

<b>Punwaney v Punwaney</b>
2016 NY Slip Op 31178(U)
June 23, 2016
Supreme Court, New York County
Docket Number: 153223/2014
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ  
*Justice*

PART 13

RAJESH PUNWANEY,  
Plaintiff,  
-against-

INDEX NO. 153223/2014  
MOTION DATE 05-25-2016  
MOTION SEQ. NO. 008  
MOTION CAL. NO. \_\_\_\_\_

LAVINA PUNWANEY and  
JUANITA PUNWANEY,  
Defendants.

The following papers, numbered 1 to 8 were read on this motion for an open commission.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1-3</u>
Answering Affidavits — Exhibits _____	<u>4-6</u>
Replying Affidavits _____	<u>7-8</u>

Cross-Motion:  Yes  No

Upon a reading of the foregoing cited papers, it is Ordered that Defendants’ motion for an Order directing the issuance of an Open Commission to depose, and demand documents from out-of-state non-party witnesses, is granted.

Plaintiff brought this action against his mother Lavina Punwaney (herein “Defendant Lavina”) and his sister Juanita Punwaney (herein “Defendant Juanita”) (Lavina and Juanita collectively referred to as “Defendants”) alleging conversion of funds held in seven accounts owned by Bhagwan Punwaney (herein “Father”) in the State Bank of India (herein “Accounts”). Plaintiff claims he was the sole beneficiary of the Accounts his Father held, and that the Defendants converted those funds by changing the beneficiary on the Accounts to be in favor of Lavina.

Defendants contend that it was the Father, prior to his death on May 16, 2013, who changed the beneficiary. Specifically, the Defendants assert that the Father removed Plaintiff from four accounts in 2008 and the remaining three accounts in 2012, naming his mother Lavina as the beneficiary. Plaintiff contends that this swap of the beneficiaries was the result of the Defendants conspiring with the Bank to change the beneficiary name in 2014 after Plaintiff brought the instant action. Defendants contend that the Bank removed Plaintiff’s name as beneficiary in 2008 and 2012 only after written instruction from the Father to do so. Further, Defendants state that the Bank had erroneously continued to issue account certificates (the U.S. equivalent to account statements) in Plaintiff’s name until it discovered the error in 2014, and that upon this discovery the Bank issued the correct certificates reflecting the appropriate names on the accounts.

Defendants now move for an Order pursuant to CPLR §3108 directing the issuance of an Open Commission enabling the Defendants to depose, and demand documents from, two out-of-state non-party witnesses, Mr. Manish Chandra and Mrs. Divya Mansukhani.

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

These two witnesses are the State Bank of India employees who are alleged to have material and necessary information regarding the Father's request for a change in beneficiary names on his seven Accounts. Plaintiff opposes the motion.

CPLR § 3101(a) allows for the "full disclosure of all evidence material and necessary in the prosecution or defense of an action regardless of the burden of proof." "The words 'material and necessary' as used in section 3101 must be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist in preparation for trial by sharpening the issues and reducing delay and prolixity" (Kapon v. Koch, 23 N.Y.3d 32, 38, 11 N.E.3d 709, 988 N.Y.S.2d 559 [2014] citing to, Allen v. Crowell–Collier Publishing Co., 21 N.Y.2d 403, 406, 288 N.Y.S.2d 449, 452, 235 N.E.2d 430, 432 [1968]).

Defendants argue that Mr. Chandra's testimony, as the person who had authoritative direction and control over the Accounts, is crucial to authenticate the information asserted in his September 24, 2014 and January 15, 2015 letters which contain important, relevant, material and necessary facts to the defense of this litigation. Defendants' contend Mr. Chandra would testify that it was the Father's written instructions in 2008 and 2012 that prompted the Bank to change the beneficiary on the Accounts, that Defendants had no part in instituting these changes, and that his testimony would provide the foundation to admit relevant Bank maintained documents.

Defendants also argue that the deposition of Mrs. Mansukhani is material and necessary because she was identified by the Bank, pursuant to the Subpoena, as the individual who spoke with the Father on the phone in 2012, confirming the Father's instructions to change the beneficiary name on three of the accounts. Additionally, Defendants contend that Mrs. Mansukhani's deposition may reveal other pertinent facts surrounding the retitling of the Accounts. Defendants argue that this testimony is crucial to their defense in this action because Mrs. Mansukhani has first hand knowledge as to the Bank's actions in 2012.

Generally, the procedure employed when seeking the deposition of a nonparty witness is to "secure a stipulation, or in the alternative serve a subpoena on the nonparty witness, pursuant to CPLR 3106." (Wiseman v. American Motors sales Corp., 103 A.D.2d 230, 479 N.Y.S.2d 528 [2<sup>nd</sup> Dept. 1984]). However, obtaining the deposition of a nonparty witness outside of New York State depends "solely upon the cooperativeness of the witness..." (Id.) Here, Defendants contend that they have made multiple attempts to secure Mr. Chandra's testimony, however, Mr. Chandra has refused to come to New York to testify. (Mot. Exhs. 10, 11 & 12).

Defendants state that Plaintiff previously served a subpoena on the Bank to secure Bank Officer testimony without success. Plaintiff served a subpoena duces tecum and ad testificandum on the New York Office of the State Bank of India on October 16, 2015. (Mot. Exh. 9). In a letter dated November 2, 2015, the Bank stated that none of the parties maintained any accounts with the Bank's New York Branch and asserted its rights under the Foreign Sovereign Immunity Act as to India related accounts (Mot. Exh. 15). The Bank subsequently provided Plaintiff's counsel with documents responsive to the subpoena on January 20, 2016, and identified, within those documents, Mr. Chandra and Mrs. Mansukhani as the Bank officers who handled the Father's Accounts. (Mot. Exh. 14).

Without the cooperation of the nonparty out of state witnesses, a party is left to make an application to the court under CPLR §3108 because "service of a subpoena on a nonparty witness outside this State is void [as] no authorization for such service exists." (Wiseman, *Supra*, see also Judiciary §Law 2-b; Peterson v. Spartan Inds., 40 A.D.2d 807, 338 N.Y.S.2d 352 [1<sup>st</sup> Dept. 1972]). Both witnesses live in India, and since they will not stipulate to appearing for depositions they are not subject to the subpoena power of New York State. (Matter of Oxycontin II, 76 A.D.3d 1019, 1021 (2<sup>nd</sup> Dept. 2010)).

CPLR § 3108 states in part that, "A commission or letters rogatory may be issued where necessary or convenient for the taking of a deposition outside of the state." CPLR §3113 provides in part that, "Depositions may be taken... in a foreign country, before any diplomatic or consular agent or representative of the United States, appointed or accredited to, and residing within, the country, or a person appointed by commission or under letters rogatory..." (CPLR §3113(a)(3)). "A party seeking an open commission must demonstrate that the testimony sought is not only necessary to his prosecution of the case but also is otherwise unavailable." (Karaduman v. Newsday, Inc., 95 A.D.2d 669, 463 N.Y.S.2d 221 [1<sup>st</sup> Dept. 1983]).

"A commission is the direction by a New York court to an appointed commissioner under New York law, and who bears the seal of this court, to take testimony." (Boatswain v. Boatswain, 3 Misc.3d 803, 778 N.Y.S.2d 850, 2004 N.Y. Slip Op. 24096 [Sup. Ct. Kings County]).

"American discovery is often significantly broader than is permitted in other jurisdictions...therefore...a more stringent test should apply in international discovery..." as opposed to discovery just needing to be material and necessary. (Richbell Information Services, Inc. v. Jupiter Partners L.P., 32 A.D.3d 150, 816 N.Y.S.2d 470 [1<sup>st</sup> Dept. 2006], citing Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197 [1958]). This higher standard is whether the information sought is crucial "to the resolution of a key issue in the litigation." (Richbell, *Supra*).

Plaintiff opposes the motion arguing that Plaintiff's counsel would incur significant costs by being forced to appear at a deposition in India. Plaintiff also contends that the deposition testimony of these witnesses is irrelevant because under Indian Law the Father did not have authority to unilaterally change the name of the beneficiary on the Account without the Joint Account holder's (here allegedly Plaintiff's) consent. Even if that is the case, that is all the more reason the deposition of these two witnesses is crucial to the litigation. Not only because these witnesses have information as to who authorized, when

it was authorized and why the beneficiary on the account was authorized to be changed; but if these witnesses, being residents of India, unilaterally and illegally changed the beneficiary's name on the Accounts, this testimony as to why they went against such policy is not only material and necessary, but crucial to the prosecution or defense of this action.

The information that would be obtained through the depositions of these two witnesses is crucial to proving or disproving issues in this litigation. Further, as demonstrated by the Bank's New York Branch response to Plaintiff's subpoena and Mr. Chandra's reluctance to appear in New York for a deposition, this information cannot be obtained elsewhere. Therefore, the issuance of an open commission is a proper remedy.

Accordingly, it is ORDERED that Defendants' motion for an open commission to take the depositions of and demand documents from Mr. Manish Chandra and Mrs. Divya Mansukhani is granted, and it is further,


ORDERED, that pursuant to CPLR §3108, a commission issue in this action to the Clerk of the High Court of Bombay, or any other authorized person who may administer oaths pursuant to the laws of India, to take the deposition upon oral questions of, and demand documents from, Manish Chandra, as a non-party witness in this action and that he return the transcript of the testimony subscribed by the witness, certified to be correct, annexed to said commission with any exhibits produced and proved before him/her, to the clerk of the Supreme Court of the State of New York, County of New York, 60 Centre Street, New York, New York, by certified or registered mail, with all convenient speed, and it is further,

ORDERED, that pursuant to CPLR 3108, a commission issue in this action to the Clerk of the High Court of Bombay, or any other authorized person who may administer oaths pursuant to the laws of India, to take the deposition upon oral questions of, and demand documents from, Divya Mansukhani, as a non-party witness in this action and that she return the transcript of the testimony subscribed by the witness, certified to be correct, annexed to said commission with any exhibits produced and proved before him/her, to the clerk of the Supreme Court of the State of New York, County of New York, 60 Centre Street, New York, New York, by certified or registered mail, with all convenient speed.

ENTER:

MANUEL J. MENDEZ  
J.S.C.

Dated: June 23, 2016

  
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MANUEL J. MENDEZ  
J.S.C.

Check one:  FINAL DISPOSITION    X NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST                       REFERENCE