Dinunzio v Berezin
2019 NY Slip Op 31237(U)
May 1, 2019
Supreme Court, Suffolk County
Docket Number: 11882/2015
Judge: William G. Ford
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SHORT FORM ORDER **INDEX NO.: 11882/2015**

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE OF THE SUPREME COURT

Motions Submit Date: 12/13/18
Mot Conf Held: 10/10/18
Mot Seq 001 MG
Mot Seq 002 MD

PLAINTIFF'S COUNSEL:
Scott Lockwood, Esq.
375 Commack Rd., Ste 200
Deer Park, New York 11729

DEFENDANT'S COUNSEL:
Hirschel Law Firm, PC
71 South Central Ave., Ste 103
Valley Stream, New York 11580

JASON DINUNZIO,

Plaintiff,

-against-

RICHARD BEREZIN & RBNGG INC.,

Defendants.

On plaintiff's motion to compel compliance with a non-party subpoena *duces tecum* or in the alternative to punish for contempt for noncompliance with the same pursuant to CPLR 2308 & 3101(a); and on the cross-motion by non-party witness to quash a subpoena *duces tecum* pursuant to CPLR 2304, the following papers were considered in the Court's following determination:

1. Notice of Motion, Affirmation in Support & other supporting papers/exhibits;
2. Cross-Notice of Motion & Memorandum of Law;
3. Reply Affirmation in Further Support; and upon due deliberation and full consideration of all of the foregoing, it is

ORDERED that defendant's motion to quash three subpoenas for expert witness depositions pursuant to CPLR 2304 and CPLR 3101(d)(1)(iii) is **granted** as follows; and it is further

ORDERED that plaintiff's counsel is hereby directed to serve a copy of this decision and order with notice of entry by certified mail return receipt requested on defense counsel and personally on the non-party witness **no later than 15 days** from the entry of this order; and it is further

ORDERED that, if applicable, within 30 days of the entry of this decision and order, that defendant's counsel is also hereby directed to give notice to the Suffolk County Clerk as required by CPLR 8019(c) with a copy of this decision and order and pay any fees should any be required.

BACKGROUND

Before the Court is plaintiff's breach of contract action against defendants arising out of the complaint seeking money damages constituting unpaid wages and expectation damages from plaintiff's allegations of being entitled to certain profits from a business venture he and defendant were involved in. The action commenced with plaintiff's filing of summons and complaint on July 9, 2015. Defendants joined issue serving an answer with affirmative defenses dated September 24, 2015.

During discovery, on July 24, 2017, plaintiff's counsel took a pretrial deposition of defendant Berezin to *inter alia* determine the extent, nature and scope of profits defendant derived from the business venture. Plaintiff claims that at that deposition defendant testified that he derived no profits, but that his daily living expenses and other purchases were paid for by credit, his mother, and other friends.

On this basis, plaintiff now seeks discovery from defendant's mother, non-party witness Alice T. Berezin, seeking the production of financial documentation corroborative of defendant's claims of no profits and further related to his daily living expenses and purchases. Simply put, plaintiff seeks to obtain financial documentation corroborative or that would dispute defendant's claims concerning profits, the crux of plaintiff's complaint for damages, or to paint a picture of defendant's finances. For the relevant period, as plaintiff has claimed, and defendant has not disputed, defendant has resided with his mother, the non-party witness.

Following the deposition, on August 8, 2017 plaintiff's counsel on notice effectuated personal service of a subpoena *duces tecum* seeking the production of documents pertaining to "loans and monies" provided by non-party Alice Berezin to defendant Berezin. Acknowledging receipt of the subpoena, defense counsel corresponded with plaintiff's counsel via letter dated September 29, 2017 advising that Ms. Berezin would not be complying with the subpoena and would move to quash it, represented by defense counsel. The instant applications then followed.

STANDARD OF REVIEW

Discovery Generally

CPLR 3101(a) broadly mandates "full disclosure of all matter material and necessary in the prosecution or defense of an action." This provision is liberally interpreted in favor of disclosure (*see* ***Kavanagh v. Ogden Allied Maintenance Corp.***, 92 NY2d 952, 954; ***Allen v. Crowell–Collier Publ. Co.***, 21 NY2d 403, 406; ***Matter of Skolinsky***, 70 AD3d 845, 892 NYS2d 913; ***Riverside Capital Advisors, Inc. v. First Secured Capital Corp.***, 292 AD2d 515, 739 NYS2d 281; ***Ural v Encompass Ins. Co. of Am.***, 97 AD3d 562, 566, 948 NYS2d 621, 625–26 [2d Dept 2012]).

The test to be employed by the Supreme Court when determining discovery issues is one based on usefulness and reason (*see* ***Andon v. 302–304 Mott St. Assoc.***, 94 NY2d 740, 746, 709 NYS2d 873). However, discovery demands which are unduly burdensome, lack specificity, or seek privileged and/or irrelevant information are improper and will be vacated (*see* ***Board of Mgrs. of the Park Regent Condominium v. Park Regent Assoc.***, 78 AD3d 752, 753, 910

NYS2d 654; ***Bell v. Cobble Hill Health Ctr., Inc.***, 22 AD3d 620, 621, 804 NYS2d 362; ***Lopez v. Huntington Autohaus***, 150 AD2d 351, 352, 540 NYS2d 874; ***H.R. Prince, Inc. v Elite Envtl. Sys., Inc.***, 107 AD3d 850, 850, 968 NYS2d 122, 123–24 [2d Dept 2013]).

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 preparation for trial by sharpening the issues and reducing delay and prolixity.' " Discovery is not unlimited, however, and the supervision of discovery is generally left to the broad discretion of the trial court. At the same time, a party is **108 "not entitled to unlimited, uncontrolled, unfettered disclosure" (***Quinones v 9 E. 69th St., LLC***, 132 AD3d 750, 750, 18 NYS3d 106, 107–08 [2d Dept 2015]).

Accordingly, the supervision of disclosure and the setting of reasonable terms and conditions therefor rests within the sound discretion of the trial court and, absent an improvident exercise of that discretion, its determination will not be disturbed" (***Gould v Decolator***, 131 AD3d 445, 446–47, 15 NYS3d 138, 140 [2d Dept 2015][internal citations omitted]).

It is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims" (***Crazytown Furniture v. Brooklyn Union Gas Co.***, 150 AD2d 420, 421, 541 NYS2d 30; *see* Seigel, N.Y. Prac. § 345; CPLR 3101[a]; ***Herbst v. Bruhn***, 106 AD2d 546, 483 NYS2d 363; ***Andon v. 302–304 Mott St. Assocs.***, 94 NY2d 740, 746, 709 NYS2d 873; ***Palermo Mason Constr. v. AARK Holding Corp.***, 300 AD2d 460, 751 NYS2d 599; ***Vyas v Campbell***, 4 AD3d 417, 418, 771 NYS2d 375, 376 [2d Dept 2004]). "The burden of serving a proper demand is upon counsel, and it is not for the courts to correct a palpably bad one" (***Bell supra.***, 22 AD3d at 621).

Propriety of the Non-Party Subpoena

"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' " It is the one moving to vacate the subpoena who has the burden of establishing that the subpoena should be vacated under such circumstances (***Campbell v. City of New York***, 51 Misc.3d 1231(A)[Sup. Ct., Kings Co. 2016]).

Pursuant to CPLR 3101(a)(4), a party may obtain discovery from a nonparty in possession of material and necessary evidence, so long as the nonparty is apprised of the circumstances or reasons requiring disclosure. The notice requirement of CPLR 3101(a)(4) "obligates the subpoenaing party to state, either on the face of the subpoena or in a notice accompanying it, 'the circumstances or reasons such disclosure is sought or required' " (***Matter of Kapon v. Koch***, 23 NY3d 32, 39, 988 NYS2d 559, *quoting* CPLR 3101 [a][4]; *see* ***Velez v. Hunts Point Multi–Service Ctr. Inc.***, 29 AD3d 104, 111, 811 NYS2d 5). After the subpoenaing party has established compliance with the CPLR 3101(a)(4) notice requirement, disclosure from a nonparty requires no more than a showing that the requested information is relevant to the prosecution or defense of the action. However, the party or nonparty moving to vacate the subpoena has the initial burden of establishing either that the requested deposition testimony "is 'utterly irrelevant' " to the action or that " 'the futility of the process to uncover anything legitimate is inevitable or obvious' " (***Bianchi v. Galster Mgmt. Corp.***, 131 A.D.3d 558, 559, 15 N.Y.S.3d 189, 189-90 [2d Dept. 2015]; ***Ferolito v Arizona Beverages USA, LLC***, 119 AD3d

642, 643, 990 NYS2d 218, 219 [2d Dept 2014]; ***DiBuono v Abbey, LLC***, 163 AD3d 524, 525, 81 NYS3d 109, 111 [2d Dept 2018]).

Contempt for Disobedience with Non-Party Subpoena

Judiciary Law § 753 [A][5] reads in relevant part:

> **A**. A court of record has power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced, in any of the following cases:
>
> **5.** A person subpoenaed as a witness, for refusing or neglecting to obey the subpoena, or to attend, or to be sworn, or to answer as a witness.

A motion to punish a party for civil contempt is addressed to the sound discretion of the motion court (*see* ***Cassarino v. Cassarino***, 149 AD3d 689, 690, 50 NYS3d 558; ***Matter of Hughes v. Kameneva***, 96 AD3d 845, 846, 946 NYS2d 211; ***Chambers v. Old Stone Hill Rd. Assoc.***, 66 AD3d 944, 946, 889 NYS2d 598). To prevail on a motion to hold a party in civil contempt, the movant must establish by clear and convincing evidence (1) that a lawful order of the court was in effect, clearly expressing an unequivocal mandate, (2) the appearance, with reasonable certainty, that the order was disobeyed, (3) that the party to be held in contempt had knowledge of the court's order, and (4) prejudice to the right of a party to the litigation (see Judiciary Law § 753[A][3]; ***El–Dehdan v. El–Dehdan,*** 26 NY3d 19, 29; ***Matter of Fitzgerald***, 144 AD3d 906, 907, 41 NYS3d 271).

Once the moving party makes this showing, the burden shifts to the alleged contemnor to refute the movant's showing, or to offer evidence of a defense, such as an inability to comply with the order *(see* ***El–Dehdan v. El–Dehdan***, 26 NY3d at 35; ***Matter of Fitzgerald,*** 144 AD3d at 907, 41 NYS3d 271; ***Mollah v. Mollah***, 136 AD3d 992, 993, 26 NYS3d 298; ***Lundgren v. Lundgren***, 127 AD3d 938, 940–941, 7 NYS3d 393).

A hearing is required only if the papers in opposition raise a factual dispute as to the elements of civil contempt, or the existence of a defense *see* ***Matter of Fitzgerald***, 144 AD3d at 907, 41 NYS3d 271; ***Matter of Savas v. Bruen***, 139 AD3d 736, 737, 30 NYS3d 673; ***El–Dehdan v. El–Dehdan***, 114 AD3d 4, 17, 978 NYS2d 239, *aff'd.* 26 NY3d 19).

However, under Judiciary Law § 756, a contempt application must be in writing, must be made upon at least 10 days' notice, and must contain on its face the statutory warning that **"failure to appear in court may result in ... immediate arrest and imprisonment for contempt of court"** (Judiciary Law § 756). Since the defendant's oral application failed to comply with any of these procedural safeguards, the Supreme Court erred when it punished the plaintiff for contempt for failing to comply with its prior order (***Xand Corp. v Reliable Sys. Alternatives Corp.***, 35 AD3d 849, 850, 827 NYS2d 269, 270 [2d Dept 2006][emphasis in original]).

DISCUSSION

Applying well-reasoned precedent to the rivaling applications before the Court, the Court finds as follows. The non-party witness's motion to quash is **denied**. On the motion to quash, as a matter of substance, this Court does not find, as it is required to, that the sought discovery identified in the notice accompanying the subpoena *duces tecum* is wholly irrelevant or immaterial to the claims and defenses outlined in the parties' pleadings in this matter. Procedurally speaking, counsel for the non-party witness did not follow proper procedure and make a demand of plaintiff's counsel to withdraw the subpoena. Instead, movant determined not to comply and make the application. This notwithstanding, this Court disagrees with defendants' characterizations concerning the relevancy and materiality of the discovery sought and thus, the motion to quash is **denied**.

Therefore, this Court directs the non-party witness' compliance with the served subpoena **no later than** 30 days from receipt of a copy of this decision and order.

However, on the other hand, this Court also **denies** that branch of plaintiff's motion seeking a contempt citation against the non-party witness for her noncompliance with subpoena. As a matter of form, this Court agrees with defense counsel that plaintiff's motion fails to conform with the requirements of Judiciary Law promptly noticing the non-party witness that her noncompliance could exposure to civil liability or arrest.

The foregoing constitutes the decision and order of this Court.

Dated: May 1, 2019
Riverhead, New York

WILLIAM G. FORD, J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**