

Matter of Mosse v Gordon & Rees LLP
2014 NY Slip Op 31771(U)
July 8, 2014
Sup Ct, NY County
Docket Number: 651214/2014
Judge: Eileen A. Rakower
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X

In the Matter of the Application of

RICHARD MOSSE,

Petitioner,

Plaintiff,

-against-

GORDON & REES LLP, DIANE KREBS,
ROBERT MODICA, and JOSEPH SALVO,

Respondents.

Index No.
651214/2014

DECISION
and ORDER

Mot. Seq. 1 and 2

Pursuant to Articles 75 and 23 of the Civil Practices
Law and Rules to Quash an Arbitration Subpoena,

-----X

HON. EILEEN A. RAKOWER:

Petitioner, Richard Mosse (“Mosse”) moves, pursuant to CPLR 7502 and 2304, to quash the Subpoena dated April 4, 2014 issued to Petitioner by counsel for Respondents directing Petitioner to testify at an arbitration proceeding captioned *Kriozere v. Gordon & Rees* (Mot. Seq. #1).

Respondents, in turn, move to dismiss the Petition (Mot . Seq. #2).

Michael Kriozere commenced the arbitration proceeding against Gordon & Rees LLP, his previous counsel, alleging that the firm committed legal malpractice in its representation of him and his affiliates in an action entitled *American Property Consultants, Ltd. (“APC”) v. Portsmouth Holdings, LLC*, Index No. 602068/2007 (“the Underlying Action”). In the APC Action, APC, a real estate consultant that provides financial advisory and investment banking services,

claimed that it was entitled to fees from Kriozere and his affiliates under an exclusive fee agreement. Summary judgment as to liability was awarded in favor of APC by Justice Kornreich on May 9, 2011. Thereafter, APC and Kriozere stipulated to the entry of judgment on July 11, 2011. The parties entered into a settlement agreement on January 25, 2012 and the Stipulation of Discontinuance was filed on February 23, 2012.

Petitioner, Mosse, is the principal of APC, the Plaintiff in the Underlying Action.

Petitioner submits a Petition that is verified by Petitioner's counsel, Jeffrey A. Mitchell. Mr. Mitchell makes the verification on behalf of Petitioner, "who resides outside of New York." Mr. Mitchell further avers that he "also acted as counsel for American Property Consultants, Ltd., ... to which this Special Proceeding relates" and that he has "personal knowledge of the pleadings, proceedings and filings made in that action."

Petitioner objects to the Subpoena on the grounds that the release entered between APC and Kriozere in the 2012 settlement agreement bars Gordon & Rees from pursuing the testimony of Mosse, that Mosse lacks relevant evidence, any factual evidence that Mr. Mosse could provide was memorialized in the transcript of his deposition taken November 9, 2009, and that any questions concerning "litigation decisions or strategy" in the APC Action are protected by the attorney-client privilege.

James Maloney, attorney for Respondents, states, "As I clearly explained to Mr. Mosse's counsel, Mr. Mitchell, the purpose of having Mr. Mosse under subpoena was a pure contingency in the event that the Claimants in the arbitration raised new facts concerning the transactions between APC and Kriozere not covered by Mr. Mosse's deposition in the APC Action. Clearly, Gordon & Rees is not seeking any privileged information in the underlying litigation but rather factual information not covered in Mr. Mosse's deposition."

CPLR §2304 empowers the court to quash, fix conditions or modify a subpoena. Pursuant to CPLR 2304, "A motion to quash, fix conditions or modify a subpoena shall be made promptly in the court in which the subpoena is returnable."

As set forth in *Reuters, Ltd., v. Dow Jones Telerate, Inc.*, 231 A.D. 2d 337, 340-41 [1st Dept. 1997]:

While the difference between a judicial and nonjudicial subpoena is significant in regard to the availability of, and procedural course for, sanctions, there is no significant difference with respect to evaluating the substantive grounds for deciding either a motion to compel compliance with or to quash a subpoena, which present essentially identical substantive issues, albeit that they are brought by a different party with a different perspective. (citations omitted). Among those grounds is the contention that the documents sought are not relevant to the issues extant before the tribunal, whether that tribunal be a panel of arbitrators, a court, a legislative or administrative board of inquiry, a Grand Jury, or other such entity.

It is frequently opined that a motion to quash on relevancy grounds will be denied as long as the party issuing the subpoena duces tecum can show that the materials sought are not “utterly irrelevant” to the matter at hand. (citations omitted). However, this broadly stated standard, while consistent with a policy favoring the production of information, should not serve as an excuse for a court to abdicate its responsibility to determine whether the materials sought are in fact relevant to a legitimate subject of inquiry (citations omitted) or to permit the subpoena power to be used as a tool of harassment or for the proverbial “fishing expedition” to ascertain the existence of evidence (citations omitted). This is of special significance where the subpoena is issued in the context of a civil dispute between private parties, where the issues before the tribunal are necessarily limited to those affecting the specific dispute. A broader view of relevance may be applied when the subpoena is issued by an administrative or legislative investigatory body, since the relevance of such an “office subpoena” depends on the authorized breadth of the investigation itself. (citations omitted).

Reuters, 231 A.D.2d at 340-41.

Here, on this record and at this juncture, Respondents have failed to demonstrate that Mosse’s testimony is necessary to what appears to be a private dispute between a client and their attorney. In fact, Respondents specifically state

that “the purpose of having Mr. Mosse under subpoena was a pure contingency in the event that the Claimants in the arbitration raised new facts concerning the transactions between APC and Kriozere not covered by Mr. Mosse’s deposition in the APC Action.”

Wherefore it is hereby

ORDERED that the motion to quash the Subpoena ad testificandum and duces tecum, dated April 7, 2014, issued to Petitioner, Richard Mosse, is granted.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: JULY 8, 2014 .



EILEEN A. RAKOWER, J.S.C.