

<b>McKee v Ford Motor Co.</b>
2020 NY Slip Op 32640(U)
August 13, 2020
Supreme Court, New York County
Docket Number: 104450/2008
Judge: Lyle E. Frank
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK PART IAS MOTION 52

Justice

INDEX NO. 104450/2008
MOTION DATE 04/22/2020
MOTION SEQ. NO. 013

JOHN P MCKEE, RUTH MCKEE, OXFORD HEALTH PLANS (PROPOSED INTERVENOR),

Plaintiff,

- v -

FORD MOTOR COMPANY, MEADOWBROOK FORD INC, FORD SYOSSET, JOHN CICARDO, PAUL GIAMBONA (3RD PARTY DEFT.)

Defendant.

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 013) 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 501, 502

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

This action arises out of a motor vehicle accident that occurred on October 27, 2006 in Massapequa, New York, and involves a 2001 Ford Mustang convertible owned and driven by plaintiff John McKee. Plaintiff alleges that the 2001 Ford Mustang had design defects, which caused his injuries from the accident.

Plaintiff attempted to serve a subpoena duces tecum on Roger Burnett, an employee of Ford, on November 4, 2019, requiring him to appear in court to testify and seeking materials pertaining to case-specific crash and/or sled tests purportedly conducted by Ford. Plaintiff mailed the Subpoena to Ford's counsel. Defendant Ford, moves to quash the subpoena duces tecum, based on improper service, and seeks a protective Order barring enforcement of the subpoena. For the reasons set forth below, defendant's motion is granted.<sup>1</sup>

<sup>1</sup> The Court would like to thank Yichao Zhang and Jason Petropoulos for their assistance in this matter.

## I. Service

CPLR Section 2303(a) states, in pertinent part, that any person subpoenaed “shall be paid or tendered in advance authorized traveling expenses and one day’s witness fee.” It also provides that a subpoena requiring attendance or a subpoena duces tecum must be served in the same manner as a summons, with two exceptions. Under the first exception, where the subpoena is served pursuant to CPLR Section 308(2), service is deemed complete upon the delivering or mailing of the subpoena, whichever is later, at the person’s actual place of business, dwelling or usual place of abode. Under the second exception, if the subpoena is served by the nail and mail method pursuant to CPLR Section 308(4), service is deemed complete upon the delivering or mailing of the subpoena, whichever is later.

The Court agrees with defendant that plaintiff failed to include the witness fee and properly serve Mr. Burnett. Here, plaintiff failed to comply with CPLR Section 2303(a). First, plaintiff did not enclose advance payment for the witness’ travel expenses and one day witness fee with the Subpoena. Second, as defendant argues cogently in its affidavit, plaintiff failed to effectuate service in any of the manners permitted under Section 2303. Plaintiff did not serve Mr. Burnett in person, at his actual place of business, dwelling or usual place of abode. Nor did plaintiff serve the subpoena through the proper nail and mail method. Instead, plaintiff mailed the subpoena to Ford’s counsel, who has never agreed to accept service on behalf of Mr. Burnett. Additionally, Mr. Burnett did not designate Ford’s counsel as his agent for service. Accordingly, the Court agrees with defendant that the service of the subpoena is improper.

## II. Subpoena

Assuming *arguendo* that service was proper, plaintiff’s subpoena would still be quashed pursuant to CPLR § 2304. The court may grant the discovery the subpoena seeks in order to

prevent substantial prejudice if “unusual or unanticipated circumstances develop subsequent to the filing of a note of issue. . .” See 22 NYCRR § 202.21(d). Plaintiff seeks a subpoena more than four years after the note of issue was filed, the subpoena is seeking to reopen discovery, and plaintiff has not attempted to show any unusual or unanticipated circumstances that would warrant additional discovery. As such, plaintiff failed to make the necessary showings.

While plaintiff is correct in arguing that the trial court can determine the admissibility of subpoenaed materials, there must still be a determination as to whether the documents belong in court at all. See *Tribeca Space Managers v Tribeca Mews Ltd.*, 64 Misc 3d 1230[A], 2019 NY Slip Op 51373[U] [Sup Ct, NY County 2019]). The court can determine, as has been done here, that the plaintiff has failed to show that the documents belong in court.

Moreover, the subpoena is addressed to Richard Burnett, who had already been deposed in 2010, and was not the subject of any post deposition demands. Lastly, the Honorable Judge Reed had previously issued an order ruling that plaintiff is not entitled to the discovery they seek and this subpoena, specifically in items 1 through 30, includes very similar demands to the demands that were denied in the previous order. Items 31 through 39 had not been denied in the prior order but seek disclosure that is not warranted by special circumstances.

Accordingly, it is hereby

ORDERED defendant’s motion to quash the subpoena *duces tecum* address to Mr. Richard Burnett is granted.

8/13/2020

DATE

*LF*  
LYLE E. FRANK, J.S.C.

CHECK ONE:

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CASE DISPOSED

GRANTED

DENIED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

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NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: