

Haffner v Lester

2015 NY Slip Op 31055(U)

June 16, 2015

Supreme Court, Queens County

Docket Number: 702863 2013

Judge: David Elliot

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

STEVEN R. HAFFNER and
GORDON & HAFFNER, LLP,
Plaintiffs,
-against-

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No. 702863 2013

Motion
Date May 1, 2015

ROY J. LESTER, LESTER & ASSOCIATES, P.C.,
PAUL BIBBO and NADINE LUGO,

Motion
Cal. No. 41

Motion
Seq. No. 3

The following papers read on this motion by nonparty Katerina Arvanitakis (Arvanitakis) for an order pursuant to CPLR 2304 and 3103 quashing a judicial subpoena served by defendants Paul Bibbo and Nadine Lugo.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	EF28-32
Answering Affidavits - Exhibits.....	EF34-41
Reply Affidavits.....	EF42

Plaintiffs commenced this action sounding in defamation by e-filing a copy of the summons with notice on July 22, 2013. A complaint was e-filed on November 26, 2013, after both sets of defendants herein (collectively defendants Bibbo and Lugo, and defendants Roy J. Lester and Lester & Associates, P.C.) served a demand for complaint. An amended complaint was e-filed on March 5, 2014; though same appears to have been rejected as untimely by the Lester defendants, defendants Bibbo and Lugo answered the amended complaint and asserted a counterclaim against plaintiffs.

By judicial subpoena dated February 27, 2015, defendants Bibbo and Lugo sought to conduct Arvanitakis' deposition and provide documents "relating to the issues in this action." The face of the subpoena further states the following: "The Complaint in which you are alleged as a witness and for which your testimony is sought is attached hereto." The amended complaint was, indeed, attached. Though Arvanitakis' name is mentioned several times in the amended complaint, it would appear that defendants Bibbo and Lugo are only concerned with her apparent connection to the sixth and seventh causes of action asserted therein (*see* Affirmation in Opposition at ¶ 4).¹ To that end, the court will focus on those two causes of action.

In their sixth cause of action for slander *per se* against defendant Bibbo, plaintiffs allege the following, in part:

"Later that day (Monday, August 6, 2012), Bibbo and Lugo appeared together at the law offices of Katerina Arvanitakis where Bibbo made the following statements about Haffner to Arvanitakis and to Lisi who was also present: (a) Haffner is a crook; (b) He's going to jail; (c) And going to be disbarred and Dave too; (d) He is definitely off his rocker, something mentally wrong with him; (e) Haffner already committed one escrow violation by taking the money out of the escrow account to bid at the auction without authorization; (f) He tried to steal my money at the auction; and, (g) My hunch about Haffner is right; that he is stuck and desperate and has other skeletons, either a drug addict or an alcoholic."²

In their seventh cause of action for slander *per se* against defendant Lugo, plaintiffs alleged the following, in part:

"At that same meeting (at the law offices of Katerina Arvanitakis August 6, 2012), Lugo made the following statements to Arvanitakis and Lisi about Haffner: (a) Haffner is completely incompetent; (b) He is hard-up for money

1. Indeed, the third and fourth causes of action, in which Arvanitakis' name appears, are not interposed against defendants Bibbo and Lugo. Though the tenth cause of action is asserted against defendant Lugo, Arvanitakis' name was only mentioned to provide context with respect to another individual and there is no allegation that she was privy to any of the statements or allegations asserted in that particular cause of action.

2. Per this court's November 14, 2014 order, that branch of the motion by defendants Bibbo and Lugo for an order dismissing the sixth cause of action was granted only as to statement (d), but was otherwise denied as to the remaining statements alleged therein.

and lying about his bill and he sees money so he's gonna grab it; (b) Haffner was in cahoots with Yackow from the beginning; (c) He must have a drinking problem; (d) We're not going to stop until Haffner is disbarred and going to get Dave too."³

By this motion, Arvanitakis seeks to quash the subpoena served upon her, on the grounds that same is: (1) palpably improper and abusive; (2) done with the purpose of harassment and annoyance; and (3) immaterial and irrelevant to the defense of this action.

CPLR 3101 (a) provides that there shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action. The phrase "material and necessary" is to be interpreted liberally to require disclosure of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity (*see Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403 [1968]; *D'Ambrosio v Racanelli*, 101 AD3d 1069 [2012]; *Friel v Papa*, 87 AD3d 1108 [2011]). Further, pursuant to CPLR 3101 (a) (4), a party may obtain disclosure from a nonparty who is in possession of material and necessary evidence as long as the nonparty is advised of the circumstances or reasons requiring the disclosure and, in moving to quash, the subpoenaing witness must establish either 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.' Should the witness meet this burden, the subpoenaing party must then establish that the discovery sought is 'material and necessary' to the prosecution or defense of an action, i.e., that it is relevant" (*Kapon v Koch*, 23 NY3d 32 [2014]). Here, Arvanitakis failed to meet this burden.

It should first be noted that, to the extent the motion is made pursuant to CPLR 4503 (which is not cited in the Notice of Motion itself but rather mentioned in passing in the affirmation in support), Arvanitakis has failed to substantiate her contention that any information sought is protected by an attorney-client privilege and, as such, she is not entitled to quash the subpoena on that ground (*see e.g. Straus v. Ambinder*, 61 AD3d 672[2009]; *Kellner v General Motors Corp.*, 273 AD3d 444 [2000]).

Arvanitakis first contends that the subpoena is palpably improper since, among other things: the allegations in the complaint with respect to her are remote and tenuous; upon review, she "does not believe that she has any relevant testimony to offer in connection with this suit"; plaintiffs mention her sparingly in the amended complaint and, where she does appear, same is never pivotal to plaintiffs' contentions; defendants Bibbo and Lugo have not

3. Per the same order, that branch of the motion dismissing the seventh cause of action was granted as to statement (a), statement (b[1]), except for "lying about his bill," and statement (d), but was otherwise denied as to the remaining statements alleged therein.

established that she was actually a witness to any of the statements; and the subpoena failed to state the circumstances or reasons for the disclosure.

These arguments are without merit. The face of the subpoena is clear and properly noticed, inasmuch as it specifically states that Arvanitakis' testimony is sought due to the fact that the amended complaint alleges that she was a witness to certain statements, as further described in the sixth and seventh causes of action; further, as indicated, *supra*, Arvanitakis was provided with a copy of said pleading so she was aware in what capacity her testimony was needed (CPLR 3101 [a] [4]; *see Kapon*, 23 NY3d at 39). Contrary to her contentions, her testimony with respect to these statements is quite relevant herein; i.e., either she was a witness to the statements made or she was not. Notably, one of the elements of a cause of action for defamation is publication to a third party (*see Kamchi v Weissman*, 125 AD3d 142 [2014]; *Konig v CSC Holdings, LLC*, 112 AD3d 934 [2013]). Further, it is unclear why Arvanitakis takes the position that defendants Bibbo and Lugo have not established that she was a witness to the statements made, when those were the facts as alleged by plaintiffs, not defendants. Finally, Arvanitakis' "belief" that she has no relevant testimony is insufficient to meet her burden on a motion to quash (*see Menkes v Beth Abraham Health Servs.*, 120 AD3d 408 [2014], *citing Kapon*, 23 NY3d at 34). It is noted that she does not deny the allegations of the amended complaint as they relate to her, as a nonparty to whom the allegedly defamatory remarks were published.

Arvanitakis further states that the sole purpose of the issuance of the subpoena is to harass and annoy her. To that end, Arvanitakis cites to the fact that defendants Bibbo and Lugo have brought three separate actions against her and are using the subpoena power via this action to circumvent the discovery schedules in place in those other actions. Further, Arvanitakis avers that the intentions of defendants Bibbo and Lugo to harass and annoy her are clear, considering the fact that the subpoena is dated prior to the date of the amended complaint.

Neither do these arguments warrant the relief sought. As to the latter contention, same is without merit, inasmuch as the subpoena is dated February 27, 2015 and the amended complaint is dated March 5, 2014. As to the former, notwithstanding the other lawsuits between these parties, there is no indication that the subject subpoena was motivated by a purpose other than to seek discovery from the witness regarding the instant lawsuit, as evidenced by the terms of the subpoena itself. Thus, it is clear that the scope of the discovery sought is limited.

Finally, for the reasons noted above, Arvanitakis has not carried her burden of demonstrating that the information sought is neither material nor relevant to the defense of this action (*see Kapon*, 23 NY3d at 34; *Ferolito v Arizona Beverages USA, LLC*, 119 AD3d

642 [2014]). In the amended complaint, Arvanitakis was named as a witness to certain statements made by defendants Bibbo and Lugo, said statements forming the basis for two causes of action against them.

Accordingly, Arvanitakis' motion for an order quashing the judicial subpoena served by defendants Bibbo and Lugo is denied. Arvanitakis shall appear on a date to be stipulated by her and the parties on or before, but no later than, July 6, 2015, at the place and time designated in the judicial subpoena.

A copy of this order is being faxed to movant's counsel and counsel for the parties on this date.

Dated: June 16, 2015

J.S.C.