

Harris v Lichtenstein
2020 NY Slip Op 31062(U)
April 26, 2020
Supreme Court, New York County
Docket Number: 154155/2017
Judge: Nancy M. Bannon
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

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TAMARA HARRIS, BETSY HARRIS,

Plaintiff,

- v -

ANDREW LICHTENSTEIN, ALLISON HARRIS SCHIFINI,
TJ MONTANA ENTERPRISES, LLC.,

Defendant.

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INDEX NO. 154155/2017

MOTION DATE 12/19/2018

MOTION SEQ. NO. 006

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 006) 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 105, 106, 107, 108, 109, 110, 111, 112, 113, 115, 123, 124, 125, 126, 127, 128, 129

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

On August 2, 2018, the plaintiffs sent notices advising the defendants that they had served three subpoena duces tecum on HSBC Bank, JP Morgan Chase Bank, and Bank of America (the subpoenas) seeking certain financial documents described herein. The defendants move pursuant to (i) CPLR 2304 to quash the subpoenas and (ii) CPLR 3103 for a protective order prohibiting the disclosure of the information sought in the subpoena. The plaintiffs oppose the motion. The branch of the motion seeking to quash the subpoena is granted, and the remainder of the motion is denied without prejudice.

This action arises from a disputed 19.35% interest in TJ Montana Enterprises LLC (TME) following the death of one of its owners, Steven Harris (Steven). The plaintiffs maintain that they are the proper owners of that 19.35% in TME pursuant to Steven's will and assignment proffered by the plaintiffs in a related surrogate court action, Estate of Steven Harris, (Bronx County Surrogate File No: 2017-1035). The defendant Allison Harris Schifini claims that Steven's wife, Bernice Harris, is the true owner of his interest pursuant to TME's operating agreement, as opposed the bequest contained in the will and assignment.

The plaintiffs claim that the defendants attempted to sell off TME's assets prior to their ability to assume control of their interest in company to dissipate any assets before the plaintiffs could benefit from their claimed interest. On May 12, 2018, the parties appeared for oral argument on the plaintiffs' motion for a temporary restraining order and preliminary injunction seeking to enjoin the defendants from dissipating the assets of TME prior to a determination of the ownership of the 19.35% interest in the company. At the appearance, the plaintiffs withdrew their motion and the parties entered into a so-ordered stipulation of settlement. The stipulation of settlement provides, in relevant part, that the defendants shall escrow 19.35% of the profits of TME pending a determination of the proper owner of the 19.35% interest, and that the defendants are to give information to the plaintiffs about the rent, expenses, and income of the company and to disclose relevant records regarding the same.

The three subpoenas seek disclosure of the following documents:

1. The HSBC Subpoena seeks disclosure of all documents concerning or reflecting accounts held in the name of Steven A. Harris, TME or any other person or entity to which Steven A. Harris or TME is an authorized party or representative for the period January 1, 2011 to the present, all documents concerning or reflecting withdrawals made on April 24, 2017, from accounts held in the name of Steven A. Harris or TME, and all bank or certified check issued from or on account of all accounts held in the name of Steven A. Harris or TME from January 1, 2017 to the present.
2. The Bank of America Subpoena seeks disclosure of all documents concerning or reflecting accounts held in the name of Steven A. Harris, TME or any other person or entity to which Steven A. Harris or TME is an authorized party or representative for the period January 1, 2011 to the present, all documents concerning or reflecting persons with signing authority on any accounts held in the name of TME, and all governing documents of TME.
3. The JP Morgan Chase Subpoena seeks disclosure of of all documents concerning or reflecting accounts held in the name of Steven A. Harris, TME or any other person or entity to which Steven A. Harris or TME is an authorized party or representative for the period January 1, 2016 to the present.

The defendants seek to quash the subpoenas on the following three grounds (i) the subpoenas fail to apprise the third-parties of the basic allegations in the action, and as the plaintiffs have not served a complaint and are relying on a bare-bones summons with notice, the subpoenas are facially defective, (ii) the subpoenas seek disclosure of the Steven and TME's bank records beyond the time that the plaintiffs could possibly have had any interest in TME and are therefore palpably improper and overbroad, and (iii) the subpoenas are an attempt to circumvent a stipulation of confidentiality in a separate action.

The plaintiffs respond that a complaint is not necessary to apprise the third parties of the reasons documents sought in a subpoena are necessary, and that the subpoenas are necessary because the plaintiffs refuse to comply with the May 12, 2017 stipulation of settlement entered into by the parties in this action wherein the defendants agreed to provide TME's financial documents and operating agreement to the plaintiffs.

The Court of Appeals in Kapon v Koch, 23 NY3d 32 (2014), held that a subpoenaing party must sufficiently state the "circumstances or reasons" that support disclosure from the non-party "either on the face of the subpoena itself or in a notice accompanying it." Kapon, supra at 32. Such notice is required to provide a third-party with enough information to apprise a stranger to the litigation the 'circumstances or reasons' why the requested disclosure was sought or required." Id. at 39. The notice accompanying the subpoenas served by the plaintiffs merely state that "disclosure is sought because it cannot be obtained from other sources and is material and necessary to the prosecution of the above-captioned action in that, among other reasons, the respondent/deponent is alleged to possess certain documents and knowledge concerning the parties' claims, and defenses to be asserted, against one another." Such notice, along with the summons with notice, which merely summarily lists causes of action without any factual support, *i.e.* breach of fiduciary duty, unjust enrichment, fraudulent conveyance, declaratory judgment, breach of agreement, and fraud, fails to apprise the third-parties of the nature of the litigation such that they could challenge the relevancy of the requested documents. Id. As such, the subpoenas are quashed. However, this court, by two orders dated April 21, 2020, provided the plaintiffs with 20 days to file a complaint, and granted the plaintiffs' motion to enforce the May 12, 2017 settlement agreement against the defendants. In light of these developments, it is appropriate that the granting of the motion to quash be without prejudice.

In that regard, the plaintiffs are reminded that a motion to quash a subpoena will be granted when the futility of uncovering anything legitimate is obvious, or the information sought is, "utterly irrelevant to any proper inquiry." Kapon v Koch, 23 NY3d 32 (2014). It is well settled that a subpoena must not be used as a tool of harassment or for a "fishing expedition to ascertain the existence of evidence." Reuters Ltd. v Dow Jones Telerate, Inc., 231 AD2d 337, 337 (1st Dept. 1997); see Law Firm of Ravi Batra, P.C. v Rabinowich, 77 AD3d 532 (1st Dept. 2010). Discovery sought pursuant to a subpoena may be denied if such discovery is overbroad or harassing. See Id.; CPLR 3103. Inasmuch as the plaintiffs interest in TME appears to have accrued on March 7, 2017 through Steven's contested will and assignment, the plaintiffs'

requests for financial documents concerning or reflecting accounts held in the name of Steven A. Harris, TME or any other person or entity to which Steven A. Harris or TME is an authorized party or representative for the period January 1, 2011 to the present, are overbroad.

To the extent that the defendants also seek a protective order pursuant to CPLR 3103, that branch of the motion is denied, without prejudice. A protective order is to “prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.” CPLR 3103. As the plaintiffs’ subpoenas are quashed, and the defendants do not identify any other discovery request that remains outstanding seeking discovery that would fit the reasons for issuing a protective order under CPLR 3103, a protective order at this time would be premature.

Accordingly, it is hereby,

ORDERED that the branch of the defendants’ motion pursuant to CPLR 2304, seeking to quash the subpoenas duces tecum served HSBC Bank, JP Morgan Chase Bank, and Bank of America by the plaintiffs on August 2, 2018 is granted, and HSBC Bank, JP Morgan Chase Bank, and Bank of America need not produce the requested documents; and it is further,

ORDERED that the branch of the defendants’ motion pursuant to CPLR 3103 seeking a protective order prohibiting disclosure of the information and documents sought in the subpoena is denied without prejudice.

This constitutes the Decision and Order of the court.



 NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

4/26/2020

DATE

 NANCY M. BANNON, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER