

2020 WL 6114708 (N.Y.Sup.) (Trial Order)  
Supreme Court of New York.  
New York County

IRONSHORE SPECIALTY INSURANCE COMPANY, Plaintiff,

v.

RED HOOK CONSTRUCTION GROUP II, LLC, 12 East 13th Street Property Ownership, LLC, DHA Capital, LLC, Continental Properties, Inc., Titanium Construction Services, Inc., Jose Mendez Defendant.

No. 652378/2019.  
October 16, 2020.

**Decision + Order on Motion**

Neal M. Glazer and Jonathan L. Kranz, London Fischer LLP, for plaintiff.

Warren T. Harris of the Law Office of James J. Toomey, for 12 East 13th Street Property Ownership, LLC, DHA Capital LLC, Continental Properties, Inc. and Titanium Construction Services, Inc., defendants.

Present: Hon. Arlene P. Bluth, Justice.

**MOTION DATE N/A**

**MOTION SEQ. NO. 001**

\*1 The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 34, 35, 36, 37, 38, 39, 40, 41 were read on this motion to/for QUASH SUBPOENA, FIX CONDITIONS.

The motion by defendants 12 East 13th Street Property Ownership, LLC, DHA Capital LLC, Continental Properties, Inc. and Titanium Construction Services, Inc. ("Movants") to quash a subpoena from plaintiff and for a protective order relating to a deposition of non-party Hitesh Chhabhaya is denied.

**Background**

In this declaratory judgment action, Movants seek to quash the subpoena of a witness who they claim was already deposed in an underlying action. In that case, an employee of defendant Red Hook claims that he was working on a scaffold and chopping concrete when the concrete came down on the scaffold and caused plaintiff to fall. Movants claim that Mr. Chhabhaya was a former Red Hook employee who signed a contract in connection with the construction project that would require plaintiff to provide them with insurance coverage.

Plaintiff's claim in this case is that certain policies issued to Red Hook do not provide coverage to Movants for the underlying personal injury action and that the coverage determination turns on whether Red Hook (a subcontractor) actually entered into a written contract. The key question is whether a one-page written agreement is valid and enforceable. Mr. Chhabhaya is the person who signed this alleged agreement.

Movants argue that Mr. Chhabhaya was already questioned under oath and that a further deposition would reveal nothing. They claim it would not produce any relevant evidence, that the subpoena was not properly served and that the deposition date was scheduled for a Sunday.

In opposition, plaintiff points out that it never deposed Mr. Chhabhaya in the underlying case and it is not a party to the underlying action. It argues that it should be entitled to question the witness who allegedly signed a contract that will determine the extent of coverage in this action. Plaintiff emphasizes that Movants assert a counterclaim which contends that two days before the construction accident, Mr. Chhabhaya signed an agreement which requires plaintiff to provide coverage.

Plaintiff also argues that Movants have no standing to bring the motion because their only objection is that they got the chance to depose Mr. Chhabhaya in the underlying lawsuit. But Movants are not named in the subpoena and do not have an interest in the deposition. Plaintiff claims that the subpoena was properly noticed and that it was scheduled for a Sunday based on the witness' availability.

### Discussion

“An application to quash a subpoena should be granted only where the futility of the process to uncover anything legitimate is inevitable or obvious ... or where the information sought is utterly irrelevant to any proper inquiry. It is the one moving to vacate the subpoena who has the burden of establishing that the subpoena should be vacated under such circumstances” (*Matter of Kapon v Koch*, 23 NY3d 32, 38-39, 988 NYS2d 559 [2014] [internal quotations and citations omitted]).

\*2 “An individual or entity who seeks a protective order bears the initial burden to show either that the discovery sought is irrelevant or that it is obvious the process will not lead to legitimate discovery. Once this burden is met, the subpoenaing party must establish that the discovery sought is ‘material and necessary’ to the prosecution or defense of an action, i.e., that it is relevant” (*Liberty Petroleum Realty, LLC v Gulf Oil, L.P.*, 164 AD3d 401, 403-04, 84 NYS3d 82 [1st Dept 2018] [internal quotations and citations omitted]).

Setting aside whether Movants have standing, the fact is that they did not meet their burden to show that the discovery sought is irrelevant. This case turns, in part, on whether there was a written agreement signed by Mr. Chhabhaya. If there was no valid and enforceable contract in effect before the accident, then neither Movants nor Red Hook would be entitled to coverage under plaintiff's insurance policies. There is no way this Court could find that a deposition of the person who might have signed the contract is utterly irrelevant.

That Mr. Chhabhaya was previously deposed in another litigation is of no moment. Plaintiff was not a party to the underlying action so it should have a chance to question the witness. The Court rejects movants' argument that it should look at the prior deposition transcript and determine that there are no other questions which plaintiff (who did not ask questions at that deposition) should be able to ask.

The Court declines to award plaintiff costs and fees. Because the date for the deposition in the subpoena has passed, the plaintiff may schedule a new date.

Accordingly, it is hereby

ORDERED that the motion by defendants 12 East 13th Street Property Ownership, LLC, DHA Capital LLC, Continental Properties, Inc. and Titanium Construction Services, Inc. to quash a subpoena from plaintiff and for a protective order relating to a deposition of non-party Hitesh Chhabhaya is denied.

Remote Conference: February 9, 2021

**10/16/2020**

**DATE**

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**ARLENE P. BLUTH, J.S.C.**

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