

**Rosenthal v Meza**

2022 NY Slip Op 32508(U)

July 27, 2022

Supreme Court, New York County

Docket Number: Index No. 656351/2017

Judge: Barbara Jaffe

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE PART 12

Justice

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ERIC ROSENTHAL, NICHOLAS CASCIO,

Plaintiff,

- v -

DEOGENE MEZA, MELODY MEZA, THE
FUTURES GROUP IT LLC, FUTURES GROUP
HOLDINGS INC., FUTURES GROUP STAFFING
SOLUTIONS INC., L.M. COHEN & CO. LLP
CERTIFIED PUBLIC ACCOUNTANTS,

Defendants.

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INDEX NO. 656351/2017

MOTION DATE

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 104-106, 108-113 were read on this motion to quash subpoena.

Defendants Deogene Meza and Melody Meza (Mezas), and The Futures Group IT LLC (Futures IT) (collectively, movants) move pursuant to CPLR 3101(a)(4) for an order quashing the subpoena that was served on non-party ResMac, Inc. (ResMac) on April 25, 2022. Plaintiffs oppose.

I. PERTINENT FACTS

In their complaint, plaintiffs allege that defendants made material misrepresentations concerning commissions owed to them for work performed as employees of Futures IT, and that Futures IT possessed sufficient resources to pay the commissions and failed to do so, instead using company funds to pay for the Mezas's personal expenses and obtaining business loans based on inaccurate financial information. (NYSCEF 69).

The subpoena sought to be quashed is directed to ResMac, whereby it is required to produce documents and correspondence pertaining to defendants and any loan application,

including as to a specific mortgage of real property for which it provides the mortgage identification number and parcel ID number. Plaintiffs explain therein that the documents sought are material and necessary as they relate to unpaid commissions they duly earned from defendants, and to the misuse of defendants' assets in contravention of their obligations to pay them. (NYSCEF 106).

## II. CONTENTIONS

In support of their motion, movants assert that plaintiffs' subpoena seeks information which is not material or necessary to the action, as the Mezas's records and communications with a lender for personal reasons are outside the scope of the underlying employment dispute, plaintiffs having been employed by Futures IT, not by the Mezas. They maintain that the subpoena is premature, as the documents may be sought from movants in the normal course of discovery, which is ongoing, and that it is overbroad, as it seeks documents from a period beyond the limitations period for the pertinent causes of actions. If the subpoena is not quashed, movants ask that a protective order be entered limiting the scope to all documents pertaining to Futures IT for 2016 to 2017. (NYSCEF 105).

In response, plaintiffs assert that the motion is made pursuant to an inapposite CPLR provision of the CPLR, that movants lack standing to challenge the subpoena as they have no ownership or other interest in a lender's internal underwriting records and decisions, and that the motion is defective absent an affirmation of good faith. Plaintiffs also maintain that the information sought in the subpoena is germane to their claims that the Mezas purposely undercapitalized and/or transferred assets from Futures IT. They note that at her deposition, they questioned Melody about the mortgage without objection, and that they asked that she produce the loan application. As movants' counsel stated that Melody could not find loan application, the

subpoena is necessary. (NYSCEF 108).

### III. ANALYSIS

When making a disclosure-related motion, the movant must submit an affirmation reflecting efforts made in good faith to resolve the issue raised by the motion. (22 NYCRR § 202.7). Pursuant to 22 NYCRR § 202.20-f and this court's part rules, available on the New York State Supreme Court website, the failure to submit such affirmation "may result in the denial of a discovery motion." (<https://www.nycourts.gov/legacypdfs/courts/ljd/supctmanh/Rules/part12rules.pdf>). As movants fail to submit an affirmation with "the time, place, and nature of the consultations that counsel had with [opposing] counsel to try to resolve the issues raised by the motion" (*Cashbamba v 1056 Bedford LLC*, 172 AD3d 415, 416 [1st Dept 2019]), their motion fails (*see 148 Magnolia, LLC v Merrimack Mut. Fire Ins. Co.*, 62 AD3d 486 [1st Dept 2009] [upholding denial of motion to quash subpoena where defendant failed to submit affirmation of good faith or set forth time, date, and nature of consultations with plaintiff]).

If the motion is considered, movants lack standing to object to the subpoena as they have no ownership or other interest in those records. (*AQ Asset Mgt. LLC v Levine*, 111 AD3d 245, 260 [1st Dept 2013] [depositor lacks standing to quash subpoenas directed at bank records of his accounts]). Movants also fail to demonstrate that the requested documents are irrelevant to plaintiffs' causes of action and that they are not limited to the period of time previously found to be relevant. Nor are the subpoenas premature under the circumstances.

### V. CONCLUSION

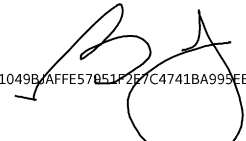
Accordingly, it is hereby

ORDERED, that the motion to quash the subpoenas issued to ResMac, Inc. is denied; and

it is further

ORDERED, that the parties are directed to either enter into a stipulation encompassing their next compliance conference on or before September 14, 2022, or appear for the conference in room 341, 60 Centre Street, New York, New York, on September 14, 2022 at 2:15 pm or virtually if necessary.

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7/27/2022

DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE