

Matter of New Breed Logistics, Inc. (Furman)

2009 NY Slip Op 32779(U)

November 6, 2009

Supreme Court, New York County

Docket Number: 103760/09

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE

PART 10

Justice

New Breeds Logistics

INDEX NO.

103762/09

MOTION DATE

- v -

MOTION SEQ. NO.

001

Furman

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 ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

FILED

NOV 30 2009

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11/6/09

JUDITH J. GISCHE, J.S.C.

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 10

-----x
In the Matter of the Application of

NEW BREED LOGISTICS, INC.,

Petitioner,

Decision/Order
Index # 103760/09
Mot. Seq. # 001

For Issuance of a Subpoena to take the Oral
Deposition and for Production of Documents of

DAVID FURMAN,

Respondent,

for use in an Action Entitled New Breed Logistics, Inc. v. CT INDY NH TT, LLC and Bozzuto's Inc.,
Pending in the Superior Court of Connecticut,
Judicial District of New Haven at New Haven.

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-----x
Pursuant to CPLR § 2219(A) the following papers were considered by the court
in connection with these petitions and/or motions:

PAPERS	NUMBERED
Resp's n/m (quash).....	1
DJF affid in supp w/ exhs.....	2
JMS affirm in opp., exhibits.....	3
AJL affirm in opp, exhibits.....	4
DJF reply affid.....	5
MAB affid.....	6

Hon. Judith J. Gische:

Upon the foregoing papers, the decision and order of the court is as follows:

In an action pending in the Superior Court in Connecticut entitled New Breed Logistics, Inc. v. CT INDY NH TT, LLC et al., petitioner New Breed Logistics, Inc. filed a motion seeking a commission to take a non-party deposition of respondent David

Furman and to obtain certain documents. That motion was granted, and in accordance with the commission, petitioner applied to this court for an ex parte order pursuant to CPLR § 3102 (e) authorizing the issuance of a subpoena directed to Furman. On March 19, 2009, this court issued the order.

Respondent has now moved to quash the subpoena served upon him for deposition and *duces tecum*, and for a protective order. The parties have since resolved the issue concerning the documents requested; the only issue remaining in this proceeding is whether respondent must give testimony.

Underlying facts

Petitioner entered into a commercial lease with PREI North Haven Developers, LLC ("PREI"), whereby petitioner leased one out of three buildings on the certain property located at 300 Montowese Avenue, North Haven, Connecticut. Pursuant to the terms of the lease and a amendment thereto, petitioner had an option and right of first offer to lease the two remaining buildings on the property.

On January 5, 2007, petitioner and CT INDY, as the successor-in-interest to PREI, executed a Second Amendment to the Lease. Respondent represented CT INDY in connection with the negotiation of the Second Amendment. A draft of the Second Amendment contained language relating to petitioner's right of first offer. Petitioner objected to that language contained in the draft, and the final version of the Second Amendment did not refer to petitioner's right of first offer at all.

In July 2008, CT INDY entered into a lease with Bozzuto's Inc. ("Bozzuto's") for space at the property, which petitioner claims violated its right of first offer. Petitioner commenced the Connecticut action, wherein CT INDY claims that petitioner's right of

first offer to lease one of the buildings terminated while PREI still owned the property, long before Respondent prepared draft of the Second Amendment which otherwise referred to such right.

Discussion

At the outset, the court rejects respondent's argument that petitioner is required to demonstrate "special circumstances" in order to obtain respondent's testimony pursuant to CPLR § 3101 (a) (4). Rather, the court's inquiry with respect to objections raised by persons required to testify pursuant to CPLR 3102(e) is limited to determining: (1) whether the witnesses' fundamental rights are preserved; (2) whether the scope of inquiry falls within the issues of the pending out-of-state action; and (3) whether the examination is fair. Matter of Ayliffe, 166 AD2d 223 (1st Dept 1990). However, the court may, in its discretion, quash a subpoena issued under CPLR § 3102 (e) due to overbreadth or to prevent harassment. Matter of Kirkland & Ellis, 176 Misc2d 73 (NY Sup 1998). The courts "will not prejudge the materiality or the competency of the evidence in a cause pending in another jurisdiction and will afford the widest possible latitude in the conduct of such examinations." Matter of Ayliffe, *supra*, quoting Matter of Roberts, 214 AD 271 (1st Dept 1925).

In this case, the Connecticut Superior Court has determined that respondent has information that is "relevant and necessary" for the trial of the pending action, and that it would be in the interests of justice for respondent to be deposed. Accordingly, respondent's arguments regarding the need or other availability of his testimony has already been implicitly determined. See Matter of Ayliffe, *supra*; see also Matter of Jarvis v. Jarvis, 141 Misc2d 404 (NY Sup 1988).

Respondent does not argue that his fundamental rights will be violated in any way or that such a deposition would be prejudicial or unfair. Moreover, respondent admits that any testimony he may offer, which is not otherwise subject to an attorney client privilege, would fall within the ambit of the issues raised in the Connecticut action. Respondent's principal argument, that he may be asked questions which he cannot answer due to the attorney client privilege is a red herring because respondent is not being compelled to violate this privilege.

Accordingly, respondent's motion is denied in its entirety.

Conclusion

In accordance herewith, it is hereby

ORDERED that the petition is hereby dismissed; and it is further

ORDERED that the clerk is directed to enter judgment in favor of the respondent; and it is further

ORDERED that any requested relief not otherwise expressly granted herein is denied, and it is further

ORDERED that this shall constitute the decision and order of the court.

Dated: New York, New York
November 6, 2009

FILED
NOV 30 2009
NEW YORK
COUNTY CLERK'S OFFICE

SO ORDERED:



Hon. Judith J. Glische J.S.C.