

Buckstine v Schor

2019 NY Slip Op 34918(U)

April 3, 2019

Supreme Court, Westchester County

Docket Number: Index No. 57710/2016

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER-COMPLIANCE PART

-----X
HANNAH BUCKSTINE,

Plaintiff,

-against-

JORDAN SCHOR, JORDAN'S OF NEW PALTZ, L.L.C.,
L'CORE ENTERPRISE CORP., KEITH CARPENTIER,
WAYNE BRADFORD, and ROBERT GERMINARA,

Defendants.

-----X
L'CORE ENTERPRISE CORP.,

Third-Party Plaintiff,

-against-

WAYNE BRADFORD,

Third-Party Defendant.

-----X
LEFKOWITZ, J.

The following papers were read on the motion by non-party Keith Carpentier for an order pursuant to CPLR 2304, 3101 and 3106 quashing the subpoena issued to non-party Keith Carpentier; pursuant to CPLR 3103 issuing a protective order as to said subpoena; for costs pursuant to 22 NYCRR 130-1.1(c)(2); and for such other and further relief as this court deems just, proper and equitable.

- Order to Show Cause - Affirmations in Support - Memorandum of Law - Exhibits A-L - Affidavit - Proof of Service
- Affirmation in Opposition
- Defendant's Affirmation in Support

Upon the foregoing papers and the proceedings held on January 7, 2019, the motion is

decided as follows:

This is an action to recover damages for personal injuries allegedly sustained by plaintiff as a result of a fall down stairs at 52 Main Street, New Paltz, NY that occurred on October 25, 2014, when she was a patron at a pizzeria operated by Jordan Schor and Jordan's of New Paltz, L.L.C. ("the Jordan defendants") on premises leased from defendant/third-party plaintiff L'Core Enterprise Corp. ("L'Core").

Plaintiff commenced this action against the Jordan defendants and L'Core with the filing of a summons and complaint on May 31, 2016. An amended complaint was then filed on August 1, 2016, followed by a second amended complaint on December 20, 2016, all against the same three defendants. Some months later, defendant Schor disclosed a contract entitled Fat Bobs Management Contract & Sale of Business dated June 14, 2013. This contract identifies Jordan Schor and Carpentier as the buyers of Fat Bob's at 52 Main Street, New Paltz, NY and Robert Germinara, now deceased, as the seller. Pursuant to an Order of this court (Ecker, J.), dated December 14, 2017, plaintiff was given leave to amend her second amended complaint to add Keith Carpentier, Wayne Bradford and Robert Germinara (deceased) as defendants. On December 20, 2017, plaintiff filed the third amended complaint.

In pertinent part, the third amended complaint reasserted the claims against the Schor defendants and L'Core and added new claims against Carpentier, Bradford and Germinara. The claims against Carpentier are premised upon his alleged personal interest in Jordan's and the complaint asserts various causes of action against Carpentier in the ownership and operation of Jordan's. On February 9, 2018, Carpentier moved to dismiss plaintiff's third amended complaint as to the allegations against him. In a Decision & Order dated May 3, 2018, this court (Ecker, J.), granted Carpentier's motion to dismiss pursuant to CPLR 3211(a)(7), failure to state a cause of action.

On October 18, 2018, plaintiff provided Carpentier's counsel with a copy of a subpoena ad testificandum and duces tecum which sought the deposition testimony of Carpentier as well as the production of certain documents. Although Carpentier's counsel asked plaintiff to withdraw the subpoena, she declined to do so and as a result, the court issued a briefing schedule for the instant motion.

Specifically, the subpoena at issue seeks information (a) concerning the business relationship between and/or among Schor, Germinara and Carpentier at the time of plaintiff's accident; (b) clarifying the parties' intent and understanding when executing the contract as to whether Germinara thereby transferred an ownership interest to Schor; (c) concerning Schor's absence of adherence to corporate structure and form concerning Jordan's of New Paltz, LLC; and (d) concerning plaintiff's accident. The subpoena also seeks the production of all documents concerning (a) the June 14, 2013 Fat Bobs Management Contract & Sale of Business, including without limitation, correspondence, drafts of the contract, loan agreements and evidence of payment between or among Carpentier, Schor and/or Germinara; (b) Jordan Schor; (c) the property located at 52 Main Street, New Paltz, New York; (d) Germinara or any entity known by

Carpentier to be owned by, controlled by or affiliated with Germinara, concerning 52 Main Street New Paltz, New York; and (e) any liability insurance policy against which a claim can be made in this case.

Carpentier's challenge to the subpoena is twofold: (1) the testimony sought by the subpoena is not material to this action; and (2) the subpoena demands objectionable, overly broad documents that are irrelevant or not in Carpentier's possession. With respect to materiality, Carpentier contends that he does not possess any information or documents concerning plaintiff's accident, the premises, or the rights or obligations of the parties. To begin, Carpentier avers that he has no personal knowledge of plaintiff's accident and was not at the premises on the date of the alleged accident. Indeed, Carpentier states that he was unaware of plaintiff's accident until he was served with the third amended complaint in January of 2018, over three years after its occurrence. Moreover, Carpentier avers that he is not, nor has he ever been, a principal, member, Shareholder, or had any ownership or equity interest in Jordan's of New Paltz LLC or Jordan's Pizzeria. Continuing, Carpentier avers that at no time did he ever manage, control, maintain, or been employed by Jordan's of New Paltz or Jordan's Pizzeria. He does not now, nor did he ever have the authority to act on behalf of Jordan's of New Paltz or Jordan's Pizzeria and he has never held himself out as a representative, agent or owner of Jordan's. He never exercised or had the authority to exercise any control over the operation or maintenance of Jordan's of New Paltz or Jordan's Pizzeria and he did not maintain or inspect or cause others to maintain or inspect the premises, nor did he ever have the authority to do so. Finally, Carpentier avers that he has never entered into any contracts or agreements or acted in any capacity on behalf of Jordan's of New Paltz or Jordan's Pizzeria.

Carpentier does acknowledge that in or about June of 2013, he loaned \$17,000 to Jordan Schor in connection with the purchase of Fat Bob's. In early September 2013, Schor and Carpentier agreed that Schor would reimburse Carpentier the funds loaned to him over the course of 24 months. Schor and Carpentier executed a written agreement to that effect, but Carpentier is not in possession of an executed original or signed copy of the agreement.

With respect to the specifics of the subpoena, Carpentier avers that he does not have information related to any alleged business relationship between Schor and Germinara, nor did he have a business relationship with Germinara. Carpentier states further that it is impossible for him to have any knowledge of other "[p]arties' intent and understanding when executing the contract." Similarly, because Carpentier does not have any information regarding the operation of Jordan's, he does not have any knowledge about whether Schor adhered to corporate structure and formalities regarding the operation of his business.

In addition, Carpentier asserts that he is a small business owner, such that time spent away from his business is a financial hardship to him and puts an unreasonable burden on his ability to pursue work, particularly given that he has no information as to plaintiff's accident or the business entity being operated at 52 Main Street at the time of the incident.

Next, Carpentier contends that the subpoena is facially defective and should be quashed on that basis alone. The instant subpoena states that it seeks "testimony that relates to plaintiff's accident" as well as "all" documents within four vague, overly broad, unduly burdensome,

cumulative and non-specific categories. As such, it does not simply and clearly set forth the documents demanded and the Second Department has held that document requests seeking "all" documents are over broad and palpably improper. (*See Deglioumini v Deglioumini*, 308 AD2d 501 [2d Dept 2003]). Additionally, the request for any liability insurance policy is improper and irrelevant when asked of a non-party.

Carpentier also urges this court to issue a protective order pursuant to CPLR 3103(a) as the subpoena seeks information that is utterly irrelevant and the futility of uncovering anything legitimate is inevitable or obvious. This court has already dismissed all claims against Carpentier based on Schor's deposition testimony that Carpentier was only an initial investor who had no responsibilities concerning the ownership, maintenance or control of Jordan's. Carpentier does not possess any additional information relevant to plaintiff's claims.

Lastly, Carpentier urges this court to impose costs against plaintiff in light of her frivolous attempt to obtain purported discovery from him. Under 22 NYCRR 130-1.1(a), this court has the discretion to award Carpentier costs in the form of reimbursement for actual expenses reasonably incurred as well as reasonable attorneys fees resulting from plaintiff's frivolous conduct. Carpentier has already provided all of the information he has with respect to Jordan Schor and Fat Bobs. Plaintiff has not shown that the information she seeks is within Carpentier's knowledge or possession or that it is material or necessary. Carpentier argues that plaintiff has not demonstrated a reason for the subpoena other than harassment. Therefore, costs in the form of expenses and attorneys fees associated with this motion should be awarded.

The Jordan defendants support Carpentier's application to quash the non-party subpoena and emphasize that the overly broad subpoena seeks information wholly unrelated to the negligence claims asserted in plaintiff's complaint; that in dismissing plaintiff's complaint against Carpentier, the court found that there was no nexus between Carpentier's knowledge of the premises and plaintiff's accident; and that Schor testified that Carpentier was a silent investor who did not acquire an ownership interest in the business, Jordans of New Paltz.

In support of her opposition, plaintiff contends that the subpoena is enforceable as to both form and substance. Plaintiff asserts that the subpoena satisfies the notice requirement of CPLR 3101(a)(4), i.e., she gave sufficient information to challenge the subpoena on a motion to quash. The face of the subpoena states that she "[s]eeks this disclosure from [Carpentier] because, as a named party to the [Fat Bob's contract he] possess[es] information material and necessary to the prosecution of this action" and then continues to particularize the four areas of inquiry. Further, plaintiff challenges Carpentier's reliance on *Deglioumini*, 308 AD2d at 501. Notwithstanding any impropriety of demanding "all" documents, plaintiff claims that when viewed in the context of her detailed requests, Carpentier's argument fails entirely.

Moreover, plaintiff maintains that Carpentier has failed to establish that the information she seeks is irrelevant. Again, as the subpoena states, because he is a named party to the Fat Bob's contract, he possesses information material and necessary to this action. Because Schor has been unable to explain his relationship to 52 Main Street, New Paltz, NY, Carpentier's deposition could reasonably lead to clarification of such things as whether the parties to the contract contemplated that ownership of Fat Bob's would transfer to Schor; whether Schor and

Jordan's of New Paltz, LLC properly adhered to a corporate structure, whether Schor repaid Carpentier according to their personal loan agreement which gave Carpentier an interest in Fat Bob's until repayment in full; and his knowledge of plaintiff's accident. While it may be that Carpentier cannot possess any information regarding other parties' intent and understanding when executing the Fat Bob's contract, he is able to testify as to his own intent and understanding of the terms of the contract. Additionally, the fact that he was dismissed as a defendant in this action is irrelevant. The issue presently is not whether he is a proper party to this lawsuit, but rather whether he is properly subject to non-party discovery. The analysis differs and plaintiff notes that in dismissing Carpentier as a party, the court found only that plaintiff could not support a claim that he demonstrated an indicia of control at the premises from which liability could be ascribed to him.

Finally, plaintiff insists that insofar as Carpentier has not met his burden to quash the subpoena, it follows that he has not met his burden on his motion for a protective order. He has offered no basis for the court to conclude that disclosure will cause any "[u]nreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts," (*see* CPLR 3103).

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action." The phrase "material and necessary" is "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 Publishing Co.*, 21 NY2d 403 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). Although the discovery provisions of the CPLR are to be liberally construed, "a party does not have the right to uncontrolled and unfettered disclosure" (*Merkos L'Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 408 [2d Dept 2009]; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531 [2d Dept 2007]). The trial court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*Auerbach v Klein*, 30 AD3d 451 [2d Dept 2006]; *Feeley v Midas Properties, Inc.*, 168 AD2d 416 [2d Dept 1990]). Pursuant to CPLR 3103(a), "[t]he court may at any time on its own initiative, or on motion of any party . . . make a protective order denying, limiting, conditioning or regulating the use of any disclosure device to prevent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice to any person or the courts."

To obtain nonparty discovery, a party must show only that the nonparty discovery is "material and necessary" to the prosecution or defense of the action. Conversely, a nonparty subpoena should be quashed "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'" (*In re Kapon v Koch*, 23 NY3d 32 [2014]; *Ferolito v Arizon Beverages USA*, 119 AD3d 642 [2d Dept 2014]). The one seeking to quash the subpoena has the burden of demonstrating the subpoena should be vacated under the circumstances. If this burden is satisfied, the subpoenaing party must then establish that the discovery sought is relevant to the prosecution or defense of an action (*In re Kapon v Koch*, 23 NY3d 32 [2014]; *Ferolito v Arizon Beverages USA*, 119 AD3d 642 [2d Dept 2014]).

Contrary to plaintiff's assertions, Carpentier has met his burden of demonstrating that the subpoena should be quashed. While it may give Carpentier adequate notice of the subject matter about which his knowledge was sought, Carpentier has established that he has no additional relevant information to provide. To be sure, his affidavits both in connection with his motion to dismiss and this motion demonstrate that he has no relevant information with respect to plaintiff's accident and that he has no knowledge concerning Schor's absence of adherence of corporate structure and form. In this regard, Schor's deposition testimony supports Carpentier to the extent that Schor testified that Carpentier was a silent investor; that he did not acquire an ownership interest in the business, Jordan's of New Paltz; and that Carpentier's loan to Schor was not tied to the profits of Jordan's of New Paltz.

Similarly, apart from the impermissible demand for "all" documents in the five categories demanded and for which there is no exception for "viewed in the context of the detail of the requests," (*see Degliuomini*, 308 AD2d at 501), the subpoena's demands, for example, for all documents concerning Jordan Schor and the property located at 52 Main Street, New Paltz, NY are patently vague and over broad and on their face seek evidence irrelevant to this matter.

In short, the futility of uncovering anything legitimate pursuant to the non-party subpoena is inevitable or obvious and the information sought is utterly irrelevant to any proper inquiry, (*see Kapon*, 23 NY3d at 32). Having met his burden of establishing that the subpoena should be vacated under these circumstances, it becomes plaintiff's obligation to establish that the discovery sought is relevant to the prosecution or defense of this action. This she has not done and cannot do. The subpoena must be quashed and a protective order granted.

With respect to Carpentier's additional request for sanctions, Section 130-1.1 of the Rules of Chief Administrator (22 NYCRR) provides that "[t]he court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, . . . costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from the frivolous conduct as defined in this Part." Conduct within the meaning of Part 130 is that which is "completely without merit in law," or as being "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another," or "it asserts material factual statements that are false" (Rules of Chief Administrator [22 NYCRR] § 130-1.1[c]). In determining whether conduct is frivolous, the court shall consider the circumstances under which the conduct took place, "whether or not the conduct was continued when its lack of legal basis or factual basis was apparent, or should have been apparent, or was brought to the attention of counsel or the party" (*id.*). The party seeking the imposition of the award of attorney's fees pursuant to the Rule has the burden of demonstrating that the conduct of the opposing party was frivolous within the meaning of the rule (*Miller v Miller*, 96 AD3d 943 [2d Dept 2012]).

While this court is troubled by plaintiff's persistence in seeking unrelated testimony and documents from a nonparty, the court cannot state that plaintiff's conduct was per se frivolous within the meaning of Section 130-1.1 of the Rules of Chief Administrator (22 NYCRR). However, under the circumstances herein and given the inordinate amount of time, effort, energy and resources that Carpentier, a small business owner, had to expend, after already having provided information in his possession and being dismissed from this action, the court finds that

Carpentier is entitled to \$100.00 in motion costs per CPLR 8202 and a monetary award in the amount of \$250.00. Plaintiff's counsel shall pay Carpentier the \$100.00 in costs and \$250.00 monetary award on or before April 18, 2019.

All other arguments raised on this motion and evidence submitted by the parties in connection thereto have been considered by this court, notwithstanding the specific absence of reference thereto.

In light of the foregoing it is:

ORDERED that the motion by non-party Keith Carpentier for an order pursuant to CPLR 2304, 3101 and 3106 quashing the subpoena issued to non-party Keith Carpentier is granted; and it is further

ORDERED that the motion by non-party Keith Carpentier for an order pursuant to CPLR 3103 issuing a protective order as to said subpoena is granted; and it is further

ORDERED that the motion by non-party Keith Carpentier for sanctions is denied; and it is further

ORDERED that plaintiff's counsel shall pay Carpentier costs per CPLR 8202 in the amount of \$100.00 and a monetary award in the amount of \$250.00 on or before April 18, 2019; and it is further

ORDERED that plaintiff shall file proof of payment on or before April 19, 2019; and it is further

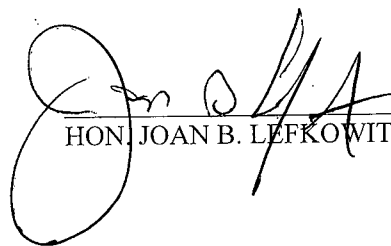
ORDERED that the parties shall appear in the Compliance Part, Courtroom 800, on April 23, 2019, at 9:30 a.m. as they were previously directed to do so; and it is further

ORDERED that counsel for Carpentier shall serve a copy of this order with notice of entry upon all parties within seven (7) days of entry.

The foregoing constitutes the decision and order of this court.

Dated: White Plains, New York

4-3, 2019


HON. JOAN B. LEFKOWITZ, J.S.C.

All parties by NYSCEF:

Susan A. Romano, Esq.
French & Casey, LLP
Attorneys for non-party Keith Carpentier

29 Broadway, 27th Floor
New York, NY 10006

cc: Compliance Part Clerk