

Harris v Harris

2020 NY Slip Op 31937(U)

June 17, 2020

Supreme Court, New York County

Docket Number: 656962/2017

Judge: Nancy M. Bannon

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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. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

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INDEX NO. 656962/2017

BERNICE HARRIS AND, ALLISON HARRIS SCHIFINI
INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF, TJ
MONTANA ENTERPRISES, LLC,

MOTION DATE 02/06/2019

MOTION SEQ. NO. 002

Plaintiff,

- v -

BETSY HARRIS A-K-A BETSY SAVAGE, TAMARA
HARRIS INDIVIDUALLY AND AS PRELIMINARY
EXECUTOR OF THE, ANDREW LICHTENSTEIN, TJ
MONTANA ENTERPRISES, LLC

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 97, 98, 102, 106, 110

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

On August 3, 2018, the plaintiffs noticed parties that they served a subpoena duces tecum on Chase Manhattan Bank (the subpoena) seeking certain financial documents described herein. The defendants move pursuant to CPLR 2304 to quash the subpoena and pursuant to CPLR 3103 for a protective order prohibiting the disclosure of the information sought in the subpoena. The plaintiffs oppose. The branch of the motion seeking to quash the subpoena is granted to the extent discussed herein 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 claim that Steven's wife, Bernice Harris, acceded to his interest pursuant to TME's operating agreement, as opposed to a disputed will and assignment proffered by the defendants in a related surrogate court action, Estate of Steven Harris, (Bronx County Surrogate File No: 2017-1035). The plaintiffs further claim that the defendants improperly received diverted TME funds prior to Steven's death, potentially through an account held in TME's name at Chase Manhattan Bank.

The plaintiffs served the instant subpoena seeking disclosure relating to the defendants' alleged receipt of these diverted funds.

The subpoena seeks disclosure of three sets of documents:

- 1) All documents (including, but not limited to monthly and year-end bank statements, cancelled checks, deposit records, withdrawal records, and wire transfers) concerning or reflecting accounts held in the name of Betsy Savage a/k/a Betsy Harris and/or Tamara Harris for the period January 1, 2016 to the present.
- 2) All documents (including, but not limited to monthly and year-end bank statements, cancelled checks, deposit records, withdrawal records, and wire transfers) concerning or reflecting accounts held in the name of TJ Montana Enterprises LLC for the period January 1, 2016 to the present.
- 3) All documents (including, but not limited to monthly and year-end bank statements, cancelled checks, deposit records, withdrawal records, and wire transfers) concerning or reflecting accounts held in the name of any other person or entity and as to which Betsy Savage a/k/a Betsy Harris and/ or Tamara Harris is an authorized party or representative, for the period January 1, 2016 to the present.

The defendants seek to quash the subpoena on the following two grounds (i) the disclosure sought from Chase relates to causes of action alleging the diversion of funds by Tamara Harris and/or Bernice Harris that were subject to a motion to dismiss pending at the time of the motion, and (ii) the subpoena seeking disclosure of the defendants' personal bank records is palpably improper and overbroad. The court, by an order dated April 23, 2020, partially granted the defendant's motion to dismiss pursuant to CPLR 3211(a)(7), dismissing the causes of action alleging the diversion of funds.

The determination of whether the discovery sought is appropriate rests within the sound discretion of the trial court, the discovery sought must be "material and necessary." Id. A motion to quash a subpoena should be granted, only 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). The burden of establishing the information sought is irrelevant or futile, is on the non-party being subpoenaed. See Velez v Hunts Point Multi-Serv. Ctr., Inc., 29 AD3d 104 (1st Dept. 2006). 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 also be denied if such discovery is overbroad or harassing. See Id; CPLR 3103. Furthermore,

document requests in a subpoena using the terms “any” and “all” without limitations as to date may be overbroad if the materials sought include matters that may be privileged or are “clearly irrelevant.” Id.

Inasmuch as the documents sought are relevant only to the causes of action dismissed pursuant to CPLR 3211(a)(7), the defendants have established that they are presently “utterly irrelevant to any proper inquiry,” and are therefore quashed. Moreover, to the extent that the plaintiffs first and third requests seek all documents concerning or reflecting accounts held in the name of Betsy Savage a/k/a Betsy Harris and/or Tamara Harris or accounts for which either is an authorized party or representative from January 1, 2016 to the present, such requests are also quashed because they are overbroad, improperly seek disclosure of the defendants’ personal financial records, and the dates for which the records are sought extend at least 15 months before the defendants are alleged to have received funds improperly diverted from TJ Montana Enterprises LLC. See Aetna Ins. Co. v Mirisola, 167 AD2d 270 (1st Dept. 1990) (discovery requests denied as overbroad and seeking information of a confidential and private nature not relevant to issues).

However, as the plaintiffs may be able to cure the defects in their complaint, and the causes of action that were dismissed relate to improper transfers of money from TJ Montana Enterprises LLC, potentially through an account which the plaintiffs have been unable to access, the second set of documents requested in the subpoena concerning or reflecting accounts held in the name of TJ Montana Enterprises LLC for the period January 1, 2016 to the present would be material and necessary to their action, particularly in keeping with this state’s policy of liberal discovery. See Kapon v Koch, supra. CPLR 3101 must “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.” Id. Although the defendants further argue that the second set of documents should be in the possession of TJ Montana Enterprises, LLC, as the account was held in its name, “section 3101(a)(4) imposes no requirement that the subpoenaing party demonstrate that it cannot obtain the requested disclosure from any other source. Thus, so long as the disclosure sought is relevant to the prosecution or defense of an action, it must be provided by the nonparty.” Id.

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’ subpoena is quashed, and the defendants do not identify any other discovery request seeking the same discovery, 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 subpoena duces tecum served on Chase Manhattan Bank by the plaintiffs on August 3, 2018 is granted, and Chase Manhattan Bank 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.

6/17/2020

DATE

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

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE