Schettino v Tedesco
2016 NY Slip Op 32523(U)
September 21, 2016
Supreme Court, Suffolk County
Docket Number: 12-22120
Judge: Joseph Farneti

[* 1]

SHORT FORM ORDER

COPY

INDEX No. 12-22120

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 5-29-12 (001)
MOTION DATE 12-11-14 (002)
MOTION DATE 8-20-15 (003)
MOTION DATE 10-13-15 (004)
MOTION DATE 11-5-15 (005)
ADJ. DATE 11-12-15
Mot. Seq. #001-MD
#002-MD
#003-MotD
#004-MD
#005-XMotD

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LUIGI SCHETTINO, as Administrator of the Estate of WILLIAM F. SCHETTINO, Deceased,

Plaintiff,

- against -

RICHARD TEDESCO, SUFFOLK COUNTY SHERIFF'S DEPARTMENT and COUNTY OF SUFFOLK,

Defendants.

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Upon the following papers numbered 1 to 80 read on these motions for and opposed to discovery ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 8, 22 - 27, 36 - 48, 57 - 65 ; Notice of Cross Motion and supporting papers 66 - 76 ; Answering Affidavits and supporting papers 9 - 18, 28 - 35, 49 - 54 ; Replying Affidavits and supporting papers 1 - 21, 55 - 56, 77 - 78, 79 - 80 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion (#001) by the plaintiff for an Order, pursuant to CPLR 3124, compelling the defendants to comply with the plaintiff's combined demand for discovery dated August 16, 2012, is denied; and it is further

ORDERED that the motion (seq. #002) by the plaintiff, pursuant to CPLR 2307 and 3120, for the issuance of a so-ordered subpoena *duces tecum* to be served on the New York State Police is denied without prejudice to renewal; and it is further

ORDERED that the motion (seq. #003) by the defendants for an Order quashing the subpoenas *duces tecum* served by the plaintiff upon nonparties AT&T and Sprint/Nextel, and for sanctions pursuant to 22 NYCRR § 130-1.1, is granted to the extent that said subpoenas are quashed, and is otherwise denied; and it is further

ORDERED that the motion (seq. #004) by the plaintiff for an Order compelling the defendant Richard Tedesco to submit to a deposition conducted by the plaintiff's new counsel is denied; and it is further

ORDERED that the cross motion (#005) by the defendants for an Order vacating the notice of deposition seeking the deposition of the defendant Richard Tedesco and for sanctions pursuant to 22 NYCRR § 130-1.1, is granted to the extent that said notice is vacated, and is otherwise denied.

This action arises from a motor vehicle accident that occurred at approximately 6:00 p.m. on March 14, 2012, in the westbound HOV lane of the Long Island Expressway east of Exit 59 (Ocean Avenue), in the Town of Islip, State of New York. The accident occurred when a vehicle operated by the defendant Richard Tedesco ("Tedesco"), an employee of defendant Suffolk County Sheriff's Department, struck and killed the plaintiff's decedent, William Schettino ("Schettino"). It is undisputed that Schettino's motor vehicle had stopped in the HOV lane, and that Schettino had exited his vehicle before the accident. It appears that, because a local law enforcement officer was involved in this fatal accident, the New York State Police ("State Police") investigated the incident.

In considering these motions, seeking or opposing the release of certain records possibly related to this action, it is appropriate to set forth some background information regarding the parties' exchange of disclosure herein. This action was commenced by the filing of a summons and complaint on July 23, 2012. After issue was joined, the plaintiff served a combined demand for discovery and inspection dated August 16, 2012, and the defendants served a response dated December 18, 2012. The defendants served supplemental responses to the plaintiff's combined demand on December 19, 2012, January 2, 2013, and May 21, 2013. In addition, a preliminary conference was held on January 2, 2013, and the defendants served a response to preliminary conference order dated January 2, 2013. After Tedesco was deposed on February 27, 2014, the plaintiff served a supplemental discovery demand for discovery and inspection dated September 19, 2014, and the defendants served their response on November 7, 2014. Thereafter, the plaintiff served subpoenas duces tecum on AT&T and Sprint/Nextel seeking Tedesco's telephone records. On or about September 4, 2015, the plaintiff served a notice to take a second deposition of Tedesco.

The plaintiff moves (seq. #001) to compel the defendants to fully respond to his combined demand dated August 16, 2012. The Court finds that the affirmation of good faith submitted in support of the motion is insufficient to warrant the relief requested herein (*see* Uniform Rules for Trial Cts [22 NYCRR] § 202.7 [a]). Such an affirmation "shall indicate the time, place and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held" (Uniform Rules for Trial Cts [22 NYCRR] § 202.7 [c]). Here, the movant's affirmation merely provided that there was two letters sent to the defendants' attorney. It

does not appear that there was any effort made on those occasions to resolve the parties' discovery dispute, but only to advise the defendants that the disclosure was outstanding. "The burden is on the party seeking sanctions based on disclosure issues to comply with Uniform Rules for Trial Cts [22 NYCRR] § 202.7 [a] [2] and [e]. If the moving defendant did not confer with the opposing parties counsel, they should have set forth their reasons for not doing so in the affirmation. The court should not be left to wonder whether any consultation with opposing parties counsel occurred, or be compelled to assume the reasons why no consultation occurred" (***Hutchinson v Langer***, 25 Misc 3d 1235[A], 2009 NY Slip Op 52427[U] [Sup Ct, Kings County 2009]). The submitted affirmations are deficient (*see* ***Tine v Courtview Owners Corp.***, 40 AD3d 966, 838 NYS2d 92 [2d Dept 2007]; ***Cestaro v Chin***, 20 AD3d 500, 799 NYS2d 143 [2d Dept 2005]; ***Barnes v NYNEX, Inc.***, 274 AD2d 368, 711 NYS2d 893 [2d Dept 2000]). Accordingly, the motion is denied as procedurally defective.

The plaintiff moves (seq. #002) pursuant to CPLR 2307 and CPLR 3120 for the issuance of a so ordered subpoena duces tecum to be served on the State Police, a nonparty to this action. In support of his motion, the plaintiff submits a copy of its supplemental discovery demand dated September 19, 2014, the defendants' response dated November 7, 2014, and a copy of the proposed subpoena duces tecum to the State Police. In the subject demand, the plaintiff seeks, among other things, Tedesco's telephone records for one year before and one year after the date of this incident, and documents from the State Police investigation. In their response, the defendants indicate that they do not possess the documents requested regarding the State Police investigation, and they object to the release of any information regarding Tedesco's telephone records or related information. It appears that the plaintiff's efforts to obtain Tedesco's telephone records center on his deposition testimony that he did not have a cell phone in his vehicle at the time of this incident, that the phone had broken months before, and that he "looked up" to see Schettino's vehicle stopped in the HOV lane.

A party may obtain discovery from a nonparty in possession of matter material and necessary to the prosecution or defense of their action upon notice stating the circumstances or reasons such disclosure is sought or required (CPLR 3101 [a] [4]). It is well-settled that the subpoenaing party must first sufficiently state the circumstances or reasons underlying the subpoena either on the face of the subpoena itself or in a notice accompanying it, and "must include that information in the notice in the first instance ... lest it be subject to a challenge for facial insufficiency" (***Matter of Kapon v Koch***, 23 NY3d 32, 39, 988 NYS2d 559, 565 [2014]; *see also* ***Bianchi v Galster Mgt. Corp.***, 131 AD3d 558, 15 NYS3d 189 [2d Dept 2015]). Because a nonparty is not likely to be aware of the issues in the subject litigation, the notice must give the recipient of the subpoena "sufficient information to challenge the [subpoena] on a motion to quash" (***Matter of Kapon v Koch***, 23 NY3d at 39, 988 NYS2d at 565). Absent the required notice, a subpoena is facially defective and a motion to quash will be granted (***Gihon LLC v 501 Second St., L.L.C.***, 50 Misc3d 1208[A], 28 NYS3d 648 [Sup Ct, Kings County 2016]; ***Jamaica Wellness Med., P.C. v USAA Court Office Assistant. Insurance. Co.***, 49 Misc3d 926, 16 NYS3d 444 [Sup Ct, Kings County 2015]).

The proposed subpoena duces tecum submitted for signature by the undersigned, and attached as an exhibit to the plaintiff's motion, does not contain a notice on its face or otherwise stating the circumstances or reasons that it is requesting the materials from the State Police. Although it appears that the State Police are, or should be, aware of the reasons for the subject subpoena, it is determined that the subpoena is facially deficient and procedurally defective. Under the circumstances, the plaintiff's motion for a so ordered subpoena seeking materials from the State Police is denied without prejudice to renewal.

The defendants move by order to show cause (seq. #003) for an Order quashing subpoenas served by the plaintiff upon two nonparty telephone companies and for sanctions against counsel for the plaintiff. It is well-settled that, once a subpoenaing party has provided the nonparty with adequate notice, the party moving to quash "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 [movant] 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" (***Matter of Kapon v Koch***, 23 NY3d at 34, 988 NYS2d at 562). "An application to quash a subpoena should be granted '[o]nly where the futility of the process to uncover anything legitimate is inevitable or obvious' ... or where the information sought is 'utterly irrelevant to any proper inquiry' " (***Matter of Kapon v Koch***, *id.*, citing ***Anheuser–Busch, Inc. v Abrams***, 71 NY2d 327, 331, 525 NYS2d 816 [1988]).

Here, the defendants have failed to meet their burden that the materials requested from the nonparty telephone companies are utterly irrelevant or are obviously futile in uncovering anything legitimate in this action.[1] However, the subpoenas duces tecum issued to AT&T and Sprint/Nextel do not contain a notice on their face or otherwise stating the circumstances or reasons that it is requesting the materials from said nonparties. Under the circumstances, the subpoenas which are the subject of the instant motion are quashed as facially deficient and procedurally defective.

Regardless, the branch of the defendants' motion which seeks sanctions against counsel for the plaintiff is denied. The gravamen of the defendants' contention is that the right to the materials sought in the subpoenas served upon the telephone companies is an issue before the undersigned, and an attempt by the plaintiff "to side step the discovery process that is currently taking place before the Court." In addition, counsel for the defendants contends that the subject subpoenas constitute a "fishing expedition," and that they cannot be issued until a note of issue is filed. Both of these latter contentions are without merit. A party is generally free to select the discovery devices they wish to use and the order in which to use them (*see* ***Samide v Roman Catholic Diocese of Brooklyn***, 16 AD3d 482, 791 NYS2d 643 [2d Dept]). The fact that plaintiff's right to obtain Tedesco's telephone records from the defendants was presented for a determination by the undersigned in plaintiff's motion seq. #001 does not mean that the plaintiff must abandon alternative methods of obtaining discovery in this action.

The Court finds that the plaintiff's service of the subject subpoenas while also seeking to compel the defendants' to disclose the requested materials is based, in part, upon legal theory, and clearly did not rise to the level of "frivolous conduct" as contemplated by court rules (*see* Uniform Rules for Trial Cts [22 NYCRR] § 130-1.1 [a]; CPLR 8303-a; ***Agostini v Sobol***, 304 AD2d 395, 757 NYS2d 555 [1st Dept 2003]; ***Juron & Minzner v State Farm Insurance. Co.***, 303 AD2d 463, 756 NYS2d 428 [2d Dept 2003]). Accordingly, the defendants motion is granted to the extent that the subject subpoenas are quashed, and is otherwise denied. However, nothing herein shall be deemed to limit the plaintiff's ability to seek to properly obtain the subject discovery, or the ability of the defendants, or any nonparty, to properly oppose any such efforts.

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[1] The plaintiff's opposition to the motion indicates that a copy of the video of the subject accident is attached as Exhibit A to his papers. Neither a tab A nor the video is included in the papers received by the Court. However, the plaintiff does not claim that the video bears on the issues before the undersigned, and it is determined that the presence or the absence of the exhibit is not relevant to its determinations herein.

The plaintiff moves (seq. #004) for an Order compelling Tedesco to submit to a second deposition in this action pursuant to a notice of deposition dated September 4, 2015. In support of his motion, the plaintiff submits, among other things, a sufficient affidavit of good faith, and the transcript of Tedesco's deposition. The defendants cross-move (seq. #005) to vacate the subject notice and for sanctions against counsel for the plaintiff. Under the circumstances, the motion and cross motion will be addressed together herein. In his motion, the plaintiff contends that the deposition conducted by prior counsel "[l]eft unaddressed ... numerous material questions that the sought deposition will help clarify prior to trial," and that a further deposition will allow Tedesco to testify at a "properly mature stage of the case." In addition, the plaintiff contends that the "broad" and "far-reaching" scope of discovery pursuant to CPLR 3101 (a) permits the relief sought and requires the defendants to have grounds to obtain a protective order pursuant to CPLR 3103 to preclude the requested discovery.

In opposition, the defendants contend that the plaintiff does not indicate that Tedesco refused to answer any question put to him at his deposition, and that the plaintiff has failed to otherwise make a showing of the need for the requested second deposition. Generally, a "further" or second deposition of a party is prohibited absent a failure of the witness to answer all the questions posed at their deposition (*see* ***Lacqua v Staten Is. Univ. Hosp.***, 56 AD3d 529, 867 NYS2d 515 [2d Dept 2008]; ***Cassidy v County of Nassau***, 84 AD2d 742, 443 NYS2d 742 [2d Dept 1981]). An "additional" deposition of a party generally arises in the context of an action against a corporate defendant where there is a question whether the individual produced in the first instance had personal knowledge of the facts and circumstances involved. In that context, the plaintiff must establish that the witness produced lacked sufficient knowledge of the facts or was otherwise inadequate, and that the testimony of the proposed witness is material and necessary to the prosecution of the case (***Thristino v County of Suffolk***, 78 AD3d 927, 910 NYS2d 664 [2d Dept 2010]; ***Barone v Great Atl. & Pac. Tea Co.***, 260 AD2d 417, 687 NYS2d 718 [2d Dept 1999]). The party seeking the additional deposition of a corporate witness must make "a detailed showing of necessity for taking further depositions" (***Defina v Brooklyn Union Gas Co.***, 217 AD2d 681, 630 NYS2d 533 [2d Dept 1995]).

In reply, the plaintiff alleges that the initial deposition of Tedesco was "ineffective," and that New York's liberal approach to discovery tracks the federal standard set forth in FRCP 26 (b) (2) (*citing* ***Mann v Cooper Tire***, 33 AD3d 24, 816 NYS2d 45 [1st Dept 2006]. The federal rule permits a court to limit the extent of discovery if it determines that: "(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1)." In addition, the plaintiff contends that the standards regarding a party's request for the additional deposition of a corporate witness are not applicable to that of an individual, who is subject to "New York's mandate for 'full disclosure' of 'all matter' material and necessary to a case, *see* CPLR 3101."

A review of the transcript of Tedesco's deposition reveals that he answered all questions put to him, and that prior counsel for the plaintiff closed the questioning without reservation. More importantly, in making his motion the plaintiff has failed to indicate how said deposition was "ineffective," what material question were not addressed and need clarification before trial, or how this action has become "properly mature." In addition, without determining the applicability of the federal rule in this action or any other, the plaintiff has failed to present facts or other information enabling the undersigned to determine, among other things, whether a further deposition of Tedesco would be unreasonably cumulative or duplicative, whether additional information regarding the facts at issue, if

any, can or cannot be obtained from some other source, or whether the plaintiff did, did not, or will have an ample opportunity to obtain the information by discovery in the action.

Finally, the plaintiff fails to provide any binding authority for his proposition that the case law governing a party's burden in seeking the additional deposition of a corporate defendant is not applicable herein. It is undisputed that Tedesco is an employee of the Suffolk County Sheriff's Department, and that counsel for the defendants permitted Tedesco to answer any and all fact-based questions posed at the subject deposition. Thus, the plaintiff would generally be prohibited from obtaining a further deposition of Tedesco (*see* ***Fowler v Yonkers Gospel Mission***, 67 AD3d 635, 889 NYS2d 603 [2d Dept 2009]; ***Barber v BPS Venture, Inc.***, 31 AD3d 897, 819 NYS2d 329 [3d Dept 2006]).

Under the circumstances, it is determined that the defendants were not obligated to bring a motion for a protective order pursuant to CPLR 3103. Accordingly, the plaintiff's motion to compel Tedesco to submit to a further deposition is denied.

The branch of the defendants motion (seq. #005) seeking to vacate the subject notice of deposition is granted for the reason set forth herein, and the branch seeking the imposition of sanctions is denied. Pursuant to Part 130 of the Uniform Rules for the New York State Trial Courts, a court, in its discretion, may award costs and impose sanctions for frivolous conduct in a civil action or proceeding (22 NYCRR § 130-1.1 [a]). Conduct is regarded as frivolous if "it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law," if "it asserts material factual statements that are false," or if it is undertaken to "delay or prolong the resolution of the litigation, or to harass or maliciously injure another" (22 NYCRR § 130-1.1 [c]; *see* ***Mascia v Maresco***, 39 AD3d 504, 833 NYS2d 207 [2d Dept]). The defendants failed to establish that the plaintiff engaged in frivolous conduct within the meaning of 22 NYCRR § 130-1.1 (c) (*see* ***Kaplon-Belo Assoc., Inc. v D'Angelo***, 79 AD3d 931, 912 NYS2d 886 [2d Dept 2010]; ***Dank v Sears Holding Mgt. Corp.***, 69 AD3d 557, 892 NYS2d 510 [2d Dept 2010]).

The foregoing constitutes the decision and Order of the Court.

Dated: September 21, 2016

Hon. Joseph Farneti
Acting Justice Supreme Court

____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION