

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.

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

-----X  
IN THE MATTER OF THE APPLICATION OF  
DAVID A. BOYARSKY, d/b/a D.A.B BROKERAGE  
SERVICES, Petitioner, to Examine Charter Realty &  
Development Corp. and Enforce Subpoena Duces Tecum  
Issued in Accordance with CPLR 3119 in an  
action entitled DAVID A. BOYARSKY d/b/a  
D.A. B. BROKERAGE SERVICES, Plaintiff v  
ACADIA REALTY TRUST, Defendant, pending  
in the Middlesex County Superior Court in the  
Commonwealth of Massachusetts.

**DECISION & ORDER**

Index No. 53667/14  
Motion Date: Apr. 28, 2014

Seq. No. 1

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LEFKOWITZ, J.

The following papers were read on the petition and motion of petitioner for an order pursuant to CPLR 3124 directing Charter Realty & Development Corp. ("Charter") to produce documents requested in Schedule A of the subpoena duces tecum served upon it by petitioner.

Petition - Exhibits A-B

Order to Show Cause

Affirmation in Support by Howard M. Brown, Esq. for Petitioner - Exhibits A-D

Affirmation in Response by Alana Van der Munde, Esq. for Charter Realty  
& Development Corp.

Affirmation in Reply by Evan Wiederkehr, Esq. for Petitioner

Upon the foregoing papers, the petition and motion are decided as follows:

In this special proceeding, petitioner seeks an order compelling Charter to produce the documents demanded in the subpoena duces tecum served upon it by petitioner. The heading of the subpoena indicates that the subpoena is being issued pursuant to Uniform Interstate Deposition and Discovery Act and CPLR 3119. The subpoena further identifies the "Originating State" as Massachusetts, the "Originating County" as Middlesex, the "Originating Court" as the Superior Court, and the "Originating Case #" as 13-01220. In the Massachusetts action, petitioner seeks to recover amounts allegedly owed to him for services relating to Acadia Trust Realty's purchase of White City and White City East Shopping Centers in Massachusetts. Charter allegedly purchased the properties with Acadia as part of a joint venture. The subpoena demands Charter produce documents, electronically stored information or objects as set forth in Schedule A, which is annexed to the subpoena. Schedule A seeks, inter alia, documents and communications for the period of January 1, 2010 from Acadia, as well as documents and communications mentioning White City Shopping Centers and petitioner. Charter is a nonparty

in the Massachusetts action. The subpoena is signed by Massachusetts counsel for petitioner and was issued by the Westchester County Clerk.

After the service of the subpoena upon Charter in New York, Charter served objections to the subpoena. Charter objected to the requests in the subpoena on the grounds that they sought documents protected by the attorney-client privilege, attorney work product and confidential information. Charter also objected to the requests as overly broad, vague and seeking information not reasonably calculated to lead to the discovery of admissible evidence.

In the petition and order to show cause, petitioner contends that Charter's objections do not generally comply with CPLR 3122 since the statute requires the production of documents and requires information be provided as to any documents being withheld. Petitioner further contends that the communications and documents sought are material and necessary, and there is no reason to limit production through the December 31, 2010 date of closing on the properties or to a one-year window. Petitioner also contends that Charter's production has been insufficient as Charter has only produced one email. Petitioner asserts that it is "inconceivable" that Acadia and Charter, who were entering into a joint venture for the purchase of a shopping center, would have no communications during or after the purchase.

In opposition to the motion, Charter contends that it has complied with the subpoena. On or about February 7, 2014, despite its objections to the subpoena, Charter produced certain documents obtained through a search of its electronically stored files, but withheld those documents it deemed privileged. Charter further contends that, thereafter, on April 11, 2014, an additional search of the electronic files was conducted and additional email files were located which were potentially responsive. Charter's counsel asserts that she is reviewing the additional emails and would make a second production on or before April 23, 2014.

In a reply affirmation filed with the court on April 22, 2014, petitioner contends that Charter has only produced 400 documents, which only included one email and due diligence documents for the White City Shopping Centers. Accordingly, petitioner contends that Charter has failed to produce communications between it and Acadia and between Charter and third-parties as requested in the subpoena. Petitioner further argues that the inadequacy of Charter's production is demonstrated by the fact that in April, 2014, Charter undertook another search and located additional email files which "potentially contain additional communications and/or documents responsive to the Subpoena." Petitioner, therefore, seeks an order directing Charter to provide further responses to the document requests set forth in the subpoena, including a statement pursuant to CPLR 3122 which states what documents are being withheld and the reasons the documents are being withheld.

Although there is clearly a dispute as to whether Charter has complied with the subpoena, the motion to compel Charter to comply with the subpoena must, nevertheless, be denied since the subpoena was improperly served pursuant to CPLR 3119. Effective January 1, 2011, New York adopted the Uniform Interstate Deposition and Discovery Act, and incorporated it into CPLR 3119. "The purpose of the act is to allow for disclosure in New York for use in an action

pending in another United States jurisdiction without the need for a [New York] court order” (Conners, Supplementary Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR 3119; see Sponsor’s Mem in Support, Bill Jacket, L 2009, ch 29, Bill No. S4256; Aloe, Outside Counsel, *New CPLR § 3119 Promises to Ease Path for Out-of-State Depositions*, NYLJ Online, Feb. 22, 2011). Prior to the enactment of CPLR 3119, the only method for obtaining discovery in New York in an action pending in another state was by an application for a court order pursuant to CPLR 3102 (e). CPLR 3119, however, provides that a party in an action pending in another state may obtain the issuance of a subpoena for service in New York without a court order from a New York court. CPLR 3119 (b) provides that an out-of-state party may submit “an out-of-state subpoena to the county clerk in the county in which the discovery is sought to be conducted in this state,” and “the clerk ... shall promptly issue a subpoena for service upon the person to which the out-of-state subpoena is directed” (CPLR 3119 [b][1],[2]). Alternatively, CPLR 3119 (b) provides that “if a party to an out-of-state proceeding retains an attorney licensed to practice in this state, and that attorney receives the original or a true copy of an out-of-state subpoena, the attorney may issue a subpoena under this section” (CPLR 3119 [b][4]). Accordingly, CPLR 3119 provides an expedited procedure by which to obtain disclosure in New York for use in an action pending in another United States jurisdiction without the need for a New York court order.

In order to take advantage of the expedited procedure set forth in CPLR 3119, however, an out-of-state party seeking the issuance of a subpoena in New York must have already obtained a subpoena directing the discovery from the court of record in the other state or territory of the United States. Notably, CPLR 3119 (a)(1) defines an “out-of-state subpoena,” which is required under both methods set forth in CPLR 3119 for the issuance of a New York subpoena, as “a subpoena issued under authority of a court of record of a state other than this state.” Moreover, CPLR 3119 (b)(3) provides that when a party requests the issuance of a subpoena by the county clerk, the subpoena must incorporate the terms of the out-of-state subpoena. Additionally, the legislative history indicates that the statute contemplated that the scope of the examination under the subpoena would be determined by the court of the other state in which the out-of-state action is pending, not a New York court (Sponsor’s Mem in Support, Bill Jacket, L 2009, ch 29, Bill No. S4256). Thus, the language of the statute, as well as the legislative history, clearly indicates that a prerequisite for the use of the expedited procedure set forth in CPLR 3119 is a subpoena issued by a court of record in a state other than New York. Accordingly, in *Matter of New York Counsel for State of California Franchise Tax Bd.* (33 Misc3d 500, *affd* 105 AD3d 186 [2d Dept 2013]), this court previously held that the expedited procedure of CPLR 3119 is only applicable where an out-of-state judicial subpoena has been issued by a court in another state or territory of the United States (see Conners, Supplementary Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR 3119).

In the present proceeding, there is no evidence in the record that a subpoena or other document, however denominated, directing discovery was issued under authority of the court of

record in the Massachusetts action.<sup>1</sup> The only subpoena submitted in support of the petition and motion was the subpoena duces tecum issued by petitioner's Massachusetts counsel which was presented to the Westchester County Clerk for issuance pursuant to CPLR 3119. Accordingly, it does not appear that the scope of discovery set forth in the subpoena was determined by the Massachusetts court of record as contemplated by CPLR 3119. In the absence of a subpoena or other document directing discovery issued by the Massachusetts court, the subject subpoena was erroneously issued by the Westchester County Clerk pursuant to CPLR 3119. Insofar as the subpoena was erroneously issued, this court cannot direct Charter to comply with its directives and the subpoena must be quashed.

Additionally, the subpoena is facially defective insofar as it fails to provide notice of the circumstances and reasons for the disclosure as required by CPLR 3101 (a)(4) (*Velez v Hunts Point Multi-Service Ctr.*, 29 AD3d 104 [1<sup>st</sup> Dept 2006]). To the extent, however, that Charter did not initially raise this objection and provided disclosure pursuant to the subpoena, the objection was, in effect, waived (*Id.* at 112).

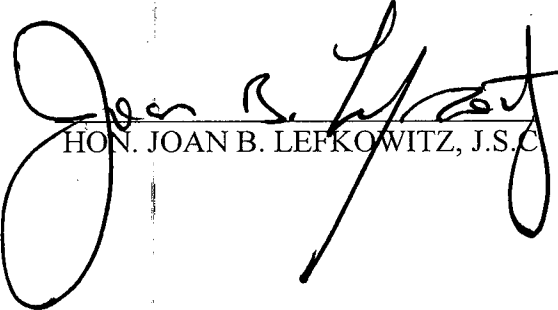
Accordingly, it is

ORDERED that the petition and motion are denied and the subpoena served by petitioner upon Charter is quashed; and it is further

ORDERED that petitioner shall serve a copy of this order with notice of entry upon counsel for Charter and Acadia, defendant in the Massachusetts action, within ten (10) days of entry.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York  
May 9, 2014



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

TO:

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By NYSCEF

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<sup>1</sup> CPLR 3119 (a)(4) defines "subpoena" as "a document, however, denominated issued under authority of a court of record" which requires, inter alia, a person to attend a deposition, produce documents or permit inspection of premises.

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