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Defense of the non-party witness: What you should know

BY MICHAEL A. BURGER
Daily Record Columnist

The daughter of a good client — call her Allison — appeared at the office late one afternoon visibly distressed and holding a subpoena in her hand.

Its terms required her to allow a stranger to enter and inspect the inside of her house. The subpoena was issued by the attorney for the plaintiff wife in a divorce action. Allison was not getting divorced; she was not a party to the lawsuit and was unrelated to either party in any way.


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It appeared Allison's house was owned by the divorcing husband two years earlier. The divorcing husband sold the property to a buyer, who in turn sold it to Allison the next year. Allison and her family worked very hard to purchase the house — she held two full time jobs. Allison's children and boyfriend, the children's father, sacrificed as well. The whole family worked hard together during their free time to repair and refurbish the old house.

There appeared to be a dispute as to the value of the house when the divorcing husband sold it, and the divorcing wife wanted an appraisal so she could claim her equitable share of the marital estate. While the house's value or interior condition today seemed of dubious relevance to its value two years ago, if we were going to contest the subpoena, immediate action was required.

During a telephone conference with the plaintiff's lawyer, who issued the subpoena, I asked for the subpoena to be withdrawn, but she politely refused.

The subpoena was issued, ostensibly, pursuant to CPLR 3120. Until a few years ago, a non-party's remedy upon receiving an objectionable subpoena was to make a motion to quash. This was expensive and time-consuming and placed the burden of motion practice on a non-party.

However, on Sept. 1, 2004, the Legislature enacted a fairer law, CPLR 3122, requiring the non-party witness simply to make written objection to the issuing party. The issuing party then has the burden of making a motion to compel compliance, setting forth reasons to which the non-party can respond, CPLR 3124.

Objection to the non-party subpoena

I drafted a letter to the issuing attorney for the party objecting to the subpoena and described its infirmities. The subpoena itself was deficient: While it listed the disclosure sought, it was unaccompanied by a notice stating the circumstances or reasons why the requested discovery was required, see CPLR 3101(a)(4).

The subpoena failed "to show that the information sought [is] relevant, or that circumstances exist ... warranting discovery from a non-party witness," *Lutz v. Goldstone*, 31 AD3d 449, 451 (Second Dept. 2006) (citing CPLR 3101[a][4]).

Understand this is not a mere procedural objection: "The purpose of such requirement is presumably to afford a non-party who has no idea of the parties' dispute or a party affected by such request an opportunity to decide how to respond," *Velez v. Hunts Point Multi-Service Center Inc.*, 29 AD3d 104, 110 (First Dept. 2006).

In fact, had the substantive requirement of CPLR 3101(a)(4) been met, it would have been evident on the face of the subpoena that the disclosure sought was unjustified. The current condition of the subject premises was immaterial and irrelevant to its condition at some time in the past, two owners back in the chain of title, when it belonged to the warring spouses. The issuing party "failed to address how [a current] interior inspection of the ... premises will accurately reflect the condition of the interior" during the previous years relevant to her claim, *Schlesinger v. Town of Ramapo*, 11 Misc3d 697, 700-01 (Sup. Ct. 2006).

All civil discovery is limited to "matter material and necessary" to the action, CPLR 3101(a). Furthermore, "[d]isclosure against a non-party is available only upon a showing of special circumstances, i.e., that the information sought to be discovered is material and necessary and cannot be discov-

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ered from other sources or otherwise is necessary to prepare for trial," *Sand v. Chapin*, 246 AD2d 876, 877 (Third Dept. 1998); *accord Cerasaro v. Cerasaro*, 9 AD3d 663, 665 (Third Dept. 2004); *Schlesinger*, 11 Misc3d at 701 (public documents provide a reasonable, alternative means of evaluating the interior of the petitioner's residence as it previously existed).

When "disclosure is sought against a non-party more stringent requirements are imposed," *Velez*, 29 AD3d at 108.

Since the divorcing couple once occupied the subject premises, they were well-acquainted with its interior condition at the time of the target valuation date and, therefore, were capable of providing the information in support of an appraisal and in lieu of invading Allison's privacy.

The subpoena also failed to indicate the manner of making the inspection or to provide any meaningful limitation on same. I asked the issuing attorney to consider that the sanctity of a person's house should not be invaded without proper cause and extraordinary precision in the manner and scope of entry. In this case, there was no cause to subject Allison to a ranging search of her house when its current condition affords no evidence of its prior condition, and when the parties had direct evidence of its prior condition — including contemporaneous video footage of the interior and many available examples of identical floor plans currently for sale — and open to public view from Rochester's housing stock.

Allison asserted her right to be free from a warrantless searches unsupported by probable cause, U.S. Constitution, amend IV. While the Fourth Amendment contemplates government action, an attorney's use of legal process as an officer of the court implicates Constitutional protections.

Finally, Allison reserved all rights, including the right to notice of any application brought before the court concerning her rights or her house, the right to an opportunity to be heard, timely tender of applicable witness fees, the right to demand an undertaking or surety bond, the defrayal of any expenses and/or lost wages, without limitation, see, e.g., U.S. Constitution, amends XIV, V; NYS Const. art 1 § 6; CPLR 2303(a); 3022(d); 8001(a).

Objection to an 'ex parte' order

Opposing counsel responded to our objection by faxing a court order allowing the inspection. Neither I nor Allison was aware the parties applied for an order and we were not able to defend our rights. The "ex-parte" order is issued by a judge in relative secrecy as to an affected person, without inviting them to attend and be heard. It's an unorthodox procedure when it comes to affecting a homeowner's right to privacy, and there is no statutory authority for it, absent probable cause to believe evidence of a crime will be found in the house and prior notice could lead to destruction of such evidence, *In re Abe A.*, 56 NY2d 288 (1982) (*obiter dictum* directing notice and an opportunity to be heard before process issued when there is no exigency); *Matter of Horace*, 168 Misc2d 981, 986 (Supreme Court, Monroe Co., 1996; Siragusa, J.: "[W]here there is no exigency, due process requires notice to the suspect" before issuance of a search warrant); *Department of Housing Pres. and Devel. of the City of New York v. Perlongo*, 134 Misc2d 722, 725 (1986), "the *ex parte* nature of the application poses serious due process concerns"; see also NYS Const. art I § 6; U.S. Const. amends. IV, V, XIV. 1; see generally *Basch v. Greenwald*, 16 AD3d 1123 (Fourth Dept. 2005), defendant should be "given an opportunity to submit responding papers and present oral argument on the issues raised in plaintiff's motion."

Normally an order directing an innocent property owner to admit a stranger to inspect her house would only, if ever, issue after she was given notice and an opportunity to be heard in advance, *see People v. Legrande*, 182 Misc2d 375, 377 (N.Y. Co. Ct. 1999), non-party property owner served with order to show cause for home inspection in a criminal action, given the opportunity to be heard and consult with counsel.

Significantly, Legrande (the party seeking access to the house) was facing criminal prosecution for a violent felony sex offense implicating his liberty interest for up to seven years and there was no other way for the defense to assess the house, which was the alleged crime scene.

My client and I were forced to file an application for an order to show cause, an emergency stay of the offending order and that the court direct the parties to provide us with all information related to the issue at hand, along with other preliminary relief. We also requested motion costs and reserved Allison's right to seek sanctions and attorney's fees for frivolous or abusive legal maneuvers, subject to the parties' responses to our order to show cause.

The court signed the order and temporarily stayed the inspection, pending decision on her motion.

The plaintiff predictably opposed Allison's motion and cross-moved to compel obedience with the subpoena, insisting access to Allison's house was essential to her case. The plaintiff claimed she could not obtain the appraisal she needed to present at trial without an interior inspection of the house. Conspicuously absent from the plaintiff's papers,

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however, was an affidavit from her appraiser corroborating the need to view the interior of the premises. The plaintiff desperately cited various cases to support her extraordinary request to gain access to a non-party's house, but the plaintiff's reading of this precedent was easily refuted.

The plaintiff cited *Tannenbaum v. Tenenbaum*, which held that: "A party seeking discovery from a non-party witness must show special circumstances, *see Lanzello v. Lakritz*, 287 AD2d 601 [2001]; *Dioguardi v. St. John's Riverside Hospital*, 144 AD2d 333, 334 (1988). The existence of such special circumstances is not established merely upon a showing that the information sought is relevant. Rather, special circumstances are shown by establishing that the information sought cannot be obtained through other sources, *see Murphy v. Macarthur Holding B.*, 269 AD2d 507 (2000).

The plaintiff's reliance on *McDaid v. Semegran*, 16 Misc3d 1102(A) (2007) also was misplaced. In *McDaid*, the non-party subpoena sought documents not implicating any privacy interest and containing information unavailable from any other source. This was not the situation in the case at bar.

Fortunately, before we filed a reply or opposition to the plaintiff's papers, the plaintiff raised surrendered, agreeing to withdraw her subpoena and cross-motion for an inspection.

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