

Moses v Weil

2023 NY Slip Op 30568(U)

February 27, 2023

Supreme Court, New York County

Docket Number: Index No. 151159/2023

Judge: Sabrina Kraus

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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. SABRINA KRAUS PART 57TR

Justice

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INDEX NO. 151159/2023

ROBERT H. MOSES, BAR NOTHING RESOURCES L.P.,
MOSES GULF COAST HOLDINGS, LP,

MOTION DATE N/A

PETITIONERS,

MOTION SEQ. NO. 002

- v -

MATTHEW WEIL,

**DECISION + ORDER ON
MOTION**

RESPONDENT.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33

were read on this motion to/for QUASH SUBPOENA, FIX CONDITIONS.

BACKGROUND

Petitioners commenced this proceeding seeking to depose Respondent a non-party witness in relation to litigation pending in Texas. Petitioners obtained a subpoena from this Court addressed to Matthew Weil (Weil) on the basis that Weil was residing at 320 W. 86th St. in New York City.

Defendants in the Texas litigation and Weil now move for an order quashing the subpoena on the arguing *inter alia* that Weil is not a resident of New York State, was not properly served and that the court lacks jurisdiction over him.

For the reasons stated below, the motion is granted.

ALLEGED FACTS

In September 2019, Petitioners commenced an action entitled *Robert H. Moses, Bar Nothing Resources, L.P., and Moses Gulf Coast Holdings, L.P. v. Delfin Midstream, Inc. et al.*

under Cause No. 2019-71020, in the 295th Judicial District Court of Harris County, Texas. The action arises from a decision by Defendants not to buy or lease certain of Petitioner Robert H. Moses's mineral interests in Cameron Parish, Louisiana, which Defendants had considered for the purpose of producing natural gas for export from Defendants' planned LNG facility off the Louisiana coast. Petitioners have asserted claims for common-law fraud and based on quasi-contractual theories, all of which arise out of Moses's allegation that Defendants orally promised to reimburse him for enhancements to seismic surveys of his mineral interests and for work he claims to have performed in the course of unsuccessfully attempting to convince Defendants to buy his assets.

On January 6, 2023, Petitioners applied to the Texas court for issuance of Letters Rogatory directed to the Clerk of the Court for New York County, New York. In support of the application, they noted that Weil was Chief Financial Officer of Defendant Fairwood Peninsula Energy Corporation ("FPEC") from March 27, 2015, to April 2018, and possessed personal knowledge "of FPEC's "operations in soliciting investments and 'issuing' stock." With regard to the matters in controversy in the Texas action, they claimed that FPEC and Weil solicited Mr. Moses' business contacts and used his financial resources in a failed attempt to develop a liquified natural gas project ("the Project") in Cameron Parish, LA, and that Weil was physically present in meetings with Mr. Moses and FPEC's CEO—Mr. Fred Jones—when Mr. Moses was repeatedly assured that FPEC would "make good" on Mr. Moses' time spent and financial investment on the Project. Petitioners' application further noted that Weil had declined to accept service of a subpoena or voluntarily appear for deposition.

On January 13, 2023, the Texas court granted the application over Defendants' objections. The Letter Rogatory stated Weil was believed to be located at 320 W. 86th St., Apt.

11A, N.Y., N.Y. 10024. The Texas court sought the following assistance from this Court: “Requests and authorizes, in the interest of justice, the issuance of a subpoena by your proper and usual process summoning Mr. Weil to appear before via zoom or equivalent video link for an oral deposition before a duly authorized notary, and causing the administration of an oath to such witness, so that his deposition may be taken before trial by the parties on matters in controversy in the above-captioned action.”

On February 6, 2023, Petitioners applied to this Court under CPLR § 3102(e) for an order authorizing issuance of a New York subpoena requiring Weil to appear at a deposition via Zoom or other videoconferencing service.

By Order dated February 10, 2023, the Hon. Lori S. Sattler ordered that “an appropriate New York Subpoena for deposition by oral examination via Zoom or an equivalent video conferencing service, as sought by and proposed by the Petitioners, may be issued to Matthew Weil, whose address is 320 W. 86th St., Apt. 11A, New York, New York 10024.” It was further ordered that the deposition take place on February 17, 2023, and that a copy of the Order and Subpoena be served on Weil by personal service on the 10th day of February 2023 by 4:00 p.m.

A process server made two attempts to serve Weil. On February 10, 2023, the process server left the Subpoena with a doorman named “Nelson” at 320 W. 86th Street, followed by a mailing to that address. According to the process server’s affidavit, at the time of service he spoke to Weil on the telephone, who requested that he leave a copy of the papers with the building doorman, Nelson. Weil also requested that the process server email him a copy of the papers, and which was done at approximately 4:48 PM by sending an email to the address Weil provided to the process server.

Weil states that he is not a New York State resident. Weil does not provide the state or address where he alleges he resides but asserts he is the resident of another state and has a drivers license in another state. As for the address where the papers were served, Weil states he does not own the apartment and has only been there one time in the six months prior to service of the subpoena. Weil states he did not know what kind of papers were being emailed to him, the process server alleges he told Weil it was a subpoena for a deposition with a short return date.

DISCUSSION

The Court Lacks Jurisdiction over Weil

“Two (2) components must be satisfied for a court to have personal jurisdiction over a person: first, service of process must be properly effectuated and second, the court must have power to reach the party in order to enforce its judicial decrees.” *Cherfas v. Wolf*, 20 Misc. 3d 1118(A), at *2 (Sup. Ct., Kings Co. 2008). Service of process cannot by itself vest a court with jurisdiction over a non-domiciliary of New York state. Generally, “[a] nonparty, nondomiciliary witness is clearly not subject to the subpoena power of the court” of New York (*Zeeck v Melina Taxi Co.*, 177 AD2d 692, 694, [2nd Dept 1991]).

In the present matter, CPLR 3102(e) provides, in relevant part that, “when under any mandate, writ or commission issued out of any court of record in any other state ... it is required to take the testimony of a witness in the state, he or she may be compelled to appear and testify in the same manner and by the same process as may be employed for the purpose of taking testimony in actions pending in the state.” The power to issue a subpoena in actions pending in New York State is governed by Judiciary Law § 2-b, which provides that a court of record has power “to issue a subpoena requiring the attendance of a person found in the state to testify in a cause pending in that court.”

As a non-party, non-domiciliary, who was in another state when process was purportedly served upon him, Weil is beyond this Court’s jurisdiction.

The Court is unpersuaded by Petitioners’ arguments to the contrary. The court does not find any basis to hold that Weil authorized the doorman to accept process. Nor does the court find the fact that Weil’s family owns an apartment in New York City, that he has regularly frequented, to be a basis to assert jurisdiction over Weil in New York. Finally, the court finds no basis to order Weil’s attorneys to accept service on his behalf.


WHEREFORE it is hereby:

ORDERED that the motion to quash the subpoena is granted; and it is further

ORDERED that, within 20 days from entry of this order, petitioners shall serve a copy of this order with notice of entry on the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that this constitutes the decision and order of this court.


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2/27/2023
DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED
<input type="checkbox"/>	SETTLE ORDER	
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	

<input type="checkbox"/>	NON-FINAL DISPOSITION	
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
<input type="checkbox"/>	SUBMIT ORDER	
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: