Shea v Mad River Bar & Grille
2019 NY Slip Op 32682(U)
September 6, 2019
Supreme Court, New York County
Docket Number: 157627/2018
Judge: W. Franc Perry

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

----------X

KATHLEEN SHEA,

Plaintiff,

- v -

MAD RIVER BAR & GRILLE, 'JOHN DOE #1", first and last names fictitious and unknown and intending to represent an individual known to the petitioner as 'MAD RIVER DANNY", the bouncer at MAD RIVER BAR & GRILLE and 'JOHN DOE #2", first and last names fictitious and unknown and intending to be the bartender at MAD RIVER BAR & GRILLE,

Defendants.

----------X

INDEX NO. 157627/2018

MOTION DATE May 9, 2019

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 21, 22, 23, 24, 25, 26, 27, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73

were read on this motion and cross motion to CONTEMPT/COMPEL/QUASH.

In this dram shop action, commenced by filing a Summons with Notice on August 16, 2018, plaintiff seeks an order of contempt against nonparty Alexander Calabrese, for failing to comply with a nonparty subpoena to give testimony regarding his knowledge about the circumstances of Christopher Shea's death (plaintiff's son). (NYSCEF Doc. No. 24). Alternatively, plaintiff seeks to compel Calabrese to appear for a deposition within twenty days. Plaintiff also moves for an order compelling nonparty Hans Seheer-Thoss to appear to be deposed pursuant to the subpoena served upon him on November 15, 2018. Nonparty Seheer-Thoss has not appeared or opposed this motion. Nonparty Calabrese has cross moved seeking a protective order and to quash the subpoena issued by plaintiff and served on November 15, 2018. Neither a demand for a complaint nor a complaint has been filed.

BACKGROUND

This court previously issued an order quashing a prior subpoena served upon nonparty Calabrese finding that plaintiff had served the subpoena less than 20 days prior to the deposition and because the subpoena did not provide sufficient notice pursuant to CPLR §3101(a)(4). Specifically, because there had not been a complaint served in the action, and based upon the paucity of the notice in the prior subpoena, the court found that it did not provide the nonparty with adequate notice of the circumstances or reasons why such disclosure was sought. (NYSCEF Doc. No. 20). Following the court's decision, plaintiff served a new subpoena upon nonparty Calabrese and nonparty Seheer-Thoss on November 15, 2018, seeking their depositions on December 10, 2018.[1] The subpoena provided that plaintiff is seeking "testimony in this action with regard to your knowledge regarding the circumstances of Christopher Shea's death including the night of Thursday April 7, 2016, which will support this dram shop claim as you were with Christopher at the defendant bar on that night and are fully familiar with the circumstances therein." (NYSCEF Doc No. 24).

In her motion to compel, plaintiff argues that her son died of intoxication with a finding of alcohol and drugs in his system, including fentanyl, and that Christopher was accompanied by nonparty Calabrese, when he went to the Mad River Bar and Grille ("Mad River Bar" and/or "bar") the evening leading up to his death. It is plaintiff's contention, upon information and belief, that Mr. Calabrese is "associated" with known dealers of prescription and non-prescription drugs to minors, who used Mad River Bar as their "offices". (NYSCEF Doc. No. 21, ¶6). Plaintiff asserts that "[t]his is not the first time a minor has died after being in the company of Mr. Calabrese. While at Mad River Bar and Grille with Mr. Calabrese, the decedent had

[1] Although plaintiff served a Subpoena Duces Tecum and Ad Testificandum, no documents were requested and the motion seeks only to compel deposition testimony.

telephone communications with Mr. Hans Seherr-Thoss. Mr. Seherr-Thoss continued to have telephone communications with the decedent up until hours before his death." (Id. at ¶¶7-9). Plaintiff does not submit any documentary proof to support these allegations nor is the motion supported by an affidavit from the plaintiff, or anyone else with personal knowledge.

Rather, plaintiff relies on the affirmation of her counsel and summarily concludes that nonparty Calabrese and nonparty Seherr-Thoss, are fully familiar with the details and occurrences the night Christopher was present at Mad River Bar prior to his passing. Plaintiff contends that the cross motion to quash is another attempt to stonewall and delay production of relevant evidence and testimony, as information from nonparty Calabrese is necessary for Kathleen Shea's dram shop complaint against the defendant bar. Significantly, however, plaintiff has not alleged that any person was injured as a result of Christopher Shea's or anyone else's alleged intoxication on that night.

Nonparty Calabrese contends that service of the new subpoena is inconsistent with this court's prior order and alternatively, even if the court finds that service of the subpoena does not violate the court's prior order, the subpoena should be quashed as it is still deficient and does not provide notice of the circumstances or reasons that nonparty Calabrese's deposition is sought or required. Calabrese maintains that given the procedural history which demonstrates that plaintiff has commenced three separate actions, by filing a summons with notice and has not yet filed a complaint against defendants Mad River Bar and John Does 1 and 2, this court should issue a protective order, and not permit plaintiff to serve any further nonparty subpoenas until a complaint has been filed and defendants have answered the complaint. (NYSCEF Doc. No. 65).

Additionally, Calabrese argues that plaintiff's motion to compel makes clear that she considers Calabrese culpable in her son's death and an eventual defendant. (NYSCEF Doc. No.

21, ¶6-7). As noted, the procedural history indicates that plaintiff initially commenced an action against Calabrese and others, and subpoenaed him prior to filing a complaint. (NYSCEF Doc. No. 64). When Calabrese filed a Demand for a Complaint pursuant to CPLR §3012, plaintiff voluntarily dismissed the action, without prejudice, only to re-file the instant action without naming Calabrese as a defendant and is again seeking to depose him prior to drafting and filing a complaint. (NYSCEF Doc. No. 10). As such, Calabrese maintains that despite plaintiff's contentions, she is in fact seeking pre-action disclosure and that the standard set forth in CPLR §3102(c) cannot be met by plaintiff. Specifically, Calabrese argues that pre-action disclosure cannot be used as a fishing expedition to ascertain whether a cause of action exists and that since it appears that Calabrese may be a defendant in this action or the other pending action, he is entitled to the protections set forth in CPLR §3102(c). For the reasons that follow, the motion to compel is denied and the cross motion to quash is granted.

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, so long as the nonparty is apprised of the circumstances or reasons requiring disclosure. Once the notice requirements are met, disclosure from a nonparty requires no more than a showing that the requested information is "material and necessary" (see *Matter of Kapon v Koch*, 23 NY3d 32, 988 N.Y.S.2d 559, 11 N.E.3d 709 [2014]).

As an initial matter, this court's prior decision did not set conditions that must be met by plaintiff prior to serving a nonparty subpoena. Rather, the court granted the motion to quash the prior subpoena on the basis that plaintiff had not complied with the notice provisions set forth in CPLR §3101(a)(4). (NYSCEF Doc. No. 20). Accordingly, to the extent nonparty Calabrese

seeks to quash the subpoena based on this court's prior decision, that portion of the motion is denied.

Turning to the issue of whether the current subpoena provides sufficient notice, in order to obtain discovery from a nonparty, "'the subpoenaing party must first sufficiently state the 'circumstances or reasons' underlying the subpoena (either on the face of the subpoena itself or in a notice accompanying it)" (*Ferolito v Arizona Beverages USA, LLC*, 119 AD3d 642, 643, 990 NYS2d 218 [2d Dept 2014] quoting *Kapon v Koch*, 23 NY3d at 34; accord *Reid v Soults*, 138 AD3d 1091, 1092, 30 N.Y.S.3d 669 [2d Dept 2016]). More specifically, the subpoena must detail the relationship between the nonparty and the parties and provide the nonparty with ample information to challenge the subpoena. (*Ferolit*o, 119 AD3d at 643).

"[W]here disclosure is sought from a nonparty, the nonparty shall be given notice stating the circumstances or reasons such disclosure is sought or required. The purpose of such requirement is presumably to afford a nonparty who has no idea of the parties' dispute or a party affected by such request an opportunity to decide how to respond." *Velez v Hunts Point Multi-Serv. Ctr., Inc.* (29 AD3d 104, 110, 811 NYS2d 5, 9, [1st Dept 2006]). Contrary to plaintiff's contention, the 1984 amendments to CPLR section 3101(a)(4), did not eliminate the subpoenaing party's obligation to provide notice of the circumstances that the testimony is being sought from the nonparty. Indeed, as the Court of Appeals explained in *Kapon v Koch*, "[a]lthough the nonparty bears the initial burden of proof on a motion to quash, section 3101 (a) (4)'s notice requirement nonetheless 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." (*Kapon v Koch*, 23 NY3d at 39). In finding the notice requirements had been met in *Kapon,* the Court reasoned that the subpoena, "not only included the date, time and location of

the depositions, but also affixed copies of the amended complaint in the California action detailing the relationship between AMC and Kurniawan. The notice served the function intended by the legislature: it gave petitioners sufficient information to challenge the subpoenas on a motion to quash." (*id.*) Indeed, the 1984 amendments did not eliminate the necessary protections to avoid abuses of nonparty witnesses under CPLR 3103 and 3104.

Here, the face of the subpoena and the deposition notice provide that plaintiff is seeking "testimony in this action with regard to your knowledge regarding the circumstances of Christopher Shea's death including the night of Thursday April 7, 2016, which will support this dram shop claim as you were with Christopher at the defendant bar on that night and are fully familiar with the circumstances therein." (NYSCEF Doc No. 24). As noted, no complaint has been filed and even though plaintiff has commenced three separate actions, two of which remain pending, the only activity related to litigating this action, has involved plaintiff's attempts to depose the nonparties. As such, there is no context within which to evaluate the "circumstances" noted on the face of the subpoena because no complaint has been filed, issue has not been joined, and no discovery has taken place.

Additionally, the subpoena issued to nonparty Calabrese and nonparty Seheer-Thoss, does not detail the relationship between the nonparties and the defendants, and simply does not provide the nonparties with sufficient information to challenge the subpoena. Plaintiff does not even attempt to detail whether the nonparties know John Does 1 and 2, or whether the nonparties are the John Does. Plaintiff argues that Mr. Calabrese is being subpoenaed solely as a third-party witness that has information surrounding Christopher Shea's death necessary to prove a dram shop case against the defendants. Based on this record, however, where the Summons with Notice cryptically denotes that the "the nature of this action is: Dram Shop", the subpoena does

not sufficiently provide the "circumstances or reasons" that the discovery sought from these nonparties (who were previously named as defendants in an action discontinued by plaintiff without prejudice), is necessary to litigate a dram shop action against the bar and the John Does. Moreover, there are no allegations that Christopher Shea's or someone else's intoxication led to another person being injured that night, a key element to a strict liability dram shop claim. (see *Adamy v Ziriakus*, 92 NY2d 396, 400, 704 NE2d 216, 681 NYS2d 463 [1998]; *Sherman v Robinson*, 80 NY2d 483, 486-487, 606 NE2d 1365, 591 NYS2d 974 [1992] [General Obligations Law § 11-101 (1), known as the Dram Shop Act, makes a party who unlawfully sells alcohol to another person liable for injuries caused by reason of that person's intoxication]).

Indeed, plaintiff has not submitted any information that would allow nonparty Calabrese and nonparty Seheer-Thoss to challenge whether the information being sought from them is material, necessary and relevant to the dram shop claim asserted in the summons with notice. Rather, plaintiff's counsel summarily claims, without citation to any evidence or affidavit by a person with knowledge, that this is not the first time a minor has died after being in the company of Mr. Calabrese and that Mr. Calabrese and Mr. Hans Seherr-Thoss, had telephone communications with the decedent. Moreover, plaintiff argues that she is seeking the nonparty depositions to maintain and go forward with this action, to obtain evidence that will show their involvement in Christopher Shea's death. (NYSCEF Doc. No. 21, ¶¶11 and 22). The additional information in the subpoena, contradicts the accusatory and conclusory statements set forth in the motion to compel, and does not provide sufficient detail as to why the nonparties' testimony is being sought to support a dram shop action against the named defendant bar.

While the First Department has allowed the lack of notice on the face of the subpoena to be remedied by the party opposing the motion to quash, here, plaintiff's motion papers do not

remedy the lack of notice but rather compounds it. (see *Velez v Hunts Point Multi-Serv. Ctr., Inc.*, 29 AD3d at 115). In support of her motion to compel, plaintiff has argued that Calabrese was with the decedent at the Mad River Bar the night that led to Christopher Shea's death, and will be able to testify as to the details of the underage decedent's admission to the bar and service of alcohol on that fateful night. The subpoena does not provide any information regarding the relationship between the nonparties and the named defendant or the John Does, the basis of plaintiff's claims or her theory of the case.

As noted, there are no allegations that the decedent's or someone else's intoxication led to another person being injured which is a critical element in a dram shop action. Merely stating the witness has knowledge of the underlying incident because he was at the bar that night, is not specific enough to provide the subpoenaed individual with enough information regarding the circumstances of why plaintiff is seeking to depose him. (see *Gonzalez v. Newport E., Inc.,* Index No. 113985/2011, 2014 Misc. LEXIS 6081 [N.Y. Cnty. Dec. 22, 2014]) [where the court granted the motion to quash the subpoena finding that simply stating that the witness has knowledge of the incident is not sufficient to provide the subpoenaed individual with enough information regarding why he is to be questioned]). Nonparty Calabrese correctly argues that he is no better position than he was on September 7, 2018 when he was served with plaintiff's second subpoena that was quashed by this court's prior decision and order.

Plaintiff represents that the instant subpoena is not seeking pre-action discovery, it is seeking discovery from a third party, necessary to prove the elements of a dram shop claim against the bar. This circular argument however, is not supported by any evidence and is made in a vacuum as no complaint has been filed and issue has not been joined. Moreover, while it is certainly understandable that plaintiff would want to depose the people who were with her son

on the night of his death, plaintiff has simply glossed over the deficiency of the notice provided in the subpoena and the contradictory statements set forth in the motion to compel which accuse the nonparties of involvement in Christopher Shea's death. (NYSCEF Doc. No. 21, ¶¶11 and 22). On this record, the notice required to obtain discovery from nonparties is deficient because plaintiff has simply not provided enough information to allow the nonparty to challenge whether the testimony sought from them is material and necessary to litigate a dram shop claim.

Notwithstanding the broad scope of liberal discovery favored by our courts, it is not unlimited; and when it is sought from a nonparty it is only permitted "[a]fter the subpoenaing party has established compliance with the CPLR 3101 (a) (4) notice requirement". (*Kapon v Koch*, 23 NY3d at 39). This notice must be sufficient to allow the nonparty to challenge whether the information being sought is material and relevant to the claims asserted. On this record, there are no claims asserted other than the conclusory allegations set forth in plaintiff's counsel's affirmation which lacks probative value as it is not supported by citation to any evidence or an affidavit by a person with knowledge. There is only a summons with notice, there is no complaint and no demand for a complaint.

The deficiency of the notice is compounded by the fact that plaintiff's expressed justification for seeking the nonparty testimony is to support a dram shop claim, yet there are no allegations that demonstrate plaintiff can even allege a meritorious dram shop claim against the bar and plaintiff has made conclusory allegations in support of the motion to compel that blatantly contradict the reasons set forth in the face of the nonparty subpoena. When seeking discovery from a nonparty, it is critical that the nonparty be provided with ample information to challenge the subpoena (see CPLR 3101 [a] [4]; *Kapon v Koch*, 23 NY3d at 39; *Velez v Hunts Point Multi-Serv. Ctr., Inc.*, 29 AD3d at 110; *Ferolito v Arizona Beverages USA, LLC*, 119

AD3d at 643). This court finds the notice provided to the nonparties here, does not satisfy the requirements set forth in §3101(a)(4).

Reviewing the subpoena as one seeking pre-action disclosure pursuant to CPLR §3102(c), does not compel a different result. The law is settled that disclosure in advance of service of a summons and complaint is available only where there is a demonstration that the party bringing such a petition has a meritorious cause of action and that the information being sought is material and necessary to the actionable wrong. (see *Liberty Imports v Bourguet*, 146 AD2d 535, 536, 536 NYS2d 784 [1st Dept 1989]). Thus, while a pre-action examination may be appropriate to facilitate accurate pleading, it is not permissible as a fishing expedition to ascertain whether a cause of action exists (*id.* at 536; see also, *Matter of Stewart v New York City Tr. Auth.*, 112 AD2d 939, 492 NYS2d 459 [2d Dept 1985]). Only when "'the facts alleged state a cause of action . . . an examination to determine the identities of the parties and what form or forms the action should take is appropriate'" (*Matter of Stewart v New York City Tr. Auth.*, 112 AD2d at 940). Generally, the determination of whether a party has demonstrated merit lies in the sound discretion of the trial court (*Matter of Peters v Sotheby's Inc.*, 34 AD3d 29, 821 NYS2d 61 [1st Dept 2006], lv denied 8 NY3d 809, 865 NE2d 1257, 834 NYS2d 90 [2007]).

Here, although plaintiff contends that she is not seeking pre-action disclosure but rather is attempting to obtain discovery from nonparties after having commenced an action by filing a summons with notice, the arguments advanced in support of the motion to compel demonstrate otherwise. Specifically, plaintiff argues that "the testimony of both witnesses, under oath, is necessary for maintaining and going forward with this action" and that nonparty Calabrese's counsel is "attempting to stonewall and delay production of this necessary and relevant evidence

and testimony that will show his own involvement in decedent's death" (NYSCEF Doc. No. 21, ¶¶11 and 22).

Based on the arguments advanced, coupled with the procedural history of this action, it does appear, despite her protestations to the contrary, that plaintiff is attempting to depose the nonparties to obtain information to draft a complaint against them or the John Does. As noted, however, plaintiff cannot meet the standard set forth in §3102(c) to justify deposing the nonparties prior to drafting a complaint. The purported dram shop action against Mad River Bar, asserted in the Summons with Notice, is based solely on the conclusory statements of plaintiff's counsel. Indeed, plaintiff has conceded that she is seeking the nonparty depositions to maintain and go forward with this action, to obtain evidence that will show their involvement in Christopher Shea's death. (NYSCEF Doc. No. 21, ¶¶11 and 22). As noted, CPLR 3102 (c) is not available for such a purpose. To the extent that nonparty Calabrese is a potential defendant in this action, he is entitled to the protection of CPLR 3102 (c) and to have plaintiff's claims reduced to specific allegations prior to being deposed. Accordingly, no basis for pre-action disclosure has been established by plaintiff here.

As has been heretofore noted, with respect to nonparty discovery, the party seeking disclosure must satisfy the threshold notice requirement set forth in CPLR §3101(a)(4) and the determination of whether a particular discovery demand is appropriate lies "within the sound discretion of the trial court, which must balance competing interests." (Id.; *Santariga v McCann*, 161 AD2d 320, 555 N.Y.S.2d 309 [1st Dept 1990] [the scope and supervision of disclosure is a matter within the sound discretion of the court in which the action is pending]).

We turn now to nonparty Calabrese's request for a protective order. Specifically, a protective order is sought to permit nonparty Calabrese to appear for deposition only after a complaint has been filed and Mad River Bar appears in the action and answers the complaint.

CPLR 3103(a) states in relevant part that "[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...". The protective order is designed to "prevent unreasonable annoyance ... disadvantage or other prejudice to any person or the courts." (See, CPLR 3103[a]). "The burden of establishing any right to protection is on the party asserting it; the protection claimed must be narrowly construed; and its application must be consistent with the purposes of the underlying immunity." (*148 Magnolia, LLC v Merrimack Mut. Fire Ins. Co.,* 62 AD3d 486, 487, 878 N.Y.S.2d 727 [1st Dept 2009]).

CPLR 3103 can be invoked on motion by any party or person from whom disclosure is sought or by the court *sua sponte*, "to limit, condition, or regulate 'the use of any disclosure device.' More significantly, and manifesting the range of power that CPLR 3103(a) confers on the court, it can be used to deny the use of the device, or of all devices." (see, Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3103:1).

Here, the court concludes that a protective order is necessary to prevent "disadvantage or other prejudice" to the nonparties whose testimony is sought by plaintiff "to maintain and go forward with this action", "to obtain evidence that will show their involvement in Christopher Shea's death". (NYSCEF Doc. No. 21, ¶¶11 and 22). As noted, plaintiff has not satisfied the notice requirements set forth in CPLR 3101(a)(4) and has failed to meet the standard required for pre-action disclosure under §3102(c). Additionally, the record demonstrates that when nonparty Calabrese was sued as a defendant and he demanded a complaint, plaintiff voluntarily discontinued

the action without prejudice and without filing a complaint, and then commenced this action filing a Summons with Notice, against defendants Mad River Bar, John Doe1 and John Doe 2; plaintiff then served her third subpoena seeking deposition testimony from nonparty Calabrese and nonparty Seheer-Thoss.

In the interest of fairness and as a matter of policy, nonparties should not be burdened with responding to subpoenas for lawsuits in which they have no stake or interest unless the particular circumstances of the case require their involvement. (see, *Kooper v Kooper*, 74 AD3d 6, 18, 901 N.Y.S.2d 312 [2d Dept 2010]). Here, plaintiff has failed to demonstrate the circumstances necessary to require nonparty depositions to occur in an action where no complaint or demand for complaint has been filed, issue has not been joined and no discovery has taken place. As such, a protective order is issued to the nonparties to prevent unreasonable annoyance, disadvantage, and prejudice, and the deposition on oral examination of nonparties Alexander Calabrese and Hans Seheer-Thoss, by plaintiff shall not take place until plaintiff files a complaint in this action against defendant Mad River Bar and Grille and said defendant appears and answers the complaint. Accordingly, it is hereby,

ORDERED that plaintiff's motion, sequence no. 002, to hold Alexander Calabrese in contempt is denied; and it is further

ORDERED that plaintiff's motion, sequence no. 002, to compel Alexander Calabrese to appear to be deposed is denied; and it is further

ORDERED that plaintiff's motion, sequence no. 002, to compel Hans Seheer-Thoss to appear to be deposed is denied; and it is further

ORDERED that nonparty Calabrese's cross motion to quash the subpoena is granted; and it is further

ORDERED that the motion for a protective order of nonparty Alexander Calabrese is granted and the court grants a protective order to nonparty Hans Seheer-Thoss; and it is further;

ORDERED that, in order to prevent unreasonable annoyance, disadvantage, and prejudice, the deposition on oral examination of nonparties Alexander Calabrese and Hans Seheer-Thoss, by plaintiff shall not take place until plaintiff files a complaint in this action against defendant Mad River Bar and Grille and said defendant appears and answers the complaint.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

9/6/2019
DATE

W. FRANC PERRY, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE