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Civil Court, City of New York,
 New York County.
 Marc **SMILOW**, Petitioner,
 v.
 Natalie **ULRICH**, Respondent.

Dec. 1, 2005.

Background: Owner filed use holdover proceeding to recover possession of tenant's rent-stabilized apartment. Tenant moved to serve document production demand and to depose owner's wife.

Holdings: The Civil Court, City of New York, New York County, [Gerald Lebovits, J.](#), held that:

(1) tenant was entitled to production of documents relating to owner's alleged intent to use building as single-family dwelling, and

(2) tenant was entitled to depose owner's wife.
 Motions granted.

West Headnotes

[1] Pretrial Procedure 21

[307Ak21 Most Cited Cases](#)

(Formerly 307Ak332)

No per se rule prohibits disclosure of document in summary holdover proceedings, and summary proceeding, despite its name, is nonetheless judicial proceeding, and ends of justice ought not be sacrificed to speed. [McKinney's CPLR 408](#).

[2] Pretrial Procedure 24

[307Ak24 Most Cited Cases](#)

(Formerly 307Ak403)

Requests for disclosure of documents in summary holdover proceedings should be carefully tailored to obtain information necessary to tenant's defenses or counterclaims. [McKinney's CPLR 408](#).

[3] Pretrial Procedure 26

[307Ak26 Most Cited Cases](#)

In determining whether party to summary holdover proceeding has demonstrated ample need to justify disclosure request, court should consider whether (1) movant has asserted facts to establish cause of action; (2) movant has demonstrated need to determine

information directly related to cause of action; (3) information requested is carefully tailored and is likely to clarify disputed facts; (4) granting disclosure would lead to prejudice; (5) court can alleviate the prejudice; and (6) in case of landlord's discovery request, whether court can structure discovery to protect pro se tenant against any adverse effects of request. [McKinney's CPLR 408](#).

[4] Pretrial Procedure 23

[307Ak23 Most Cited Cases](#)

Motion for leave to conduct disclosure in summary holdover proceeding is not for landlord's exclusive benefit, and tenant may also be granted similar relief if disclosure demand reaches ample-need threshold to defend against proceeding. [McKinney's CPLR 408](#).

[5] Pretrial Procedure 24

[307Ak24 Most Cited Cases](#)

Presumption favors granting disclosure in favor of tenant in summary holdover proceeding when opposing party has exclusive possession of material facts relating to owner's intended use.

[6] Landlord and Tenant 278.7(5)

[233k278.7\(5\) Most Cited Cases](#)

Owner seeking to recover possession of rent-regulated housing accommodation for his own use must establish good faith at trial as element of his prima facie case. [Rent Stabilization Code, § 2524.4\(a\)](#), McK.Unconsol.Laws.

[7] Pretrial Procedure 375

[307Ak375 Most Cited Cases](#)

Tenant was entitled in owner's use holdover proceeding to production of documents relating to owner's alleged intent to use building containing her rent-stabilized apartment as single-family dwelling, despite owner's assertions about relocating his family to building and having construction workers on site, where tenant had no actual or constructive knowledge of owner's purported personal desire to use her apartment, documents were directly related to tenant's defense that owner did not have good faith intent to live in building, and documents sought related to plans for building renovations and owner's other properties. [McKinney's CPLR 408](#); [Rent Stabilization Code, § 2524.4\(a\)](#), McK.Unconsol.Laws.

[8] Pretrial Procedure 23

[307Ak23 Most Cited Cases](#)

Scope of discovery in owner's use proceeding is not limited to named petitioner-landlord, and may also include nonparties who will aid in determining facts related to cause of action. [McKinney's CPLR 408; Rent Stabilization Code, § 2524.4\(a\)](#), McK.Unconsol.Laws.

[\[9\] Pretrial Procedure](#) 

[307Ak97 Most Cited Cases](#)

Tenant was entitled in owner's use holdover proceeding to depose owner's wife regarding owner's alleged intent to use building containing her rent-stabilized apartment as single-family dwelling, where owner and his wife had exclusive knowledge about facts relating to their family's proposed use of apartment. [McKinney's CPLR 408; Rent Stabilization Code, § 2524.4\(a\)](#), McK.Unconsol.Laws.

[\[10\] Pretrial Procedure](#) 

[307Ak21 Most Cited Cases](#)

Disclosure in summary proceeding is allowed only by leave of court, and disclosure in Civil Court takes place pursuant to Civil Practice Law and Rules. [McKinney's CPLR 408](#).

**393 Pryor Cashman Sherman & Flynn LLP, New York City ([Todd E. Soloway](#) of counsel), for petitioner.

**394 Himmelstein, McConnell, Gribben, Donoghue & Joseph, New York City ([Sam Himmelstein](#) and David Hershey-Webb of counsel), for respondent.

[GERALD LEBOVITS, J.](#)

***180 I. Background**

Petitioner, Marc **Smilow**, brought this owner's use holdover proceeding to recover possession of respondent's rent-stabilized apartment, which is located at 26 West 87th Street in New York County. Petitioner purportedly intends to convert the building--including all the rent-regulated apartments in the building--into a single-family home for himself, his wife, and his two young children.

Respondent moves under [CPLR 408](#) for leave in this special proceeding to serve on petitioner a document-production demand and a request to depose Jill **Smilow**, petitioner's wife. Petitioner consents to his own deposition but opposes both document production and Ms. **Smilow's** deposition. Petitioner also argues in the alternative that if the

court grants leave to respondent to serve the document demand she attaches as Exhibit "G," he may still decline to produce the demanded documents. According to petitioner, respondent did not move to compel disclosure but rather only for leave to serve a document and deposition demand.

Respondent seeks disclosure to ascertain petitioner's good-faith intention to use the building as a single-family home. Respondent wants to learn about petitioner's other properties, his other attempts to recover apartments for his or his family's use, his plans to renovate the building, and his primary residence. *181 (See Respondent's Proposed Notice to Produce Documents and Other Information.)

Respondent's motion for disclosure raises three issues. The first is whether she is entitled to disclosure to determine petitioner's good-faith to bring this owner's use proceeding. The second is whether, if disclosure is warranted, respondent is entitled to depose Ms. **Smilow**, a nonparty. The third is whether respondent's motion for an order under [CPLR 408](#) asking for leave of the court to serve demand for documents necessarily encompasses an order to compel compliance with the disclosure request.

Petitioner argues that respondent's motion for disclosure should be denied. According to respondent, she has failed to demonstrate "ample need." Petitioner contends that he has made his good-faith intentions to use the subject building as his family home "abundantly clear" to respondent. In this regard, petitioner alleges that he moved into the building with his family in early July 2005 and began the initial construction of the premises, as evidenced by the presence of construction workers on site. Petitioner also argues that in his notice of nonrenewal, he notified respondent that he intends to renovate the subject building to create a single-family home and that he has retained an architectural firm to draft a renovation plan. (See Petitioner's Affirmation in Opposition to Respondent's Motion for Discovery at ¶¶ 37-40.) From this, respondent suggests that respondent cannot dispute his claim.

Respondent questions the validity of petitioner's assertions. Respondent states that she has no personal knowledge about petitioner's actual intentions for using the apartment and that a basis exists to question petitioner's credibility and his good-faith intentions. First, respondent asserts that petitioner has an economic incentive to evict the rent-regulated tenants in the building, to regain

possession of the apartments, and to re-rent them at market rates. Second, respondent alleges that petitioner owns other properties in New ****395** York City to which he could move without having to evict respondent. Third, respondent asserts she has reason to know that petitioner cannot possibly recover all the apartments in the building to create a "single family home." According to respondent, one of the tenants cannot be evicted. Finally, respondent asserts that the true purpose of this owner's use proceeding is retaliation because she has rallied the other tenants in the building against petitioner. (See Natalie Ulrich's Affidavit of Sept. 6, 2005, at ¶¶ 7-11.)

***182 II. Legal Standard for Disclosure in Owner's Use Proceedings**

[1] Disclosure is unavailable as a matter of right in summary proceedings. Leave of the court must be obtained to conduct disclosure. The primary purpose of the leave requirement is to make summary proceedings expedient and reduce costs. But no per se rule prohibits disclosure in summary proceedings, and "a summary proceeding, despite its name, is nonetheless a judicial proceeding, and the ends of justice ought not be sacrificed to speed." (42 W. 15th St. Corp. v. Friedman, 208 Misc. 123, 125, 143 N.Y.S.2d 159 [App. Term 1st Dept. 1955, per curiam].)

[2][3] To justify disclosure, a movant must demonstrate "ample need" for a claim or defense. Requests for disclosure should be carefully tailored to obtain information necessary to a tenant's defenses or counterclaims. (NY Univ. v. Farkas, 121 Misc.2d 643, 647, 468 N.Y.S.2d 808 [Civ. Ct., N.Y. County 1983]; see generally Anthony J. Fiorella, Jr., Outside Counsel, *A Judicial Perspective on Permissible Discovery in Summary Proceedings*, N.Y.L.J., Aug. 19, 1999, at 1, col. 1; Richard T. Walsh, Outside Counsel, *Disclosure in Special Proceedings Under CPLR § 408*, N.Y.L.J., Dec. 5, 1995, at 1, col. 1.). In the seminal New York University v. Farkas, the court provided a list of factors on whether ample need has been met. The factors include whether (1) "the petitioner has asserted facts to establish a cause of action"; (2) the movant has demonstrated a need to determine "information directly related to the cause of action"; (3) the information requested is "carefully tailored and is likely to clarify the disputed facts"; (4) granting disclosure would lead to prejudice; (5) the court can alleviate the prejudice; and (6) whether the court can structure discovery to protect pro se tenants against any adverse effects of a landlord's

discovery requests. (Farkas, 121 Misc.2d at 647, 468 N.Y.S.2d 808.)

[4] A motion for leave to conduct disclosure is not for a landlord's exclusive benefit. A tenant may also be granted similar relief if the disclosure demand reaches the ample-need threshold to defend against the proceeding. A tenant's request for disclosure in an owner's use proceeding may not be not conclusory. (E.g. Blane v. Isles, N.Y.L.J., Apr. 28, 1997, at 5, col. 4 [App. Term 1st Dept., per curiam] [denying disclosure because "tenant has not demonstrated ... the existence of circumstances warranting disclosure"]; Trojan v. Wisniewska, 8 Misc.3d 382, 392, 797 N.Y.S.2d 833 [Hous. Part, Civ. Ct., Kings County 2005] ["The mere conclusory statements that the petitioner must prove 'good faith' at trial, without more, does not demonstrate 'ample need' for discovery."]; Kahn v. Pizarro, N.Y.L.J., Jan. 4, 1993, at 22, col. 6 [Hous. Part, Civ. Ct., ***183** Bronx County] [same].) But disclosure is routinely granted in owner's use cases for tenants who provide specifics about depositions or documentary evidence sought.

In owner's use proceedings, courts have granted tenants' motions for disclosure when the facts relating to the proposed ****396** use of the apartment in question, including the owners' good-faith intention to use the apartment for their personal use, were in the landlord's exclusive possession. (See e.g. Miller v. Vosoghi, N.Y.L.J., Apr. 18, 2001, at 18, col. 1 [App. Term 1st Dept., per curiam] [finding that tenant showed ample need when landlord's intent to recover apartment was in landlord's exclusive knowledge]; Teichman v. Ciapi, 160 Misc.2d 182, 184, 612 N.Y.S.2d 293 [App. Term 1st Dept. 1994, per curiam] [holding that disclosure was necessary to determine whether landlords acted in good faith]; Nestor v. Britt, N.Y.L.J., Apr. 24, 1990, at 22, col. 3 [App. Term 1st Dept., per curiam] [granting disclosure to determine whether landlord should be estopped from maintaining proceeding because of its similarity to prior proceeding between same parties]; Perlman v. Martinez, N.Y.L.J., Jan. 6, 1999, at 27, col. 6 [Hous. Part, Civ. Ct., Kings County] [holding that tenant demonstrated ample need because landlord and landlord's son had exclusive knowledge about who intended to occupy subject apartment].)

[5] In Miller, for example, the Appellate Term granted the tenant's motion for disclosure because the operative facts about the landlord's intention to recover the apartment for his son were within the landlord's knowledge and because the tenant needed

the information to mount a proper defense. (See N.Y.L.J., Apr. 18, 2001, at 18, col. 1.) Indeed, a presumption favors granting disclosure when the opposing party has exclusive possession of material facts relating to the owner's intended use. (See e.g. Friedman, 208 Misc. at 125, 143 N.Y.S.2d 159 [allowing examination of bills of particulars in owner's use proceedings and requiring courts of first instance to control grants of discovery requests in their discretion]; Teichman, 160 Misc.2d at 183, 612 N.Y.S.2d 293 [granting disclosure order to extent needed to defend against owner's use proceeding]; Schwartz v. Seidman, N.Y.L.J., May 8, 2002, at 21, col. 2 [Hous. Part, Civ. Ct., N.Y. County] [granting discovery on subject of landlord's good-faith intention to use apartment for his family]; Mandell v. Cummins, N.Y.L.J., July 25, 2001, at 18, col. 4 [Hous. Part, Civ. Ct., N.Y. County] [granting tenant's motion for disclosure because facts relating to use of apartment by owner's family were within owner's knowledge]; Perlman, N.Y.L.J., Jan. 6, 1999, at 27, col. 6 [granting discovery in owner's use proceeding *184 to determine whether premises were really needed for intended purpose: use by landlord's son]; Steinmetz v. Cedeno, N.Y.L.J., Jan. 3, 1996, at 27, col. 4 [Hous. Part, Civ. Ct., Kings County] [granting tenant's motion for order compelling petitioner to appear for further deposition and respond to tenant's questions relating to racial, ethnic, and religious demographics of subject building].)

Disclosure in owner-use proceedings is now routine. According to one leading authority, "Discovery is [so] often freely allowed in ... owner use cases after motion to the court [that] [p]racticitioners may avoid the delay of motion practice, cost to their clients and the use of court time if they agree to a discovery schedule ... without court intervention." (Fern Fisher, View from the Bench, in Andrew Scherer, Residential Landlord-Tenant Law in New York § 13:52 [2005 ed].)

III. Respondent's CPLR 408 Motion for Leave to Serve Document Production

Petitioner contends that because the Omnibus Housing Act (Law of 1983, Ch. 403, eff. Apr. 1, 1984) substantially changed the law to eliminate the "good faith" requirement in owner's use cases, a **397 tenant has no need or right to secure disclosure to ascertain a landlord's good faith to occupy premises for personal or family use. This argument has been articulated well in different sources, particularly in Alan D. Kucker and Santo Golino, Real Estate and Title Trends, *Discovery*

Controversies in Summary Proceedings, N.Y.L.J., Mar. 20, 2000, at S2, col. 1, who contend that the Legislature's "[h]aving omitted good faith from the statute, it would appear that the basis for granting discovery to tenants in owner occupancy proceedings has also been eliminated."

As Kucker and Golino explain, the former Rent Stabilization Code (Old Code), promulgated by the Rent Stabilization Association and approved by the New York City Department of Housing Preservation and Development, had provided at section 54(B) that an owner need not offer a renewal lease when "[t]he owner seeks in good faith to recover possession of a dwelling unit for his or her own personal use and occupancy or for the use and occupancy of his immediate family." Until the 1983 Omnibus Housing Act, owner's use cases were heard, not in Civil Court, but before the Conciliation and Appeals Board. Section 50 of Omnibus Housing Act amended Rent Stabilization Law (RSL) (Administrative Code of City of NY) § 26-511 (formerly YY51.6.0) by adding a new owner's use provision, the current RSL § 26-511(c)(9)(b), which provides nothing about any need to prove good faith.

*185 Similarly, the current Rent Stabilization Code (RSC) (9 NYCRR) § 2524.4(a)(1), which amended the Old Code effective May 1, 1987, also eliminated the Old Code's requirement that a landlord prove good faith in an owner's use proceeding. Instead, current RSC (9 NYCRR) § 2524.4(a)(5) provides for penalties--penalties that did not exist under the Old Code--if the owner does not occupy the dwelling unit for personal or family use after obtaining possession. According to RSC § 2524.4(a)(5), an owner's failure to use the unit for the intended purpose after the tenant vacates or to continue in occupancy for three years may deprive the owner of any right to increase the legal regulated rent for three years and, in addition, the former tenant will still be able to maintain a plenary claim against the owner.

Petitioner argues, therefore, that the Legislature acted intentionally in deleting the good-faith proof requirement and replacing it with penalties for acting in bad faith. (See Kucker and Golino, *supra* [citing Patrolmen's Benev. Assn. of City of N.Y. v. City of NY, 41 N.Y.2d 205, 208-209, 391 N.Y.S.2d 544, 359 N.E.2d 1338 [1976] ["[a]n irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded' "], quoting McKinney's Cons. Laws of NY, Book 1, Statutes, § 240] [alteration in Patrolmen's Benev. Assn.].)

Whatever merit this argument of statutory interpretation might have had, the courts have rejected it. Despite the amendments noted above, case law since 1987 has consistently required owners to show at trial good faith that they seek to occupy the apartment for their personal use. (See e.g. [Powers v. Babic](#), 177 A.D.2d 432, 432, 576 N.Y.S.2d 535 [1st Dept. 1991, mem.] [agreeing with Appellate Term that "Civil Court, having observed the witnesses' demeanor and heard their testimony, was in ... be[st] position to make findings of fact on the issue of good faith...."]; [Horsford v. Bacott](#), 5 Misc.3d 132(A), 798 N.Y.S.2d 710, 2004 WL 2625028, at *1, 2004 N.Y. Slip Op. 51399[U], *1 [App. Term, 1st Dept., Nov. 17, 2004, per curiam]; **398 [Ellis v. Epstein](#), 2003 WL 21699931, *1, 2003 N.Y. Slip Op. 51127[U], *1 [App. Term, 1st Dept., Jul. 15, 2003, per curiam]; [Proctor v. Barns](#), 2002 WL 1291835, at *1, 2002 N.Y. Slip Op. 50215[U], *1 [App. Term, 1st Dept., May 29, 2002, per curiam]; [Delorenzo v. Famiglietti](#), N.Y.L.J., May 1, 1996, at 30, col. 4 [App. Term 1st Dept., per curiam]; [Nestor](#), N.Y.L.J., Apr. 24, 1990, at 22, col. 3; [Kamen v. Buchanan](#), 5 Misc.3d 553, 783 N.Y.S.2d 252 [Hous. Part, Civ. Ct., N.Y. County 2004]; [Harrilal v. Bennett](#), N.Y.L.J., Dec. 17, 2003, at 21, col. 1 [Hous. Part, Civ. Ct., Kings County].)

[6] Thus, a petitioner must establish "good faith" at the trial in an owner's use proceeding as an element of the petitioner's *186 prima facie case. ([Mandell](#), N.Y.L.J., July 25, 2001, at 18, col. 4; [Sobel v. Mauri](#), N.Y.L.J., Dec. 12, 1984, at 10, col. 4 [App. Term 1st Dept., per curiam].) That was true before 1987. (See e.g. [Edelman v. McGoldrick](#), 281 App.Div. 686, 686, 117 N.Y.S.2d 379 [2d Dept. 1952, mem.].) It remains true today.

Owner's use proceedings are governed by RSC (9 NYCRR) § 2524.4(a)(1). When a rent-stabilized lease expires, the landlord must offer the tenant a renewal. But § 2524.4(a)(1) allows an owner to refuse to offer a renewal lease when the owner seeks to recover possession of a rent-regulated housing accommodation either for the "owner's personal use and occupancy" or for "the use and occupancy of a member of his or her immediate family as his or her primary residence." (See [Matter of Rosenbluth v. Finkelstein](#), 300 N.Y. 402, 405, 91 N.E.2d 581 [1950] [involving owner's seeking to recover for own use]; [Nestor](#), N.Y.L.J., Apr. 24, 1990, at 22, col. 3 [involving owner's seeking to recover for family member]; [Sobel](#), N.Y.L.J., Dec. 12, 1984, at 10, col. 4 [involving owner's seeking to recover for own use].)

Recovery for personal use must be in "good faith." An owner satisfies the "good faith" requirement if "he or she seeks to gain possession with the honest or genuine intention to recover the tenant's premises for personal and/or family use." ([Delorenzo](#), N.Y.L.J., May 1, 1996, at 30, col. 4, quoting RSC § 2524.4[a][1].)

[7] Applying the factors set forth in [Farkas](#), this court finds that respondent has established ample need to obtain the requested documents. The information sought relates directly to respondent's defense: petitioner's lack of good faith. The issue of "good faith" is often in dispute and constitutes a tenant's main defense. That an owner's subjective intent is within the owner's sole possession is critical in granting disclosure under CPLR 408 to delineate material facts.

The documents respondent requests bear directly on the disputed facts and are carefully tailored in scope to address those facts. For example, respondent's document request relates to plans for the building renovations, and petitioner's other properties are relevant on the issue of good faith--whether he will convert the building into a single-family home. As such, respondent's request does not constitute a "fishing expedition," as petitioner characterizes it.

Respondent need not accept petitioner's bare assertions at face value. Petitioner's conclusory assertions about relocating his family to the building and having construction workers on *187 site are not dispositive of whether petitioner actually intends to recover respondent's apartment for his personal use--that is, as his family home for his wife and children. Issues of facts remain about whether he wishes to oust the tenant and replace her with another tenant who will pay a higher rent. Additionally, issues of fact remain about whether the building is structurally amenable to being converted into a single-family home. Merely because petitioner notified respondent of his desire to convert the building **399 into a single-family home does not prove his good-faith intentions to do so. Respondent need not accept petitioner's representations and just move on and out. (See [Harris v. Bigelow](#), 135 Misc.2d 331, 334, 515 N.Y.S.2d 176 (Civ. Ct., N.Y. County 1987) ["There can be no presumption that a respondent possesses facts sufficient to prepare a defense to a proceeding which is predicated on a petitioner's alleged good faith intention to use a respondent's apartment as a primary residence."].)

Like the tenants in *Miller, Nestor, and Cummins*, respondent is entitled to disclosure because facts related to respondent's defense-- petitioner's good faith intention to recover the apartment for use as his family home--are exclusively in petitioner's knowledge. Thus, respondent would potentially face a danger of unfair prejudice in her defense should her motion be denied.

Petitioner insists that the facts in *Miller* are "drastically different" from those here. Petitioner argues that here, unlike *Miller*, facts associated with petitioner's good-faith intention to create a single-family home in the subject building are known to petitioner as well as respondent. (See Petitioner's Affirmation in Opposition to Respondent's Motion for Discovery at ¶¶ 47, 50- 51.) The court disagrees. Exclusivity precludes sharing. Petitioner's subjective intent is inherently in his exclusive purview; respondent is not privy to it. Respondent has a right to disclosure to assess the true purpose behind petitioner's bare assertions and conduct.

The rationale to grant disclosure in a summary proceeding when the information is within the sole control of one party is not limited to owner's use proceedings. Courts routinely grant disclosure in other contexts, when information related to a claim or defense is within the sole custody or control of the party opposing disclosure. (See e.g. *85th Estates Co. v. Kalsched*, N.Y.L.J., May 18, 1992, at 27, col. 4 [App. Term 1st Dept., per curiam] [granting landlord's motion for leave to conduct disclosure to determine whether respondent used rent-stabilized apartment improperly]; *188 *Pamela Equities Corp. v. Louis Frey Co., Inc.*, 120 Misc.2d 281, 283, 465 N.Y.S.2d 659 [Civ. Ct., N.Y. County 1983] [granting disclosure in nonpayment proceeding involving complex rent calculations].) Courts liberally grant disclosure requests in nonprimary-residence proceedings. (See e.g. *YMCA v. Buhler*, N.Y.L.J., July 10, 1986, at 6, col. 3 [App. Term 1st Dept., per curiam]; *Jump Assocs. v. Bigelow*, N.Y.L.J., Mar. 26, 1986, at 11, col. 5 [App. Term 1st Dept., per curiam] [granting landlord discovery request in nonprimary-residence proceeding].)

This rationale, which extends to all special proceedings, regardless of the procedural context, reflects the courts' concerns with the availability of information relevant to the material facts of a claim or defense.

This case is similar to *85th Estates*, in which the

landlord initiated a holdover proceeding on the ground that the tenant, without the landlord's consent, was using the stabilized apartment improperly as a psychologist's office. (See N.Y.L.J., May 18, 1992, at 27, col. 4). In *85th Estates*, the court allowed an examination before trial of the tenant because the landlord established ample need that information about the business use in the apartment was solely in the tenant's knowledge.

On the other hand, this case is distinguishable from *Antillean*, in which the court denied the tenant's motion for disclosure. (See *Antillean Holding Co., Inc. v. Lindley*, 76 Misc.2d 1044, 1048, 352 N.Y.S.2d 557 [Civ. Ct., N.Y. County 1973].) *Antillean* was a nonpayment proceeding in which the tenant's request for disclosure **400 related to her RPAPL 755 and MDL § 302 defense. According to the tenant in *Antillean*, the landlord had failed to provide essential services and to repair dangerous and hazardous conditions. (*Id.* at 1048, 352 N.Y.S.2d 557.) In *Antillean*, the tenant was the best witness of the conditions in the apartment in question. Respondent here has no actual or constructive knowledge of petitioner's purported personal desire to use respondent's apartment. Thus, unlike the disclosure request in *Antillean*, respondent's disclosure request is essential to her defense.

Respondent's showing of ample need, coupled with petitioner's exclusive knowledge about his actual subjective intentions for use of the building, warrants pretrial disclosure of the requested documents.

IV. Respondent's Motion under CPLR 408 to Depose Jill Smilow

[8][9] The scope of discovery in an owner's use proceeding is not limited to the named petitioner-landlord. The scope may also include nonparties who will aid in determining facts related to *189 the cause of action. Examining petitioner's wife before trial is warranted because petitioner wants the apartment for himself and his wife. As evidenced by petitioner's notice of nonrenewal, petitioner has put his wife's intentions in issue by including her in his plan to use the building as a single-family home. (See Exhibit C to Petitioner's Affirmation in Opposition to Respondent's Motion for Discovery at ¶ 2.) Thus, Ms. **Smilow** has knowledge not shared with respondent about the apartment's proposed use.

The Appellate Term, First Department, allows nonparty spouses in owner's use proceedings to be

examined before trial when the spouse has actual knowledge pertinent to the proceeding. In *Nestor*, for example, the court granted the tenant leave to depose the owner and a nonparty family member for whom possession was sought "so that ... factual circumstances alleged to exist by petitioners can be fleshed out." (*Nestor*, N.Y.L.J., Apr. 24, 1990, at 22, col. 3.)

Petitioner and his wife have exclusive knowledge about facts relating to their family's proposed use of the apartment. As in *Nestor*, respondent is entitled to depose petitioner's wife to determine petitioner's actual intentions. (Cf. *Schwartz*, N.Y.L.J., May 8, 2002, at 21, col. 2 [compelling deposition of petitioner, who himself had no plans to live in apartment].) Deposing her is relevant, nonprejudicial, and unintrusive. (See *Fiorella*, *supra*, at N.Y.L.J., Aug. 19, 1999 ["Relevancy, prejudice and intrusiveness remain the yardstick by which such a request [to depose a nonparty witness] is measured."].)

V. Disclosure under [CPLR 408](#)

The final issue before the court is the scope of [CPLR 408](#) in special proceedings like this one. At oral argument, petitioner argued that respondent is not entitled to compel document production. Petitioner argued that [CPLR 408](#) is directed solely to whether the court will allow leave to serve a disclosure demand. Should the court grant respondent's motion, petitioner contends, he need not comply with the disclosure demands—he need merely accept service of the demand.

[10] The case law rejects petitioner's position. Disclosure in a summary proceeding, which is a special proceeding, is allowed only by leave of court, and disclosure in Civil Court takes place pursuant to the Civil Practice Law and Rules. (See Civ. Ct. Act § 1101; [CPLR 408](#); *Islamic Community, Inc. v. Elshariff*, N.Y.L.J., Oct. 12, 1999, at 28, col. 3 [Hous. Part, Civ. Ct., Kings County]; ***401**[Plaza Operating Partners Ltd. v. IRM \(U.S.A.\) Inc.](#), 143 Misc.2d 22, 23-24, 539 N.Y.S.2d 671 [Hous. Part, Civ. Ct., N.Y. County 1989].) When leave of ***190** court is given, disclosure takes place pursuant to [CPLR 3101](#), which provides mandatory full disclosure of all information material and necessary to a claim or defense. ([CPLR 3101](#).) As the Court of Appeals has explained, "[t]he words 'material and necessary', are, in our view, to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist

preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason." ([Allen v. Crowell-Collier Pub. Co.](#), 21 N.Y.2d 403, 406, 288 N.Y.S.2d 449, 235 N.E.2d 430 [1968].)

In special proceedings, motions under [CPLR 408](#) seeking leave of court to serve a disclosure demand contemplate a motion to compel disclosure, even though a formal motion to compel under [CPLR 3124](#) need not be made until a party fails to comply with a demand after service has been effected. On granting leave to serve a document demand, courts contemporaneously consider the propriety of compelling disclosure of facts material and necessary to disposing of the case. (See e.g. [Roth v. Pakstis](#), 13 A.D.3d 194, 195, 785 N.Y.S.2d 917 [1st Dept. 2004, mem.] [granting plaintiff's motion to compel discovery because granting discovery was proper exercise of discretion under [CPLR 408](#)]; [Matter of Niagara Mohawk Power Corp. v. City of Saratoga Springs Assessor](#), 2 A.D.3d 953, 954-955, 767 N.Y.S.2d 683 [3d Dept. 2003, mem.] [granting petitioner's motion to compel discovery in proceedings under RPTL article 7, which [CPLR 408](#) governs]; [Chalfin v. Sabol](#), N.Y.L.J., Jun. 26, 1992, at 22, col. 1 [Sup. Ct., N.Y. County] [rejecting petitioner's opposition to compelled production on ground that proceeding was special proceeding and that disclosure is available only under court order granting leave to conduct disclosure under [CPLR 408](#)].)

Petitioner has not demonstrated that compliance with the disclosure request would be unduly burdensome, prejudicial, or dilatory. Petitioner has not objected to disclosing any document requested and has not cross-moved under [CPLR 3103](#) for an order of protection. Petitioner would allow respondent to serve her document demand and reserve the right to object only when respondent moves to compel under [CPLR 3124](#) or for sanctions. But objecting only at that phase, when respondent already annexed to her motion a proposed notice to produce documents and has thus given petitioner an opportunity to oppose with specificity, contradicts the purpose of a motion in a special proceeding for leave to conduct disclosure under [CPLR 408](#) and assures only delay, waste, and expense, to the litigants and to the court.

***191** Respondent having shown ample need for disclosure, this court directs petitioner to comply with the document demand that respondent now has leave to file.

Respondent's motion under [CPLR 408](#) for an order granting leave to conduct disclosure on the issue of good faith is granted, as is respondent's motion for leave to depose Jill **Smilow**.

This proceeding is marked off the calendar pending disclosure.

This opinion is the court's decision and order.

11 Misc.3d 179, 806 N.Y.S.2d 392, 2005 N.Y. Slip Op. 25515

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