

Cornejo v Rose Castle Corp.
2022 NY Slip Op 32657(U)
August 8, 2022
Supreme Court, Kings County
Docket Number: Index No. 500178/2016
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

**JOSE CORNEJO and CARLOS CORNEJO on behalf
of themselves and others similarly situated,**

Plaintiffs,

-against-

**ROSE CASTLE CORP. d/b/a ROSE CASTLE,
ROSE CASTLE PARTY FUNCTION CORP.,
ROSE CASTLE CATERING INC.,
YIDEL HIRSCH, ABRAHAM ROSENBERG,
and any other related entities,**

Defendants.

DECISION /ORDER

Index No. 500178/2016

Motion Seq. No. 16, 17

Date Submitted: 6/30/22

*Recitation, as required by CPLR 2219(a), of the papers considered on non-party NYS Department
of Taxation and Finance's motions to quash plaintiffs' subpoenas and related relief.*

Papers	NYSCEF Doc.
Notice of Motion/Order to Show Cause, Affirmation and Exhibits..	<u>203-206,224-226; 220-222</u>
Affirmation in Opposition, Affidavits and Exhibits Annexed.....	<u>233-240</u>
Reply Affirmation.....	<u>243; 242</u>

Upon the foregoing cited papers, the Decision/Order on these motions is as follows:

This is a class action for unpaid wages, tips, service charges, and gratuities. The class is defined in a prior 2017 order of this court, which certified the class as “all individuals who performed work as servers, attendants, bussers, bartenders, food runners, captains and in related service positions at Defendants’ catered events from October 2009 to the present, including those at the facility commonly known as Rose Castle.” The action was commenced in Nassau County and was transferred to Kings County by so-ordered stipulation in 2016. The action was discontinued as against defendant Yidel Hirsch in 2016, but it was not so-ordered. The court hereby orders that his name be removed from the caption, as well as “any other related entities”.

Background

In Motion Seq. #16, non-party DTF (New York State Department of Taxation and Finance) moves by order to show cause for an order quashing a subpoena served upon it. In Motion Seq. #17, non-party DTF (New York State Department of Taxation and Finance) moves by notice of motion for the same relief. The two motions were submitted on consent and without argument on 6/20/22.

The first motion was an order to show cause signed on September 9, 2021, and was originally returnable on 12/9/21. It seeks an order pursuant to CPLR “quashing, vacating, canceling, and setting aside the subpoena duces tecum dated 8/11/21.” The second motion was filed on November 3, 2021 and was originally returnable on December 1, 2021. It seeks an order “quashing a subpoena served upon the Department for certain tax records, upon the grounds that the subpoena was improperly served and, alternatively, that the subpoena violates the New York State Tax Law's secrecy provisions” which subpoena is dated October 26, 2021.

Movant distinguishes the two motions thusly “the non-party New York State Department of Taxation and Finance filed a proposed order to show case, with supporting affirmation, seeking similar relief as set forth in further detail below. However, the Court has not acted on this proposed order to show cause, and more recently issued a separate subpoena dated October 26, 2021, which is the subject of this new motion.” The court notes that it cannot “act” upon a motion before the parties agree that it is fully briefed and ready for argument or submission. Here, there are several stipulations which were e-filed with briefing schedules. Both motions were submitted on June 30, 2022, for decision.

The first subpoena [Doc 189 dated 8/10/21] sought:

1. "All Form NYS-45" for each quarter from 2009 until the present submitted by or related to Rose Castle Corp., Rose Party Functions Corp., Rose Castle Catering, Inc., and Coqui's Corp. ("defendant entities").¹
2. A list of all individuals known to have been employed by [the four defendant entities] from 2009 to the present and their last known contact information.

The second subpoena was issued on October 26, 2021 [Doc 219] in response to plaintiffs' motion filed by notice of motion on August 10, 2021 (Motion Seq. #13) for the issuance of said subpoena. It requested the same items. In fact, it is the same subpoena. That is, when plaintiffs filed the notice of motion for Motion Seq. #13, the proposed subpoena was e-filed as an exhibit to the motion. But instead of e-filing it correctly as an exhibit, it was e-filed as "subpoena (request to so order)". Therefore, it was sent to the undersigned to sign immediately upon filing. Unaware that there had been a motion made for the issuance of the subpoena, a motion which is not necessary, but is permissible, the court signed the subpoena. Then, when the motion was submitted for decision, the second identical subpoena was signed. As the motion was not served upon the NYS DTF, it was not opposed. Therefore, as there was really only one subpoena, admittedly signed twice, there is no distinction to be made with regard to the court's analysis of one of these two motions versus the other.

Discussion

"Disclosure in civil actions is generally governed by CPLR 3101 (a), which directs: [t]here shall be full disclosure of all matter material and necessary to the prosecution or

¹ Coqui's Corp. is not a defendant.

defense of an action, regardless of the burden of proof. . . . The test is one of usefulness and reason. *Forman v Henkin*, 30 NY3d 656, 661 (2018) (internal quotation marks and citations omitted). CPLR 3101 (a) "embodies the policy determination that liberal discovery encourages fair and effective resolution of disputes on the merits, minimizing the possibility for ambush and unfair surprise." *Id.* at 661 (internal quotation marks and citation omitted). "The supervision of disclosure and the setting of reasonable terms and conditions therefor rests within the sound discretion of the trial court" *Montalvo v CVS Pharm, Inc.*, 102 AD3d 842, 843 (2d Dept 2013) (internal quotation marks and citations omitted). Pursuant to CPLR 3124, "[i]f a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article . . . the party seeking disclosure may move to compel compliance or a response." On a motion brought pursuant to CPLR 3124, the burden is on the party seeking the disclosure to establish a basis for the production sought. *Rodriguez v Goodman, M.D.*, 2015 NY Slip Op 31412(U), *5 (Sup Ct, NY County 2015). "[T]he party challenging disclosure bears the burden of establishing that the information sought is immune from disclosure." *Ambac Assurance Corp. v DLJ Mortg. Capital, Inc.*, 92 AD3d 451, 452 (1st Dept 2012). Courts have found that a party is not required to respond to a discovery demand that is "palpably improper . . . [in that it is seeking] irrelevant information, or [is] overbroad and burdensome." *Montalvo v CVS Pharm, Inc.*, 102 AD3d at 843.

Here, plaintiffs have tried to obtain the information from the defendants but have been unsuccessful. For example, the court directed defendants to provide authorizations for the release of their tax returns from 2009 to the present (Doc 217) on September 10, 2021, but defendants have not complied. As a result, they have been unable to identify the members

of the class. Further, their employer seems to close its business and open under a new name on a regular basis, as is discussed further below.

The subpoena is not overly broad or unduly burdensome. It is not facially deficient insofar as it provides sufficient notice of the "circumstances or reasons" why the disclosure was "sought or required" from plaintiffs (CPLR 3101[a][4]). The NYS DTF is a government agency which is supposed to monitor that employers pay to it all withheld income taxes, and, ideally, that the amounts match the amounts on an employee's W-2 at the end of the year.

Conclusions of Law

DTF's rationale for moving to quash the subpoena is erroneous, in the court's opinion. The records sought are records of the plaintiffs' own funds, which were withheld from their paychecks and should have been turned over to DTF. Plaintiffs allege that gratuities were included in the customer's contracts for catering services but were not turned over to them. Counsel for the plaintiffs is entitled to see what their employer reported as their wages, and the amounts which were withheld for state and local taxes. There is no other way to compare this information with the plaintiffs' W-2 forms.

The subpoena requests two types of information. First, it requests the defendants' business' filings of withheld State and local income taxes (as well as withheld unemployment insurance) for their employees, which employers are obligated to turn over to the State of New York each quarter on Form NYS-45. Second, it requests a list of employees for the entities with their last known addresses. While this would be helpful for notifying potential class members, it appears this is not information kept in this format by the moving non-party DTF. Form NYS-45 asks for only the names and social security numbers of the employees. Further, it appears the New York State Department of Labor provided similar information to

plaintiffs' counsel after the subpoena at issue here was served upon that agency (See Doc 251).

To be clear, form NYS-45 Part A, regarding unemployment insurance, asks employers to provide a total number of employees for the quarter, the total "renumeration" paid (in total) in the quarter, and by applying the appropriate percentage of the wages subject to contribution, the amount that was withheld from employees and the amount that must be paid to New York State for unemployment insurance. None of this information is specific to any person, nor does it reveal any private or secret information. Part B of the form asks the employer how much was withheld from its employees' pay for State and NYC income taxes, in a lump sum and not specific to each employee, and how much, in turn, must be turned over to New York State. Part C of the form asks for each employee's name, social security number, gross wages for the quarter, and amounts for each employee withheld for unemployment insurance and for State and local income taxes. Part D is for corrections and additions, presumably for an amended form, and Part E asks for change of business information, if the business is sold or transferred, and to what entity. Other than the social security numbers of the employees, there is nothing on these forms that needs to be redacted, or which reveals any secret or private information.

With regard to the subpoena for records of Coqui's Corp., a corporation listed as inactive since 8/18/16 on the New York State Department of State, Division of Corporation's database, an entity which is not a party, the court grants the motion. It is not clear why plaintiffs' subpoena and affirmation in opposition refers to this corporation as a defendant. Thus, the subpoena is quashed with regard to this entity.

With regard to defendant Rose Castle Corp. d/b/a Rose Castle, a corporation listed as inactive since 12/26/01 on the New York State Department of State, Division of Corporation's database, as "dissolved by proclamation" for not filing NYS tax returns, the movant must respond in some fashion to the subpoena, perhaps solely to state that there were no filings by this corporation for 2009 or later. If there were NYS-45 filings, then DTF should turn them over, with the social security numbers of the employees redacted.

Next, with regard to defendant Rose Party Functions Corp., a corporation listed as inactive since 12/29/04 on the New York State Department of State, Division of Corporation's database, as "dissolved by proclamation" for not filing NYS tax returns, the movant must respond in some fashion to the subpoena, perhaps solely to state that there were no filings by this corporation for 2009 or later. If there were filings, then DTF should turn them over, with the social security numbers of the employees redacted. The court notes that this State website indicates that it was this corporation that was doing business as "Rose Castle", not Rose Castle Corp.

Finally, with regard to defendant Rose Castle Catering Inc., an active corporation according to the NYS Department of State, Division of Corporations database, the motion is denied with regard to the NYS-45 forms. DTF must comply with the subpoena, with the social security numbers of the employees redacted.

The court notes that it appears that the same individuals involved with the defendant corporations have conducted business under other similar names, all corporations with their principal office in Kings County, which are not parties to this action, including Rose Castle Hall Inc. [started in 2011] and Rose Castle Party Services Corp. [started in 2013], both of which are listed as active corporations on the New York State Department of Corporations

public website. Plaintiffs may have been working for all of these entities. The multiplicity of entities with “Rose Castle” in their name organized in Kings County gives an appearance, at least to this court, of an entity trying to evade its paperwork obligations, if not more nefarious goals, and while the audit division of DTF may already be investigating this situation, these plaintiffs will not necessarily benefit from any such investigation.

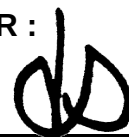
Accordingly, it is **ORDERED** that the motion is granted with regard to Coqui’s Corp., which is not a party defendant, and is denied with respect to the three named corporate defendants, and DTF shall turnover all of the NYS-45 forms filed by the three defendant corporations from 2009 to the present, with the social security numbers of the employees redacted, within 60 days.

It is further **ORDERED** that the motion is granted with respect to the subpoena’s request for “A list of all individuals known to have been employed by [the four defendant entities] from 2009 to the present and their last known contact information,” and that part of the subpoena is hereby quashed.

This constitutes the decision and order of the court.

Dated: August 8, 2022

ENTER:



Hon. Debra Silber, J.S.C.