

Star Auto Sales of Queens LLC v Filardo

2021 NY Slip Op 33957(U)

March 5, 2021

Supreme Court, Queens County

Docket Number: Index No. 717443/2017

Judge: Marguerite A. Grays

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE MARGUERITE A. GRAYS**
Justice

IAS PART 4

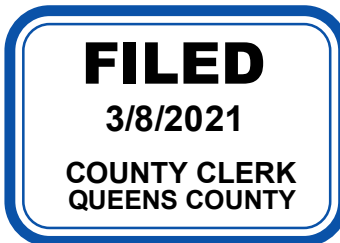
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STAR AUTO SALES OF QUEENS LLC
D/B/A STAR SUBARU,

Plaintiff(s),

-against-

DOUGLAS FILARDO and
SUBARU MOTORSPORTS D/B/A
MOTORSPORTS ADVERTISING,

Defendant(s).
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Index
No.: 717443/2017

Motion
Dated: September 8, 2020

Motion
Cal. No.:

Motion
Seq. No.: 6

The following papers numbered EF120-EF126, EF128-EF147, EF148-EF156 and EF158-EF162 on this motion by plaintiffs for an Order: (1) pursuant to CPLR §2304, quashing three non-party subpoenas *duces tecum* served by defendants, and (2) pursuant to CPLR §3101(4), for a protective order prohibiting disclosure of the information and documents sought in the subpoenas; and on this cross-motion by defendants for an Order: (1) pursuant to CPLR §2304, quashing the subpoenas *duces tecum* served by plaintiff on defendants' Chase Bank account and American Express credit card account, and (ii) pursuant to CPLR §3103, granting a protective order prohibiting disclosure of the documents and information sought in the subpoenas.

	PAPERS NUMBERED
Notice of Motion – Affs – Exhs.....	E120-E126
Notice of Cross- Motion – Affs- Exhs.....	E128-E147
Aff in Opp to Cross- motion – Affs – Exhs.....	E148-E156
Reply Aff – Exhs.....	E158-E162

Upon the foregoing papers, it is ordered that this motion by plaintiff and cross-motion by defendants are granted.

In this action, plaintiff seeks to recover damages resulting from the alleged illegal and improper conduct of former sales manager defendant Douglas Filardo (Filardo) during Filardo's employment with plaintiff, wherein Filardo is alleged, *inter alia*, to have embezzled funds.

On June 19, 2020, defendants served a subpoena duces tecum on Gregory W. Fox, Esq. of Marshall, Denehy, Warner, Coleman & Goggins seeking the "entire file", including pleadings, motions, court orders, discovery requests, discovery responses, documents produced, deposition transcripts with exhibits and non-privileged communications, with regard to litigation involving that firm in an action pending in the Eastern District of New York entitled *Star Auto Sales of Bayside, Inc. (d/b/a Star Toyota of Bayside), et al., v. Voynow, Bayard, Whyte and Company, LLP, et al.* (index number 1:18-CV-05775). On June 30, 2020, defendants served a subpoena seeking the same type of information on Daniel Tessler, Esq. counsel for a party involved in litigation pending in Supreme Court, Nassau County, in the action entitled *Star Auto Sales of Bayside Inc, et al., v. Despina Theocharis* (index number 613475/2017), and on Raymond C. Baierlein, Esq., counsel for a party in a matter pending in Queens Supreme Court in the action entitled *Star Auto Sales of Bayside Inc, et al., v. Michael Karouzakis*, (index number 718804/2018), also seeking the "entire file" in relation to that litigation. The actions are cases in which plaintiff was one of a number of other corporate plaintiffs and involve allegations of fraud made by several automotive dealerships, including plaintiff, against other employees.

Plaintiff asserts in the instant motion that all three subpoenas should be quashed on the grounds that the information sought is irrelevant to the instant action, that the requests are overboard, and that the nonparty subpoenas each lack the requisite notice under CPLR §3101(a)(4). A review of the three subpoenas shows that they are each bereft of language that sufficiently states "the circumstances and reasons" for which such disclosure is required (*See, Matter of Kapon v Koch*, 23 NY3d 32 [2014]). Such language must be set forth on the face of the document or with an accompanying notice (*Matter of Kapon v Koch, supra*). This "minimal obligation" is the standard that must be met before any further analysis is required (*Ferolito v Arizona Beverages, USA*, 119 AD3d 642 [2014]; *Bianchi v Galster Mgt. Corp.*, 131 AD3d 558 [2015]; *Reda v Port Authority of N.Y. and N.J.*, 188 AD3d 1278 [2020]). The purpose of the rule is to ensure that the entity receiving the subpoena, which is a stranger to


the action, understands why it is receiving the subpoena and what is being asked of it so that it can decide how to respond (*Velez v. Hunts Point Multi-Service Center*, 29 AD3d 104, 110 [2006]). Here, plaintiff objects to the subpoena on such grounds, and the objection has not been waived (*Velez v. Hunts Point Multi-Service Center, supra*). A subpoena is facially defective when it fails to provide sufficient explanation of the circumstances or reasons requiring disclosure either on its face or in any accompanying material (*Capacity Group of NY v Duni*, 186 AD3d 1482 [2020]).

Notwithstanding the foregoing, from their very wording, in seeking the “entire file” related to certain litigation, the subpoenas are defective in that they are overly broad. Plaintiff’s correctly argue that much of the information sought is publicly available. While defendants argue that, in a series of emails, they agreed to limit the scope of the demand, no amended subpoenas were served, and plaintiff still maintains its objection on the grounds of over breadth. The limitations suggested in the defendants’ counsels’ emails themselves serve as tacit recognition of the overboard nature of the requests. The objectionable nature of overbroad discovery requests also applies to subpoenas (*Bour v 254 Bleeker LLC*, 104 AD3d 454 [2013]; *Rodriguez v Crescent Contracting Corp.*, 305 AD2d 215 [2003]). Here, it is noted that not all of the information sought in the subpoenas can be said to be ‘utterly irrelevant,’ (see *Kapon v Koch, supra*), however, when a request is overly broad or seeks irrelevant information, the remedy is for the Court to vacate the entire demand rather than to prune it (*Matter of Cheryl LaBella Hoppenstein 2005 Trust*, 186 AD3d 1230 [2020] as cited by *Arch Specialty Insurance Co. v HDI Gerling America Ins. Co.*, 70 Misc 3d 1210(A), [Sup. Ct, NY Co., Jan. 21, 2021]). While the court does not rule out that defendants may yet craft a proper subpoena, the task to do so is that of defendants and not the court. Accordingly, the branch of plaintiff’s motion to quash the three subpoenas served on plaintiff is granted, as is the branch of motion for a protective order pursuant to CPLR §3103.

The cross-motion to quash plaintiff’s nonparty subpoenas for Filardo’s Chase Bank account and American Express credit card account is granted. On May 27, 2020, this Court issued an Order vacating Plaintiffs First Request for Production of Documents on grounds that nearly identical discovery requests were overly broad and lacked specificity. Subpoenas are not to be used as a discovery tool (*Capacity Group of NY, LLC v Duni, supra*; *Law Firm of Ravi Batra PC v Rabinowich*, 77 AD3d 532 [2010]). Here, plaintiff’s justification for the requests, to wit: that they “may show” that Filardo was living beyond his means, or that the records “may show” that Filardo deposited more money in his account than he was earning at Star Subaru, is plainly and impermissibly hypothetical and tantamount to the proverbial ‘fishing expedition’ (See *Oak Beach Inn Corp. v Town of Babylon*, 239 AD2d 568 [1997]; *Law Firm of Ravi Batra PC v Rabinowich, supra*). Rather, subpoenas should be employed only for the production of specific documents that are relevant to the material facts at issue (*Matter of Terry D.*, 81 NY2d 1042 [1993]).

Accordingly, the cross-motion to quash the two subpoenas and for a protective order, is granted.

Dated: 3/5/21



MARGUERITE A. GRAYS
J.S.C.

