Faggione v Room Mate Hotel NY, Inc.
2014 NY Slip Op 34060(U)
June 10, 2014
Supreme Court, Queens County
Docket Number: Index No. 701729/2013
Judge: Rudolph E. Greco, Jr.
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ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE RUDOLPH E. GRECO, JR. IAS PART 32
Justice

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LAUREN FAGGIONE,

Plaintiff,

-against-

ROOM MATE HOTEL NY, INC. and HHC TS REIT LLC, and XYZ (being a fictitious entity),

Defendants.

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Index No.: 701729/2013

Motion Dated: March 26, 2014
Cal. No.: 54
Seq. No.: 2

Motion Dated: April 7, 2014
Cal. No.:34
Seq. No.: 3

The following papers numbered 1 to 13 read on plaintiff's application for an order quashing a subpoena pursuant to CPLR §2304 and awarding costs and/or imposing sanctions, (*sequence 2*); and plaintiff's unopposed motion for a default judgment against defendant HHC TS REIT LLC (HHS) (*sequence 3*).

	Papers Numbered
Order to Show Cause, Good Faith Affirmation, Affirmation, Exhibits, Affidavit of Service.....	1-5
Opposition, Exhibits.....	6-7
Reply, Exhibit.....	8-9
Notice of Motion, Affirmation, Exhibits.....	10-13

FILED
JUN 18 2014
COUNTY CLERK
QUEENS COUNTY

Upon the foregoing papers, it is ordered that this application and unopposed motion are determined as follows:

This action was commenced for personal injuries sustained on April 18, 2013, when plaintiff allegedly fell on a set of stairs while a patron at the Grace Hotel owned and/or operated and/or maintained by each or one of the named defendants. A summons and complaint dated May 14, 2013 was served on defendant Room Mate Hotel NY, Inc. (Room Mate) who served their answer along with various discovery demands on November 11, 2013. Defendant HHS was served on June 11, 2013 pursuant to CPLR §311-a(a) and has failed to answer.

Included within defendant Room Mate's combined discovery demands was a demand for employment records that specially requested "authorizations for all employment records referable to the plaintiff for five (5) years prior to the date of the accident to the present", (*see* Defendant's

Opposition at Exhibit "A"). Plaintiff responded on February 19, 2014 by providing the authorizations however, the dates and scope of the records authorized were significantly limited. Defendant nevertheless mailed these authorizations to plaintiff's employer Bloomberg LLC, under cover letters dated February 21 and 26, 2014. The cover letters parroted the language later found in the subpoena *duces tecum* for all employment records, . Defendant' s counsel alleges that after this mailing their paralegal Joanna Borrero received a call from the human resources manager at Bloomberg, LP who advised that corporate policy only allowed for release of employment records pursuant to a subpoena. Later, when Ms. Borrero asked a representative of the human resources department to confirm such policy in writing, she was likewise advised that doing so was against company policy. An affidavit of Joanna Borrero is submitted in support of these contentions.

In light of such policy, defendant issued the subpoena which is the subject of this motion to Bloomberg LP requesting production of plaintiff's employment file. On the face of such subpoena was claimant's name and date of birth, as well as the date of the accident. It is unclear if a cover letter accompanied the service of the subpoena on Bloomberg LP. A copy was sent to plaintiff's counsel who then requested withdrawal of the subpoena claiming it to be overly broad in both content and time. Specifically, plaintiff's attorney highlighted that the claim for lost wages was limited in the bill of particulars to the one week she missed following the accident, and it was beyond the scope of such claim to request records related to "applications, promotions, discipline, suspensions, performance reviews, physical examinations, etc.", (*see* Plaintiff's Affirmation at Exhibit "D"). A further argument raised against use of the subpoena was the impending preliminary conference scheduled for March 10, 2014.

Defendant points out that despite plaintiff's limited lost wage claim, she makes these additional claims in her bill of particulars: 1) plaintiff sustained injuries including concussion with loss of consciousness and amnesia; 2) that such injuries are permanent in nature and plaintiff will continue to experience pain as a result; 3) anxiety and mental anguish have further substantially prevented the plaintiff from enjoying the normal fruits of her activities, including not limited to social, educational and economic; 4) plaintiff missed one week from work and intermittent days thereafter; and 5) plaintiff was totally or partially disabled from work for one week following the accident and intermittently thereafter to date, (*see* Defendant's Opposition at Exhibit "B"). Additionally, defendant argues that it was free to use any discovery device it choose to and did not have to wait until the preliminary conference to do so.

In general "a subpoena duces tecum may not be used as a fishing expedition for the purposes of discovery or to ascertain the existence of evidence, but rather to compel the production of specific documents that are relevant and material to facts at issue in a pending judicial proceeding" (People v Robinson, 87 AD2d 877, 878 [2nd Dept. 1982]; *see also*, Matter of Terry D., 81 NY2d 1042, 1044 [1993] *citing* Matter of Constantine v Leto, 157 AD2d 376, 378 [3rd Dept. 1990], People v Gissendanner, 48 NY2d 543, 551 [1979], Matter of Murray v Hudson, 43 AD3d 936, 937 [2nd Dept. 2007], Matter of N. v Novello, 13 AD3d 631, 632 [2nd Dept. 2004]). In a very recent decision that abrogated *Kooper v. Kooper* (74 AD3d 6 [2nd Dept. 2006 [*cited by both movant and respondent herein]*), the New York Court of Appeals clarified the burden and necessary showings on a motion

to quash, (*see* Kapon v Koch, -NE3d- 2014 NY Slip Op 02327 [2014]). In *Kapon* the Court concluded that the non-party bears the initial burden of establishing "that the discovery sought is "utterly irrelevant" to the action or that "the futility of the process to uncover anything legitimate is inevitable or obvious".[1] Should the [movant] meet this burden, the subpoenaing party must then establish that the discovery sought is "material and necessary"... i.e. that it is relevant" (*id.*) to the action, (*see also* Anheuser-Busch, Inc. v Abrams, 71 NY2d 327, 331-32 [1988] *citing* Matter of Edge Ho Holding Corp., 256 NY 374, 382 [1931] *and* La Belle Creole Intl. S.A. v Attorney-General of the State of New York, 10 NY2d 192, 196 [1961] *quoting* Matter of Dairymen's League Coop. Assn. v Murtagh, 274 AD2d 591, 595 [1st Dept. 1948]).

In its application to the present matter, the above holding necessitates denial of plaintiff's motion in that she failed to meet her initial burden. Plaintiff did not demonstrate how the discovery sought was "utterly irrelevant" to the action, or that the process of reviewing plaintiff's employment records to discover facts legitimate to her claim would obviously prove futile. The burden thus, does not shift to the subpoenaing party to establish that the discovery sought is material and necessary.

However, given the recent nature of the Court of Appeals decision we note that defendant did demonstrate that the employment records were material and necessary, (*see* CPLR §3101[a]), especially in light of the liberal interpretation afforded to such terms, (*see* Allen v Crowell-Collier Publishing Co., 21 NY2d 403, 406 [1968]). Plaintiff's claims put her physical condition at issue; she alleges that her injuries are permanent, and have and will continue to effect her normal activities including, most pertinently those of an economic nature. Accordingly, all employment records including but not limited to those related to promotions, reprimands, performance reviews and disability claims, and not just those related to attendance and payroll as plaintiff asserts, are material and necessary. [2]

Lastly, there was neither nothing improper in defendant's use of the subpoena to obtain these records, nor in their decision to serve same prior to the preliminary conference. Initially, the non-party from whom the records were sought mandated it and secondly, defendant was free to choose the discovery device it wished to use and was not confined to employ another device prior, (*see* Edwards-Pitt v Doe, 294 AD2d 395 [2nd Dept. 2002], Barouh Eaton Allen Corp. v Int'l Bus. Machs. Corp., 76 AD2d 873, 874 [2nd Dept. 1980]).

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[1]This initial burden however, does not obviate the need of "the subpoenaing party to state, either on the face of the subpoena or in a notice accompany it, 'the circumstances or reasons such disclosure is sought or required'" (Kapon *supra*), in accordance with CPLR §3101(a)(4). In this instance the facial insufficiency of the subpoena was not at issue since the non-party upon whom it was served made no objection thereto (*see* CPLR 3122 [a]). Nevertheless, given that the non-party necessitated the service of the subpoena after rejecting the authorizations provided, this Court would find that the notice requirement of CPLR §3101(a)(4) was met.

[2]*Kapon* specifically did away with the "requirement" that the party issuing the subpoena must show that the evidence sought cannot be obtained from other sources as one not found in CPLR §3101(a)(4). Therefore, we do not address such a showing herein.

In light of the above, plaintiff's application to quash and for costs and/or sanctions is denied in its entirety, and it is

ORDERED that Bloomberg LP shall comply with the terms of the subpoena.

The Court now considers plaintiff's motion for a default judgment against defendant HHS (*sequence 3*) and grants same. Plaintiff properly served the summons and complaint on HHS pursuant to CPLR §311-a(a). An affidavit of service was provided to substantiate same. Defendant failed to submit an answer, request an extension of time to do so, or otherwise appear in this matter, and failed to oppose this motion. The time to do so has since expired. Plaintiff has further demonstrated compliance with CPLR §3215 (f) and (g)(4). Accordingly, it is

ORDERED, that plaintiff's motion for a default judgment against defendant HHS is hereby granted without opposition; and it is further

ORDERED, that plaintiff shall have an Inquest to assess the amount of damages at the time of trial; and it is further

ORDERED, that a copy of this order with notice of entry shall be served upon all parties hereto within twenty (20) days of the date of such entry.

Dated: June 10, 2014

Rudolph E. Greco, Jr.
J.S.C.