

Glassman v Weinberg
2018 NY Slip Op 32001(U)
August 17, 2018
Supreme Court, New York County
Docket Number: 650838/2016
Judge: Tanya R. Kennedy
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. TANYA R. KENNEDY PART IAS MOTION 63EFM

Justice

INDEX NO. 650838/2016
MOTION DATE N/A
MOTION SEQ. NO. 006

KENNETH GLASSMAN,
Plaintiff,

- v -

SARAH WEINBERG,
Defendant.

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 006) 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 152

were read on this motion to/for QUASH SUBPOENA, FIX CONDITIONS

Upon the foregoing documents, it is Ordered that the motion, pursuant to CPLR 2304 and 3103, to quash the subpoena duces tecum, dated January 25, 2018 ("January 2018 subpoena") served upon non-party David A. Kaminsky, Esq. ("Kaminsky") by defendant Sarah Weinberg ("Weinberg") and for a protective order to enjoin and restrain Kaminsky from having to comply with such subpoena is granted. The cross-motion by defendant Weinberg for an order, pursuant to CPLR 3124 and 2308, compelling Kaminsky to comply with the January 2018 subpoena is denied.

On May 10, 2013, Weinberg sold two buildings, one of which included the family home where she resided for over fifty (50) years. Both properties each contained a commercial space. Approximately a month after selling the properties, Weinberg retained plaintiff attorney Kenneth J. Glassman ("Glassman") to commence an action against her former son in law, Kaminsky, granddaughter, Danielle Kaminsky ("Danielle"), the purchaser Linda Salamon ("Salamon"), the attorney who represented Weinberg at the closing, Jeffrey Asher, Esq. ("Asher") (who also prepared a Power of Attorney, a Revocable Trust and other documents for Weinberg) and his law firm Robinson, Brog Leinwand Greene Genovese & Gluck, P.C., ("Robinson Greene") and others in Supreme Court, New York County, under index number 652273/2013, asserting causes of action for rescission and to set aside the sale and deed due to fraud, conversion, unjust enrichment and legal malpractice (Rescission Action). The Rescission Action was dismissed

following motion practice and the Appellate Division, First Department, affirmed the dismissal of Weinberg's amended complaint, which it described as "barebones" (*Weinberg v Sultan*, 142 AD3d 767 [1st Dept 2016]).

However, the Appellate Division expressed concern "over the manner in which the sale of the building ... was orchestrated by defendant Kaminsky ... [who] procured the purchaser and referred plaintiff to the attorneys who represented her in the transaction and assisted her at the closing" (*id.*). An Article 81 guardianship proceeding was also commenced to determine whether a guardian should be appointed for Weinberg, who is an elderly woman with dementia, and the proceeding was ultimately dismissed. Weinberg subsequently commenced a second action against Kaminsky in Supreme Court, New York County, under index no 150869/17 (2017 Action), which was dismissed after motion practice and is now on appeal.

Glassman commenced this action against Weinberg in Supreme Court, New York County, under index number 650838/2016, asserting causes of action for an account stated, quantum meruit and breach of the retainer agreement. Weinberg filed an answer asserting various affirmative defenses and counterclaims, including legal malpractice in the Rescission Action and for malpractice in a foreclosure action.

Weinberg then served a subpoena *duces tecum*, dated February 1, 2017 (February 2017 subpoena) on Kaminsky in this action and he moved to quash. The motion court (Coin, J.) issued a June 14, 2017 order which granted the motion "without prejudice to renew following the completion of party discovery." (Exhibit 3 to Sestack Affirmation)

The January 2018 subpoena sets forth thirty-six (36) separate requests which seeks "all communications and documents" relating to:

(a) items exchanged between or amongst Kaminsky and the other defendants in the Rescission Action regarding Weinberg's business, personal and financial matters; Kaminsky's former wife; the subject properties in the Rescission and Foreclosure Actions and the Sarah Weinberg Revocable Trust; items sent or received by Kaminsky relating to Weinberg's business, personal and financial matters; and items sent or received by Kaminsky relating to Weinberg, including her business, personal and financial matters; communications related to counsel engaged by Weinberg, including engagement letters, termination of services, payments for services and requests that payments be disgorged or returned; and any trust and estate work performed by Asher or Robinson Brog on behalf of Weinberg;

(b) Weinberg's placement in a nursing home, facility or location other than the family home; the guardianship proceeding; Weinberg's Last Will and Testament and revocation,

at any time period; Weinberg's health or competency, for any time period; Weinberg's age from any time period and how documents were obtained; banks where Weinberg conducted business and/or banking; Weinberg's birth certificate and naturalization file from any time period and how such documents were obtained; and the disciplinary proceeding Weinberg commenced against Kaminsky;

(c) payments by Salamon and other entities to Kaminsky concerning work relating to the property subject to the Rescission Action; payments by Kaminsky to Danielle or on Danielle's behalf; and certain legal or business matters Kaminsky handled and/or business relationships between Kaminsky and certain individuals and/or entities from 2006 to the present;

(d) the mortgage default for the family home and the Foreclosure Action; refinancing of the family home; leasing of the commercial space at the family home; a particular equipment lease and the corresponding guaranty, payments under the lease, default and lawsuit; inquiries pertaining to the sale of, offers to purchase, or refinancing of the family home; drafts of the Contract of Sale for the family home and drafts of any documents relating to the Contract of Sale for the family home; appraisal and/or valuations of the family home; the Contract of Sale for the subject buildings; title work on the sale of the family home; placement of funds in Sultan's IOLA account for the family home; Escrow Agreement concerning the family home; the Section 1031 exchange for the family home and videotaping of the closing of the sale of the family home.
(Exhibit 1 to Sestack Affirmation)

Counsel for Kaminsky argues that the information sought is excessively broad, irrelevant to the claims against Kaminsky for fraud or aiding and abetting fraud or conspiracy to commit fraud; and is merely an attempt to harass Kaminsky and to conduct a fishing expedition to aid Weinberg in the 2017 Action.

Weinberg's counsel argues in opposition and in support of the cross-motion that the January 2018 subpoena seeks documents relevant to Weinberg's malpractice counterclaims against Glassman. Weinberg's counsel also maintains that due to Weinberg's cognitive difficulties and Alzheimer's diagnosis, she needs to obtain the documents from Kaminsky to proceed with her malpractice counterclaims and that Kaminsky conceded that he arranged the sale of the family home.

CPLR 3101(a) provides that:

[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by:

(4) any other person, upon notice stating the circumstances or reasons such disclosure is sought or required.

A court has broad discretion over the discovery process to determine whether the information sought is “material and necessary” (*see Allen v Crowell-Collier Publ. Co.*, 21 NY 2d 403, 406 [1968]). The words “material and necessary” are to be “interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity (*id.*).

However, under CPLR 3103(a):

[t]he court may at any time on its own initiative, or on motion of any party or of any person from whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.

CPLR 2304 provides that a court may “quash, fix conditions or modify a subpoena.” A party seeking to quash a subpoena *duces tecum* is entitled to such relief where it meets its burden of establishing that “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*, 23 NY3d 32, 38-39 [2014] [internal citations and quotation marks omitted]). Once the moving party satisfies its burden on a motion to quash, the burden then shifts to the requesting party to establish that the information sought is “material and necessary” to the prosecution or defense of the action (*see Ferolito v Arizona Beverages USA, LLC* 119 AD3d 642, 643 [2d Dept 2014]).

The Court of Appeals has consistently held that a subpoena *duces tecum* “may not be used for the purpose 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” (*Matter of Terry D.*, 81 NY 2d 1042, 1044 [2015] [internal citations and quotation marks omitted]).

The January 2018 subpoena is extremely overbroad and fails to identify documents with any specificity. Where, as here, a subpoena seeks “any and all documents” and fails to specify the particular records sought, the party subject to the subpoena is not required to “cull the good from the bad” (*Platt v GC ENG & Assoc. Eng'g, P.C.*, 2014 NY Slip Op 31579(U), *8 (Sup Ct, NY County 2014). In addition, “[c]ourts have the option to quash those subpoenas in their

entirety, rather than prune them (*id.*) and this Court exercises its discretion to follow such course of action. Further, the January 2018 subpoena appears to be an attempt to conduct a fishing expedition, considering the pending appeal of the 2017 Action. Therefore, Kaminsky need not answer the January 2018 subpoena.

ACCORDINGLY, it is ORDERED that the motion to quash the subpoena *duces tecum*, pursuant to CPLR 2304, and for a protective order, pursuant to CPLR 3103 is granted; and it is further

ORDERED that the cross-motion to compel compliance with the subpoena, pursuant to CPLR 3124 and 2308 is denied; and it is further

ORDERED that the parties shall appear for a status conference on October 10, 2018 at 2:15 p.m.

8/17/2018
DATE

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input checked="" type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

APPLICATION:

CHECK IF APPROPRIATE:

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

Hon Tanya R. Kennedy
TANYA R. KENNEDY, J.S.C.

TANYA R. KENNEDY
J.S.C.