

Podstupka v Kolomick
2009 NY Slip Op 32968(U)
December 23, 2009
Supreme Court, Nassau County
Docket Number: 011363-2009
Judge: Timothy S. Driscoll
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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x
STEVEN PODSTUPKA,

**TRIAL/IAS PART: 25
NASSAU COUNTY**

Plaintiff,

-against-

Index No: 011363-2009

DIANE KOLOMICK,

**Motion Seq. No: 3
Submission Date: 11/2/09**

Defendant.

-----x

The following papers having been read on this motion:

- Notice of Motion, Affirmation in Support and Exhibits.....x**
- Affirmation in Opposition and Exhibits.....x**
- Reply Affirmation in Further Support and Exhibits.....x**

This matter is before the Court for decision on the motion filed by Defendant Diane Kolomick on October 9, 2009 and submitted on November 2, 2009 to quash certain subpoenas. For the reasons set forth below, the Court denies Defendant's motion in its entirety.

BACKGROUND

A. Relief Sought

Defendant Diane Kolomick ("Kolomick" or "Defendant"), as well as non-parties Pamela Rzonca ("Rzonca"), Helen Kolomick ("H. Kolomick") and D&P Distributors, Inc. f/k/a TSSR Distributor Inc. ("D&P") move for an Order: 1) pursuant to CPLR § 2304, quashing a September 29, 2009 subpoena duces tecum issued to JP Morgan Chase Bank, seeking bank records of D&P Distributors, Inc. f/k/a TSSR Distributor Inc. ("D&P") ("D&P Subpoena"), and pursuant to CPLR § 3103 vacating the D&P Subpoena and denying any disclosure pursuant

thereto; 2) pursuant to CPLR § 2304, quashing a September 29, 2009 subpoena duces tecum issued to JP Morgan Chase Bank, seeking Diane Kolomick's bank records or the records of any account that Diane Kolomick holds jointly with Pamela Rzonca ("Kolomick-Rzonca Subpoena"), and pursuant to CPLR § 3103, for a protective order vacating the Kolomick-Rzonca Subpoena and denying any disclosure pursuant thereto; 3) pursuant to CPLR § 2304, quashing a September 29, 2009 subpoena duces tecum issued to Capital One Bank, seeking Diane Kolomick's bank records or the records of any account that Kolomick holds jointly with Pamela Rzonca ("Second Kolomick-Rzonca Subpoena"), and pursuant to CPLR § 3103, for a protective order vacating the subpoena and denying any disclosure pursuant thereto; 4) pursuant to CPLR § 2304, quashing a September 29, 2009 subpoena duces tecum issued to Citibank, seeking bank records for DSSR Beverage, LLC ("DSSR Subpoena"), and pursuant to CPLR § 3103, for a protective order vacating the subpoena and denying any disclosure pursuant thereto; 5) pursuant to CPLR § 2304, quashing a September 29, 2009 deposition subpoena issued to Pamela Rzonca and subpoena duces tecum issued to Pamela Rzonca ("Rzonca Deposition and Rzonca Subpoena Duces Tecum"), and pursuant to CPLR § 3103, for a protective order vacating the subpoenas, and denying any disclosure pursuant thereto; and 6) pursuant to CPLR § 2304, quashing a September 29, 2009 deposition subpoena issued to Helen Kolomick and subpoena duces tecum issued to Helen Kolomick ("Helen Kolomick Deposition and Helen Kolomick Subpoena Duces Tecum"), and pursuant to CPLR § 3103, for a protective order vacating the subpoenas, and denying any disclosure pursuant thereto.

Plaintiff Steven Podstupka opposes the motion.

B. The Parties' History

This action stems from the former romantic relationship between the parties Steven Podstupka ("Podstupka") and Diane Kolomick ("Kolomick") during which they also became involved in various business ventures together. Their background is outlined in a prior decision issued by this Court on November 6, 2009, and the Court incorporates that decision herein by reference. One of the businesses at issue is a corporation called DSSR Beverage, LLC ("DSSR").

Podstupka commenced this action on June 12, 2009 seeking, *inter alia*, the imposition of a constructive trust on various assets that Kolomick obtained since 1997. Podstupka's claims

are predicated upon an “oral joint venture agreement” that the parties allegedly entered into in 2002 (“Alleged Agreement”) for the purpose of acquiring parcels of real property, vehicles, boats and making other investments (Compl at ¶ 24). Podstupka claims that, based on Kolomick’s failure to honor this Alleged Agreement, she is liable to him for misappropriation and conversion, breach of fiduciary duty, accounting, waste and diversion of “joint venture monies,” breach of contract, unjust enrichment, fraud, constructive fraud, negligent misrepresentation, and breach of the duty of good faith and fair dealing. Podstupka alleges that Kolomick breached the Alleged Agreement by interfering with his possessory right to certain specific income and property held solely in Kolomick’s name. Podstupka claims that Kolomick commenced this alleged interference with his possessory rights in February 2008. As a result, he seeks the imposition of a constructive trust on virtually all of her assets.

Non-party Pamela Rzonca (“Rzonca”) is Kolomick’s sister. Rzonca owns D&P Distributors, Inc. f/k/a TSSR Distributor, Inc. (“D&P”), a New York corporation in which Kolomick has no ownership interest. Non-party Helen Kolomick (“H. Kolomick”) is Kolomick’s mother. Non party DSSR Beverage, LLC (“DSSR”) is a limited liability company in which Podstupka and Kolomick are each 50 percent members (Kolomick Aff. at ¶4).

Although Podstupka has not asserted any causes of action against either Rzonca, D&P or H. Kolomick, he has served several subpoenas with respect to, *inter alia*, their bank records. These subpoenas are the subject of the instant application by Kolomick and the non-party movants, to, quash and vacate the various subpoenas and deny any disclosure pursuant to them. In support of their application, counsel for Kolomick and the non party movants argues that “[i]n a last-ditch attempt to salvage his fundamentally defective claims from summary judgment, Plaintiff...has embarked on an overbroad, palpably improper fishing expedition aimed at harassing Kolomick and her family and extracting an 11th-hour nuisance settlement” (Aff. in Supp. of Motion at ¶3). Further, he argues that the subpoenas are defective for a number of additional reasons including:

- **The D&P Subpoena:** Kolomick has no ownership interest in D&P; Podstupka has not asserted any causes of action against Rzonca or D&P.
- **The Kolomick-Rzonca Subpoena and the Second Kolomick-Rzonca Subpoena:** The verified complaint (“Complaint”) purports to allege that Kolomick breached the Alleged

Agreement by interfering with plaintiff's possessory right to certain specific income and property held solely in Kolomick's name and that this alleged interference, commenced in February 2008, forms the basis for the imposition of a constructive trust on virtually all of her personal assets. Yet, these two Kolomick-Rzonca subpoenas do not seek bank records relating to any specific transactions occurring after February 2008; rather, they seek all of the records from any bank account held either in Kolomick's name or jointly in Kolomick and Rzonca's name since January 2008.

- **The DSSR Subpoena:** The DSSR account at Citibank was open for only a few months in early 2009. All of the records relating to the DSSR Citibank account were produced to Podstupka during discovery in this action pursuant to document requests that Podstupka served on Kolomick. Thus, this subpoena misleadingly states that disclosure is sought directly from Citibank because the "requested documents are not otherwise available to the undersigned."
- **The Pamela Rzonca Deposition & the Pamela Rzonca Subpoena Duces Tecum:** Podstupka has not maintained any causes of action against either Rzonca or D&P. There is no clear reference as to why the deposition subpoena for Rzonca - which states, in pertinent part:

[t]he circumstances or reasons such disclosure is sought or required are as follows: The requested documents are not otherwise available to the undersigned and are material and necessary to the prosecution of this action.

- is necessary in this action. Counsel for Kolomick argues that "Considering that the Rzonca Deposition Subpoena seeks Rzonca's deposition, not documents, Podstupka's supposed reason for requiring Rzonca's deposition makes no sense whatsoever" (Aff. in Supp., ¶ 16). Counsel submits that Podstupka issued this Subpoena solely to harass Kolomick's close relatives and extract a nuisance settlement from Kolomick. He also argues that the request in the Subpoena Duces Tecum for D&P's corporate records and bank records is improper because D&P is not a party to this action and has no colorable connection to this action. Finally, given the allegations in the Complaint, the Subpoena Duces Tecum's request for records from accounts held jointly in Kolomick and Rzonca's name since January 1995 is overbroad.

- **The Helen Kolomick Deposition & the Helen Kolomick Subpoena Duces Tecum:** Counsel for Kolomick and the non-party movants advances the same arguments that propounded in support of his claim that the Rzonca's Subpoenas are improper, including: 1) Podstupka has not alleged any causes of action against H. Kolomick who is a widow and a senior citizen; 2) the Deposition Subpoena is confusing because it asks for documents, and is advanced solely to harass Kolomick's mother and extract a nuisance settlement from Kolomick; 3) the Subpoena Duces Tecum improperly seeks D&P's corporate records and bank records despite the fact that D&P is not a party to this action and has no colorable connection to this action; and 4) the Subpoena Duces Tecum is overbroad in that it seeks records from accounts held jointly in Kolomick and H. Kolomick's name since January 1995, although the allegations in the Complaint address Kolomick's alleged conduct since 2008.

Counsel for Kolomick and non-party movants affirms that, by letters dated October 6 and October 7, 2009, in accordance with CPLR § 2304, he asked Podstupka's counsel to withdraw the various Subpoenas, and outlined the reasons that he believed the Subpoenas were improper. Podstupka's counsel declined to withdraw the Subpoenas. Thus, counsel for Podstupka affirms that he made good faith attempts to resolve the matter without resort to motion practice.

In opposing the instant application, counsel for Podstupka affirms that he deposed Kolomick, on July 29, 2009, at which time Kolomick made a concerted attempt to frustrate any efforts to disclose information relevant to Podstupka's allegations. Podstupka's counsel maintains that, as evidenced in Kolomick's deposition testimony, Kolomick and her counsel have refused to provide Podstupka with many documents, including those that are being sought by the Subpoenas, including: 1) Kolomick's tax returns, 2) Kolomick's bankruptcy filing, 3) gifts that Kolomick gave to others, 4) several joint accounts that Kolomick maintained with Rzonca at various institutions, 5) the DSSR account that Kolomick opened at Chase Bank, 6) the joint account that Kolomick maintained with Rzonca at Charles Schwab, 7) documents relevant to the formation of DSSR, 8) documents DSSR's accountant prepared, including tax returns, 9) accounts into which Kolomick deposited DSSR checks, 10) paychecks Kolomick received from DSSR, and 11) documents evidencing Rzonca's role in DSSR. As a result,

counsel for Plaintiff issued the Subpoenas at issue. Counsel for Podstupka provides transcripts of Kolomick's deposition testimony, which reflects her responses to questions regarding the above matters, and others that Podstupka's counsel refers to in his opposition papers.

C. The Parties' Positions

Kolomick and the non-party movants submit that the Court should issue a protective order quashing all of Podstupka's subpoenas because, *inter alia*, 1) the D&P Subpoena is improper because it seeks records regarding an entity in which Kolomick has no ownership interest, and against which the Complaint makes no allegations; 2) the Kolomick-Rzonca Subpoena and Second Kolomick-Rzonca Subpoena, which request account records since January 2008 of all accounts that Kolomick held individually or with Rzonca, seek information that is not relevant to Podstupka's claims in this litigation; 3) Podstupka has not demonstrated that special circumstances, specifically his inability to obtain the documents from Postupka, exist to warrant disclosure from non-parties; and 4) the Subpoenas seeking account information since 1995 is overbroad in light of the allegations in the Complaint which relate to property that Kolomick has acquired since 1997, and the Alleged Agreement that the parties entered into in 2002.

Podstupka opposes the motion, submitting, *inter alia*, that 1) as evidenced by her deposition testimony, Kolomick frustrated the efforts of Podstupka's counsel to elicit relevant information; 2) as Podstupka learned of the formation of D&P after the Complaint was filed, the address of D&P is that of Kolomick's mother and sister, and D&P was allegedly formed at the time that Kolomick was improperly secreting money from Podstupka, the documents sought regarding this entity are relevant; 3) in light of Kolomick's allegedly improper diversion of moneys from DSSR without Podstupka's knowledge, the bank records sought in the Subpoenas are relevant; and 5) despite Podstupka's requests, Kolomick has failed to produce numerous relevant documents, including but not limited to documents regarding personal bank accounts, joint property, personal tax returns, tax returns of entities that Kolomick signed and W-2 forms that Kolomick has received.

RULING OF THE COURT

CPLR § 3101(a) provides that there shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof. *See Allen*

v. Cromwell-Collier Pub. Co., 21 N.Y.2d 403, 406 (1968); *Spectrum Systems International Corporation v. Chemical Bank*, 78 N.Y.2d 371 (1991); *Quevedo v. Eichner*, 29 A.D.3d 554 (2d Dept. 2006). The Court of Appeals in *Allen, supra*, held that “[t]he words ‘material and necessary’ are . . . to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason.” *Id.* See also *Andon v. 302-304 Mott Street Assocs.*, 94 N.Y.2d 740, 746 (2000); *Spectrum Systems International Corporation v. Chemical Bank, supra*; *Parise v. Good Samaritan Hosp.*, 36 A.D.3d 678 (2d Dept. 2007). This statute embodies the policy determination that liberal discovery encourages fair and effective resolution of disputes on the merits, minimizing the possibility for ambush and unfair surprise. *Spectrum Systems, supra*, at 376, citing 3A Weinstein-Korn-Miller, N.Y. Civ. Prac. paragraphs 3101.01-3101.03.

CPLR § 3103(a) provides that “a court may make a protective order conditioning or regulating the use of any disclosure device...to prevent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice to any person or the courts.” The CPLR also establishes three categories of protected materials, also supported by policy considerations: 1) privileged matter, which is immune from discovery pursuant to § CPLR 3101(b), 2) attorney's work product, which is also immune from discovery pursuant to CPLR § 3101(c), and 3) trial preparation materials, which are subject to disclosure only on a showing of substantial need and undue hardship in obtaining the substantial equivalent of the materials by other means, pursuant to CPLR § 3101(d)(2). *Spectrum Systems*, 78 N.Y.2d at 376-377. The burden of establishing any right to protection is on the party asserting it, the protection claimed must be narrowly construed and its application must be consistent with the purposes underlying the immunity. *Spectrum Systems* at 377.

The purpose of a subpoena duces tecum is to compel the production of specific documents that are relevant and material to facts at issue in a pending judicial proceeding. *Velez v. Hunts Point Multi-Service Center, Inc.*, 29 A.D.3d 104, 112 (1st Dept. 2006). The court should grant a motion to quash a subpoena duces tecum only when the materials sought are utterly irrelevant to any proper inquiry. *Id.*; *New Hampshire Ins. Co. v. Varda, Inc.*, 261 A.D.2d 135 (1st Dept. 1999); *Matter of Reuters Ltd. v. Dow Jones Telerate*, 231 A.D.2d 337, 341 (1st Dept.

1997). The burden of establishing that the requested documents and records are utterly irrelevant is on the person being subpoenaed. *Gertz v. Richards*, 233 A.D.2d 366 (2d Dept. 1996).

While CPLR § 3120 was amended effective September 1, 2003 to dispense with the requirement of a motion and require only the service of a subpoena duces tecum on a non-party witness for production of documents, the subpoena must specify the time, place and manner of making the inspection, copy, test or photograph, and set forth individually or by category the items to be inspected and describing each item and category with reasonable particularity. *Velez*, 29 A.D.3d at 109. The amendment did not change the requirement of CPLR § 3101(a)(4) that, where disclosure is sought from a nonparty, the nonparty shall be given notice stating the circumstances or reasons such disclosure is sought or required. *Id.* at 111. A party seeking discovery from a nonparty witness must show special circumstances. *Tannenbaum v. Tannenbaum*, 8 A.D.3d 360 (2d Dept. 2004), quoting *Lanzello v. Lakritz*, 287 A.D.2d 601 (2d Dept. 2001); *Dioguardi v. St. John's Riverside Hosp.*, 144 A.D.2d 333, 334 (2d Dept. 1988). A party does not establish the existence of special circumstances merely by showing that the information sought is relevant. A party can establish special circumstances by establishing that the information sought cannot be obtained through other sources. *Tannenbaum v. Tannenbaum*, supra, citing *Murphy v. Macarthur Holding B.*, 269 A.D.2d 507 (2d Dept. 2000). See also *Moran v. McCarthy, Safrath & Carbone, P.C.*, 31 A.D.3d 725 (2d Dept. 2006).

Here, Plaintiff has established the need for the discovery sought. The items that Plaintiff seeks may clearly relate to Plaintiff's underlying theory that the Defendant has engaged in a course of conduct that includes improperly using DSSR funds to pay her personal expenses and diverting monies from DSSR to an account she opened in Citibank without Plaintiff's knowledge, as well as other deceptive conduct. At her deposition, Kolomick provided testimony demonstrating that it is her practice to commingle her finances with those of her sister (*Kolomick Tr.*, pp. 49-64, 68-70, 178-183). By reviewing all of the banking records for all of the accounts that Defendant and her sister maintain, Plaintiff will be better able to determine the extent of that commingling.

It is not dispositive to the Court's determination of this motion that Plaintiff has not yet asserted any causes of action against D&P. In an Affidavit dated October 15, 2009 (Ex. 2 to P's

Opp.), Podstupka affirmed that, in January of 2009, Rzonca started a corporation called TSSR Distributor Inc. ("TSSR"), a name that sounded similar to DSSR, the company in which the parties were involved. Podstupka submitted, in that Affidavit, that Kolomick used her sister, Rzonca, as an alter ego in forming TSSR. Podstupka affirmed, further, that the name of TSSR was subsequently changed to D&P and provided documentation in support of that assertion. Counsel for Podstupka affirms, further, that the certificate of incorporation for TSSR lists the address of that corporation as 6 L'Ecluse Lane, Huntington, New York 11743, which is the address of Kolomick's mother, H. Kolomick, and Kolomick's sister, Rzonca. In light of these allegations, and Podstupka's claim that Kolomick was actively engaged in secreting money from him and DSSR at the time that TSSR was formed, the Court concludes that the information that Podstupka seeks by way of the Subpoenas is germane to the issues in this case and necessary to Podstupka to attempt to establish his claims.

The Court also concludes, upon a review of the motion papers, including Kolomick's deposition testimony, that Kolomick has been less than cooperative in responding to Podstupka's document requests. Thus, the Court concludes that Podstupka has no other method of securing this information, and that the third-party Subpoenas are appropriate.

In light of the foregoing, the Court denies the motion by Defendant and non-movant third parties for an Order pursuant to CPLR § 2304 quashing the Subpoenas Duces Tecum served on JP Morgan Chase Bank, Capital One Bank and Citibank, and an Order pursuant to CPLR § 3103, granting a protective order relieving the non-parties of their obligations to respond to the Subpoenas. The Court directs the individuals and financial institutions to whom the Subpoenas are addressed to comply with those Subpoenas on or before January 29, 2010.

All matters not decided herein are hereby denied.


This constitutes the decision and order of the Court.

The Court reminds counsel of their required appearance before the Court for a Preliminary Conference on April 19, 2010 at 9:30 a.m.

ENTER

DATED: Mineola, NY

December 9, 2009



HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED

DEC 14 2009

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**