

**Arshin v Finkel**

2021 NY Slip Op 30813(U)

March 15, 2021

Supreme Court, New York County

Docket Number: 161228/2020

Judge: Lynn R. Kotler

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

ALEXANDER ARSHIN and LILIA ARSHIN

INDEX NO. 161228/2020

- v -

MOT. DATE

MARINA FINKEL et al.

MOT. SEQ. NO. 1-4

The following papers were read on this motion to/for
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits ECFS DOC No(s).
Notice of Cross-Motion/Answering Affidavits — Exhibits ECFS DOC No(s).
Replying Affidavits ECFS DOC No(s).

This is a special proceeding seeking an order: (1) compelling respondents Marina Finkel, Vladislav Finkel, Yelena Medvedik, Sunrise Express of New Jersey, LLC, Irina Tevlin, CPA, PLLC, and Leonid Zayonts, to produce by dates certain all documents in their possession, custody or control that are responsive to the Subpoenas Ad Testificandum and Duces Tecum that were issued and served upon them in accordance with the Uniform Interstate Deposition and Discovery Act and CPLR § 3119; (2) requiring respondents to appear for remote depositions by dates certain; and (3) for an award of costs and attorneys' fees against respondents in connection with the filing of this application.

The proceeding was brought by order to show cause (motion sequence 1), which directed petitioners to serve, among others, respondents via personal service. Petitioners have provided proof of service, but only respondents Marina Finkel and Vladislav Finkel (collectively the "Finkels"), through counsel, have submitted opposition to the motion. In an interim order dated February 16, 2021, the court adjourned motion sequence 1 to March 2, 2021 for the Finkels to refile their opposition papers (NYSCEF Doc No. 41) and separately upload each of the exhibits in support thereof as a separate NSYCEF document. The Finkels finally complied with that order on March 2, 2021 (NYSCEF Doc. Nos. 71-80).

Meanwhile, petitioner has filed three more motions: sequence 2 to advance motion sequence 1 and file supplemental papers in support of the original motion and sequences 3 and 4 seeking pro hac vice admission of Attorneys Christopher Anton and Peter Frazza. The Finkels oppose motion sequence 2 but there is no opposition to the remaining motions.

All four motions are hereby consolidated for the court's consideration and disposition in this single decision/order. The court's decision follows.

According to the petition, the underlying subpoenas were issued in connection with an action commenced by non-party Bayonne Express LLC ("Bayonne Express") in New Jersey State Court

Dated: 3/15/21

HON. LYNN R. KOTLER, J.S.C.

- 1. Check one: [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION
2. Check as appropriate: Motion is [ ] GRANTED [ ] DENIED [X] GRANTED IN PART [ ] OTHER
3. Check if appropriate: [ ] SETTLE ORDER [ ] SUBMIT ORDER [ ] DO NOT POST
[ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

asserting claims for minority shareholder oppression and related causes of action against Adult Medical Daycare Corp. of Bayonne ("Adult Medical"), petitioners Alexander Arshin and Lilian Arshin and non-party Alexander Levin. In their answer to Bayonne Express' complaint, petitioners assert that Bayonne Express' claim of an ownership interest in Adult Medical is barred by an Option Agreement in which petitioners, along with Levin, Elena Levina, Leonid Zayonts, Yelena Medvedik, Marina Finkel and Vladislav Finkel, as "Grantors," expressly represented and acknowledged that Adult Medical is "100% owned by [Alexander and Lilia] Arshin." Petitioners have further asserted counterclaims seeking, *inter alia*, a declaratory judgment that Bayonne Express is not and never has been a shareholder of Adult Medical.

In connection with the underlying subpoenas, petitioners argue that the discovery sought is material and necessary to their defense and the prosecution of the counterclaims in the New Jersey Action. Meanwhile, the Finkels argue that the requested documents are duplicative of the requests served by petitioners on Bayonne Express in the New Jersey Action, "with the exception of requests for the Finkels' personal tax returns and communications between Marina and the defendants in the New Jersey Matter."

Further, the Finkels' counsel represents that they would accept service of the subpoenas, and consented to the jurisdiction of New Jersey "for purposes of handling discovery disputes in the New Jersey Matter and enforcing compliance with the subpoenas." The Finkels requested that motion sequence 1 be withdrawn against them and claim that "[o]n or about January 18, 2021 [they] provided the [petitioners'] counsel with documents responsive to their subpoenas." The Finkels' counsel further states in relevant part that the Finkels "would produce any additional documents responsive to the subpoenas, with the exception of those which were previously requested from Bayonne Express via requests for production in the New Jersey Matter, including their personal tax returns and electronic communications with the Arshins, Levin and Bayonne, which are in their possession, custody or control within the next thirty (30) days." As such, the Finkels' counsel asserts that "there is no ongoing discovery dispute which necessitates an order compelling the productions of documents from the Finkels or dates for the depositions."

In support of motion sequence 2, petitioners' counsel explains that: [1] Yelena Medvedik sent an email indicating that she received the subpoena, is looking to get an attorney and does not have responsive documents; [2] Medvedik's divorce counsel possesses responsive documents but indicates that Medvedik has declined to consent to their production and a motion to enforce a subpoena on Medvedik's counsel is pending in New Jersey; [3] Leonid Zayonts, sole proprietor of Sunrise Express, sent an email to petitioner's counsel acknowledging receipt of the subpoena, indicated that Zayonts was in the process of getting an attorney, and promised to provide responsive documents and appear for a deposition; and [4] Irina Tevlin, CPA, PLLC, has produced responsive documents and agreed to appear for a remote deposition on March 18, 2021. Petitioners continue to seek an order compelling all respondents to comply with the subpoenas. The Finkels submitted opposition to motion sequence 2 as well and maintain that it should also be denied because petitioners "are either already in possession of the documents sought in their subpoenas or the same documents have been requested in" the New Jersey Action.

At the outset, motion sequence 2 is granted to the extent that petitioners are granted leave to supplement motion sequence 1. The court now turns to the petition itself.

Pursuant to CPLR § 2308[b][1], "if a person fails to comply with a subpoena which is not returnable in a court, the issuer or the person on whose behalf the subpoena was issued may move in the supreme court to compel compliance." "On such a motion, the issuer must show that the items sought to be subpoenaed 'have some relevancy and materiality to the matter under investigation'" (*Hynes v. Moskowitz*, 44 NY2d 383 [1978]). Further, "[a] person subject to a nonjudicial subpoena *duces tecum* may challenge it in court if the subpoena requires the production of irrelevant or immaterial documents, or is used as an instrument of harassment (*id.* [internal citations omitted]). CPLR § 2308[b][1] authorizes the imposition of costs and a penalty for failing to comply, each "not exceeding fifty dollars".

Since Irina Tevlin, CPA, PLLC has complied with the subpoena, that portion of the petition is denied as moot. As for the balance, it is granted. Petitioners have met their initial burden. The defaulting respondents have naturally failed to rebut that showing. As for the Finkels, the court finds their opposition wanting. Merely claiming overlap between records sought from Bayonne Express does not demonstrate that requesting similar records from them is irrelevant or immaterial nor have they shown that the subpoenas were merely designed to harass them. Accordingly, petitioners are entitled to an order compelling the remaining respondents to comply with the subpoenas. Given the length of time that has passed since the subpoenas were served and the looming trial date in the New Jersey Action, the court directs all respondents but Irina Tevlin, CPA, PLLC to comply with the subpoenas by: [1] producing all responsive documents in their possession within 15 days from service of this order with notice of entry upon them; and [2] appearing for a deposition virtually on a mutually agreeable date and time within 30 days from service of this order with notice of entry. Respondents are directed to contact petitioner's counsel to set the date and time for the depositions.

Finally, petitioners seek an award of costs and attorneys' fees against respondents, which is granted only as to the Finkels and the remaining respondents but Irina Tevlin, CPA, PLLC in conformance with CPLR § 2308[b][1], to wit, \$100 against each representing \$50 for costs and \$50 for failure to comply with the subpoenas.

The court now turns to the motions for admission *pro hac vice*. While this decision disposes of this proceeding, petitioners may need to make a subsequent application for contempt should the respondents fail to comply with this order. Therefore, the court finds that the remaining motions should be granted without opposition, as petitioners have provided proof of the attorneys' good standing in New Jersey and the other requirements for admission *pro hac vice* have been met.

Accordingly, it is hereby

**ORDERED** that motion sequence 2 is granted to the extent that petitioners are granted leave to supplement motion sequence 1 with the papers filed therein; and it is further

**ORDERED** that motion sequence 2 is otherwise denied; and it is further

**ORDERED** that the petition is granted to the following extent:

[1] respondents Marina Finkel, Vladislav Finkel, Yelena Medvedik, Sunrise Express of New Jersey, LLC, and Leonid Zayonts are directed to comply with the Subpoenas Ad Testificandum and Duces Tecum by:

[a] producing all responsive documents in their possession within 15 days from service of this order with notice of entry upon them; and

[b] appearing for a deposition virtually on a mutually agreeable date and time within 30 days from service of this order with notice of entry. Respondents are directed to contact petitioner's counsel to set the date and time for the depositions; and

[2] the Clerk is directed to enter a money judgment in favor of petitioners and against each of the respondents Marina Finkel, Vladislav Finkel, Yelena Medvedik, Sunrise Express of New Jersey, LLC, and Leonid Zayonts for \$100 each; and it is further

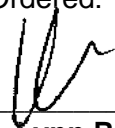
**ORDERED** that the balance of the petition is denied as moot; and it is further

**ORDERED** that motion sequence numbers 3 and 4 are granted without opposition; and it is further

**ORDERED** that Attorneys Christopher Anton and Peter Frazza are hereby admitted *pro hac vice* for all purposes in connection with the above-captioned action, and they shall be familiar with and shall comply with the standards of professional conduct imposed upon members of the New York bar, and other rules governing the conduct of attorneys. New York Court Rules § 520.11[d].

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 3/15/21  
New York, New York

So Ordered:  
  
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Hon. Lynn R. Kotler, J.S.C.