

**Eskenazi v Mackoul**

2011 NY Slip Op 30818(U)

March 24, 2011

Supreme Court, Nassau County

Docket Number: 017248/06

Judge: Thomas P. Phelan

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

*Present:*

**HON. THOMAS P. PHELAN,**  
*Justice.*

TRIAL/IAS PART 2  
NASSAU COUNTY

LYNN ESKENAZI and STEVEN KRITZBERG,

Plaintiffs,

ORIGINAL RETURN DATE: 03/21/11  
SUBMISSION DATE: 03/21/11  
Index No. 017248/06

-against-

ROBERT E. MACKOUL, DEBORAH K. MACKOUL,  
THE HANOVER INSURANCE GROUP and ONE  
BEACON INSURANCE COMPANY,

MOTION SEQUENCE #15

Defendants.

The following papers read on this motion:

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Plaintiffs move by order to show cause dated March 15, 2011, for an order, pursuant to CPLR 2304 and 3101, declaring that the subpoenas duces tecum issued by defendant, One Beacon Insurance Company ("One Beacon"), to plaintiffs' experts, James DeMartinis, Michael Simon, Jed Nelson and Kenneth Acks, are quashed as overly broad, ambiguous and seeking information protected by the attorney-client privilege, work product doctrine and protection for documents prepared in anticipation of and for trial. Defendants oppose the motion.

CPLR 3101 governs the scope of disclosure and provides, in pertinent part, as follows.

"(a) Generally. There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by:

\* \* \*

(4) any other person, upon notice, stating the circumstances or reasons such disclosure is sought or required."

Plaintiffs argue that the subpoenas duces tecum should be quashed because they are defective on their face contending that none of the subpoenas contain any “notice stating the circumstances or reasons such disclosure is sought or required.”

“A subpoena “served on a nonparty is “facially defective” and unenforceable if it neither contains, nor is accompanied by, a notice stating the circumstances or reasons such disclosure is sought or required.’ (See *Kooper v Kooper*, 74 AD3d 6, 13 [2d Dept 2010], quoting *Matter of American Express Prop. Cas. Co. v Vinci*, 63 AD3d 1055, 1056 [2d Dept 2009].) In the First Department, a showing of such circumstances or reasons on a properly-served motion to compel might cure the defect (see *Velez v Hunts Point Multi-Serv. Ctr., Inc.*, 29 AD3d 104, 111 [1st Dept 2006]), but the Second Department has expressly reserved on the question (see *Kooper v Kooper*, 74 AD3d at 13-14)” (*Hernandez v. Mueller*, 29 Misc.3d 522, 528 [Sup. Ct. Kings Co. 2010]).

In *Kooper* the court stated:

“We have not, however, had occasion to consider whether a motion to quash for lack of the required notice may be successfully defeated upon an adequate showing of circumstances and reasons for the requested disclosure, nor do we have occasion to do so now” (*Id.* at 14).

Plaintiffs further argue that the subpoenas duces tecum are defective and unenforceable because the attorney for One Beacon failed to make a showing of special circumstances when she obtained a court order for the subpoenas.

New York, as opposed to federal courts, is restrictive in its rules with respect to pre-trial expert disclosure. Unlike federal practice, interrogatories and depositions of experts are exceedingly rare and require a showing of “special circumstances” under CPLR 3101 (d)(1). It is a significant hurdle, and it is not sufficient to make conclusory allegations that such material is essential to preparation for litigation (*232 Broadway Corp. v. New York Property Ins. Underwriting Ass’n*, 171 A.D.2d 861 [2d Dept.1991]). Special circumstances, when found, most often involve unique factual circumstances. Where, for example, death was called by a falling tree, which was removed within 48 hours of the event but after it had been inspected by an expert for defendant, plaintiffs were entitled to depose defendant’s expert as to the result of his inspection (*Dixon v. City of Yonkers*, 16 A.D.3d 542 [2d Dept.2005]; see also, *Flex-O-Vit USA, Inc. v. Niagara Mohawk Power Corp.*, 281 A.D.2d 980 [4<sup>th</sup> Dept.2001]). Even in such cases involving special circumstances, the expert may not be compelled to reveal his opinion; rather, the inquiry is limited “to the factual circumstances of the observations of the experts and the procedures performed by them. Inquiring into the expert’s opinion [would be] prohibited (*The Hartford v. Black & Decker (U.S.) Inc.*, 221 A.D.2d 986 [4<sup>th</sup> Dept.1995]).

This concept of “special circumstances” must be differentiated from the former requirement in the Second Department that subpoenas served on non-parties must recite that the information sought is not available from other sources. This requirement has been, at least ostensibly,

abandoned as a requirement in the Second Department (*Kooper v. Kooper*, 74 A.D.3d 6 [2d Dept. 2010]). In analyzing the 1984 amendment to the CPLR, however, the court in *Kooper* noted that it did not change the requirement that a party obtain ‘[a] court order upon a showing of special circumstances’ when further disclosure is sought concerning the expected testimony of an expert witness; this is the sole remaining subsection with the ‘special circumstances’ language (CPLR 3101 [d] [1] [iii])” (*Id.* at 12).

In the absence of such special circumstances, access to an opponent’s expert is governed by CPLR 3101 (d)(1)(i) which provides in pertinent part as follows:

**“(d) Trial preparation. 1. Experts. (i)** Upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert’s opinion. However, where a party for good cause shown retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the expert’s testimony at the trial solely on grounds of noncompliance with this paragraph. In that instance, upon motion of any party, made before or at trial, or on its own initiative, the court may make whatever order may be just. In an action for medical, dental or podiatric malpractice, a party, in responding to a request, may omit the names of medical, dental or podiatric experts but shall be required to disclose all other information concerning such experts otherwise required by this paragraph.”

Plaintiffs also assert that the subpoena duces tecum should be quashed because they are overly broad and fail to satisfy the requirement that the information sought is material and necessary.

“ Although some of the records sought are undoubtedly relevant the subpoenas are overly broad. Besides seeking matter which is clearly irrelevant, the subpoenas with their . . . demands [for the complete certified file] would require the production of materials which may well be privileged” (*Grotallio v. Soft Drink Leasing Corp.*, 97 AD2d 383 [1<sup>st</sup> Dept. 1983]).

Finally, plaintiffs argue that the subpoenas duces tecum served upon plaintiff’s experts should be quashed because they seek material prepared in anticipation of litigation or for trial contending that the expert witnesses were retained by plaintiffs after the commencement of this lawsuit and that each will testify on behalf of plaintiffs at trial in accord with the expert notices provided.

“Although production is here sought on trial rather than before trial, the conditions to warrant disclosure set forth in CPLR 3101 (subd. [d], par. 1) are equally applicable, that is, opinions of experts prepared for litigation are not obtainable unless the material can no longer be duplicated because of a change in conditions and withholding it will result in injustice or undue hardship”

because of a change in conditions and withholding it will result in injustice or undue hardship” (*In re Brooklyn Bridge Southwest Urban R. Proj.*, 50 Misc.2d 478, 480 [Sup. Ct. New York Co. 1966]).

Defendant One Beacon argues that the experts’ files are not privileged.

“[T]he CPLR establishes three categories of protected materials, also supported by policy considerations: privileged matter, absolutely immune from discovery (CPLR 3101 [b]); attorney’s work product, also absolutely immune (CPLR 3101 [c]); and 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 (CPLR 3101 [d] [2])” (*Spectrum Sys. v. Chemical Bank*, 78 NY2d 371, 377 [1991]).

“Whether or not privileged, a record may qualify in whole or in part as attorney work product, or even trial preparation materials” (*Id.* at 381).

In reply plaintiffs contend that defendants made no argument that they should be entitled to any report that may have been prepared prior to trial because of substantial need of the materials in the preparation of the case and they are unable without undue hardship to obtain the substantial equivalent of the materials by other means as required by CPLR 3101(d)(2).

Defendants may cross examine the expert witnesses at trial. The extent of cross-examination of an expert is discretionary with the court, but it cannot preclude questioning of the witness as to his opinion and the material upon which it is based.

Based upon all of the foregoing, plaintiffs’ motion to quash the subpoenas is granted and the question of whether any part of the experts’ files is discoverable shall be left to the trial judge to determine when and if the expert witnesses testify.

This decision constitutes the order of the court.

Dated: 3-24-11

HON THOMAS P. PHELAN  
THOMAS P. PHELAN, J.S.C.

**ENTERED**  
MAR 28 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE

**RE: ESKENAZI and KRITZBERG v. MACKOUL, et ano.**

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