

Evercore Partners Inc. v Lazard Freres & Co., LLC
2011 NY Slip Op 32906(U)
October 28, 2011
Supreme Court, New York County
Docket Number: 109729/11
Judge: Donna M. Mills
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SUPREME COURT OF THE STATE OF NEW YORK—NEW YORK COUNTY

PRESENT : DONNA M. MILLS
Justice

PART 58

EVERCORE PARTNERS INC. and RALPH SCHLOSSTEIN

Plaintiffs,

-against-

LAZARD FRERES & CO., LLC,

Defendants.

INDEX No. 109729/11

MOTION DATE _____

MOTION SEQ. No. 001

MOTION CAL No. _____

The following papers, numbered 1 to _____ were read on this motion for _____.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits... 1-4

Answering Affidavits- Exhibits 5-6

Replying Affidavits 7-8

CROSS-MOTION: _____ YES NO

FILED

NOV 02 2011

Upon the foregoing papers, it is ordered that this motion

NEW YORK
COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 10/28/11

Donna M. Mills
DONNA M. MILLS, J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 56

EVERCORE PARTNERS INC. and RALPH
SCHLOSSTEIN,

INDEX NO.
109729/11

Petitioner,

- against -

LAZARD FRERES & CO., LLC,

Respondent.

DECISION/ORDER

FILED

DONNA M. MILLS, J:

NOV 02 2011

In this special proceeding, Petitioners Evercore Partners Inc. (~~Evercore~~) and Ralph Schlosstein ("Schlosstein") (collectively "Petitioners"), apply for a protective order pursuant to New York Civil Practice Law and Rules ("CPLR") Article 75, CPLR 2304 and CPLR 3103 quashing the subpoena served by Respondent Lazard Freres & Co., LLC ("Respondent" or "Lazard") on March 3, 2011, which commands Mr. Schlosstein's appearance and attendance at an arbitrator's office to testify and give evidence in connection with a pending arbitration.

COUNTY CLERK'S OFFICE

BACKGROUND

Respondent is engaged in an arbitration with F. Perkins Hixon, Jr. ("Hixon"), currently pending before the Arbitration Tribunals of the American Arbitration Association, International Centre for Dispute Resolution. Mr. Hixon is a former employee of Respondent and a current employee of Evercore. Petitioners are not parties to the Arbitration.

Evercore is an independent investment banking advisory firm. In its investment business, it manages billions of assets for a broad range of institutional and high net worth investors. Petitioner Schlosstein is currently employed as Evercore's President and Chief Executive Officer.

Mr. Hixon initiated the Arbitration against Respondent seeking severance pay and other compensation to which he claims to be entitled, in connection with the termination of his employment from Respondent pursuant to various employment agreements. Respondent counter-claimed, alleging Mr. Hixon is not entitled to any pay because he

breached restrictive covenants in his agreements with Respondent that prohibited him from soliciting Respondent's employees, allegedly by contacting several then-employees of Lazard about joining Mr. Hixon at Evercore.

A relevant outstanding issue in the Arbitration is whether Mr. Hixon's alleged breach of the non-solicitation covenants in his employment agreements constituted a material breach such that it relieved Respondent of its obligations to pay Mr. Hixon pursuant to those same employment agreements. Evercore contends that it has produced hundreds of pages of documents in response to a subpoena duces tecum. Respondent issued additional subpoenas ad testificatum to compel the appearance and testimony of three Evercore employees at the Arbitration, including Mr. Schlosstein. Evercore has agreed to produce the other two employees but considers it an undue burden to require its chief executive officer to testify, and has informed the Respondents that they will not make Mr. Schlosstein available.

Petitioners now seek a protective order from this Court quashing the subpoena. Petitioner's maintain that the subpoena is unreasonable and unduly burdensome and unjustified based on the matters at issue in the arbitration.

APPLICABLE LAW & DISCUSSION

Initially the Court notes that a distinction must be made between a subpoena duces tecum and a subpoena ad testificandum. A subpoena duces tecum refers only to books and records and will issue only in a proper case, i.e., when the requested documents bear a reasonable relationship to the subject matter of the investigation (Matter of Hirschfield v Craig, 239 NY 98; Carlisle v Bennett, 268 NY 212.) A subpoena ad testificandum, however, merely requires a witness to appear and give testimony subject to any evidentiary privilege or immunity which may be asserted at the time of the examination (Matter of Hirschfield v Craig, *supra*). While there may be judicial review of both types of subpoena, the focus of that inquiry usually differs. On a motion to quash a subpoena duces tecum the court is more often concerned with protecting litigants from a burdensome or an irrelevant demand and thus is more apt to intervene

at a preliminary stage. That justification is absent when considering a motion to quash a subpoena ad testificandum. Thus there is case law to the effect that the right to issue a subpoena ad testificandum is absolute (Matter of Hirschfield v Craig, *supra*). However, a subpoena ad testificandum may be quashed if issuance of such a subpoena was beyond the power of the agency or entity involved (Matter of Richardson, 247 NY 401), or if it is obvious that the subpoena seeks irrelevant or illegitimate information (Matter of Edge Ho Holding Corp., 256 NY 374, 381 [1931]).

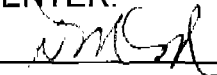
The reason for the rule that on a motion to quash a subpoena the relevancy of the proposed testimony cannot be challenged was best stated by Chief Judge Cardozo in Matter of Edge Ho Holding Corp. at 381. The court in discussing the power to issue a subpoena ad testificandum stated, [T]hey [the power to subpoena] will be rendered to a large extent abortive if his subpoenas are to be quashed in advance of any hearing at the instance of unwilling witnesses upon forecasts of the testimony and nicely balanced arguments as to its probable importance." (Emphasis supplied.) The court thus felt that prophesying the probable importance of a witness would in effect destroy the very power to subpoena (see, also, Matter of Scheeler v Buffalo Wire Works Co., 50 Misc 2d 158).

Petitioners have asserted that there is no reason why one of the most senior officers of a significant investment bank should be forced to testify when he cannot provide any unique knowledge as to the contractual dispute before the arbitrator, particularly since he nor the institution he works for is a party to the arbitration. This Court finds, however, that based on the evidence already admitted in the arbitration proceeding, it is quite apparent that Schlosstein's numerous conversations with Hixon before hiring him, and his emails forwarded to other Evercore employees regarding the recruitment of Hixon and his former colleagues at Lazard is relevant and a legitimate

inquiry, notwithstanding Schlosstein's affidavit denying any specific recollection of the emails. And, while Schlosstein is a third-party witness, Lazard should not be deprived of his testimony simply because he happens not to be a party to the Arbitration.

For all reasons, herein, the motion to quash the subpoena is denied and the petition dismissed.

Dated: 10/29/11

ENTER:

J.S.C.

DEPT. OF COURTS

FILED
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