

Matter of Harrison

2009 NY Slip Op 31843(U)

August 11, 2009

Supreme Court, New York County

Docket Number: 104537/09

Judge: Walter B. Tolub

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

WALTER B. TOLUB

PRESENT.

Index Number : 104537/2009

PART _____

HARRISON, CHRISTOPHER C.

vs

RUBEN, ESQ., STEPHEN W.

Sequence Number : 001

ORDER OF PROTECTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...

PAPERS NUMBERED

Answering Affidavits - Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

FILED

AUG 18 2009

COUNTY CLERK'S OFFICE
NEW YORK

W

Dated: 8/10/09

WALTER B. TOLUB J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

-----x
In the Matter of the Application of
CHRISTOPHER C. HARRISON, for the issuance
of Subpoenas for the Depositions of
STEPHEN W. RUBIN, ESQ., THOMAS C. DIRKS,
NEW MOUNTAIN CAPITAL, LLC, MERRILL LYNCH
BUSINESS FINANCIAL SERVICES, CHARTERHOUSE
GROUP, INC., JAY M. GATES, STEVEN B. KINSLEY
and MICHAEL B. AJOUZ, and for the production
of documents from NEW MOUNTAIN CAPITAL,
MERRILL LYNCH BUSINESS FINANCIAL SERVICES and
CHARTERHOUSE GROUP, INC., to be used in an
action entitled CHRISTOPHER HARRISON v.
JAMES BARNES and OAKLE[AF] PRINCIPLES, LLC,
DOCKET NO. CV-074032553-S, now pending in
the Superior Court of the State of
Connecticut, Judicial District of Hartford.

FILED
AUG 18 2009
COUNTY CLERK'S OFFICE
NEW YORK

Index No. 104537/09
Mtn Seq. 001

-----x
WALTER B. TOLUB, J.:

This is James Barnes and Oakleaf Principles, LLC's
(Defendants) motion for a protective order barring the
depositions of non-parties Thomas Dirks, Stephen Rubin, Esq., Jay
Gates and Charterhouse Group, Inc. (CPLR §3103[a]).

Facts

The underlying action, entitled Christopher C. Harrison v.
James Barnes and Oakleaf Principles, LLC, [Docket No. HHD-CV-07-
4032553-S] is currently pending in the Superior Court of the
State of Connecticut, Judicial District of Hartford (Connecticut
Action).

In the Connecticut Action, Mr. Harrison, represented by
attorney Mark McGowen, is claiming rights to certain stock in

Oakleaf Waste Management, LLC (Oakleaf). Plaintiff in that action claims that the stock was given to him by James Barnes and his limited liability company, Oakleaf Principles, LLC. Oakleaf was subsequently acquired by the Charterhouse Group and New Mountain Capital, LLC.

On or about April 1, 2009, Mr. McGowan, Esq., filed a Verified Petition on behalf of Mr. Harrison, with this Court, pursuant to CPLR §3102(e). Plaintiff sought an order honoring the commissions of the Connecticut Court which authorized the taking of out of state depositions and the production of documents. Specifically, Plaintiff sought an order authorizing the issuance of subpoenas and compelling the depositions of, *inter alia*, non-party witnesses, Stephen W. Rubin, Esq., Thomas C. Dirks, Jay M. Gates and Charterhouse Group.

On April 1, 2009, movants' attorney, Donald E. Frechette, Esq., emailed Mr. McGowan, memorializing and commenting on a telephone conversation they had. Mr. Frechette stated that he thought Mr. McGowan would be a necessary witness in the Connecticut Action and asked if he would voluntarily appear for depositions (Defendants' Ex. 4). Mr. McGowan's response, according to the email, was that he would "see what happens" (Id.).

On April 3, 2009, Justice Lehner of this Court, issued an order directing the depositions of various non-party witnesses

including, Stephen W. Rubin, Esq., Thomas C. Dirks, Jay M. Gates and Charterhouse Group as well s the issuance of related subpoenas.

The depositions for these non-party witnesses were originally noticed for April 28, 2009, but were subsequently adjourned to May 14, 2009 (Defendants' Ex. 3).

By motion dated May 11, 2009, Defendants moved in the Connecticut Action to revoke Mr. McGowan's admission *pro hac vice* as counsel for the plaintiff or to disqualify him in the Connecticut Action (Defendants' Ex. 5). Additionally, Defendants filed this motion, dated May 12, 2009, for a Protective Order barring the depositions from going forward until such time that the Connecticut Court determines whether Mr. McGowan should be removed as Plaintiff's counsel.

Plaintiff's counsel then filed a motion in the Connecticut Action seeking to compel Defendants, Mr. Barnes and Oakleaf Principles, LLC to adhere to the May 14, 2009 deposition date of non-party witnesses Mr. Rubin, Mr. Dirks, Mr. Gates and Charterhouse Group. On May 12, 2009, Judge Graham of the Superior Court of the State of Connecticut, issued an order directing that the depositions of non-party witnesses be conducted as scheduled (Plaintiff's Ex. C).

Pursuant to Judge Graham's May 12, 2009 order, depositions were conducted. Consequently, Plaintiff argues that this motion

for a Protective Order is moot since all depositions have already taken place.

Defendants argue, in their Reply papers, that the Connecticut Court did not have the authority to override New York rules and issue an order with respect to deposition proceedings pursuant to a New York Court order. Defendants argue that pursuant to CPLR §3103, the depositions were automatically stayed by the filing of the motion for a Protective Order. As such, Defendants seek to have the depositions stricken.

Discussion

CPLR §3103 provides:

Protective orders

[a] **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.

* * *

[c] **Suppression of information improperly obtained.** If any disclosure under this article has been obtained improperly or irregularly obtained so that a substantial right of a party is prejudiced, the court, on motion, may make an appropriate order, including an order that the information be suppressed.

The mere service of the motion papers for a protective order suspends disclosure of the particular matter in dispute

(*McKinney's Consolidated Laws of New York Annotated*, Practice Commentary, Patrick M. Connors, C3103:7).

Typically a motion for a protective order is made before the actual disclosure. But, it is also possible that the "abuse" has already occurred in connection with a disclosure already made. To the extent that the court can by any means rectify the wrong after the fact, it has the power to do so under CPLR §3103 [c]. This can be accomplished by a motion to suppress the information (Id.).

Here, Defendants filed a motion for a Protective Order pursuant to CPLR 3103 [a]. Since depositions have already been held, the remedy being sought is now moot.

Defendants appear to argue in their Reply papers that the court should strike the deposition testimony for being improperly obtained.


Even if the motion were properly brought before the Court, it would nevertheless fail. In order to succeed on a motion pursuant to CPLR 3103[c], Defendants must show prejudice sufficient to warrant the sanction of suppression (Levy v. Grandone, 8 AD3d 630 [2nd Dept 2004]). Here, Defendants fail to show any prejudice. The depositions were not overly burdensome, were not privileged, and there is no indication of why the depositions of the non-parties would not be obtainable. As such, Defendants motion must be and is denied.

Accordingly, it is

ORDERED that Defendants' motion is denied in its entirety.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 8/10/09



HON. WALTER B. TOLUB, J.S.C.

FILED
AUG 18 2009
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