

MEMORANDUM

COUNTY COURT: SUFFOLK COUNTY

TRIAL TERM PART 2

THE PEOPLE OF THE STATE OF NEW YORK, :

BY: J.F.X. DOYLE, J. C. C.

vs

Dated: January 28, 2011

GEORGE GULDI,

Case Number: I-2066-09

Defendant.

CHRISTINE MALAFI, ESQ.
SUFFOLK COUNTY ATTORNEY
H. Lee Dennison Building
100 Veterans Memorial Highway
Hauppauge, New York 11788

GEORGE GULDI, ESQ.
PRO SE DEFENDANT
100 Mill Road
Box 1308
Westhampton Beach, New York 11978

THOMAS J. SPOTA, ESQ.
SUFFOLK COUNTY DISTRICT ATTORNEY
By: Thalia M. Stavrides, Esq.
Criminal Courts Building
Center Drive South
Riverhead, New York 11901

CHRISTOPHER C. BROCATO, ESQ.
Legal Advisor to Defendant
320 Carleton Avenue
Suite 3400
Central Islip, New York 11722

Upon the following papers numbered 1 to 4 read on this order to show cause to quash subpoena; order to show cause and affirmation in support 1; Affirmation/affidavit in opposition and supporting papers 2; Letter dated January 25, 2011 from the Suffolk County District Attorney's Office 3; Reply 4 (and after hearing counsel in support of and opposed to the motion) it is, the application is determined as follows:

George Guldi, is charged here with the crimes of: Grand Larceny in the Second Degree in violation of New York State Penal Law §155.40(1); Forgery in the Second Degree in violation of New York State Penal Law §170.10(1); Criminal Possession of a Forged Instrument in the Second Degree in violation of New York State Penal Law §170.25, and; Insurance Fraud in the Third Degree in violation of New York State Penal Law §176.20.

The Suffolk County Attorney has moved, on behalf of County Executive Steve Levy for an Order, quashing a subpoena submitted by the *pro se* defendant, George Guldi, Esq. Defendant, through his legal advisor, has submitted an affidavit in opposition wherein he asserts, in pertinent part, that: (1) the cooperating witness Ethan Ellner's long standing relationship with Steve Levy included the use of Levy's political influence and protection for all of Ellner's criminal acts and enterprises; (2) Levy's testimony is not collateral;

(3) extrinsic proof tending to establish a reason for the witness to fabricate is not a collateral matter and may not be excluded.

A review of the subject subpoena reveals that it is a non-judicial subpoena and as such, improperly states that failure to comply with it would be punishable as a contempt of court (*Matter of Reuters Ltd. v. Dow Jones Telerate, Inc.*, 231 AD2d 337 [1st Dept 1997]). A person who is served with a non-judicial subpoena cannot be held in contempt for failure to comply unless and until a court has issued an order compelling compliance, which order has been disobeyed (*Dias v Consolidated Edison Co.*, 116 AD2d 453, 496 NYS2d 686 [1st Dept 1986]). Thus, there is no need to move to quash such a subpoena in order to avoid sanctions, and one who is served and does not wish to comply may safely wait until the party who served the subpoena moves to compel compliance.

Further, the subject subpoena which was served on this non-party witness, does not comply with CPLR §3101(a)(4). Here, the subpoena does not include the requisite notice stating the circumstances or reasons such disclosure is sought or required and is therefore unenforceable. The purpose of such requirement is to presumably afford a non-party, who is not a witness to any of the events and who has no personal knowledge of the facts and circumstances surrounding the pending criminal matter, an opportunity to decide how to respond (*Velez v. Hunts Point Multi-Serve. Ctr., Inc.*, 29 AD3d 104, 811 NYS2d 5 [1st Dept, 2006]). Pursuant to this section, a subpoena served on a non-party should contain a notice stating why their testimony is sought. Even though a subpoena is facially defective, the party who served the subpoena may resist a motion to quash by subsequently making that required showing. In the matter at hand, defendant's affidavit has sufficiently set forth the circumstances and reasons such disclosure is sought thereby obviating the facial defect.

CPLR §3101 provides for full disclosure of all matter material and necessary in the prosecution or defense of an action. Many of the cases decided after the 1984 amendment to CPLR §3101(a)(4), trace back to a Second Department case, *Dioguardi v. St. John's Riverside Hosp.*, 144 AD2d 333, 533 NYS2d 915 [1988], which held that the special circumstances requirement survived the 1984 amendment (*id.* at 334, 533 NYS2d 915). The Second Department recently over-ruled *Dioguardi*, stating that : “[i]n light of its elimination from CPLR 3101(a)(4), we disapprove further application of the special circumstance standard in our cases” (*id.* at 16). The Second Department concluded that “[t]he Legislature would not have included . . . separate sub-section[s] of the statute for non-parties if discovery from parties and non-parties were subject to identical considerations[,] . . . indicat[ing] that something more than mere relevance is required if the discovery request is challenged” (*id.* at 18, 901 NYS2d 312). The court there held that “[a] motion to quash is, thus, properly granted where the party issuing the subpoena has failed to show that the disclosure sought cannot be obtained from sources other than the nonparty” (*id.* at 16-17, 901 NYS2d 2d 312). This holding is consistent with prior decisions (*ie.*, *Cerasaro v. Cerasaro*, 9 AD3d at 665, 781 NYS2d 375 [3rd Dept 2004]; *Fraser v. Park Newspapers of St. Lawrence*, 257 AD2d 961, 684 NYS2d 332 [3rd Dept 1999]) as well as dicta from the Court of Appeals stating that full disclosure of material and necessary evidence may be had from nonparties “wherever sufficient independent evidence is not obtainable” (*O'Neill v. Oakdale Constr.*, 71 NY2d 521, 528 NYS2d 1 [1988]).

Here, the defendant is not entitled to obtain disclosure from the non-party witness as he has not satisfied the threshold requirement that the discovery sought is material and necessary. The defendant merely makes a bald assertion that the non-party witness testimony is not collateral and may not be excluded. Such non-specific assertions are wholly insufficient. To withstand a challenge to a discovery request, the party seeking discovery must first satisfy the threshold requirement that the disclosure sought is material and necessary. Bare assertions of special circumstances will not satisfy the threshold (*see Kooper v. Kooper*, 74 AD3d 6, 901 NYS2d 312 [2010]). The test is one of usefulness and reason (*Allen v. Crowell-Collier Publ. Co.*, 21 NY2d 403, 288 NYS2d 449[1968]). There, the Court of Appeals in *Allen*, interpreted the phrase “material and necessary” broadly, requiring disclosure of “any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity.” While relevance and materiality must be shown to obtain disclosure from a nonparty, a showing of mere relevance and materiality alone is not sufficient (*Kooper v. Kooper, supra*). Although the Court in *Kooper* declined to set forth a comprehensive list of circumstances which would justify non-party disclosure, it noted that the party’s inability to obtain the requested disclosure from any other source could be a significant factor in determining the propriety of such non-party discovery. Here, the defendant has failed to demonstrate that he could not otherwise obtain the information sought from other sources.

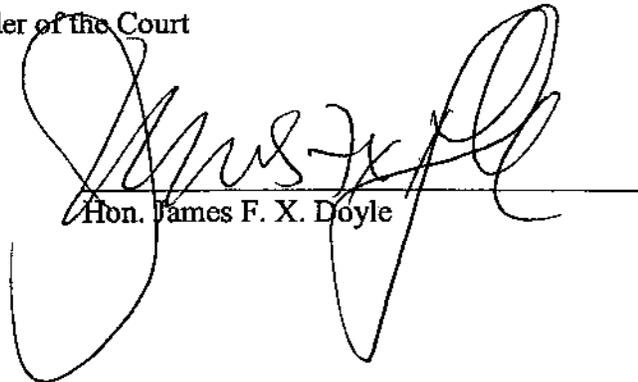
Based upon the foregoing, it is hereby:

ORDERED, that the movant’s motion to quash the subpoena is granted; and it is further

ORDERED, that the Suffolk County Attorney’s Office is directed to forthwith serve a copy of this Order, along with Notice of Entry, upon the Suffolk County District Attorney’s Office, *pro se* defendant George Guldi, Esq., and his legal advisor Christopher Brocato, Esq.

The foregoing constitutes the decision and order of the Court

Dated: Riverhead, New York
January 28, 2011



Hon. James F. X. Doyle