

Vittoria v Castelotti

2015 NY Slip Op 30083(U)

January 20, 2015

Supreme Court, New York County

Docket Number: 652551/2013

Judge: Eileen A. Rakower

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

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ROBERT VITTORIA,

Plaintiff,

- v -

Index No.
652551/2013

**DECISION
and ORDER**

Mot. Seq. 003, 004

PETER CASTELOTTI, SR.,
PETER CASTELOTTI, JR., and
LISA FREE,

Defendants.

-----X

PETER CASTELOTTI, SR.,

Third-Party Plaintiff,

- v -

CAROL VITTORIA,

Third-Party Defendant.

-----X

HON. EILEEN A. RAKOWER, J.S.C.

This is an action for declaratory judgment, breach of contract, breach of fiduciary duty, accounting, and reformation of a shareholders' agreement (the "Shareholders' Agreement") dated March 12, 1996, concerning 276-8 Pizza Corp. d/b/a John's Pizza (the "Corporation"), allegedly executed among plaintiff, Robert Vittoria ("Vittoria" or "Plaintiff"), and defendants, Peter Castelotti, Jr. ("Castelotti, Jr."), Peter Castelotti, Sr. ("Castelotti, Sr."), and Lisa Free ("Free") (collectively, "Defendants").

Non-parties Schain Leifer Guralnick (“SLG”) and Allen Rosen (“Rosen”) (collectively, the “Non-Party Accountants”), now move (Mot. Seq. #003¹) for an Order, pursuant to CPLR § 2304, quashing the subpoena duces tecum dated September 30, 2014 (the “First Subpoena”) served upon the Non-Party Accountants by Castelotti, Sr. and the subpoena duces tecum dated October 16, 2014 (the “Second Subpoena”) (and together with the First Subpoena, collectively, the “Subpoenas”) served upon the Non-Party Accountants by Castelotti, Sr., on the basis of improper service and short service in violation of CPLR § 3120(2); or in the alternative, pursuant to CPLR § 3103, for a protective order (i) modifying the Subpoenas to limit their scope; (ii) granting the Non-Party Accountants a seven-day extension of time within which to respond to the Subpoenas.

Non-Party Accountants argue that Castelotti, Sr. failed to effectuate proper service of the Subpoenas upon SLG because the Subpoenas were delivered to Nina Perez, SLG’s receptionist, who is not a person authorized to accept service of process pursuant to CPLR § 310(d). Non-Party Accountants further argue that delivering the Subpoenas to SLG’s receptionist is insufficient to properly serve the Subpoenas upon Rosen individually, as there was no follow-up mailing as required under CPLR § 308(2). Additionally, Non-Party Accountants argue that the Second Subpoena is “short dated” and therefore facially deficient under CPLR § 3120.

Castelotti, Sr. opposes. Castelotti, Sr. submits the affidavit of service, dated September 30, 2014, attesting to service upon SLG, “by personally delivering to [SLG’s] place of business at 10 East 40th Street, Suite 2710, New York, New York, and leaving the same with the person so identified as Nina Perez, who was of suitable age and indicated her authorization to accept service of said documents and did in fact accept the same.”

Castelotti, Sr. argues that the process server reasonably relied on the representations of Nina Perez claiming authority to accept service on behalf of SLG. Castelotti Sr. further argues that Nina Perez acknowledged her authority to accept service on behalf of SLG by signing the acknowledgment forms on the back covers of the copies of the Subpoenas presented by the process server at the time of service, and that SLG not only received actual notice of the Subpoenas, but also contacted Castelotti, Sr. to discuss the Subpoenas in question on October 16, 2014. Furthermore, with respect to Rosen individually, Castelotti, Sr. contends that the

¹ The notices of motion and moving papers on Mot. Seq. #003 and #004 appear to be identical, and will be addressed together.

Subpoenas are issued upon SLG only, and are only directed to Rosen's attention because Rosen was Castelotti Sr.'s contact person there.

Turning first to the Second Subpoena, CPLR § 3120 permits a party, after commencement of an action, to serve a subpoena duces tecum on any other person "to produce and permit the party seeking discovery, or someone acting on his or her behalf, to inspect, copy, test or photograph any designated documents or any things which are in the possession, custody or control of the party or person served." (CPLR § 3120[1][i]). CPLR § 3120 further provides: "[t]he notice or subpoena duces tecum shall specify the time, which shall be not less than twenty days after service of the notice or subpoena, and the place and manner of making the inspection . . .". (CPLR § 3120[2]). Here, the Second Subpoena is dated October 20, 2014, and made returnable on October 31, 2014, less than twenty days later. Accordingly, the Second Subpoena fails to comply with § 3120(2). As the Second Subpoena is facially deficient, Non-Party Accountants' arguments respecting the issue of service of the Second Subpoena need not be addressed.

As far as the First Subpoena is concerned, CPLR § 2303 requires service of a subpoena duces tecum "in the same manner as a summons". (CPLR § 2303[a]). Pursuant to CPLR § 310, personal service on a partnership may be made by delivery to "any other agent or employee of the partnership authorized by appointment to receive service; or to any other person designated by the partnership to receive process in writing, filed in the office of the clerk of the county wherein such partnership is located." (CPLR § 310[d]). This provision contains language similar to CPLR § 311(1), respecting personal service on a corporation. Thus, cases interpreting "agent by appointment" in connection with service on a corporation "should provide relevant precedents." (*Methodist Hosp. v. Perkins & Will Partnership*, 203 A.D.2d 435, 436-37 [2d Dep't 1994]). "In such circumstances, if service is made in a manner which, objectively viewed, is calculated to give the corporation fair notice, the service should be sustained." (*Fashion Page, Ltd. v. Zurich Ins. Co.*, 50 N.Y.2d 265, 272-73 [1980]). Additionally, "[i]n evaluating whether service is to be sustained, the circumstances of the particular case must be weighed." (*Id.*; *Wells v. Continuum Health Partners, Inc.*, 118 A.D.3d 632, 632 1st Dep't [2014]).

Accordingly, under the circumstances of this case, service of the First Subpoena, upon SLG, was made in a manner which, objectively viewed, is calculated to give SLG fair notice of the Subpoena and should be sustained. SLG "cannot be heard to complain that the summons was delivered to the wrong person when the process server has gone to its offices, made proper inquiry of the

defendant's own employees, and delivered the [First Subpoena] according to their directions." (*Fashion Page, Ltd. v. Zurich Ins. Co.*, 50 N.Y.2d 265, 273 [1980]).

Wherefore, it is hereby,

ORDERED that Non-Party Accountants' motion (Mot. Seq. #003, #004) to quash the Subpoenas served upon SLG and/or Rosen is granted only to the extent that the subpoena duces tecum dated October 20, 2014, upon SLG is quashed and the motion as to Rosen individually is moot; and it is further

ORDERED that SLG is directed to produce the materials requested in the First Subpoena within twenty (20) days of service of a copy of this Order, with notice of entry.

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

DATED: January 20 2015



EILEEN A. RAKOWER, J.S.C.

HON. EILEEN A. RAKOWER