

East Coast Jewelry Distrib. Inc. v Jomashop, Inc.

2020 NY Slip Op 32293(U)

February 27, 2020

Supreme Court, Kings County

Docket Number: 3180/19

Judge: Peter P. Sweeney

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

Index No.: 3180/19
Motion Date: 1-6-2020
Mot. Cal. Nos.:

-----x
In Re: the Matter of the Enforcement of the Non-Party
Subpoena Duces Tecum Issued by the Kings County Clerk
Pursuant to CPLR § 3119 in favor of certain Florida Counter
Plaintiffs East Coast Jewelry Distributors Inc.

DECISION/ORDER

Petitioner,

-against-

JOMASHOP, INC.,

Respondent,
-----x

The following papers numbered 1 to 7 were read on this petition and cross-motion:

Papers:	Numbered:
Order to Show Cause/Petition	
Affidavits/Affirmations/Exhibits.....	1
Memorandum of Law in Support.....	
Answer/Affirmation/Affidavits/Exhibits.....	2
Memorandum of Law in Opposition.....	3
Other.....	
Notices of Cross-Motion	
Affidavits/Affirmations/Exhibits/Memos of Law.....	4
Answering Affirmations/Affidavits/Exhibits/Memos of Law.....	5
Reply Affirmations/Affidavits/Exhibits/Memos of Law.....	6-7
Other.....	

Upon the foregoing papers, the this petition and cross-motion are decided as follows:

The petitioners brought this proceeding pursuant to CPLR § 2308(b) and Judiciary Law 2-b(3) for an order declaring that a subpoena duces tecum issued by the Kings County Clerk in favor of the petitioners on or about July 26, 2019 was lawfully issued, served and

ms #01 - XMD
ms #02 - XMG

authorized and directing the respondent, JOMASHOP, INC., to comply with the subpoena in all respects. The respondent cross-moves to quash the subpoena. The petition and cross-motion are consolidated for disposition.

The petitioners are defendants/counter-claimants in an action pending in the state of Florida. The petitioners served the respondent in this State with the subpoena duces tecum seeking non-party discovery. The subpoena was issued by the County Clerk of Kings County. Petitioners maintain that the discovery requested is relevant to the counterclaims they asserted in the Florida Action and they are entitled to the non-party discovery pursuant to the Uniform Interstate Depositions and Discovery Act which is embodied in CPLR § 3119. The respondent contends, among other things, that the petitioner's failure to comply with the requirements of CPLR §§ 3119 and 3101(a)(4) require that the Subpoena Duces Tecum be quashed.

Effective January 1, 2011 (*see* L. 2010, ch. 29, § 4), New York adopted the Uniform Interstate Depositions and Discovery Act which is embodied in CPLR § 3119. The purpose of the act is to provide a streamlined procedure for obtaining disclosure in New York State for use in actions pending in another United States jurisdiction without the need for a court order. To request the issuance of a subpoena under this section, "a party must submit an out-of-state subpoena to the county clerk in the county in which discovery is sought to be conducted in this state" (CPLR § 3119 (b)(1)). Notwithstanding CPLR § 3119 (b)(1), "if a party to an out-of-state proceeding retains an attorney licensed to practice in this state, and that attorney receives the original or a true copy of an out-of-state subpoena, the attorney may issue a subpoena under this section." For purposes of CPLR §

3119, an out-of-state subpoena “means a subpoena issued under authority of a court of record of a state other than this state” (CPLR § 3119 (a)(1)). Thus, the issuance of a subpoena pursuant to CPLR § 3119, whether by the county clerk or by an attorney licensed to practice in this state, requires that an “out-of-state subpoena” be first submitted to the county clerk or to an attorney licensed to practice in this state. An subpoena issued pursuant to CPLR § 3119 “must incorporate the terms used in the out-of-state subpoena” (CPLR § 3119 (b)(3)(I)).

In construing the language and legislative history of CPLR § 3119, the Court in *In re Boyarsky*, No. 53667/14, 2014 WL 7927864, at *3 (N.Y. Sup. Ct. May 09, 2014), held that “a prerequisite for the use of the expedited procedure set forth in CPLR 3119 is that the subpoena be issued by a court of record in a state other than New York” (*see also, Matter of New York Counsel for State of California Franchise Tax Bd.* (33 Misc3d 500, *affd* 105 AD3d 186 [2d Dept 2013]), *Conners*, Supplementary Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3119). Here, respondent correctly points out that there is no evidence in the record that a subpoena similar to the one issued by the County Clerk was ever issued under authority of the Florida Court. The only subpoena that is part of the record is the subpoena prepared by petitioners' New York counsel which was presented to the Kings County Clerk for execution. The fact that the parties to the Florida action may have agreed to the scope of the subpoena is of no moment.

Since is evident that an “out of state” subpoena within the meaning of CPLR § 3119 (a)(1) was never submitted to the County Clerk, the Court must deny the petition and grant respondent's motion to quash the subpoena. The Court need not reach the issue of whether

the subpoena should be quashed because it is facially defective insofar as it failed to provide notice of the circumstances and reasons for the disclosure as required by CPLR 3101(a)(4) or for the other reasons cited by the defendant.

Accordingly, it is

ORDERED and **ADJUDGED** that the petition is **DENIED** and the cross-motion to quash the subpoena is **GRANTED**.

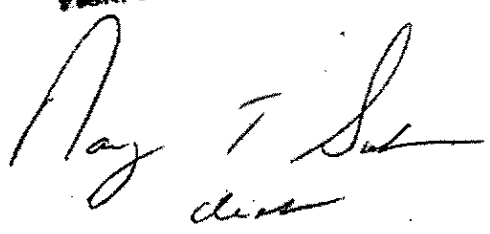
This constitutes the decision and order of the Court.

Dated: February 27, 2020



PETER P. SWEENEY, J.S.C.

Hon. Peter P. Sweeney, J.S.C.



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