

<b>Snedeker v Schiff Hardin LLP</b>
2010 NY Slip Op 30151(U)
January 14, 2010
Supreme Court, Nassau County
Docket Number: 014762-09
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  
**WILLIAM A. SNEDEKER,**

**Plaintiff,**

**-against-**

**SCHIFF HARDIN LLP,**

**Defendant.**  
-----x

**TRIAL/IAS PART: 22  
NASSAU COUNTY**

**Index No: 014762-09**

**Motion Seq. Nos: 1 & 2  
Submission Date: 11/24/09**

**The following papers having been read on these motions:**

- Notice of Motion dated 10/9/09, Affirmation in Support and Exhibits.....x**
- Notice of Motion dated 10/28/09, Affirmation in Support and Exhibits...x**
- Affirmation in Opposition and Exhibits.....x**
- Memorandum of Law in Opposition.....x**
- Reply Affirmation dated 10/29/09.....x**
- Reply Affirmation dated 11/20/09.....x**

This matter is before the Court for decision on the motions filed by Plaintiff on October 13, 2009 and October 29, 2009, and submitted on November 24, 2009. For the reasons set forth below, the Court denies 1) denies Plaintiff's first motion (Motion Sequence # 1) as moot; and 2) denies Plaintiff's second motion (Motion Sequence # 2).

**BACKGROUND**

**A. Relief Sought**

In Motion Sequence # 1 ("First Motion"), Plaintiff William A. Snedeker ("Snedeker" or "Plaintiff") seeks an Order 1) pursuant to CPLR § 2304, quashing the Subpoenas Duces Tecum ("Subpoenas") issued to non-parties Andrews Kurth, LLP ("Andrews Firm") and Herzfeld &

Rubin, P.C. (“Herzfeld Firm”) (collectively “Non-Parties”) based on Defendant’s alleged failure to serve those Subpoenas properly; 2) precluding Defendant from presenting evidence obtained by the Subpoenas; 3) directing the immediate destruction or return of the documents in question; and 4) imposing sanctions on Defendant for allegedly improper conduct in connection with those Subpoenas.

In Motion Sequence # 2 (“Second Motion”), Plaintiff seeks an Order 1) pursuant to CPLR § 2304, quashing the Subpoenas; and 2) imposing sanctions on Defendant for allegedly improper conduct in connection with those Subpoenas.

Defendant Schiff Hardin LLP (“Schiff Firm” or “Defendant”) opposes Plaintiff’s motions on the grounds that 1) Plaintiff lacks standing to challenge the Subpoenas; 2) the Subpoenas seek relevant information; 3) Defendant has cured any procedural defects with respect to the issuance of the Subpoenas; 4) the Non-Parties have raised no objection to the Subpoenas.

As the motion papers demonstrate that Defendant addressed the technical objections raised in the First Motion by re-issuing the Subpoenas, the Court denies the First Motion as moot and will address the substantive issues raised by Plaintiff in the Second Motion.

#### B. The Parties’ History

This is an action to recover damages for breach of contract. Plaintiff alleges that Defendant breached an employment agreement (“Agreement”) dated May 1, 2008 (Ex. 2 to First Motion), pursuant to which Plaintiff was employed in an “of counsel” capacity in Defendant’s real estate practice group. The Agreement was signed by Plaintiff and Robert H. Riley (“Riley”) on behalf of Defendant. The term of the Agreement was from May 12, 2008 to December 31, 2009 unless terminated by either party for cause. The Agreement further provided that Plaintiff’s initial standard billing rate would be \$540 per hour and his “annual hours expectation” would be 2,200 hours, including 1,800 revenue hours. Plaintiff alleges that he performed all of his obligations under the Agreement.

Plaintiff alleges, further, that on or about March 17, 2009, Riley advised Plaintiff that Defendant would immediately begin paying Plaintiff pursuant to a different formula than that set forth in the Agreement. By notice dated March 24, 2009, Defendant advised Plaintiff of the new, less favorable, terms of his compensation arrangement with Defendant. Plaintiff alleges that the parties attempted, but were unable, to agree on a mutual modification of the Agreement

In the Complaint, which was filed on July 24, 2009, Plaintiff alleges that Defendant's conduct constituted a breach and repudiation of the Agreement and seeks damages. In its Answer dated September 15, 2009 (Ex. E to First Motion), Defendant denied all of the material allegations of the Complaint and asserted three (3) affirmative defenses: 1) the Complaint fails to state a claim on which relief can be granted; 2) Plaintiff materially breached and repudiated the Agreement by failing to perform as required by the Agreement and by abandoning and ceasing to perform the Agreement; and 3) Plaintiff induced Defendant to enter into the Agreement by making materially false representations concerning productivity, including anticipated collections from clients and, therefore, the Agreement is voidable and unenforceable by Plaintiff.

Defendant issued a Subpoena Duces Tecum dated September 21, 2009 to the Andrews Firm ("Andrews Subpoena") (Ex. 4 to First Motion) in which it requested: 1) documents sufficient to show compensation arrangements between the Andrews Firm and Snedeker, 2) documents sufficient to show all billable/chargeable and non-billable/non-chargeable hours performed by Snedeker during or as a result of his employment by the Andrews Firm, 3) documents sufficient to show all compensation paid to Snedeker during or as a result of his employment at the Andrews Firm including, but not limited to, Snedeker's base salary or base compensation, compensation based on billings and/or collections, bonus, firm retirement contributions and any other form of compensation paid to Snedeker by the Andrews Firm, 4) documents sufficient to show Snedeker's billing rate(s) while employed by the Andrews Firm during or as a result of his employment by the Andrews Firm, and 5) documents sufficient to show collections from clients attributable to Snedeker and another named attorney during or as a result of their employment by the Andrews Firm. On or about September 30, 2009, the Andrews Firm provided Defendant's attorney with documents in response to the Andrews Subpoena.

Defendant issued a Subpoena Duces Tecum dated October 1, 2009 to the Herzfeld Firm (Ex. 5 to First Motion) that requested the same information sought in the Andrews Subpoena, as applicable to the Herzfeld Firm. On or about October 9, 2009, Plaintiff served the First Motion in which he moved to quash the Subpoenas on the grounds that they were facially defective. In response, Defendant served new Subpoenas dated October 19, 2009 on the Andrews and Herzfeld Firms that requested the same information requested in the initial Subpoenas, and also provided the recipients with 21 days to respond, and an explanation why the disclosure was

required. Specifically, the October 19, 2009 Subpoenas stated that the disclosure was required because 1) the documents requested were prepared by the firm to which the Subpoena was issued; 2) the documents requested are relevant to the defense of this matter; and 3) reliably accurate and complete copies of these documents were not available from any other party or person. Plaintiff then served the Second Motion.

### C. The Parties' Positions

Plaintiff moves to quash the Subpoenas on the grounds that the reissued Subpoenas were still facially defective because they failed to provide a reason why the non-party disclosure is relevant to the instant action. In addition, Plaintiff contends that 1) Defendant cannot establish the special circumstances required of non-party discovery, and 2) the documents sought by the Subpoenas are irrelevant to the instant matter. Plaintiff also submits that the Court should sanction Defendant for its allegedly frivolous conduct in re-issuing the Subpoenas prior to the Court issuing a decision on the First Motion, which necessitated Plaintiff making the Second Motion to quash the Subpoenas on the same grounds propounded in the First Motion.

Defendant opposes Plaintiff's motions on the grounds that 1) Plaintiff lacks standing to challenge the Subpoenas; 2) the Subpoenas seek relevant information; 3) Defendant has cured any procedural defects with respect to the issuance of the Subpoenas; and 4) the Non-Parties have raised no objection to the Subpoenas.

## RULING OF THE COURT

### A. Plaintiff has Standing to Contest the Subpoenas

A motion to quash may be made on behalf of a non-party witness by the witness or the witness' lawyer, or by one of the parties or a party's lawyer. *McDaid v. Semegran, M.D.*, 16 Misc. 3d 1102A (Sup. Ct., Nassau Co. 2007), quoting *In re MacLeman*, 9 Misc. 3d 119 (Surr. Ct., Westchester Co. 2005). CPLR § 3103(a) not only permits a non-party witness to seek such an order in his own right, but also permits any party opposing the disclosure to make the motion on behalf of the non-party. *McDaid, supra*, quoting *In re Macleman, supra*, citing David Siegel, *New York Practice* § 353, at p. 577 (4<sup>th</sup> Edition). The Court concludes that Plaintiff, as a party in this action, has standing to contest the Subpoenas.

### B. The Subpoenas Seek Relevant Information and are Otherwise Appropriate

The starting point for the Court's analysis as to whether the Subpoenas are proper is

CPLR § 3101. 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*, 78 N.Y.2d at 376, citing 3A Weinstein-Korn-Miller, N.Y. Civ. Prac. ¶¶ 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: 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. *Id.* 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 (1<sup>st</sup> Dept. 2006). Thus, the court may 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).

A subpoena duces tecum to a non-party witness 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. Moreover, the subpoena must provide the non-party with notice stating the circumstances or reasons such disclosure is sought or required. *Id.* at 111.

A party seeking discovery from a non-party 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. Rather, 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).

Turning to the instant dispute, the Court notes preliminarily that Defendant cured any technical defects in the initial Subpoenas by reissuing the Subpoenas with the appropriate notice, and an explanation of the need for the information sought. Accordingly, the Court denies Defendant's motion to quash the Subpoenas on procedural grounds.

The Court also concludes that Defendant has established the need for the information sought in the Subpoenas. The information sought may relate to Plaintiff's breach of contract action and to Defendant's affirmative defenses. By way of example, the subpoenaed records may contain information regarding Plaintiff's productivity at the Andrews and Herzfeld Firms, which may bear on Defendant's claim that Plaintiff induced Defendant to enter into the Agreement by making materially false representations concerning his productivity. The Court also concludes that special circumstances exist, warranting the disclosure at issue, because the information sought in the Subpoenas, consisting of records unique to the particular Law Firm,

cannot be obtained through other sources, including the Plaintiff. Thus, the Court rejects Plaintiff's suggestion that party discovery should have been completed before the law firm Subpoenas were served. Moreover, Plaintiff has not demonstrated that the material sought is utterly irrelevant. Accordingly, the Court denies Plaintiff's motion to quash the Subpoenas. The Court also denies Plaintiff's application for an Order 1) precluding Defendant from presenting evidence obtained by the Subpoenas; and 2) directing the immediate destruction or return of the documents in question.

The Court's conclusion that the Subpoenas should not be quashed is buttressed by the lack of any opposition to the Subpoenas by the Andrews and Herzfeld law firms. Indeed, the Andrews Firm complied with its Subpoena almost immediately. These law firms, which are nationally recognized and employ scores of prominent attorneys, surely have the expertise to assess whether they would suffer the annoyance, expense and embarrassment that the "special circumstances" rule is designed to prevent, and seek appropriate redress from the Court. That the firms did not seek the Court's intervention further demonstrates that any hurdles to non-party discovery should not be placed by the Court in the present case.

The Court directs the recipients of the Subpoenas, to the extent they have not already done so, to comply fully with those Subpoenas within thirty (30) days of their receipt of a copy of this Order.

C. Defendant's Conduct was not Frivolous and does not Warrant Sanctions

22 NYCRR § 130-1.1(a) authorizes the court, in its discretion, to 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. Section 130-1.1(c) provides that 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. Because the Court has concluded that Defendant acted properly in issuing, and reissuing, the Subpoenas, there is no basis to consider Defendant's conduct to be frivolous.

In sum, the Court 1) denies the First Motion as moot; and 2) denies the Second Motion.

All matters not decided herein are hereby denied.

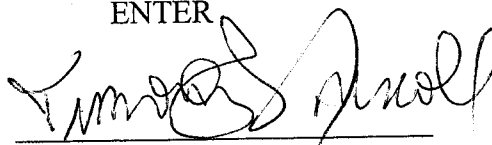
This constitutes the decision and order of the Court.

Counsel shall appear before the Court for a conference on February 8, 2010 at 9:30 a.m.

DATED: Mineola, NY

January 14, 2010

ENTER



HON. TIMOTHY S. DRISCOLL

J.S.C.

**ENTERED**

JAN 22 2010

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**