

FILED & ENTERED

FEB 22 2016

CLERK U.S. BANKRUPTCY COURT
Central District of California
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ORDER NOT FOR PUBLICATION
UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re:

ART AND ARCHITECTURE BOOKS
OF THE 21st CENTURY, a California
corporation,

Debtor.

Case No. 2:13-bk-14135-RK

Chapter 11

**ORDER ON ACE GALLERY NEW
YORK CORPORATION'S
"OBJECTION TO COMMITTEE OF
UNSECURED CREDITORS'
SUBPOENA TO PRODUCE
DOCUMENTS AND INFORMATION
ISSUED TO CITY NATIONAL BANK"
AND COMMITTEE'S RESPONSE
THERE TO REQUESTING ORDER
COMPELLING SUBPOENA
COMPLIANCE**

[NO HEARING REQUIRED]

Pending before the court is the "Objection to Committee of Unsecured Creditors' Subpoena to Produce Documents and Information Issued to City National Bank" (the "Objection") filed by Ace Gallery New York Corporation ("Ace New York"), through its counsel, Johnathan D. Freund of Freund & Brackey, LLP, ECF 1766, and the response thereto filed by the Official Committee of Unsecured

1 Creditors (“Committee”), through its counsel, Victor A. Sahn of SulmeyerKupetz, A
2 Professional Corporation, and attached Declaration of Victor A. Sahn and exhibits in
3 support thereof, ECF 1784.

4 On January 28, 2016, the Committee, through its counsel, issued and served
5 a subpoena duces tectum (“Subpoena”) to City National Bank pursuant to Federal
6 Rule of Bankruptcy Procedure (“Bankruptcy Rule”) 9016, which incorporates by
7 reference Federal Rule of Civil Procedure (“Civil Rule”) 45. Victor A. Sahn
8 Declaration, ¶ 4 and Exhibit “1,” “Subpoena to Produce Documents, Information, or
9 Objects or to Permit Inspection of Premises in a Bankruptcy Case (or Adversary
10 Proceeding).” By the Subpoena, the Committee requests the production of certain
11 documents relating to two bank accounts beginning in January 2015 through and
12 including the date of production, one of which is believed to be maintained in the
13 name, or for the benefit, of Ace New York. *Id.*, Exhibit “1,” “Subpoena to Produce
14 Documents, Information, or Objects or to Permit Inspection of Premises in a
15 Bankruptcy Case (or Adversary Proceeding).”

16 On February 8, 2016, Ace New York filed the Objection to the Subpoena,
17 raising a number of objections to the Subpoena, including improper service of the
18 Subpoena, that the documents sought are irrelevant “to the subject matter of this
19 litigation” and not “reasonably calculated to lead to the discovery of admissible
20 evidence,” that the description of the documents sought is vague, ambiguous, and
21 overbroad, and that the documents sought would “impermissibly invade the privacy
22 of ACE NEW YORK and otherwise invade any business relationship that may exist
23 between the subpoenaed party, third parties, and ACE NEW YORK and may call for
24 the disclosure of trade secret information.” However, Ace New York’s Objection to
25 the Subpoena is procedurally defective as follows and, therefore, should be
26 disregarded, if not overruled, on that basis.

27 Civil Rule 45(d)(2)(B) provides in pertinent part that,
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1 *A person commanded* to produce documents or tangible things or to
2 permit inspection may serve on the party or attorney designated in the
3 subpoena a written objection to inspecting, copying, testing, or
4 sampling any or all of the materials or to inspecting the premises—or to
5 producing electronically stored information in the form or forms
6 requested. The objection must be served before the earlier of the time
7 specified for compliance or 14 days after the subpoena is served. . .”

6 Federal Rule of Civil Procedure 45(d)(2)(B) (Emphasis added). *Only* the “person
7 commanded” can prevent disclosure by objection; however, “[t]he party to whom the
8 subpoenaed records pertain *cannot* simply object. Rather, a protective order or
9 motion to quash the subpoena is required.” *McCoy v. Southwest Airlines Co., Inc.*,
10 211 F.R.D. 381, 384 (C.D. Cal. 2002). Here, the person commanded was City
11 National Bank, and not Ace New York, and City National Bank did not file any
12 objection to the Subpoena pursuant to Civil Rule 45(d)(2)(B). Accordingly, Ace New
13 York could only object to the Subpoena by filing a properly noticed motion to quash
14 or modify the Subpoena pursuant to Civil Rule 45(d)(3), which it did not do.

15 Additionally, the court notes that it is not up to the person commanded to
16 decide whether or not to comply with a subpoena, and “[a] witness’ failure to comply
17 with a subpoena or order related to it without adequate excuse may be deemed a
18 contempt of court in which compliance is required; or, after a motion is transferred,
19 of the issuing court.” 1 Jones, Rosen, Wegner & Jones, *Rutter Group Practice*
20 *Guide: Federal Civil Trials & Evidence*, ¶ 1:107 at 1-23 (2015), *citing, inter alia*, Civil
21 Rule 45(g) (“The court for the district where compliance is required--and also, after a
22 motion is transferred, the issuing court--may hold in contempt a person who, having
23 been served, fails without adequate excuse to obey the subpoena or an order
24 related to it.”).

25 In its proposed order overruling Ace New York’s Objection that was lodged
26 with the court, the Committee requests that the court direct City National Bank to
27 produce all documents sought by the Subpoena and to otherwise fully comply with
28 the Subpoena. The Subpoena already does that, and if the subpoenaed party fails

1 to comply with the subpoena as directed, then the court may consider lack of
2 compliance with the subpoena without excuse as contempt. In such failure, the
3 Committee may then (not now) seek to properly commence contempt proceedings
4 in compliance with Rules 9016 and 9020 of the Federal Rules of Bankruptcy
5 Procedure, Rule 45 of the Federal Rules of Civil Procedure and Local Bankruptcy
6 Rule 9020-1 against City National Bank if it seeks for this court to hold City National
7 Bank in contempt for failing to comply with the Subpoena.

8 Both the objection of Ace New York and the request thereto of the Committee
9 seeking relief in an order of the court are procedurally defective since such relief
10 must be by motion. Rule 9013 of the Federal Rules of Bankruptcy Procedure; Local
11 Bankruptcy Rule 9013-1.

12 For the reasons stated above, the court hereby ORDERS as follows:

- 13 1. The court declines to sustain, and disregards, Ace New York's Objection
14 since such objection is not properly before the court.
- 15 2. The court declines to grant, and disregards, the Committee's request to
16 direct City National Bank to comply with the subpoena and issue an order
17 to such effect because such request is also not properly before the court
18 and because the subpoena already has that legal effect of directing the
19 subpoenaed party to act.
- 20 3. Having declined to rule on the respective requests of the Committee and
21 Ace New York, the court offers an advisory opinion to the subpoenaed
22 party, City National Bank, that City National Bank is fully expected to
23 comply with any lawful subpoena served on it, and any unexcused failure

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1 to fully comply with a lawful subpoena might be considered a contempt of
2 court subjecting it to monetary and other sanctions.

3 IT IS SO ORDERED.

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23 Date: February 22, 2016



24 Robert Kwan
25 United States Bankruptcy Judge
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