

Rosenthal v Meza

2019 NY Slip Op 32674(U)

September 9, 2019

Supreme Court, New York County

Docket Number: 656351/2017

Judge: Barbara Jaffe

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM

Justice

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INDEX NO. 656351/2017

ERIC ROSENTHAL, NICHOLAS CASCIO,

MOTION DATE _____

Plaintiffs,

MOTION SEQ. NO. 002

- v -

DEOGENE MEZA, MELODY MEZA, THE
FUTURES GROUP IT LLC, FUTURES GROUP
HOLDINGS INC., FUTURES GROUP STAFFING
SOLUTIONS INC.,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 32-49, 51-54
were read on this motion to/for quash subpoena, fix conditions.

Nonparty LM Cohen & Co. moves pursuant to CPLR 2304 for an order quashing a subpoena directed to it and/or pursuant to CPLR 3103 for a protective order. Defendants Meza and the Futures Group IT, LLC (Futures) join in the motion. Plaintiffs oppose. The action is for unpaid commissions and material misrepresentations concerning the commissions. Plaintiffs' salient claim is that defendants possessed sufficient money to pay the commissions and failed to do so. LM Cohen provided accounting services to Futures and personally, to the Mezas.

It is not disputed that by letter dated December 6, 2018, in response to a subpoena *duces tecum* and *ad testificandum* dated November 24, 2017 served on LM Cohen's founding partner Cohen (NYSCEF 36), and pursuant to a preliminary conference order dated May 16, 2017, counsel for LM Cohen provided plaintiffs with email correspondence among nonparty accountants and defendants and those associated with Futures, invoices pertaining to the professional services rendered by LM Cohen to defendants, and courtesy copies of Futures' 2011

tax returns. Counsel added that upon receipt of authorizations for the release of information in accordance with the policies and procedures of the Internal Revenue Service, such information would be released. (NYSCEF 37). Counsel supplemented LM Cohen's responses to the subpoena on January 22, 2019. (NYSCEF 38). Cohen was deposed on October 17, 2018. (NYSCEF 43).

The subpoena sought to be quashed is directed to Thomas Procida, CPA, an LM Cohen accountant, whereby he is required to produce all books and records regarding defendants' business and appear for a deposition. Plaintiffs explain therein that the documents sought are material and necessary as relating specifically to the unpaid commissions earned and as to their allegations of "misuse of Defendants['] assets in contravention of their obligations to pay Plaintiffs." A copy of the complaint is annexed. (NYSCEF 36).

I. DEFENDANTS' CONTENTIONS

LM Cohen maintains that it has produced "about 81 MB of documents responsive to request 1 through 16" (NYSCEF 37) and its founding partner for deposition, and that the subpoena is facially deficient for lack of the circumstances or reasons for seeking such documentation. It also claims that the subpoena is overbroad in terms of both subject matter and time which renders it unreasonable and burdensome, that it seeks some irrelevant and confidential documentation such as employment records, payroll journals, employment and unemployment returns filed, and correspondence reflecting transactions among defendants and their employees. Even if certain categories could lead to discovery of relevant information, it asserts, seeking "any and all" documents render the particular request overly board.

In seeking to depose Procida, LM Cohen argues that, absent a showing that he possesses information material and relevant to plaintiffs' trial preparation, his deposition should not be

compelled, and as LM Cohen's partner and founding member has already been deposed, Procida's deposition is "completely irrelevant."

In the alternative, LM Cohen asks that a protective order limit the scope of the subpoena to relevant documentation, and that plaintiffs reimburse LM Cohen for the costs of responding.

II. PLAINTIFFS' CONTENTIONS

In opposition, plaintiffs allege that in the course of his deposition, Cohen "heavily implicat[ed]" Procida in defendants' "financial operations." (NYSCEF 42). They also maintain that they sufficiently set forth the circumstances or reasons for the subpoena and argue that as Procida was the "main contact" with defendants with sole responsibility for preparing Futures' financial statements and that he was active in the "day-to-day services of" Futures and in assisting with efforts requiring "intimate knowledge" of their financial health, he would certainly possess relevant documents concerning the unpaid commissions. Plaintiffs also reference email correspondence concerning the unpaid commissions, which were forwarded to Procida, and concerning defendants' "precarious" finances.

Plaintiffs dispute any obligation to defray LM Cohen's expenses in responding to the instant subpoena by denying that Procida is a "quintessential, innocent, disinterested bystander," referencing the Federal Rules of Civil Procedure, and maintaining that given his involvement with defendants' finances, Procida "should have reasonably anticipated being drawn into subsequent litigation." They also observe that defendants' attempt to join in LM Cohen's objections is untimely.

III. DEFENDANTS' REPLY

In light of the discovery provided to date by it, LM Cohen argues that plaintiffs' reasons for additional discovery are insufficient and apart from reiterating its initial arguments, contends

that the subpoena evidences plaintiffs' strategy to "set out their theories regarding Defendants['] financials, and their dishonesty with respect to paying Plaintiffs' commissions which were allegedly owed." They observe that plaintiffs "purposely" fail to mention that party depositions have not yet been conducted, and that financial documentation cannot be provided without defendants' consent.

IV. ANALYSIS

Pursuant to CPLR 2304, a court may quash, modify or fix conditions related to a subpoena. An application to quash a subpoena should be granted "only 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." The nonparty movant bears the burden of proof on the motion. (*Kapon v Koch*, 23 NY3d 32, 38 [2014]).

"There 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." (CPLR 3101[a][4]; *Kapon*, 23 NY3d at 38). The statute is liberally interpreted 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.*, citing *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]).

Although the nonparty bears the burden of proof on a motion to quash, the party seeking to subpoena the nonparty must state, either on the face of the subpoena or in a notice accompanying it, 'the circumstances or reasons such disclosure is sought or required.'" (*Kapon*, 23 NY3d at 39, citation omitted). Such notice was intended by the Legislature "to apprise a stranger to the litigation [of] the 'circumstances or reasons' why the requested disclosure was

sought or required.” (*Id.*). The Court held that the subpoenas at issue satisfied the notice requirement, as they included the date, time, and location of the depositions, and a copy of the pertinent complaint was affixed to them, thereby affording sufficient information with which to challenge them on a motion to quash.

Here, as plaintiffs show all that the subpoena in issue contains all of the information contained in those at issue in *Kapon* with respect to notice, the burden shifts to LM Cohen. Given plaintiffs’ and Cohen’s identification of Procida as a person with information relevant to plaintiffs’ claims and defendants’ finances, LM Cohen fails to demonstrate that the futility of the process to uncover anything legitimate is inevitable or obvious or that the information sought is utterly irrelevant to any proper inquiry.

LM Cohen also cites no authority for the proposition that party depositions must be conducted before non-party depositions or that the disclosure of some documents renders a party’s subsequent request for documents from a non-party and/or a non-party deposition unenforceable. And, as Procida is not a disinterested witness but appears to have been privy to plaintiffs’ requests for the payment of their commissions during and after their employment with defendants, plaintiffs need not reimburse LM Cohen’s costs for complying with the subpoena. (*See e.g., Dow Chem. Co. v Reinhard*, 2008 WL 1068302 [SD NY 2008] [federal rule providing for payment of costs for production by non-party did not apply where non-party was not “quintessential, innocent, disinterested bystander” and should have reasonably anticipated being drawn into litigation due to its relationship to party]).

However, a request for any and all documents without a time limitation is overbroad. Thus, the subpoena is modified to the extent of directing the production of documents from 2008

to the present. To the extent that defendants' consent is required for the production of any of the documents, defendants are directed to provide it forthwith.

V. CONCLUSION

Accordingly, it is hereby

ORDERED, that the motion to quash the subpoena issued to Thomas Procida is granted solely to the extent of limiting disclosure to the period of 2008 to the present, and is otherwise denied, and Procida is directed to produce the documents identified in the subpoena and appear for a deposition within 60 days of the date of this order.

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9/9/2019
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					REFERENCE