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SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 7

JONATHAN L. GUSS and MELISSA GUSS,

Plaintiffs,

- against -

ERIC ARONSON, DASH SYSTEMS, INC., DASH SYSTEMS, LLC, PERMAPAVE INDUSTRIES LLC, and PERMAPAVE USA CORP.

Defendants.

INDEX NO.: 015752/2009
MOTION DATE: 7/27/2011
SEQUENCE NO.: 003

The following documents were read on this Motion:

Motion to Quash Subpoena	1.
Memorandum of Law in Support of Motion	2.
Affirmation in Opposition to Motion	3.
Reply Affirmation	4.

PRELIMINARY STATEMENT

Non-party, The Weinstein Group, P.C., moves to quash a subpoena served upon it by plaintiffs Jonathan L. Guss and Melissa Guss. The motion contends that the subpoena duces tecum is overly broad, and seeks to obtain material which is available through Eric Aronson, a party to the litigation.

BACKGROUND

Plaintiff seeks "non-privileged" information from counsel who has previously represented defendant Aronson in other unrelated matters. The subpoena, Exh. "A" to the

Motion, calls upon The Weinstein Group, P.C. to produce, on June 22, 2011, non-privileged documents concerning the Aronson Cases, defined as "litigations in any jurisdiction involving Aronson or any Aronson Company for which you or the Weinstein Group, P.C. appeared as counsel for Aronson or the Aronson Companies, or for which you or the Weinstein Group, P.C. otherwise has knowledge".

Plaintiffs are currently engaged in litigation with Eric Aronson, and contend that defendant has been unresponsive in demands for document production. They also contend that the motion is untimely, made on July 6, 2011, and returnable on July 27, when the subpoena called for production of the requested material on June 22, 2011. Plaintiff points to their correspondence of June 30,2011, responding to a June 29, 2011 communication of counsel for Weinstein, to the effect that the extension of the subpoena date to July 6, 2011 was not for the filing of objections to the subpoena, but only to the time within which the subpoenaed documents were to be produced.

DISCUSSION

The requirements for obtaining information from non-parties by means of a subpoena duces tecum have been significantly modified over the years. CPLR § 3101, entitled "Scope of Disclosure", at one time allowed disclosure as against a nonparty only "where the court on motion determines that there are adequate special circumstances". (*Cirale v. 80 Pine St. Corp,* 35 N.Y.2d 113, 116 [1974]). This requirement for a showing of "special circumstances" was not established by a "bare assertion", nor was it met by meeting the threshold "material and necessary" standard. *Id.* at 116 — 117.

In 1984 the Legislature amended CPLR § 3101(a)(4) to eliminate the requirement of a motion and the requirement of "special circumstances" for discovery against a nonparty. It inserted, instead, a requirement that such disclosure be obtained "upon notice stating the circumstances or reasons such disclosure is sought or required". The sole remaining requirement for a showing of "special circumstances" involves disclosure concerning the testimony of expert witnesses.

Despite the amendment of § 3101(a)(4) in 1984, § 3120, specifically governing document production, continued to require a court order for discovery from a nonparty. The latter statute was amended, effective September 1, 2003, to dispense with the need to make a motion, and requiring only the service of a subpoena duces tecum for production of documents in the custody and control of a nonparty witness.

In *Velez v. Hunts Point Multi-Serv. Ctr., Inc.*, 29 A.D.3d 104 (1st Dept.2006), the Court determined that "(n)othing in the [2002] amendments to CPLR 3120 . . . dispenses with the general 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. The purpose of such requirement is presumably to afford a nonparty who has no idea of the parties' dispute or a party affected by such request an opportunity to decide how to respond". The Court also noted in *Velez,* supra at 111, that the lack of such notice is not fatal, and may be remedied by the showing of circumstances and reasons in response to a motion to quash the subpoena.

Subsequent to the statutory amendments, the Second Department has continued to adhere to the view that a subpoena duces tecum 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. (*Kooper v. Kooper,* 74 A.D.3d 6, 13 [2d Dept.2010]). While not quite reaching as far as *Velez,* the Second Department has previously indicated in dicta that the lack of a statement of circumstances or reasons for the requested disclosure may be remedied by the reissuance of the subpoenas with the requisite notice. (*Matter of Validation and Review Assoc. (Berkun-Schimel),* 237 A.D.2d 614 [2d Dept.1997]).

Plaintiffs assert that the language of the subpoena, stating that ". . . such documents being relevant, material and necessary to this action because the defendants have engaged in a pattern of fraud and deceit, which pattern is evidenced by the documents hereby requested" is adequate to constitute the circumstances or reasons for the requested disclosure.

The Court is inclined to agree that the notice was adequate, but even if it were not, any deficiency has been cured by the submissions in opposition to the motion to quash. This Court agrees with the Court in *Velez,* supra, that a deficient notice, even more so than the total absence of one, is easily remediable by response to a motion to quash.

Plaintiff also contends that the motion to quash is untimely. They indicate that the first contact they received with respect to the subpoena was on September 21, 2011, the day immediately prior to the return date. They also contend that the extension of time until July 6, 2011 within which to comply with the subpoena did not include authorization to extend the time within which to object.

CPLR § 2304 merely states that a motion to quash a subpoena must be made promptly in the court in which the subpoena is returnable. While plaintiff complains that the first contact from counsel for Weinstein was on June 21, 2011, one day before the date calling for the production of documents, they have not produced any evidence of when the subpoena was actually served. It is impossible for the Court to conclude that the subpoenaed party's response was not prompt without any knowledge of the length of time it was in their possession.

Plaintiff also contends that the July 6, 2011 adjourned date was only for the purpose of producing the required documents, and did not extend the time within which to move to quash. Unfortunately, this interpretation was issued only upon receipt of correspondence from counsel for the subpoenaed party that sought to confirm the agreement of the parties. In the absence of a stipulation so limiting the purpose of the extension, the Court cannot conclude that the time within which to move was not extended to July 6, 2011.

The Court determines, therefore, that the subpoena duces tecum was not fatally defective and that the motion to quash the subpoena was timely. The issues then are whether or not the demands are overly broad or unduly burdensome to Weinstein.

Essentially, the subpoenas appear to involve six identified cases in which Weinstein Group allegedly served as counsel for Aronson. In order to comply, the subpoenaed party would be obligated to peruse each of the identified files, and extract

from them documents between counsel and client which fall into the categories of attorney-client privilege, or attorney work product. While this may involve significant time and effort, the Court does not believe that such a demand is overly broad or unduly burdensome.

Movant also contends that plaintiffs have failed to adequately demonstrate that they are unable to obtain the documents from other sources. In *Golden Mark Maintenance, Ltd. v. Alarcon,* 265 A.D.2d 377 (2d Dept.1999), the Court concluded that "(t)he Supreme Court properly quashed subpoenas because the information they sought was irrelevant. In any event, the plaintiff failed to establish that the information sought to be discovered could not be obtained from other sources" (internal citations omitted). Similarly, in *Kamen v. Diaz-Kamen,* 309 A.D.2d 784 (2d Dept. 2003), the Court affirmed the quashing of a subpoena duces tecum upon the business partner of the plaintiff in a matrimonial action on the grounds that defendant failed to establish that the information sought could not be obtained from other sources. The Court in *Kamen,* however, relied upon *Lanzello v.Lakritz,* 287 A.D.2d 601(2d Dept. 2001), which relied upon the failure of the subpoenaing party to enunciate "special circumstances" which, in fact, are no longer required.

There are, however, other cases which substantiate the quashing of subpoenas for failure to show the unavailability from sources other than non-parties. (*Hamilton v. Touseull,* 48 A.D.3d 520, 521 [2d Dept. 2008]). By excluding from the document demand all privileged material, one could reasonably conclude that all correspondence between client and attorney, all notes and memoranda regarding conversations between them, documents reflecting the thought process of the attorney in rendering an opinion, and numerous other documents, would be appropriately excluded. What remains could be very little besides the pleadings in the actions, which are filed in the County Clerk's Office in each County in which the proceedings were conducted.

Plaintiff has asserted that defendants have refused to produce documents in response to their demands.

Assuming that is so, plaintiff should request a Rule 24 conference prior to making a discovery motion. If defendant continues to maintain it's uncooperative position, the Court will allow a motion to compel discovery and in the alternative to strike the answer if appropriate.

However defendant's action is not an adequate basis to warrant the imposition upon a nonparty to produce documents which defendants refuse to do. Plaintiffs seek to establish a pattern of fraud and deceit on the part of defendants. There is no elaboration, however, which would indicate that the pattern is part of a "common plan or scheme" so as to render evidence of such prior conduct admissible. (*See Matter of Brandon*, 55 N.Y.2d 206, 212 [1982]).

The Court determines that plaintiff has failed to adequately establish that material sought by subpoena duces tecum is not available through means other than the nonparty attorney who represented one or more of the defendants in this action. It would allow the refiling of the Subpoena Duces Tecum directed to Weinstein Group, P.C. in the future if plaintiff can show unavailability of requested documents through other means.

The motion to quash the subpoena is granted.

This constitutes the Decision and Order of the Court.

Dated: September 27, 2011

J.S.C.