with an affidavit of service by hand to Mr. Kaplan. *See* 48 RCNY § 1-14 (Lexis 2006). Mr. Kaplan will be given 24 hours to object to the issuance of the subpoenas before I issue my ruling on them.

Kara J. Miller
Administrative Law Judge

March 2, 2006

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