| **Hindlin v Prescription Songs LLC** |
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| 2020 NY Slip Op 33183(U) |
| September 24, 2020 |
| Supreme Court, New York County |
| Docket Number: 651974/2018 |
| Judge: Andrea Masley |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 48EFM

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JACOB HINDLIN,

Plaintiff,

- v -

PRESCRIPTION SONGS LLC, and KASZ MONEY, INC.,

Defendants.

**INDEX NO.** 651974/2018

**MOTION DATE**

**MOTION SEQ. NO.** 006, 007

**DECISION + ORDER ON MOTION**

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 006) 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 227, 252, 253, 254, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354

were read on this motion to/for ORDER OF PROTECTION

The following e-filed documents, listed by NYSCEF document number (Motion 007) 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 255, 256, 257, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366

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

## Background

As previously discussed in *Hindlin v Prescription Songs LLC*, (2019 NY Slip Op 32018[U], *1 [Sup Ct, NY County 2018]), plaintiff Jacob Hindlin is a writer and producer of music. Defendant Prescription Songs LLC (Prescription) is a music publishing company. (*Hindlin*, 2019 NY Slip Op 32018[U], *1.) Defendant Kasz Money, Inc. (KMI) is engaged in the business of music production. (*Id.*) Hindlin and Prescription entered into a Co-Publishing Agreement (Prescription Agreement). (*Id.*; NYSCEF Doc. No [NYSCEF]146, Answer with Counterclaims ¶ 9.) Under the Prescription Agreement, Hindlin agreed to sell to Prescription an undivided forty percent interest in all of Hindlin's interest in all Compositions. (*Hindlin*, 2019 NY Slip Op 32018[U], *1.) Contemporaneously, Hindlin

entered into a Production Agreement with KMI (KMI Agreement). (*Id.*) Under the KMI Agreement, Hindlin agreed to provide KMI with his exclusive personal services as a producer, co-producer, mixer, remixer, arranger, musician, and programmer during the term set forth in the Prescription Agreement. (*Id.*)

Hindlin commenced this action for a judgment declaring the parties' rights and obligations concerning the Prescription Agreement and KMI Agreement. (NYSCEF 69, Amended Complaint.) KMI interposed two counterclaims. In the first counterclaim for breach of contract, KMI alleges that "Hindlin has breached the KMI Agreement by entering into agreements with artists and record companies (and perhaps other third parties) without the knowledge or consent of KMI, and by receiving income relating to such agreements without reporting such income to KMI or compensating KMI for such income." (NYSCEF 146, Answer with Counterclaims ¶ 40.) In the second counterclaim for a declaratory judgment, KMI seeks a declaration that the "Prescription Agreement and the KMI Agreement are both ongoing" and have not expired. (*Id.* ¶ 47.)

To facilitate discovery concerning KMI's breach of contract counterclaim, the court held conferences and issued conference orders. The orders addressed discovery sought from Hindin and nonparties sometimes referred to as third-parties or Third-Party Partners. These nonparties include Hindin's current and former managers, his counsel who represented him with respect to the agreements with artists and record companies, Spotify, Rita Ora, Maroon 5, Maroon 5 Partners, Universal Music Group, Daya, Lauv, Kristian Galva, Jack Gilinsky, Ross Golan, Malia Civetz, he Backstreet Boys, and certain businesses that Hindlin wholly owns or may operate and their associates.

Specifically, on December 18, 2019, this court ordered that

> "2. Plaintiff shall produce responsive, nonprivileged documents pertaining to requests regarding defendant KMI's counterclaim re: 'exclusive services in the entertainment industry' (Def's 12/13/19 letter at 2) to the extent that plaintiff, individually, entered into any contracts (written or oral) to perform services within the entertainment business with third-parties and/or earned a fee for services performed within the entertainment business, including but not limited to formal contracts for services and correspondence/documents pertaining to those formal/oral contracts or fees."
>
> (NYSCEF 203, 12/13/19 Order at 1.)

On January 15, 2020, this court ordered that

> "5. Paragraph 2 of the 12/17/19 order is not limited to plaintiff's individual actions involving third parties, it includes plaintiff's actions through any entities wholly-owned by plaintiff and/or through which he facilitated a qualifying transaction with a third party."
>
> (NYSCEF 204, 1/15/2020 Order at 2.)

On January 24, 2020, this court ordered that

> "B. After plaintiff's Third-Party Partners-related production with privilege logs is completed on 3/16/2020, defendant shall notify plaintiff which, if any, of the Third-Party Partners from whom or which it intends to seek third-party discovery (Notice). The Notice shall encompass any and all Third-Party Partners and the substance of the discovery defendant seeks from those Third-Party Partners and shall be sent to plaintiff on or before 3/30/2020.
>
> C. If defendant sends the Notice as contemplated in sub-paragraph (B) above, the parties shall meet and confer in good faith and, if necessary, may move by order to show cause for any relief they deem appropriate with respect to the Notice. Any proposed order to show cause filed under this sub-paragraph shall be filed pursuant to the Part Rules on or before 4/3/2020 or else deemed waived.

> D. All third-party discovery (e.g., subpoenas) relating to the Third-Party Partners is stayed until resolution of any timely-filed order to show cause contemplated in sub-paragraph (C) above or, if no proposed order to show cause is timely filed pursuant to sub-paragraph (C), until 4/4/2020.
>
> E. Further, as both parties requested in their Proposed Orders, neither party shall communicate with the Third-Party Partners or their representatives as to the issues in dispute in this action or advice that a subpoena may be served upon the Third-party Partners or their representatives in connection with this action until later of resolution of any timely-filed order to show cause contemplated in sub-paragraph (C) above or, if no OSC is filed, 4/4/2020."

(NYSCEF 205, 1/24/2020 Conference Order.) Following these these procedures, the parties moved in motion sequence numbers 006, 007 and 009 for adjudication of their discovery disputes. At issue are three subpoenas addressed to Hindlin's current and former managers but also the permissibility of subpoenas addressed to other nonparties such as the artists, attorneys, and entities referenced above.

Motion Sequence Number 007

In motion sequence number 007, Hindlin moves pursuant to CPLR 2304 to quash or modify the three subpoenas addressed to his current and former managers on the grounds that they allegedly (1) exceed the limits directed by this court's conference orders, (2) are facially defective and fail to apprise the nonparties of the circumstances and reasons requiring disclosure, (3) "attempt to circumvent the parties' disputes relating to the scope of the contract clause upon which some discovery requests are based," and (4) are overly broad and not material and necessary. (NYSCEF 211, Notice of Motion at 2.) Alternatively, Hindlin moves pursuant to CPLR 3103 for a protective order that (1) modifies, strikes, and limits the subpoenas so that they conform to this court's conference orders, (2) narrows the scope of requests to that which is material and necessary, and (3) directs the nonparties to

produce any responsive documents to plaintiff's counsel for a privilege review before production to defendants, and (4) awards costs to nonparties to be paid by the issuing party.

In *Kapon v Koch*, the Court of Appeals outlined the procedure for analyzing a motion to quash subpoenas. (23 NY3d 32, 34 [2014].)

> "[T]he subpoenaing party must first sufficiently state the 'circumstances or reasons' underlying the subpoena (either on the face of the subpoena itself or in a notice accompanying it), and the witness, in moving to quash, must establish either that the discovery sought is 'utterly irrelevant' to the action or that the 'futility of the process to uncover anything legitimate is inevitable or obvious.' Should the witness meet this burden, the subpoenaing party must then establish that the discovery sought is 'material and necessary' to the prosecution or defense of an action, i.e., that it is relevant."

(*Id.* [citations omitted].)

> "Although the nonparty bears the initial burden of proof on a motion to quash, section 3101(a)(4)'s notice requirement nonetheless obligates the subpoenaing party to state, either on the face of the subpoena or in a notice accompanying it, 'the circumstances or reasons such disclosure is sought or required.' The subpoenaing party must include that information in the notice in the first instance."

(*Id.* at 39 [citation omitted].) The function of the notice is to give the nonparty "sufficient information to challenge the subpoenas on a motion to quash." (*Id.*) Subpoenas that include the date, time, location, and affix copies of the pleadings may satisfy the notice requirement. (*Id.*)

The subpoenas here included the date, time, and location for the production of documents. (NYSCEF 220, 221, 222, Subpoenas.) The subpoenas also included the complaint, at least one of the relevant agreements, correspondence, and the answer with counterclaims. (*Id.*) Accordingly, the subpoenas provided sufficient information to challenge them on a motion to quash. Moreover, defendants assert that the subpoenaed parties were

given sufficient notice because one is currently Hindlin's manager, and two are Hindlin's previous managers. Here, the notice requirement is satisfied. (*See Kapon*, 23 NY3d at 39.)

Next, the court must determine whether Hindlin has established either that the discovery sought is "utterly irrelevant to the action" or that "the futility of the process to uncover anything legitimate is inevitable or obvious." (*Id.*) Hindlin argues that a majority of requests in the subpoenas are utterly irrelevant because they seek information concerning work "contemplated to be performed" or "negotiated" by Hindlin. (*See e.g.*, NYSCEF 220, Subpoena.) Hindlin contends that work contemplated to be performed or negotiated cannot be relevant because only work that Hindlin actually performed constitutes breaches of the KMI Agreement. Indeed, Hindlin promised to provide KMI with his exclusive personal services.[1] The court agrees that a majority of discovery sought in the subpoenas is utterly irrelevant.

Hindlin also argues that the subpoenas are duplicative of discovery he has produced, are overly broad, and seek privileged information. He further contends that the requests are improper insofar as they seek information relating to Hindlin's furnishing of "Entertainment Services", as defined in the subpoenas. Additionally, he maintains that the ESI requests are burdensome.

Because Hindlin has made the requisite showing here, the burden shifts to defendants which must establish that the discovery sought in the subpoenas is material and necessary to the prosecution of the action, i.e. that its relevant. (*Kapon*, 23 NY3d at 39.) Defendants contend that

[1] Accordingly, Hindlin appears to concede that the subpoenas are proper insofar as they seek information for "work performed" by Hindlin.

> "to the extent Defendants seek discovery relating to services 'contemplated' to be performed, this is in reference to services contemplated pursuant to written and oral contracts Plaintiff has entered into (or other agreements through which Plaintiff received or earned fees.) The contracts that Plaintiff has entered into all contemplate future work to be performed by Plaintiff. These agreements, and documents relating thereto, are obviously relevant."

(NYSCEF 302, Memorandum in Opposition at 14-15.) It is not obvious to this court that documents contemplating Hindlin's performance are relevant especially when the subpoenas also request contracts relating to work performed by Hindlin. It seems that defendants contend that contracts for work performed are the same as contracts for work contemplated but that does not explain the ways that the words "contemplated" and "negotiated" can be read to expand the scope of the subpoenas beyond contracts for "work performed" by Hindlin. The inclusion of these words in the subpoenas is further undermined by defendants' acknowledgement that "[t]he relevant question is whether Plaintiff provided services." (*Id.* at 16.) Without more, defendants' argument is insufficient to meet their burden as it is conclusory. On these grounds, the subpoenas are quashed without prejudice.

It bears noting that, although Hindlin has shown the utter irrelevance of discovery for contracts contemplated or negotiated that are not performed, he has not shown that all discovery from his managers is utterly irrelevant or that the futility of such discovery is inevitable or obvious. Hindlin argues that the subpoenas are duplicative because he responded to the same requests and produced all relevant documents in his possession. This argument is insufficient. "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." (*Kapon*, 23 NY3d at 38.)

Additionally, this is not an instance where a subpoenaing party fails to demonstrate that a nonparties' duplicative production is necessary. (*Liberty Petroleum Realty, LLC v Gulf Oil, L.P.*, 164 AD3d 401, 405 [1st Dept 2018].) Defendants offer legitimate reasons for subpoenaing Hindlin's managers and show that such information is material and necessary. As defendants assert, Hindlin produced documents revealing transactions that allegedly breached the KMI Agreement. These documents indicated that he entered into numerous transactions to provide his services to nonparties. Defendants cite multiple agreements to provide production and other services to Rita Ora and an agreement to provide an introduction between Spotify and Lauv. Defendants assert that Hindlin's current and former managers should be subpoenaed because they may be in possession of relevant information concerning the performance of these transactions that Hindlin is not. Implicit in this argument is the assertion that the managers have other information about these transactions because they, in fact, manage or managed Hindlin. Indeed, discovery from these nonparties concerning the transactions are relevant to the prosecution of the counterclaims. While Hindlin's argument that he has produced all documents in good faith may be true, it overlooks the reality that defendants are legitimately seeking relevant information from nonparties that might impeach Hindlin at trial.

Hindlin's arguments concerning the burden of ESI requests on nonparties is minimal because defendants are obligated to defray the reasonable productions expenses. (*The Bank Of New York Mellon v WMC Mortg.*, LLC, 2017 NY Slip Op 30139[U], *2 [Sup Ct, NY County 2017].)

Hindlin's arguments concerning privileged documents are not disputed by defendants who indicate their willingness to negotiate process, logistics, and timing.

Hindlin's arguments concerning the use of the word "furnishing" in connection with Entertainment Expenses in the subpoenas are unavailing as a reason to deny discovery at this juncture.

To the extent that other portions of the subpoenas are allegedly overly broad because they are not limited to a certain time frame, defendants may include time frames to tailor the requests.

Accordingly, motion sequence number 007 is granted and the subpoenas are quashed as a majority of the documents sought are utterly irrelevant as discussed above. However, the court will permit defendants a final chance to craft subpoenas that comport with this court's orders. The parties shall stipulate to amended dates in the January 24, 2020 conference order such that the protocol set out there may be followed one last time.

Motion Sequence Number 006

In motion sequence number 006, Hindlin moves pursuant to CPLR 3103 to stay all third-party discovery that Prescription and KMI intend to seek from the "Third Party Partners" identified in the April 22, 2020 email of Defendants' counsel, until the court concludes whether the KMI Agreement that forms the basis of defendants' counterclaims remains in effect.

Alternatively, Hindlin moves to (1) stay third-party discovery from Maroon 5, Maroon 5 Partners, Universal Music Group, and any related or affiliated entities (Stayed Subpoenas) by consent of the parties and requiring defendants to provide at least 7 days notice to Hindlin before renewing the Stayed Subpoenas, whereupon Hindlin shall have the right to object by order to show cause, and service of the Stayed Subpoenas shall remain stayed until either (a) Hindlin fails to object within the time provided or waives his objection or (b) the court rules on Hindlin's order to show cause in respect of the Stayed Subpoenas and (2) deny third party discovery from Rita Ora, Kristian Galva, Jack Gilinsky, Daya, Lauv, Ross

Golan and Malia Civetz or limiting third-party discovery from Rita Ora, Kristian Galva, Jack Gilinsky, Daya, Lauv, Ross Golan and Malia Civetz to (a) written agreements and documents sufficient to identify oral agreements concerning Hindlin's performance of services for third-parties within the entertainment industry and (b) documents sufficient to identify payments to Hindlin relating to the contracts or for services performed by Hindlin for third parties within the entertainment business except this discovery shall exclude (i) contemplated or anticipated agreements by Hindlin, (ii) agreements concerning Hindlin's services as a songwriter or music recording artist, (iii) agreements concerning Hindlin making "introductions" to people; and (iv) documents concerning Hindlin's ownership or role as an officer, director or manager in a third-party entity in the entertainment industry that are unrelated to Hindlin's provision of "Production Services" or "Entertainment Services" to third parties and (3) denying discovery of Electronically Stored Information.

Hindlin's request to stay discovery as to the Third Party Partners is denied. Defendants need not wait until the court concludes whether the KMI Agreement that forms the basis of defendants' counterclaims remains in effect. Defendants are entitled to discovery now to prove their counterclaims.

Hindlin also argues that the court should enter a protective order because (1) it is unlikely that defendants will succeed on their counterclaims, (2) the scope of discovery sought from the Third Party Partners is likely to exceed the scope of discovery from Hindlin, (3) the discovery sought from the Third Party Partners is duplicative of that sought from Hindlin, and (4) the discovery sought is likely to interfere with Hindlin's business relationships with these Third Party Partners.

CPLR 3103 provides that "[t]he court may ... make a protective order denying, limiting, conditioning, or regulating the use of any disclosure device. Such order shall be designated to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other

prejudice to any person or the courts." "An individual or entity who seeks a protective order bears the initial burden to show either that the discovery sought is irrelevant or that it is obvious the process will not lead to legitimate discovery. Once this burden is met, the subpoenaing party 'establish that the discovery sought is material and necessary to the prosecution or defense of an action, i.e., that it is relevant.'" (*Liberty Petroleum Realty, LLC.*, 164 AD3d at 403 [citations omitted].)

For largely the same reasons discussed above, a protective order is granted insofar as defendants may not seek from nonparties information concerning the "anticipated" or "contemplated" provision of Hindlin's services. Defendants may however, request information concerning work performed under oral or written contracts in accordance with the conference orders.

Hindlin's argument that nonparty discovery should be denied or limited because KMI's counterclaim is unlikely to succeed on the merits is unavailing. Hindlin even admits that the First Department has not finally decided any issue on the merits. Defendants are thus entitled to discovery to prove their counterclaims despite how Hindlin perceives their burden of proof. The request for a protective order on these grounds is denied.

Although the court is cognizant of the Hindlin's argument that he and some nonparties may suffer economic and reputational harm as a result of this nonparty discovery, although unfortunate, it is not a reason to deny or limit it at least on this record. Indeed, defendants are entitled to this discovery. Insofar as Hindlin and the nonparties transacted business with each other, they did so at their own risk. The request for a protective order on these grounds is denied.

To the extent that Hindlin seeks to exclude from discovery his services as a songwriter or musical recording artist, defendants assert that "they have explained to [Hindlin] that the subpoenas would not seek documents relating to Plaintiff's songwriting

services." (NYSCEF 354, Memorandum in Opposition at 14-15.) Although the court is not persuaded that Hindlin has made the requisite showing for a protective order with respect to this particular issue in this application, the parties apparently are in agreement that it need not be a topic of discovery. Nevertheless, the request for a protective order on these grounds is denied.

Hindlin's argument that a protective order should be entered with respect to nonparties, such as his business entities like Friends With Pens and their associates, is denied. Hindlin has not met his burden of showing that this information is utterly irrelevant or that it is obvious the process will not lead to legitimate discovery. (*Liberty Petroleum Realty, LLC.*, 164 AD3d at 403.) Defendants may seek this information in accordance with the parameters set out in the conference order dated January 15, 2020.

To the extent that Hindlin raises arguments about duplicative productions and burdensome ESI, they are unavailing for the reasons discussed in motion sequence number 007.

The balance of this motion is denied. The court has considered the parties' arguments and they do not demand an alternative result. The parties will continue to follow the procedure set out in the conference orders, the dates of which will be amended at the next compliance conference.

Therefore, motion sequence number 006 is granted only to the extent set forth above.

Accordingly, it is

ORDERED that motion sequence numbers 006 and 007 are granted to the extent set forth above; and it is further

ORDERED that the argument on October 23, 2020 shall proceed as to motions 10 and 11.

**Motion Seq. No. 06:**

Sept. 24, 2020
DATE

ANDREA MASLEY, J.S.C.

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| CHECK ONE: | | CASE DISPOSED | | | x | NON-FINAL DISPOSITION | |
| | | GRANTED | | DENIED | x | GRANTED IN PART | OTHER |
| APPLICATION: | | SETTLE ORDER | | | | SUBMIT ORDER | |
| CHECK IF APPROPRIATE: | * | INCLUDES TRANSFER/REASSIGN | | | | FIDUCIARY APPOINTMENT | REFERENCE |

**Motion Seq. No. 07:**

Sept. 24, 2020
DATE

ANDREA MASLEY, J.S.C.

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| APPLICATION: | | SETTLE ORDER | | | | SUBMIT ORDER | |
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