

Greco v Capobianco

2009 NY Slip Op 30949(U)

April 20, 2009

Supreme Court, Nassau County

Docket Number: 10567/08

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

JAMES GRECO and LONG ISLAND
SECURITY CONSULTANTS, INC.,

Plaintiff,

- against -

ROBERT CAPOBIANCO, PETER MANNO, JR.,
and PMI SECURITY,

Defendant.

TRIAL / IAS PART 31
NASSAU COUNTY

Index No. 10567/08

Motion Sequence No. 001, 002

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1, 2</u>
Answering Affidavits	<u>3, 4</u>
Replying Affidavits	_____
Briefs: Plaintiff's / Petitioner's	_____
Defendant's / Respondent's	_____

The nonparty witness moves for an order pursuant to CPLR 2304 quashing the subpoena duces tecum served upon him, and for a protective order pursuant to CPLR 3103 blocking the taking of his deposition in this action, and further blocking the disclosure of investigative reports, notes, and materials, and granting a stay of discovery. The plaintiffs cross move for an order pursuant to CPLR 2308 (b) holding the nonparty witness in contempt of court for disobeying the subpoena duces tecum, for an order requiring him to appear for a deposition; for an order requiring him to pay the court reporter costs associated with the first deposition; for an order pursuant to 22 NYCRR §

130-1.1 for sanctions against him and his counsel; and for an order denying his amended motion dated December 22, 2008. Each opposes the motion of the other. This Court has carefully reviewed and considered all of the papers submitted with respect to the motion and cross motion.

The Deputy County Attorney for Nassau County, the attorney for the defendants in an action pending in the United States District Court, Eastern District of New York under Docket number CV-07-2032 (JFB) (WDW) states, in an affirmation dated December 19, 2008, the underlying matter involves a former Nassau County Corrections Officer. The Deputy County Attorney states an investigation into the plaintiff's Workers Compensation claim was assigned to the nonparty witness, who is affiliated with the Nassau County Attorney's Office, and it expanded to involve allegations regarding the plaintiff's General Municipal Law § 207 (c) and job arbitration proceedings. The Deputy County Attorney points out the nonparty witness was in contact with a named defendant in the instant action in connection with that investigation, but not in contact with the codefendants here. The Deputy County Attorney notes that investigation is open and ongoing, and the nonparty witness is scheduled to testify soon at the plaintiff's job arbitration proceeding, and the plaintiff either has not yet testified or has not completed his testimony in that proceeding. The Deputy County Attorney remarks there is no provision for depositions to be held in arbitration proceedings, and pursuant to CPLR § 2404 and 22 NYCRR 202.7 (b), this affirmant contacted plaintiff's counsel, who issued

the subpoena duces tecum, and requested it be withdrawn. The Deputy County Attorney states the grounds for the request were an improper attempt to obtain disclosure of the nonparty witness' anticipated testimony and investigative materials for use in the arbitration proceeding, and the deposition would be duplicative since the nonparty witness would soon testify at that arbitration proceeding. The Deputy County Attorney explains the investigation by the nonparty witness is incomplete, disclosure now would hamper further investigation, investigation is attorney work product because it was initiated by the Nassau County Attorney's Office in connection with the plaintiff's claims, and the Nassau County Attorney's Office offered to produce the nonparty witness here following completion of his testimony in the arbitration. The Deputy County Attorney adds a copy of the nonparty witness' testimony at the arbitration proceeding could be furnished to plaintiff's counsel, and obviate additional deposition testimony. The Deputy County Attorney submits the plaintiff would be placed at an unfair advantage in the Workers Compensation and arbitration proceedings if he is permitted to ascertain details of the nonparty witness' ongoing investigation. The Deputy County Attorney avers the investigation is privileged, and its release now could compromise the probe and prejudice Nassau County while the plaintiffs would suffer no prejudice by waiting until the nonparty witness testifies at the arbitration proceeding.

The plaintiff's attorney states, in an affirmation dated January 20, 2009, in opposition to the amended third party motion by the nonparty witness, and in support of

the plaintiff's cross motion, the contact with the Deputy County Attorney for Nassau County with regard to the subpoena. The plaintiff's attorney asserts the opposing counsel did not cite nor suggest any law which would require withdrawing the subpoena duces tecum served upon the nonparty witness. The plaintiff's attorney points out the Deputy County Attorney served upon plaintiff's counsel a motion to quash that subpoena without a return date, and an unsigned good faith affirmation. The plaintiff's attorney asserts he sent the Deputy County Attorney an email specifying the numerous deficiencies in the motion, and reminding the Deputy County Attorney the nonparty witness' failure to appear would be a violation. The plaintiff's attorney contends the instant motion by the nonparty witness is defective without any legal basis, and there is no temporary restraining order suspending the validity of the subpoena duces tecum served upon the nonparty witness. The plaintiff's attorney indicates he appeared with court reporter on December 22, 2008 for the deposition of the nonparty witness, but neither he nor his attorney appeared there, rather about an hour before the deposition was to start, this affirmant received an amended notice of motion. The plaintiff's attorney noted the nonparty witness' failure to appear on the record, and concluded the deposition. The plaintiff's attorney states he received a copy of the Deputy County Attorney's December 19, 2008 good faith affirmation. The plaintiff's attorney avers the nonparty witness is in contempt of court, and there is no legal justification for his failure to appear at the deposition. The plaintiff's attorney contends the motion of the nonparty witness must be

denied, and the nonparty witness and the Deputy County Attorney be sanctioned for making a frivolous motion where their conduct cannot be considered a good faith effort to resolve the dispute.

CPLR 2304 provides:

A motion to quash, fix conditions or modify a subpoena shall be made promptly in the court in which the subpoena is returnable. If the subpoena is not returnable in a court, a request to withdraw or modify the subpoena shall first be made to the person who issued it and a motion to quash, fix conditions or modify may thereafter be made in the supreme court; except that such motion with respect to a child support subpoena issued pursuant to section one hundred eleven-p of the social services law shall be made to a judge of the family court or the supreme court. Reasonable conditions may be imposed upon the granting or denial of a motion to quash or modify.

CPLR 3103 (a) provides:

Prevention of abuse. The court may at any time on its own initiative, or on motion of any party or of any person from whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.

CPLR 2308 (b) (1) provides:

Unless otherwise provided, if a person fails to comply with a subpoena which is not returnable in a court, the issuer or the person on whose behalf the subpoena was issued may move in the supreme court to compel compliance. If the court finds that the subpoena was authorized, it shall order compliance and may impose costs not exceeding fifty dollars. A subpoenaed person shall also be liable to the person on whose behalf the subpoena was issued for a penalty not exceeding fifty dollars and damages sustained by reason of the failure to comply. A court may issue a warrant directing a sheriff to bring the witness before the person or body requiring his appearance. If a person so subpoenaed attends or is brought before such person or body, but refuses without reasonable cause to be examined, or to

answer a legal and pertinent question, or to produce a book, paper or other thing which he was directed to produce by the subpoena, or to subscribe his deposition after it has been correctly reduced to writing, the court, upon proof by affidavit, may issue a warrant directed to the sheriff of the county where the person is, committing him to jail, there to remain until he submits to do the act which he was so required to do or is discharged according to law. Such a warrant of commitment shall specify particularly the cause of the commitment and, if the witness is committed for refusing to answer a question, the question shall be inserted in the warrant.

22 NYCRR § 130-1.1 (a) provides:

The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Part. This Part shall not apply to town or village courts, to proceedings in a small claims part of any court, or to proceedings in the Family Court commenced under Article 3, 7 or 8 of the Family Court Act.

22 NYCRR § 130-1.1 (c) provides:


For purposes of this Part, conduct is frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false. Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues, (1) the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct; and (2) whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.

The Court finds the nonparty witness has met his burden for an order pursuant to CPLR 2304 quashing the subpoena duces tecum served upon him, and for a protective order pursuant to CPLR 3103 blocking the taking of his deposition in this action, and further blocking the disclosure of investigative reports, notes, and materials, and granting a stay of discovery as requested in the moving papers. The Court determines the plaintiff has not met the burdens for an order pursuant to CPLR 2308 (b) holding the nonparty witness in contempt of court for disobeying the subpoena duces tecum, for an order requiring him to appear for a deposition; for an order requiring him to pay the court reporter costs associated with the first deposition; for an order pursuant to 22 NYCRR § 130-1.1 for sanctions against him and his counsel; and for an order denying his amended motion dated December 22, 2008. The conduct of the nonparty witness and the Deputy County Attorney for Nassau County is not frivolous, as a matter of law.

Accordingly, the motion is granted, and the cross motion is denied.

So ordered.

Dated: April 20, 2009

ENTER: 

 J. S. C.

FINAL DISPOSITION

NON FINAL DISPOSTION XXX

ENTERED
 APR 23 2009
 NASSAU COUNTY
 COUNTY CLERK'S OFFICE