

**Barons Media, LLC v Shapiro Legal Group, PLLC**

2023 NY Slip Op 32469(U)

July 21, 2023

Supreme Court, New York County

Docket Number: Index No. 152278/2021

Judge: Joel M. Cohen

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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BARONS MEDIA, LLC	INDEX NO. <u>152278/2021</u>
Petitioner,	MOTION DATE <u>N/A</u>
- v -	MOTION SEQ. NO. <u>002</u>
SHAPIRO LEGAL GROUP, PLLC,	
Respondent.	<b>DECISION + ORDER ON MOTION</b>
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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103 were read on this motion for REIMBURSEMENT OF DISCOVERY EXPENSES.

Respondent Shapiro Legal Group’s (“Shapiro Legal”) motion for reimbursement of \$71,991.66 for expenses it has incurred in producing non-party discovery to Petitioner Barons Media, LLC’s (“Barons”) is **granted in part**. Shapiro shall recover **\$47,514.60**.

**BACKGROUND**

**A. The Florida Action and Subpoena**

Petitioner Barons issued a subpoena dated September 21, 2020 (“Subpoena” [NYSCEF 12]), to Shapiro pursuant to CPLR 3119 (the Uniform Interstate Deposition and Discovery Act) in connection with a Florida action known as *Barons Media, LLC v. KMBR Media et. al.* (Miami-Dade County Case No. 2020-007200-CA-01) (“Florida Action”). The Florida Action concerns a dispute between Barons and its former partners in KMBR Media. The Florida Action has been contentious, to say the least.

Shapiro served Responses and Objections to the Subpoena (NYSCEF 14) and expressly sought reasonable production expenses, including attorneys' fees, with a citation to the Commercial Division guidelines pertaining to non-party discovery. Shapiro also made a limited production of documents (NYSCEF 15).

Barons subsequently commenced this special proceeding pursuant to CPLR 3119(e) seeking to compel additional documents as well as testimony. Shapiro cross-moved to quash the Subpoena. Notably, Barons sought assignment to the Commercial Division (NYSCEF 20 [RJI Addendum]). Thus, the Rules of the Commercial Division apply (22 NYCRR 202.70).

During an April 26, 2021 hearing, the Court determined that Baron's requests were overbroad, even if viewed in the context of party discovery, as opposed to "reasonably tailored" to non-party discovery as required (NYSCEF 46 [Transcript at 6-11]). Ultimately, the Court granted in part the motion to compel including payment information as well as certain correspondence (Tr. 24-26) and denied the cross-motion to quash (NYSCEF 45 [Order]).

Additionally, the Court directed that Shapiro's travel costs be paid in advance and that Shapiro could apply for reimbursement for their discovery costs "after they have actually expended the amounts" (Tr. at 2). Shapiro subsequently engaged in extensive efforts to negotiate resolutions to issues raised by Barons and produced additional discovery (NYSCEF 57-62).

On December 9, 2022, the General Magistrate in the Florida Action found that, with specific respect to documents pertaining to Shapiro, that "Plaintiff's discovery has gone awry and that discovery in this action has become close to 'scorched earth discovery'" (NYSCEF 54 at 11). Barons has filed an Exception to the General Magistrate's Report and Recommendation (NYSCEF 102).

## **B. The Instant Motion**

On January 20, 2023, Shapiro moved for reimbursement (NYSCEF 51). Shapiro's motion is supported by an attorney affirmation annexing, among other things, a schedule of expenses broken down by timekeeper and vendor (NYSCEF 64). The schedule concerns expenses incurred after the issuance of the Court's April 26, 2021 Order.

On January 30, 2023, Barons responded. Barons' first argument is that Shapiro failed to comply with Commercial Division Rule 14 and this Court's Individual Practices because it did not meet-and-confer or submit a pre-motion letter before filing its motion. Similarly, Barons argues that Shapiro's motion was not supported by a memorandum of law and failed to include a certification with the word count limits.

Next, Barons argues that Shapiro's claimed expenses, including its attorney's fees, are inflated and were incurred by its own malfeasance in resisting discovery. Barons also argues that Shapiro has not established that attorney's fees are available or substantiated the amount sought. Barons points to one alleged instance of overbilling. Finally, Barons argues that the General Magistrate's decision in the Florida Action is not relevant.

## **DISCUSSION**

CPLR 3122(d) provides, in relevant part, "[t]he reasonable production of expenses of a nonparty witness shall be defrayed by the party seeking discovery." Section VII(B) of Appendix A to the Commercial Division Guidelines for Discovery of Electronically Stored Information ("ESI") provides, in relevant part, that a party "shall promptly defray the reasonable expenses associated with the non-party's production of ESI, in accordance with Rules 3111 and 3122(d)" and that reasonable expenses may include "fees charged by outside counsel and e-discovery consultants" (22 NYCRR 202.70).

While the CPLR does not define “reasonable production expenses,” the First Department has noted the high-costs associated with ESI discovery and directed courts to consider relevant factors, including business disruptions, in deciding whether cost-shifting is appropriate (*Tener v Cremer*, 89 AD3d 75, 82 [1st Dept 2011]). The First Department subsequently held that the Court has “broad discretion under article 31 of the CPLR” to direct cost shifting and authorized consideration factors identified in the seminal *Zubulake* case (*U.S. Bank Nat. Ass'n v GreenPoint Mtge. Funding, Inc.*, 94 AD3d 58, 63-64 [1st Dept 2012] [citing *Zubulake v. UBS Warburg, LLC*, 217 F.R.D. 309, 317–318 [S.D.N.Y.2003] [other citations omitted]).<sup>1</sup>

More recent cases make clear that “reasonable production expenses” may include attorney’s fees including those incurred in completing a privilege review (*Zimmerman v 410-57 Corp.*, 2023 N.Y. Slip Op. 31920[U], 4 [N.Y. Sup Ct, New York County 2023] [collecting cases]). Thus, as recently held by Justice Crane of this Court, reimbursable costs may include vendor and attorney’s fees (*Exp 14 Holdings LLC v LS-14 Ave LLC* [N.Y. Sup Ct, New York County 2023] [citations omitted]).

Having sought assignment to the Commercial Division and the issue of expenses – including attorneys’ fees - having been raised by Shapiro in its objections and at the hearing, Barons cannot claim any prejudice or surprise at the fact that vendor and attorney’s fees are sought. The Court has carefully reviewed the parties’ submissions and weighed the relevant factors. The Court finds that Barons’ aggressive approach was not narrowly tailored to

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<sup>1</sup> The *Zubulake* factors are (1) whether the requests are appropriately tailored; (2) the availability of relevant information from other sources; (3) the cost of production compared to the amount in controversy; (4) the cost of production compared to the resources of each party; (5) the relative ability of each party to control costs and its incentive to do so; (6) the importance of the issues in the litigation; and (7) the relative benefits to the parties of obtaining the information.

discovering information it could only obtain from Shapiro. Although Barons complains bitterly about Shapiro’s conduct, Shapiro remains a non-party that has incurred costs incurred in producing ESI in response to the Subpoena (as opposed to litigating the underlying petition and conducting an initial search). Had Barons served tailored requests, the expenses incurred would likely be lower. On these facts, the Court finds that Shapiro is entitled to recover two-thirds (66%) of its claimed expenses.

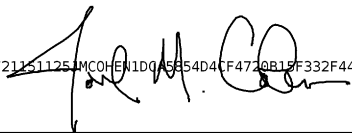
Finally, Barons’ procedural objections are rejected. Shapiro’s motion is not a discovery dispute as defined by Rule 14 but instead a collateral application for expenses authorized by the CPLR. Moreover, the record shows that any further meet-and-confer efforts would have been futile (NYSCEF 77) in light of the parties’ positions. Baron’s is correct that a separate memo of law and word count certifications should be provided, but the Court does not believe it would be equitable to deny relief on that ground alone.

\* \* \* \*

Accordingly, it is

**ORDERED** that Shapiro’s motion is **GRANTED IN PART** and Shapiro shall recover \$47,514.60 in reasonable production expenses.

This constitutes the decision and order of the Court.

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JOEL M. COHEN, J.S.C.

7/21/2023  
DATE

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		

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

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT