

<b>Matter of Berl v Trident Brands, Inc.</b>
2019 NY Slip Op 30272(U)
February 5, 2019
Supreme Court, New York County
Docket Number: 159211/2018
Judge: Eileen A. Rakower
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 6

-----X

In the Matter of the Application of

VOLKER BERL,

Petitioner,

For an Order Quashing Out-of-State Subpoena Issued  
By TRIDENT BRANDS, INC., for documents

- against-

TRIDENT BRANDS, INC.,

Respondent.

-----X

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

Defendant Trident Brands, Inc. (“Trident” or “Respondent”) served a Subpoena on Petitioner Volker Berl (“Mr. Berl” or “Petitioner”) on September 20, 2018 pursuant to CPLR § 3119 seeking documents for litigation pending in Virginia, *Trident Brands, Inc. v. PIT Mycell, LLC*, Case No. CL-2018-05741 (Fairfax County Circuit) (the “Virginia Action”). Mr. Berl moves for an Order, pursuant to CPLR § 2304, quashing the Subpoena, and pursuant to CPLR § 3103, for a protective order. Trident opposes.

*Virginia Action/Factual Background*

On April 11, 2018, Trident filed an action against PIT Mycell, LLC (“PIT”) for breach of contract, specific performance, and actual and/or constructive fraud in the Circuit Court of Fairfax County, Virginia. Trident and PIT are holders and owners of certain Convertible Promissory Notes issued by Mycell Technologies, LLC (“Mycell”). The Notes were issued pursuant to a Notes Purchase Agreement (“NPA”) dated January 22, 2016, with Mycell as maker, and LPF (MCTECH) Investment Corporation (“LPF”), PIT, New Age Ventures, LLC (“New Age”), Reno Deldotto (“Deldotto”), and Trident (collectively “Noteholders”). Trident alleges that PIT is an alter ego of Rick Peterson (“Mr. Peterson”) and New Age is an alter ego of Mr. Berl. Trident alleges that Mr. Berl and Mr. Peterson are significant investors

in Mycell and were Mycell's sole directors at all relevant times. Trident alleges that PIT, in conspiracy with Mycell and Mr. Berl, have perpetrated a fraud on Trident and the other Noteholders and violated the implied covenant of good faith and fair dealing in their efforts to frustrate any enforcement of the Notes for the benefit of Mycell and its owners.

Because of Trident's claim that Mr. Berl was directly involved with PIT's scheme, Trident issued a subpoena in the Virginia Action. Since Mr. Berl is a New York resident, on September 20, 2018, New York counsel for Trident issued a Subpoena Duces Tecum upon Mr. Berl pursuant to CPLR § 3119(b)(4). The Subpoena requests eighteen categories of documents. Mr. Berl filed the instant action by way of his Petition on October 4, 2018 to quash the subpoena and for a protective order.

### *Parties' Contentions*

Mr. Berl argues that the Subpoena fails to provide "notice stating the circumstances or reasons such disclosure is sought or required" under CPLR § 3014(a)(4) for a nonparty. Mr. Berl further argues that the information sought is overbroad and is being used as a fishing expedition. Mr. Berl contends that the Subpoena does not seek any "specific documents", and fifteen out of the eighteen categories of documents that are requested do not provide a "specific time period". Furthermore, Mr. Berl argues that compliance with the Subpoena would be unduly burdensome and costly.

In opposition, Trident argues that the requested documents are relevant because Mr. Berl "was directly involved in the scheme perpetrated by [PIT]... to commit fraud against Trident." Trident further argues that Mr. Berl is "well aware" of the Virginia Action because the directors of Mycell, including Mr. Berl, issued a joint message to owners of Mycell addressing the Virginia Action.

Turning to the specific Requests contained in the Subpoena, Trident contends that Requests Numbers 1, 2, and 3, which seek communications and related documents between Mr. Berl, Mr. Peterson and other Noteholders, is relevant to its claim of fraud made in the Virginia Action. Trident contends that Requests Numbers 6, 7, 8, 9 and 10, which seek documents related to collection or enforcement of the Notes, and Requests Numbers 11, 12, 13, and 14, which seek information concerning the transfer of any interest in or Mycell's breach of the Notes or other loan documents, may provide evidence of a scheme to frustrate enforcement on the Notes despite Mycell's breach. Trident contends that Requests Nos. 4, 5, 15, 16, and 18, which seek information that is relevant to the potential transfer of assets from

Mycell, may show that PIT used its power to prevent enforcement of the Notes, and PIT transferred assets away from Mycell so there was nothing to satisfy the Notes.

Additionally, Trident argues that Mr. Berl has not satisfied his burden of showing how any of the documents requested in the Subpoena are unduly burdensome and costly. Trident also argues that with respect to the time period for the requests, the relevant timeframe is from when the Notes went into default in December 2016.

### *Legal Standards*

CPLR § 3101(a)(4) provides that “[t]here shall be fully 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.” The “subpoenaing party must sufficiently state the ‘circumstances or reasons’ underlying the subpoena (either on the face of the subpoena itself or in a notice accompanying it), and the witness, in 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.’” *Kapon v. Koch*, 23 N.Y. 3d 32, 34 [2014]. “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*, 23 N.Y. 3d at 34.

CPLR §3119(e) requires, in relevant part, that “[a]n application to the court for a protective order or to ... quash ... a subpoena issued under this section must comply with the rules or statutes of this state and be submitted to the court in the county in which discovery is to be conducted.”

CPLR § 2304 states that “[a] motion to quash, fix conditions or modify a subpoena shall be made promptly in the court in which the subpoena is returnable.”

CPLR § 3103(a) provides that “the court may... on motion of any party... make a protective order denying, limiting, conditioning or regulating the use of any disclosure device” in order to “prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice...”

“A subpoena should be quashed when the materials sought are irrelevant or when it is being used as a fishing expedition to ascertain the existence of evidence.” *Rosen v. Bitan, MD*, 2014 WL 1325305 [N.Y.Sup.],\* 4. “In addition, courts have broad discretion to determine when the demands in a subpoena are overly broad or in the nature of discovery.” *Id.*

*Discussion*

Here, Trident has sufficiently stated the circumstances or reasons underlying the Subpoena. The Subpoena states that “the disclosure sought by this Subpoena is required because you are believed to have relevant information and/or documents in your possession that are not otherwise fully or readily available to the Plaintiff concerning the events at issue in this action pending before the Fairfax Circuit Court of the State of Virginia.”

Mr. Berl has failed to demonstrate that the information sought is ‘utterly irrelevant’ to the action or that the ‘futility of the process to uncover anything legitimate is inevitable or obvious.’” *Kapon*, 23 N.Y. 3d at 34. Mr. Berl has also failed to demonstrate that Trident’s requests are unduly burdensome or costly. However, Mr. Berl has demonstrated that the requests are overly broad insofar as no relevant timeframe was provided. As Trident identifies in its opposition, the relevant timeframe is from the Notes went into default in December 2016.

Wherefore, it is hereby

ORDERED that Petitioner Volker Berl’s motion to quash the Subpoena is denied; it is further

ORDERED that Petitioner Volker Berl’s motion for a protective order is granted to the extent that the requests contained in the Subpoena are narrowed to the timeframe from December 2016 to the present; and it is further

ORDERED that Petitioner Volker Berl shall respond to the Subpoena and produce responsive documents within 30 days from the date of this Order; and it is further

ORDERED that movant is directed to serve a copy of this order with notice of entry on the Trial Support Office (Room 158).

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: February 5, 2019



Eileen A. Rakower, J.S.C.