

Zelik v Rubashkin

2021 NY Slip Op 31607(U)

May 10, 2021

Supreme Court, Kings County

Docket Number: 501618/17

Judge: Lawrence S. Knipel

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At an IAS Term, Commercial Part 6 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 10th day of May, 2021.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

-----X

JOSEPH ZELIK,

Plaintiff,

DECISION AND ORDER

-against-

Index No. 501618/17

YITZCHOK DOVID RUBASHKIN, et al.,

Mot. Seq. No. 7

Defendants.

-----X

The following e-filed papers read herein:

NYSCEF No.:

Notice of Motion, Supporting Affirmation), and Exhibits Annexed

257-269

Affirmations in Opposition and Exhibits Annexed

270-278, 280-282

Reply Affirmation and Exhibits Annexed

283-285

In this action to foreclose on two mortgages, defendant Yitzchok Dovid Rubashkin (defendant) moves for an order: (1) quashing the Subpoena Duces Tecum and Ad Testificandum (the subpoena) served by plaintiff Joseph Zelik (plaintiff) on his accountant Yaakov Wasser (Wasser), and (2) compelling plaintiff to make available for examination the original of a particular check which he previously produced in discovery. Plaintiff opposes.

(1)

Turning to the initial branch of defendant's motion which is to quash the subpoena, the Court notes that such subpoena was personally served on Wasser's partner, Michael Lipstein (Lipstein), rather than on Wasser himself.¹ Service of the subpoena on *Lipstein* to compel pretrial testimony and document production from *Wasser* is insufficient because no additional

¹ Lipstein and Wasser are partners in the accounting firm of Wasser, Brettler, Klar & Lipstein.

mailing to Wasser under CPLR 308 (2)² was effectuated (*see Pennsy Corp. v Pinter*, 17 Misc 3d 1116[A], 2007 NY Slip Op 52025[U], *3 [Sup Ct, Kings County 2007]; *Gatley v Deters*, 128 Misc 2d 209, 210-211 [Sup Ct, Niagara County 1985]; *Matter of Taylor v Brodt*, 90 Misc 2d 793, 795 [Sup Ct, NY County 1977]).

Plaintiff's contention (in ¶ 61 of his co-counsel's opposition) that "service of process of the [s]ubpoena was effectuated upon Wasser pursuant to CPLR § 310 (a)" is unavailing. CPLR 310, entitled "Personal service upon a partnership," states, in part, that "[p]ersonal service upon persons conducting a business as a partnership may be made by personally serving the summons upon any one of them" (CPLR 310 [a]). It cannot be disputed that service of process on a partnership by service on any of its individual partners is effective and proper under CPLR 310 (a) *insofar as the partnership is concerned* (*see Larroca v Royal Assoc., LLC*, 289 AD2d 537, 538 [2d Dept 2001]).³ Here, however, CPLR 310 (a) is inapplicable, inasmuch as the subpoena demanded *Wasser's personal* attendance and document production, rather than the *partnership's general* attendance and document production (*accord Bensaul v Fanwood Estates*, 128 Misc 2d 110, 110-111 [Sup Ct, NY County 1984] ["Although service on any partner, whether named as a party or not gives the court jurisdiction over the partnership (CPLR 310), no partner's personal estate will be bound by the judgment unless he is named as

2

CPLR 308, entitled "Personal service upon a natural person," states, in part, that:

"Personal service upon a natural person shall be made by any of the following methods: . . .

2. By delivering the summons within the state to a person of suitable age and discretion at the actual place of business . . . and by . . . mailing the summons by first class mail to the person to be served at his . . . actual place of business. . . ."

3

To the same effect are the other, likewise inapposite decisions cited by plaintiff (*see Foy v 1120 Ave. of Ams. Assoc.*, 223 AD2d 232, 237 [2d Dept 1996]; *Brown v Sagamore Hotel*, 184 AD2d 47, 50 [3d Dept 1992]; *First Am. Corp. v Price Waterhouse LLP*, 154 F3d 16, 19 [2d Cir 1998]).

2

a party and personally served.”)]. Thus, the subpoena must be quashed in the absence of the follow-up mailing to Wasser as required by CPLR 308 (2).

(2)

The remaining branch of defendant’s motion seeks examination of the original of check No. 9487 in the amount of \$208.87 which allegedly was handwritten by plaintiff to the order of defendant at, or in connection with, the second loan closing (the check). Defendant denies receiving, depositing, or cashing the check. The record reflects that the check (either as a photocopy or as an original) exists in two versions: the first (or the earlier) version which is without the handwritten notation “never was negotiated” (the unannotated version); and the second (or the later) version which bears such notation (the annotated version). Both the unannotated version and the annotated version were previously produced, in the form of *photocopies*, by plaintiff to defendant. Defendant’s counsel (in ¶ 28 of his affirmation) seeks to inspect the *originals* of the annotated and the unannotated versions of the check “as [being] relevant to the usury defense.” Plaintiff, in response, submits his affidavit averring (in ¶¶ 5, 7-8 thereof) that: (1) he made a photocopy of the unannotated version of the check before tendering it at the second loan closing; (2) neither he nor the drawer bank was able to locate the canceled check; and (3) “[a]s a result, [plaintiff] wrote the notation ‘never was negotiated’ on [his] [photo]copy of the check.” Plaintiff’s affidavit makes it clear that only the original of the annotated version of the check exists, with the annotation having been placed on a true photocopy of the check. Considering that defendant already has received a true photocopy of the annotation, production of the original annotation for his counsel’s inspection cannot in any way assist him in preparing for trial (*cf. Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968] [“CPLR 3101 (a) is to be liberally construed “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.”] [emphasis added]).

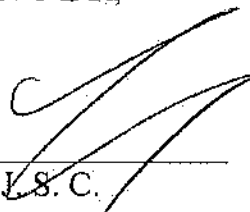
Accordingly, it is

ORDERED that defendant’s motion in Seq. No. 7 is *granted to the extent* that the subpoena is quashed for lack of adequate service on Wasser pursuant to CPLR 308 (2), and the remainder of his motion is denied; and it is further

ORDERED that plaintiff’s co-counsel, Fidelity National Law Group, shall electronically serve a copy of this decision and order with notice of entry on defendant’s counsel and on plaintiff’s other co-counsel, and shall electronically file an affidavit of service thereof with the Kings County Clerk.

This constitutes the decision and order of the Court.

ENTER,



L.S.C.

HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE