

**Hinshaw & Culberston LLP v E-Smart Technologies,
Inc.**

2013 NY Slip Op 30274(U)

January 28, 2013

Supreme Court, New York County

Docket Number: 113108/2009

Judge: Kathryn E. Freed

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED
JUSTICE OF SUPREME COURT
Justice

PART 10

Index Number : 113108/2009
HINSHAW & CULBERSTON LLP
vs.
E-SMART TECHNOLOGIES, INC.
SEQUENCE NUMBER : 011
QUASH SUBPOENA, FIX CONDITIONS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

Denial
See Order Attached

FILED
FEB 07 2013
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 1/28/13
JAN 28 2013

[Signature]
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT, J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part IAS 10

-----X
HINSHAW & CULBERTSON LLP,

Plaintiff/Counterclaim-Defendant,

-against-

E-SMART TECHNOLOGIES, INC. and

IVI SMART TECNOLOGIES, INC.

Defendants/Counterclaim-Third-Party
Plaintiffs,

-against-

MARANDA E. FRITZ and MIRANDA E. FRITZ, P.C.,

Third-Party Defendants.

-----X
HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR §2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF
THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....1-2.....
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....
ANSWERING AFFIDAVITS.....
REPLYING AFFIDAVITS.....
EXHIBITS..... 3-7.....
STIPULATIONS.....
OTHER.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THIS MOTION IS AS FOLLOWS:

Non-Party witness Kelly O'Meara makes a *pro se* motion to quash a Third-Party subpoena served on her for document production and testimony in the instant case. Defendants and Third-Party plaintiffs oppose. After a review of the papers presented, all relevant statutes and case law,

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NEW YORK
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the Court denies the motion.

Statement of facts and procedural background:

Ms. O'Meara asserts that she is the owner of Kelly & Associates, Inc., and resides in Virginia where her corporation is also based. She adamantly asserts that she has never resided in New York, nor has her corporation ever been licensed to conduct business here. She also asserts that she had previously testified in the trial of a case entitled Kelly & Associates, Inc. v. e-Smart Technologies, Inc., Index No. 3182/2010, on June 18, 2012 in Civil Court, New York County, with Judge Frank Nervo presiding over said trial. That matter was commenced to recover outstanding consultant fees and expenditures made by Kelly & Associates, Inc. on behalf of e-Smart at the direction of Mary Grace, CEO, CFO and Chairperson of the Board of e-Smart Technologies, Inc., and IVI Smart Technologies, Inc. Judge Nervo subsequently found in favor of Kelly & Associates, Inc., in the amount of \$16, 991.34, plus interest accruing from February 2010.

Ms. O'Meara also asserts that during the course of that trial, counsel for e-Smart Technologies, Inc., Michael Levine, Esq., "introduced evidence totally unrelated to the substance of [her] claims.....but, seemingly relevant to the case of Hinshaw, et al., v. e-Smart Technologies, for unpaid legal fees to Hinshaw & Culbertson, and also an ongoing Securities Exchange Commission case against e-Smart Technologies, Inc., IVI Smart Technologies, Inc., Intermarket Ventures, Inc. and Mary Grace personally."

Ms. O'Meara further asserts that on June 18, 2012, "literally moments after Judge Nervo recessed the court for the day, and exited the courtroom", Mr. Levine handed her a subpoena to appear for a deposition in the case of Hinshaw & Culbertson LLP v. e-Smart Technologies, Inc., and IVI Smart Technologies, Inc. On June 19, 2012, again while Judge Nervo was not present, Mr.

Levine handed her a second amended subpoena duces tecum for deposition in the same aforementioned case.

Positions of the parties:

Ms. O'Meara argues that service of these two subpoenas, particularly the amended one, was improper, in that she is immune from service because at the time she was served, she was only in New York for the purpose of participating in the trial in an action that she personally commenced. She argues that according to New York law, "a nonresident who voluntarily enters the state for the purpose of appearing before a tribunal as a party of witness is privileged from being served with process while coming, remaining or returning home." Ms. O'Meara mentions that the amended subpoena called for her appearance at a deposition located in White Plains, N.Y. Despite the fact that she does not specifically argue this, it can plausibly be presumed that she views this location to be extremely inconvenient. Additionally, Ms. O'Meara argues that the subpoena is facially defective in that it "gives no notice stating the circumstances or reasons" why her deposition is sought or required.

Furthermore, she argues that the subpoena indicates that the production and deposition is necessary because she has "exclusive possession of some material sought that is relevant and "might not be obtainable elsewhere." Ms. O'Meara argues that "more than 50 individuals are in possession of material that is in [her] possession, including Mr. Levine, his legal colleagues, Mary Grace, e-Smart' corporate servers, former board members, former vendors and former employees...." Finally,

Mr. Levine argues that despite her allegations, Ms. O'Meara was given prior notice of her subpoena. As his Exhibit #1 appended to his opposition papers, he appends a document entitled "NOTICE OF SUBPOENA DUCES TECUM AND AD TESTIFICANDUM TO KELLY

O'MEARA." It is dated June 28, 2012 and states that in pertinent part that pursuant to CPLR§ sections 3120 and 2305, "the annexed subpoena has been served on non-party witness Kelly O'Meara." Mr. Levine contends that said document was mailed to counsel to plaintiff and Third-Party Defendants on that same day. He also asserts that even if counsel for plaintiff and Third-Party Defendants had not received notice of the subpoena, only they, and not Ms. O'Meara, would have standing to object to same on that ground.

Mr. Levine also argues that the subpoena contains adequate notice of the reasons disclosure is sought from Ms. O'Meara, in that it states that "[t]he production and deposition is necessary because the witness has exclusive possession of some of the material sought and has information relevant to this case that might not be obtainable elsewhere." He also argues that Ms. O'Meara's protestations that she is not in exclusive possession of materials or information relevant to this case are belied by her prior testimony in the prior litigation. While Mr. Levine proffers several excerpts of said testimony which support his allegation, he also asserts that Ms. O'Meara is in possession of a smart card and an electronic door opener that she has refused to return to e-Smart.

It should be noted that in her Affirmation in Reply, Ms. O'Meara corrects and clarifies some of Mr. Levine's allegations. She asserts that while it is true that she was at one time employed by Congressman Michael Forbes, she was his Chief of Staff in the Capital Hill Office in Washington, D.C., and was paid by the federal government and not New York State. Additionally, while she admits to being a private investigator and investigative reporter, she denies having worked in either capacity in New York, as she is not licensed to do so. Ms. O'Meara also denies ever possessing a New York driver's license, filing New York state taxes or voting in New York. More importantly, she asserts that any equipment that was in her possession, (ie. the smart card and electronic door

opener), has since been turned over to the SEC via a subpoena to do so. It should be noted that Ms. O'Mear also refers to and relies on various segments of trial transcript testimony to support her assertions.

Conclusions of law:

It is well settled that the issuance of any subpoena must be supported by some factual basis (Napatco, Inc. v. Lefkowitz, 43 N.Y.2d 884 [1978]), as it is relevancy, and not the quantity of material sought, that tests its validity (American Dental Co-op., Inc. v. Attorney-General of State of N.Y., 127 A.D.2d 274 [1st Dept. 1987]). As long as the subpoena is factually supported and the information sought bears a reasonable and relevant relationship to the subject matter under investigation, it is likely that on a motion to quash, the subpoena will be upheld (Virag v. Hynes, 54 N.Y.2d 437, 441-442 [1981]; La Belle Creole Intl. S.A. v. Attorney-General of the State of New York, 10 N.Y.2d 192 [1961], *rearg. denied* 10 N.Y.2d 1011 [1961]; American Dental Co-op. Inc., v. Attorney-General of State of New York, *supra*).

Under Judiciary Law, section 2-b, the court has the power "to issue a subpoena requiring the attendance of a person found in the state to testify in a cause pending in that court." A subpoena is valid where the court has jurisdiction over the subpoenaed party or where the subpoenaed party consents to the personal jurisdiction of the court in the matter. Two criteria must be satisfied to enable a court to exert personal jurisdiction over a person: first, service of process must be properly effectuated (*see gen.* CPLR§ 308-318; *see also* Keane v. Kamin, 94 N.Y.2d 263 [1999]) and second, the court must have power to reach the party in order to enforce its judicial decrees (*see gen.* CPLR§ 301 and § 302)).

Generally, “[a] nonparty, non-domiciliary witness is clearly not subject to the subpoena power of the court” of New York (Zeeck v. Melina Taxi Co., 177 A.D.2d 692, 694 [2d Dept. 1991]). However, the voluntary appearance by a party before a court that does not have personal jurisdiction amounts to complete consent to that court’s jurisdiction in the matter, unless an objection to jurisdiction under CPLR § 3211[a][8] is asserted at the time of appearance. Moreover, non-residents of this State who are present voluntarily solely for the purpose of testifying are immune from service of process (see Wehr v. Memhard, 106 A.D.2d 262 [1st Dept. 1984]; Bartwitz v. Hotaling, 184 Misc.3d 515, 708 N.Y.S.2d 590 (Sup. Ct. Warren Co. 2000)).

In availing herself of the doctrine of immunity as it “currently is construed in this state,” Ms. O’Meara must prove that ‘(1) she is in fact a non-resident, (2) whose sole purpose in appearing in New York is to attend the judicial proceedings, and (3) there were no other means of acquiring jurisdiction over her person other than personal service in New York (Moreno v. Regan, 140 A.D.2d 313, 315 [2d Dept. 1988]; Brause 59 Co. v. Bridgemarket Associates, 216 A.D.2d 200 [1st Dept. 1995]).

In the case at bar, the subject subpoena states in pertinent part that “you produce at the time and place aforesaid, (i) all documents and e-mails, in native format, now in your custody concerning any Defendant and/or Mary Grace and/or Amanda Fritz, and (ii) any original smart-card or related materials or equipment....” The Court finds that this is sufficient factual basis to deny the motion to quash (see Napatco, Inc. v. Lefkowitz, supra).

Moreover, the Court agrees with Mr. Levine that the probative value of Ms. O’Meara’s motion is undermined by the fact that it does not contain a sworn affidavit (see Grasso v. Angerami, 79 N.Y.2d 813 [00]; Seck v. Miningreen Hacking Corp., 53 A.D.3d 608 [2d Dept. 2008]. In fact,

Ms. O'Meara's motion papers do not contain any affidavit by her attesting to the contents of her motion. Therefore, the assertions contained within can only be viewed as conclusory, speculative and self-serving.

While the Court acknowledges Ms. O'Meara's obvious frustration, it cannot grant her motion to quash because it has no legitimate basis to do so. The only option available to accommodate Ms. O'Meara at this point is to permit that her deposition take place in any location that is readily accessible and convenient to her. In fact, in his opposition papers, Mr. Levine states that he has no objection to conducting said deposition at any location where Ms. O'Meara wishes it to be conducted.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that the instant motion to quash the subpoena is denied and it is further

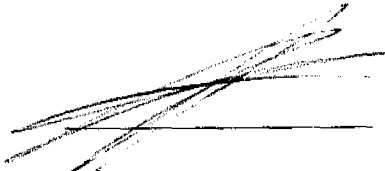
ORDERED that Kelly O'Meara decide the day, time and location that her deposition is to take place and it is further

ORDERED that this order with notice of entry be served on the appropriate Court Clerk and it is further

ORDERED that this constitutes the decision and order of the Court.

DATED: January 28, 2013

FILED
 JAN 29 2013
 FEB 07 2013
 NEW YORK
 COUNTY CLERK'S OFFICE


 Hon. Kathryn E. Freed
 J.S.C.

HON. KATHRYN FREED
 JUSTICE OF SUPREME COURT