| **Blumenthal v Krochak** |
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| 2019 NY Slip Op 31388(U) |
| May 14, 2019 |
| Supreme Court, New York County |
| Docket Number: 158028/2018 |
| Judge: William Franc Perry |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. W. FRANC PERRY** **PART** **IAS MOTION 23EFM**

***Justice***

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ANDREW BLUMENTHAL

Plaintiff,

- v -

MICHAEL KROCHAK,

Defendant.

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**INDEX NO.** 158028/2018

**MOTION DATE** 05/02/2019

**MOTION SEQ. NO.** 002

**DECISION AND ORDER**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 35, 36, 37, 38, 39, 40, 41, 42

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

Plaintiff moves to quash a subpoena served on the custodian of records for non-party, Business Network International, Inc. ("BNI"). BNI has not complied with the subpoena. Plaintiff originally moved to quash the subpoena by notice of motion returnable on April 12, 2019. On March 26, 2019 at a compliance conference, after conferencing the issues with the court, plaintiff withdrew the motion filed as sequence 001, and this court issued a decision and order permitting the withdrawal of the motion. (NYSCEF Doc. Nos. 33 and 34). Plaintiff now moves for the identical relief as was requested in motion sequence 001. Defendant opposes the motion.

## BACKGROUND

This action arises out of a criminal assault wherein plaintiff alleges that he was sexually assaulted by defendant, Michael Krochak ("defendant") on March 27, 2018. It is alleged that defendant attempted and engaged in sexual touching, as well as attempted oral sexual touching at the defendant's dental office. (NYSCEF Doc. No. 1, ¶¶8-13). On or about June 5, 2018,

defendant Krochak pled guilty to violating Penal Law Section 130.55, Sexual Abuse in the Third Degree, a misdemeanor and was placed on probation and required to undergo court-mandated counseling. (NYSCEF Doc. No. 1, ¶¶15-16). Plaintiff is now seeking compensatory and punitive damages and has alleged causes action for assault, intentional infliction of emotional distress, and negligent infliction of emotional distress. (NYSCEF Doc. No. 1).

As is particularly relevant to this motion, plaintiff alleges that he first met defendant during a business/networking event that defendant contends was organized through non-party BNI. It is alleged that defendant had a unique relationship with and access to plaintiff and that defendant took advantage of that special relationship with plaintiff. (NYSCEF Doc. No. 1, ¶10).

On March 11, 2019, defendant served a subpoena on non-party BNI requesting the following information be provided on March 26, 2019: "Any communications with member Andrew Blumenthal regarding his alleged assault by member Michael Krochak, including any complaints filed by Mr. Blumenthal;" and "All communications by member Andrew Blumenthal for the period March 1, 2018-present." (NYSCEF Doc. No. 38).

On March 12, 2019, plaintiff filed motion sequence 001 to quash the subpoena served on BNI, claiming that the subpoena sought information that was not material or relevant, was highly burdensome on the subpoenaed parties, and was sought only to delay the action. (NYSCEF Doc. No. 21). In opposition to the motion, defendant submitted emails demonstrating that BNI was in possession of documents responsive to the subpoena. (NYSCEF Doc. Nos. 26-29). The court considers those emails in deciding motion sequence 002.

On March 26, 2019, the parties appeared at a compliance conference that had been scheduled by the court in the Preliminary Conference Order. (NYSCEF Doc. No. 6). In accordance with this Court's Rules, "If a party has made a discovery motion, a conference will

be held by the Court for the same date as oral argument and will be conducted before counsel is heard on the motion." In addition, this Court's Rules governing Preliminary and Compliance Conferences plainly provide: "Attorneys attending the conference are expected to be familiar with the underlying case and have the authority to discuss and resolve all discovery issues, this includes 'per diem' attorneys, junior associates and/or attorneys other than the lead attorney appearing before the Court at the conference. Attorneys must be able to provide information as to any pending appeals, prior motion practice, and outstanding discovery."

In accordance with these rules, when the parties appeared at the compliance conference on March 26, 2019, the pending motion to quash the subpoena was on the court's calendar and the parties were advised that the court had reviewed the motion and determined the discovery sought by the subpoena to be material and necessary to the defense of the serious allegations set forth in the complaint. Inasmuch as the motion was fully submitted, but was not returnable until April 12, 2019, the parties agreed to resolve motion sequence 001 at the conference. Based on this discussion, plaintiff's attorney withdrew the motion. (NYSCEF Doc. Nos. 33 and 34). In addition to resolving the discovery motion, the parties agreed to provide additional discovery as outlined in the Compliance Conference Order. (NYSCEF Doc. No. 33).

Notwithstanding plaintiff's withdrawal of his motion seeking to quash the subpoena, plaintiff has now filed the instant motion sequence 002, seeking the identical relief sought in the withdrawn motion. Plaintiff contends that the attorney who appeared at the March 26, 2019 conference, had "mistakenly agreed to withdraw" motion sequence 001and did so "against the instructions of Raiser & Kenniff, but also without any authority or permission to do so". (NYSCEF Doc. No. 37).

**STANDARD OF REVIEW/ANALYIS**

Pursuant to CPLR §3101 (a)(4), a party may obtain discovery from a nonparty in possession of material and necessary evidence. Additionally, CPLR §3120 provides, "After commencement of an action, any party may serve on any other party a notice or on any other person a subpoena duces tecum."

It is well settled that the purpose of a subpoena duces tecum is to compel the production of specific documents that are relevant and material to facts at issue in a pending judicial proceeding (see *Matter of Terry D.*, 81 NY2d 1042, 1044, 619 NE2d 389, 601 NYS2d 452 [1993]). It is equally well settled that a motion to quash a subpoena duces tecum should be granted only where the materials sought are utterly irrelevant to any proper inquiry (see *New Hampshire Ins. Co. v Varda, Inc.,* 261 AD2d 135, 687 NYS2d 261 [1999]; *Matter of Reuters Ltd. v Dow Jones Telerate,* 231 AD2d 337, 341, 662 NYS2d 450 [1997]). "Moreover, the burden of establishing that the requested documents and records are utterly irrelevant is on the person being subpoenaed" (*Gertz v Richards*, 233 AD2d 366, 366, 650 NYS2d 584 [1996]).

These legal standards, based on well-established decisional and statutory law, direct that "[t]here shall be full disclosure of all matters material and necessary in the prosecution or defense of an action, regardless of the burden of proof." CPLR 3101 (a). The Court of Appeals has emphasized that "[t]he 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. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publ.* Co., 21 NY2d 403, 406, 235 NE2d 430, 288 NYS2d 449 [1968]; see also *Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 746, 731 NE2d 589, 709 NYS2d 873 [2000]).

A party seeking discovery must satisfy the threshold requirement that the request is reasonably calculated to yield information that is "material and necessary"—i.e., relevant—regardless of whether discovery is sought from another party (see CPLR 3101 [a] [1]) or a nonparty (CPLR 3101 [a] [4]; see e.g. *Matter of Kapon v Koch*, 23 NY3d 32, 988 NYS2d 559, 11 NE3d 709 [2014]). The "statute embodies the policy determination that liberal discovery encourages fair and effective resolution of disputes on the merits, minimizing the possibility for ambush and unfair surprise" (*Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 376, 581 NE2d 1055, 575 NYS2d 809 [1991]).

Here, there can be no doubt that the narrowly tailored subpoena, requesting documents from non-party BNI, is reasonably calculated to yield information that is "material and necessary" and obviously relevant to the allegations plaintiff has made against defendant. Contrary to plaintiff's frivolous claim that the subpoena is "abusive" because it requests "any" and "all" communications relating to broad, nonspecific and ill-defined subject matters, the subpoena is narrowly drafted and relates to specific material and relevant information concerning the alleged assault that forms the very basis for plaintiff's complaint. (NYSCEF Doc. No. 38).

Moreover, the complaint alleges that the plaintiff first met defendant during a business/networking event that defendant contends was organized through non-party BNI. In addition, the emails submitted by defendant in opposition to the motion to quash, indicate that BNI has documents responsive to the subpoena served which to date BNI has not complied with. Obviously, the narrowly tailored subpoena requesting communications from BNI member Andrew Blumenthal regarding his alleged assault for the period March 1, 2018 to the present, is not only material and relevant, the information sought is precisely the type of information

envisioned by the liberal discovery mandates set forth in the CPLR and decisional case law interpreting those provisions.

It is unfortunate that plaintiff's attorney, having withdrawn the motion at the compliance conference on March 26, 2019, has refiled the identical motion, knowing that the court had discussed these issues at length with plaintiff's and defendant's attorneys, and had all agreed that the case law as applied to the facts here, demonstrates that the subpoena is narrowly drafted and seeks discovery that is material and necessary to defend the allegations in the complaint. As such, the court is dismayed that plaintiff now argues that the attorney who appeared at the conference did not have the authority to withdraw the motion.

Sending an attorney to appear before the court who does not have the authority or permission to resolve the issues presented, is in direct violation of this court's rules which require all attorneys who appear at conferences to be familiar with the underlying case and to have the authority to resolve all discovery issues. This conduct straddles very close to being frivolous conduct as defined by 22 NYCRR 130-1.1, that would merit the imposition of sanctions.

The failure to comply with the court's rules, not only impairs the efficient functioning of the court and the timely adjudication of motions and cases, it demonstrates disrespect for the integrity of the judicial process and the lawyers who engage their best efforts to comply with the court's rules and rely on their adversary's word, when they agree to withdraw a discovery motion based on established legal precedent. Ironically, plaintiff argues that the subpoena is "abusive" and is designed to delay adjudication of the claims alleged in the complaint, however, it is plaintiff's conduct here, that has delayed resolution of this matter.

"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' " (*Anheuser-Busch, Inc. v Abrams*, 71 NY2d 327, 331-332, 520 NE2d 535, 525 NYS2d 816 [1988], citing *Matter of Edge Ho Holding Corp.*, 256 NY 374, 382, 176 NE 537 [1931] and *Matter of La Belle Creole Intl., S.A. v Attorney-General of State of N.Y.*, 10 NY2d 192, 196, 176 NE2d 705, 219 NYS2d 1 [1961], quoting *Matter of Dairymen's League Coop. Assn., Inc. v Murtagh*, 274 App Div 591, 595, 299 NY 634, 86 NE2d 509 [1948], aff'd 299 NY 634, 86 NE2d 509 [1949]). It is the one moving to vacate the subpoena who has the burden of establishing that the subpoena should be vacated under such circumstances (see *Matter of Dairymen's League Coop. Assn.,* 274 App Div at 595-596; see also *Ledonne v Orsid Realty Corp.*, 83 AD3d 598, 599, 921 NYS2d 249 [1st Dept. 2011]).

Here, plaintiff has simply failed to demonstrate that the subpoena served on non-party BNI seeks information that is "utterly irrelevant to any proper inquiry" related to plaintiff's claims. Conversely, defendant has shown that the information sought from BNI is necessary and relevant to the defense of plaintiff's claims. Moreover, defendant has demonstrated that following the incident that forms the basis of the complaint, plaintiff had communicated with people at BNI regarding the allegations set forth in the complaint, indicating that BNI is in possession of documents responsive to the subpoena. (NYSCEF Doc. Nos. 26-29). This material is subject to full disclosure pursuant to CPLR §3101 (a)(4) and must be produced by BNI in response to the subpoena.

## CONCLUSION

Accordingly, the motion to quash the subpoena is denied, and it is hereby,

ORDERED that plaintiff's motion, sequence no. 002, to quash a subpoena returnable in this court on March 26, 2019, and served upon Business Network International, Inc. on March 11, 2019, is denied; and it is further

ORDERED that the items sought in the subpoena shall be produced by Business Network International, Inc. within 20 days from service of a copy of this order with notice of entry.

5/14/2019
DATE

W. FRANC PERRY, J.S.C.

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| CHECK ONE: | [ ] | CASE DISPOSED | | [X] | NON-FINAL DISPOSITION | | |
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| APPLICATION: | [ ] | SETTLE ORDER | | [ ] | SUBMIT ORDER | | |
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