

Gilani v Kumar

2011 NY Slip Op 30863(U)

March 29, 2011

Supreme Court, Nassau County

Docket Number: 019098-10

Judge: Timothy S. Driscoll

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SCAN

**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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**NASREEN GILANI, individually and in the right
of and for the benefit of JMD Corporation,**

Plaintiff,

-against-

ASHOK KUMAR and JMD CORPORATION,

Defendants.
-----x

**TRIAL/IAS PART: 20
NASSAU COUNTY**

**Index No: 019098-10
Motion Seq. No: 3
Submission Date: 2/10/11**

The following papers having been read on this motion:

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

This matter is before the Court for decision on the motion filed by Defendants Ashok Kumar ("Kumar") and JMD Corporation ("JMD") (collectively "Defendants") on January 14, 2011 and submitted on February 10, 2011, following oral argument before the Court. For the reasons set forth below, the Court denies Defendants' motion.

BACKGROUND

A. Relief Sought

Defendants move for an Order 1) pursuant to CPLR § 2304, to quash two subpoenas duces tecum ("Subpoenas") served by Plaintiff Nasreen Gilani, individually and in the right of and for the benefit of JMD Corporation ("Plaintiff") on nonparty HSBC Bank ("HSBC"), seeking disclosure of Defendants' personal and corporate bank records; and 2) pursuant to CPLR § 3103, for a protective order as to all financial records sought via the Subpoenas, or from any other nonparty bank.

Plaintiff opposes Defendants' motion.

B. The Parties' History

The Complaint (Ex. C to Weinberger Aff. in Supp.) alleges as follows:

Plaintiff has been a holder of JMD's common stock since approximately 2003. Kumar was and still is the majority shareholder of the shares of JMD.

Plaintiff asserts the action on behalf of herself and JMD to address injuries suffered by JMD, allegedly as a result of Kumar's breach of fiduciary duty, waste of corporate assets and unjust enrichment. JMD is named as a nominal defendant solely in a derivative capacity. The Complaint alleges that no demand was made on JMD to commence this action because such a demand would have been futile for the reasons set forth in the Complaint.

The Complaint alleges three causes of action. The first cause of action alleges a breach of fiduciary duty based on Kumar's conduct, including but not limited to converting corporate funds, absconding with Plaintiff's share of a multi-million dollar Federal Telephone Excise Tax Credit ("FTETC") awarded to JMD in or around 2006, and siphoning corporate accounts receivable and tax refunds into personal and other illegitimate accounts. The second cause of action alleges conversion based on Kumar's exercise of control over the FTETC funds and failure to distribute those funds to JMD's shareholders. The third cause of action alleges Kumar's waste and misappropriation of JMD funds by conduct including the failure to use customer payments for legitimate corporate purposes, including the satisfaction of corporate debts, and the misappropriation of customer payments into illegitimate business or personal accounts.

In his Affirmation in Support, counsel for Defendants provides copies of the Subpoenas (Exs. A and B to Weinberger Aff. in Supp.). Those Subpoenas are addressed to HSBC and request all bank records and account statements for Kumar and JMD for March 1, 2007 through June 1, 2007 and October 1, 2009 through February 1, 2009 [sic]. They are dated January 5, 2011 and demand production by January 12, 2011.

In opposition, counsel for Plaintiff affirms that Plaintiff recently amended the Subpoenas to remedy certain procedural deficiencies raised by Defendants. Plaintiff provides copies of the amended subpoenas ("Amended Subpoenas") (Ex. B to Schneider Aff. in Opp.). The Amended Subpoenas request the same records as the Subpoenas but also 1) are dated January 12, 2011 and demand production by February 2, 2011; and 2) include language reflecting the reason why

disclosure is sought. Specifically, the Amended Subpoenas include the following language:

NOTICE PURSUANT TO CPLR 3101(a)(4): Plaintiff is a shareholder of J.M.D. Corporation. Plaintiff is currently engaged in litigation with J.M.D. Corporation and its majority shareholder - Ashok Kumar. Plaintiff seeks the above-listed documents to substantiate her contentions that J.M.D. Corporation received a \$2.6 million [FTETC] and that Ashok Kumar subsequently wasted these corporate assets by using them for his own personal benefit. Currently pending before the Nassau County Supreme Court is plaintiff's motion for attachment, whereby the Court would take lawful possession of defendants' bank accounts and assets to be used to satisfy a judgment against defendants. The Court has already granted a Temporary Restraining Order against J.M.D. Corporation and Ashok Kumar.

The plaintiff reasonably believes these documents will not be available through any other source other than HSBC Bank.

Plaintiff's counsel submits that the Amended Subpoenas remedy any procedural deficiencies in the original Subpoenas.

Plaintiff's counsel affirms that, on December 30, 2010, the Court scheduled a hearing on Plaintiff's separate application for an Order of Attachment against Defendants' assets. In preparation for that hearing, Plaintiff issued the Subpoenas which, Plaintiff believes, will demonstrate the illegal and improper transfers of JMD funds. The Court's records reflect that Plaintiff previously withdrew its application for an Order of Attachment, presumably because the records that are the subject of this motion are essential to that hearing.

Plaintiff's counsel affirms, further, that Kumar testified at his deposition that he maintained both personal and business accounts at the HSBC branch to which the Subpoenas and Amended Subpoenas are addressed, and that he made a loan of approximately \$2.5 million to his wife's real estate business. Plaintiff provides a copy of that deposition testimony (Ex. C to Schneider Aff. in Opp.). Plaintiff submits that the records sought may substantiate the allegations that JMD received the FTETC and Kumar used those funds to make a personal loan to his wife's business.

C. The Parties' Positions

Defendants submit that the Subpoenas are defective on the grounds that 1) they are not accompanied by a statement as to why disclosure of a nonparty is sought; 2) they do not state that the records sought are unavailable elsewhere, and Plaintiff could have requested those records by making a document demand on Defendants; and 3) they provide inadequate notice to

HSBC and Defendants.

Defendants also argue that Plaintiff is using the Subpoenas improperly to buttress her separate application for the provisional remedy of attachment, and permission to inspect JMD's books and records, which application Defendants have opposed.

Plaintiff opposes Defendants' motion submitting that 1) the Amended Subpoenas remedy any procedural deficiencies in the original Subpoenas; 2) the requested records are relevant to Plaintiff's application for an attachment with respect to Defendants' assets; and 3) the requested records are properly discoverable because they may substantiate the allegations that Kumar misappropriated the FTETC.

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 (2^d 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.

In *Kooper v. Kooper*, 74 A.D.3d 6 (2^d Dept. 2010), the Second Department discussed the issue of whether it is appropriate to continue to require a showing of special circumstances with respect to nonparty discovery. The Second Department concluded that, in light of its elimination from CPLR § 3101(a)(4), further application of the special circumstances standard is disapproved, except with respect to discovery from expert witnesses, for which applicable statutory language remains (*see* CPLR § 3101(d)(1)(iii)). *Id.* at 16. Thus, on a motion to quash a subpoena duces tecum or for a protective order, in assessing whether the circumstances or

reasons for a particular demand warrant discovery from a nonparty, those circumstances and reasons need not be shown to be "special circumstances." *Id.*

The Court in *Kooper* declined to set forth a comprehensive list of circumstances or reasons that would be deemed sufficient to warrant nonparty discovery in every case, noting that circumstances vary from case to case. 74 A.D.3d at 17. The supervision of discovery, settling of reasonable terms and conditions for disclosure, and determination of whether a particular discovery demand is appropriate are all matters within the discretion of the trial court, which must balance competing interests. *Id.*, citing, *inter alia*, *Wander v. St. John's Univ.*, 67 A.D.3d 904, 905 (2d Dept. 2009).

The Court denies Defendants' motion, based on the Court's conclusions that 1) the Amended Subpoenas remedied any procedural defects present in the original Subpoenas; 2) the Amended Subpoenas provide adequate notice regarding the reason that disclosure is sought; and 3) the requested records may be relevant on the issue of whether Kumar misappropriated the FTETC which, in turn, will be relevant to an application by Plaintiff for an attachment of Defendants' assets.

Accordingly, the Court denies Defendants' motion and grants Plaintiff permission to file a new application for an Order of Attachment, which Plaintiff shall make returnable on April 29, 2011, the date on which a conference of this matter is scheduled before the Court.

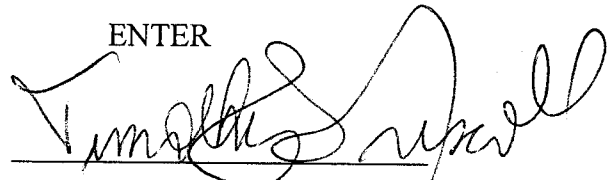
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a conference on April 29, 2011 at 9:30 a.m.

DATED: Mineola, NY
March 29, 2011

ENTER



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

APR 01 2011

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**