SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2523-20

MARIO DANIELE,

Plaintiff,

v.

LISA WHITTEMORE, NORMAN WHITTEMORE, MARGERY HWANG, ANTHONY KINSLOW, DR. PETER MULBERY, LINDSAY DUELL, and HOWARD R. JACOBSON,

Defendants,

and

ROBERTA KERRY SHARICK, and DAVID GRANT,

Defendants-Appellants.

Argued March 30, 2022 – Decided April 19, 2022

Before Judges Accurso and Marczyk.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-0693-21.

Michael D. Zahler argued the cause for appellants (Hodgson Russ LLP, attorneys; Michael D. Zahler and Carmine J. Castellano (Hodgson Russ LLP) of the New York bar, admitted pro hac vice, on the briefs).

Cassandra A. Willock argued the cause for respondent Whole Foods Market Group, Inc. (Fishman McIntyre Levine Samansky, PC, attorneys; Cassandra A. Willock, on the brief).

PER CURIAM

This matter arises from a discovery dispute stemming from an Anti-SLAPP[1] lawsuit filed in New York by defendants, who were opponents of a shopping center in which Whole Foods was to be an anchor tenant. The Anti-SLAPP suit was filed by way of a counterclaim against plaintiff, who was the developer of the center. Plaintiff initially filed an action against various opponents of the project. Plaintiff dismissed the lawsuit shortly after it was filed, but defendants continued to pursue their claims. Defendants subsequently served a subpoena on Whole Foods in New Jersey. The subpoena seeks documents regarding Whole Foods' communications with plaintiff with respect

[1] New York Law allows parties to recover attorney fees, compensatory damages and punitive damages where a SLAPP (strategic lawsuit against public participation) suit defendant proves the action was commenced for "the purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights." New York Civil Rights Law §70-a.

to a Facebook page utilizing Whole Foods' logo, along with Whole Foods' communications with the developer concerning opposition to the project, opponents of the project, and the developer's communications regarding this litigation. The subpoena further seeks the deposition of an individual with knowledge of these matters. The trial judge granted Whole Foods' motion to quash the subpoena. We reverse.

I.

Defendants' counterclaim alleges plaintiff/developer and/or the developer's representatives made intimidating contacts and threats of violence towards the project's opponents. Defendants further allege plaintiff is suspected of mailing anonymous, threatening letters to the opponents and falsely accusing them of criminal conduct. Defendants issued a subpoena seeking nine categories of documents and a one-day deposition of a Whole Foods representative.[2]

[2] The subpoena served on Whole Foods specifically requests the following:

> (1) All Documents and communications Concerning the Facebook page called "Bring Whole Foods to Rochester, NY."; (2) All Documents and Communications concerning Your granting of permission, if any, to the Developer and/or Daniele to use Your logo on social media and other websites; (3) All Documents and Communications Concerning the Developer's and/or Daniele's use of social media

Defendants argue the subpoena is narrowly tailored to discover what knowledge Whole Foods has regarding the Facebook page entitled "Bring Whole Foods to Rochester, NY" and derogatory messages on the page about the project's opponents on the website. Defendants further seek information regarding the developer's efforts to intimidate the project's opponents. Defendants submit the subpoena seeks information relevant to the core allegations in the Anti-SLAPP suit, specifically, the developer's intent and tactics utilized to intimidate the project's opponents.

Whole Foods counters the trial court properly quashed the subpoena. It asserts defendants do not allege it owns, maintains, or contributes to the Facebook page at issue in the subpoena. Whole Foods notes it is not a named

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> regarding the Project; (4) All Communications between You and the Developer and/or Daniele Concerning opposition to the Project and/or opponents of the Project; (5) All Communications with third parties Concerning opposition to the Project and/or opponents of the Project; (6) All Documents Concerning opposition to the Project and/or opponents of the Project; (7) All Documents and Communications Concerning the Developer's and/or Daniele's response to opposition to the Project and/or to opponents of the Project; (8) All Documents and Communications Concerning the Defendants in the Action; and (9) All Documents and Communications Concerning the Developer's and/or Daniele's response to litigation involving the Project.

party to the litigation, and defendants' counterclaim does not allege that Whole Foods had any knowledge or information regarding plaintiff's intent or strategy in filing the underlying lawsuit.

Whole Foods also contends the subpoenas issued in the underlying case to affiliated entities of the developer did not demand the information requested from Whole Foods, and the subpoena is overly broad and unlimited by any timeframe. Whole Foods argues the subpoena is oppressive and unreasonable because plaintiff attempted to discontinue the action two days after it was filed. It further argues defendants failed to establish a witness from Whole Foods could provide any relevant information regarding the Anti-SLAPP counterclaim. Notably, the certification in support of the motion to quash was filed by outside counsel and not a Whole Foods representative.

The trial court determined the information requested in the subpoena was not relevant. The court noted that while plaintiff dismissed the underlying lawsuit, defendants continued to pursue their counterclaim. Moreover, the court stated Whole Foods was not a party to the underlying case, and that there were no allegations made against Whole Foods. The court indicated that simply because the company logo appears on a Facebook page should not subject Whole Foods to the subpoena at issue. The trial court further noted there are no claims

plaintiff was in any way involved with Whole Foods and there was "no rational link" between Whole Foods and the lawsuit. The trial court characterized the discovery request as a fishing expedition.

II.

Appellate courts "accord substantial deference to a trial court's disposition of a discovery dispute." Brugaletta v. Garcia, 234 N.J. 225, 240 (2018) (citing Capital Health Sys., Inc. v. Horizon Healthcare Servs., Inc., 230 N.J. 73, 79-80 (2017)). We defer to a trial judge's discovery rulings absent an abuse of discretion or a judge's misunderstanding or misapplication of the law. Capital Health, 230 N.J. at 79-80 (citing Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371 (2011)).

It is well established that our discovery rules are to be construed liberally in favor of broad pretrial discovery. Id. at 80 (quoting Payton v. N.J. Tpk. Auth., 148 N.J. 524, 535 (1997)). Rule 4:10-2(a) provides:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

In order to overcome the presumption in favor of discoverability, a party must "show 'good cause' for withholding relevant discovery by demonstrating, for example, that the information sought is a trade secret or is otherwise confidential or proprietary." Capital Health, 230 N.J. at 80.

Although we have recently cautioned that judges should be mindful of the burden and expense of extensive discovery demands directed at non-parties, our review of this matter convinces us the judge was overly solicitous of Whole Foods' non-party status. Trenton Renewable Power, LLC v. Denali Water Sols., LLC, ___ N.J. Super. ___ (2022). That Whole Foods is not a party to the New York litigation does not insulate it from subpoena practice and having to respond to reasonable discovery requests by parties to the suit. Similarly, that the developer withdrew the complaint shortly after it was filed, but defendants nevertheless pursued their counterclaim, is not a relevant consideration in addressing the discovery dispute. While the trial judge in New York allowed plaintiff to dismiss the complaint, the court denied plaintiff's motion to dismiss the counterclaim. Accordingly, defendants have a right to conduct discovery with respect to their counterclaim.

The trial court further determined the requested discovery was not relevant and there was no rational connection between Whole Foods and the

underlying litigation. We disagree. The substance of the subpoenaed information is relevant and reasonably calculated to lead to admissible evidence. The subpoena seeks discovery related to information or documents Whole Foods has with respect to defendants' Anti-SLAPP suit and the developer's efforts to intimidate the project's opponents. It is not unreasonable to conclude that plaintiff/developer may have communicated with Whole Foods with respect to the status of the project, the contentious opposition, and related litigation. If there were communications, these may be relevant to defendants' counterclaim. If there were no such contacts, Whole Foods can respond accordingly.

While Whole Foods attempts to distance itself from the litigation, Whole Foods is the anchor tenant in the development and appears to be at the center of the underlying dispute, with respect to the opposition to the project.[3] This is not to suggest Whole Foods did anything to cause this controversy. However, it is not a stretch to assume Whole Foods may be in possession of documents related to the dispute involving the parties. While Whole Foods is not a party to the litigation, it is still required to comply with a properly issued subpoena that seeks relevant information.

[3] Whole Foods states defendants "deceptively" refer to the project as the "Whole Foods Plaza," but the developer actually referred to the project by that name in the now dismissed lawsuit in New York.

Whole Foods argues defendants' counterclaim does not set forth any allegation Whole Foods had any knowledge or information regarding plaintiff's intent or strategy in filing the underlying lawsuit, but defendants are not required to make that showing in advance of issuing a subpoena. That is why parties conduct discovery—to investigate and obtain information about facts at issue in a lawsuit. Given the New York court has allowed defendants' counterclaim to proceed, they are permitted to pursue discovery. Whole Foods, in turn, must comply with the subpoena. That is the essence of non-party discovery. To the extent Whole Foods has no information in response to the subpoena, it can so indicate.

While Whole Foods may be entitled as a non-party to broader discovery protections than a party to litigation in certain circumstances, it has not made the necessary showing based on the current record. See Trenton Renewable Power, (slip op. at 16). Whole Foods relied on a certification from outside counsel as opposed to an individual from Whole Foods with personal knowledge regarding the availability of the discovery at issue and/or whether the requests were unduly burdensome or oppressive. See R. 1:6-6 and R. 4:10-3. Again, the information sought by way of the subpoena is relevant and reasonably calculated to lead to admissible evidence. Thus, Whole Foods must respond to the

subpoena. However, Whole Foods may interpose any appropriate objections, consistent with Rule 4:10-2 and Rule 1:6-6, in responding to the subpoena or seek a protective order pursuant to Rule 4:10-3. If the parties cannot resolve any disagreement, "[w]e have no doubt that the court will be able to exercise its discretion in resolving any additional disputes." Trenton Renewable Power, slip op. at 19.

To the extent we have not otherwise addressed Whole Foods' arguments, they lack sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E). For the reasons noted above, we reverse the trial court's order quashing the subpoena.