

**Skutnik v Messina**

2017 NY Slip Op 33234(U)

February 8, 2017

Supreme Court, Orange County

Docket Number: 403/2016

Judge: Sandra B. Sciortino

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time 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 ORANGE

-----X

ANTHONY SKUTNIK,

Plaintiffs,

-against-

**DECISION AND ORDER**

Index No.: 403/2016

**Motion Date: 1/12/17**

Sequence No. 3

PETER SCOTT MESSINA a/k/a SCOTT MESSINA,

Defendant.

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**ORIGINAL**

**SCIORTINO, J.**

The following papers numbered 1 to 6 were read in connection with the application of defendant for an Order quashing a subpoena served upon Citibank N.A.:

<u>PAPERS</u>	<u>NUMBERED</u>
Order to Show Cause/Affirmation (Lefland) Exhibits A-D	1 - 2
Affidavit in Opposition (Skutnik)/ Affirmation (Gold)/ Exhibits 1-15	3 - 4
Reply Affirmation (Cardinale) Exhibits A-C/ Affidavit (Messina)	5 - 6

This action arises out of an alleged loan of \$45,000.00 by plaintiff to defendant, in or around June, 2002, for which there was never a written contract or promissory note. The loan has never been repaid. On or about March 10, 2016 Plaintiff filed a Summons and attorney-Verified Complaint in which plaintiff alleges that, at all relevant times, defendant was and continues to be a resident of the State of Florida. Defendant moved to dismiss the Complaint on the grounds that, *inter alia*, the Court lacks personal jurisdiction over the defendant. Defendant argued plaintiff did not establish that defendant had sufficient contacts with New York so as to warrant jurisdiction, nor that a \$5,000.00 wire made on June 20, 2002 had anything to do with the alleged \$45,000.00 loan. By Decision and Order dated June 23, 2016, this Court denied defendant's motion to dismiss,

without prejudice to bring another motion at the conclusion of discovery. With respect to the jurisdiction issue, the Court stated that it is not at all clear whether defendant had or continues to have sufficient contact with New York so as to invoke jurisdiction and held that plaintiff is entitled to discovery reasonably related to such issue.

On or about November 21, 2016, plaintiff's attorney served a subpoena *duces tecum* on Citibank, N.A. in Smithtown, New York. The subpoena sought "any and all documents...concerning the defendant and any and all other records, evidences and writings...concerning this action, including but not limited to all bank statement for all accounts, including but not limited to Account No. 7076, for customer PETER SCOTT MESSINA A/K/A SCOTT MESSINA... from 2002 to present." No copy of the subpoena was served upon the defendant or his attorney, as is required by Civil Practice Law & Rules §3120(3). Defendant learned about the subpoena when he received a letter from Citibank, advising him that the subpoena (copy enclosed) had been served.

Defendant now moves to quash the subpoena, as he was never provided notice, and he alleges that the subpoena fails to identify the purpose for the discovery sought. Moreover, defendant alleges that the subpoena is overbroad.

Plaintiff does not deny its failure to serve a copy on defendant. On that basis alone, the Court would have authority to quash the subpoena. (*Matter of Krissler Business Institute, Inc.* 244 AD2d 486 [2d Dept 1997]) Moreover, Civil Practice Law & Rules §3101(a)(4) conditions the right to such disclosure specifically on the provision of notice "stating the circumstances or reasons such disclosure is sought." There can be no denial that the subpoena lacks such notice.

For those reasons, the subpoena, as served, is facially deficient. However, the Court's prior decision granted to plaintiff the right to reasonable discovery reasonably related to the issue of jurisdiction. In answering plaintiff's first set of interrogatories, defendant did not object to plaintiff's demands for all statements from 2002 to present. Plaintiff has suggested that the failure to do so

waived defendant's right to oppose the subpoena; but, as defendant notes, that right was specifically reserved in its Responses. Moreover, Civil Practice Law & Rules §3103 enables the court to make a protective order at any time. This application seeks such protection, and the Court finds that defendant did not waive the right to make such an application.

Nevertheless, the application to quash on the grounds of relevance, or overbreadth, is denied. In the June 23, 2016 Decision and Order, the Court specifically found that "...if a New York bank account is used to conduct almost all of the business of a party, the same may demonstrate an intent to take advantage of the protections of New York law on a continuous and systematic basis, creating a constructive "presence" in New York. (*Georgia Pac. Corp. v. Multimark's Int'l Ltd.*, 265 AD2d 109, 111 [1st Dept 2000])" (Decision at 8) While defendant asserts that he has no contacts with the State of New York, he has maintained a bank account in this state for fifteen years. As defendant himself acknowledges, the inquiry is not limited to whether he was present in New York in 2002, but whether he has maintained a presence here sufficient to confer jurisdiction of the New York courts. Plaintiff has no way of knowing this without examination of the bank records, to ascertain whether defendant continued to (and may still continue to) use that New York account to conduct "almost all of his business." Six months of records is far from sufficient to answer that question. Plaintiff is entitled to a thorough review of the nexus, if any, between defendant's use of the Citibank account and his dealings, personal or business, in the State of New York.

Plaintiff has sufficiently established his right to the information in the custody of Citibank, and its relevance. While the subpoena which was served is deficient, a new subpoena, complying with the provisions of the Civil Practice Law & Rules, will not be quashed.

On the basis of the foregoing it is ORDERED that Defendant's motion is granted. Plaintiff may serve a new subpoena, in full compliance with sections 3101 and 3120 of the Civil Practice Law & Rules, on notice to defendant.

This order shall constitute the decision of this Court.

**ENTER**

Dated: February 8, 2017  
Goshen, New York



HON. SANDRA B. SCIORTINO, J.S.C.

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