

**Mauray Realty Co. v Advantage Wholesale Supply,  
LLC**

2023 NY Slip Op 33047(U)

September 5, 2023

Supreme Court, New York County

Docket Number: Index No. 156371/2020

Judge: Lisa S. Headley

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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. LISA S. HEADLEY PART 28M

Justice

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INDEX NO. 156371/2020

MAURAY REALTY CO., MAURAY REALTY USA, LLC,

MOTION DATE 11/21/2022

Plaintiff,

MOTION SEQ. NO. 002

- v -

ADVANTAGE WHOLESALE SUPPLY, LLC, DOVID SMETANA, MALKIE SMETANA

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 78, 79, 80, 81, 82, 83, 84, 85, 86, 91, 103, 105, 106, 107, 108

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

Defendants Advantage Wholesale Supply LLC, Dovid Smetana, and Malkie Smetana (herein collectively as "Defendants") filed the instant motion, pursuant to CLPR §§ 2304 and 3103, to quash seventeen subpoenas issued against the following non-party entities: (i) MacGregor Abstract Corporation, (ii) Flushing Bank, (iii) Big Apple Abstract Corp., (iv) Imperial Abstract Corporation, (v) Madison Abstract Inc., (vi) Arbor Agency Lending, LLC, (vii) 79-25 Queens Blvd. Funding LLC, (viii) Nissan 1662 St. Nicholas Ave LLC, (ix) Tishrei 79-25 Queens Boulevard LLC, (x) Shevat 1504-1506 Jerome Ave LLC, (xi) Iyar 1335-1339 Flatbush Ave LLC, (xii) Leyla Tokuzlu, (xiii) Royal Abstract of New York, LLC, (xiv) JP Morgan Chase, N.A.; (xv) Prem Prekash Mandli (USA), Inc., (xvi) B & S Property Management Group LLC; and (xvii) 1335-9 Flatbush Realty LLC, ("the subpoenas"). Plaintiffs Mauray Realty Co. and Mauray Realty USA, LLC (herein collectively, as "Plaintiffs") filed a cross-motion to compel, pursuant to CPLR §3124, and opposition to Defendants' motion to quash. Defendants filed a reply and opposition to Plaintiffs' motion to compel.

Background

This tort action arises from Plaintiffs' claims against defendant, Advantage Wholesale Supply ("Advantage Wholesale"), to collect on a money judgment against non-party, Advantage Plastics, Inc. ("Advantage Plastics") issued in 2018. Plaintiffs allege that businesses and assets

were transferred from Advantage Plastics to Advantage Wholesale between 2008 and 2012, without consideration. Plaintiffs allege that the defendants Dovid Smetana and Malkie Smetana (“Smetanas”), as the owners of Advantage Wholesale, unlawfully benefited when the businesses and assets were transformed and fraudulently conveyed from Advantage Plastics to Advantage Wholesale.

#### **Defendant’s Affirmation in Support**

In support of the motion, Defendants argue, *inter alia*, that Plaintiffs filed seventeen subpoenas as a fishing expedition to increase the cost of this litigation and to obtain the Smetanas’ personal financial information. Defendants also argue that Plaintiffs’ primary motive is to harass Defendants into paying a judgment against non-party Advantage Plastics, a company owned by the Smetanas, that went defunct over ten years ago. Defendants also argue that subpoenas seek irrelevant documents and information concerning unrelated real estate purchases, sales, and refinances by non-party companies owned by the Smetanas. Defendants argue that some of the information sought in the subpoenas are irrelevant because some of the transactions occurred before defendant Advantage Wholesale was formed. For example, defendants assert that the subpoenas seek mortgage information, contracts, title insurance information, communication, and checks from the real estate closings from fifteen years ago and from the Smetanas’ unrelated non-party companies and from *bona fide* purchasers/sellers who have no relationship to the defendants or non-party, Advantage Plastics.

Additionally, Defendants argue Plaintiffs’ subpoenas should be quashed and/or dramatically limited in scope because the real estate transactions of non-party companies, like Advantage Plastics, owned by the Smetanas have nothing to do with alleged fraudulent conveyances from Plastics to Advantage Wholesale. Defendants assert the purchase and sale of the specified properties occurred either before Advantage Wholesale was formed in 2008, or after Advantage Plastics stopped conducting business in 2012. Lastly, Defendants contend Plaintiffs’ argument that Advantage Plastics or Advantage Wholesale Supply could have funded the purchases, which does not constitute a basis for the subpoenas and transfers to the Smetanas non-party companies, are both irrelevant and embodies a fishing expedition.

#### **Plaintiff’s Affirmation in Support of Cross-Motion and Opposition to Defendants’ Motion**

Plaintiffs filed opposition to the motion to quash, and a cross-motion pursuant to *CPLR* § 3124 seeking to compel compliance to discovery demands and to compel defendant Dovid

Smetana to sign Internal Revenue Form 4506 in order for Plaintiffs to obtain the 2010 Tax return for Advantage Plastics. Plaintiffs argue, *inter alia*, that the discovery of the alleged fraudulent actions by the Defendants would render Advantage Plastics “judgment proof” because there was a prior action commenced in 2006, in this Court, which resulted in a money judgment for \$558,899.57 against Advantage Plastics, which was duly entered on April 19, 2018. (*See NYSCEF Doc. No. 21*). Plaintiffs allege Defendants engaged in a fraudulent scheme to avoid satisfying the 2018 judgment, in favor of Plaintiffs, Mauray Realty Co., and Mauray Realty USA, LLC, by transferring the assets of Advantage Plastics to the Defendants, including Advantage Wholesale to make Advantage Plastics judgment proof.

Plaintiffs argue the demand for production of Advantage Plastics’ tax returns from 2008 through 2018 is in connection with its enforcement proceedings. Plaintiffs contend that these tax returns would demonstrate that the business operations of Advantage Plastics were being phased out and assumed by its successor, Advantage Wholesale. Furthermore, Plaintiffs assert the tax returns and leases produced in June 2020 and July 2020, and those produced in this action show how the Smetanas withdrew substantial sums of money from Advantage Plastics and Advantage Wholesale. (*See NYSCEF Doc. No. 21*).

Additionally, Plaintiffs argue the non-party subpoenas requesting transactions involving properties where Defendant Advantage Wholesale entered into written leases originally held by Advantage Plastics should not be quashed because the documents are necessary and relevant to Plaintiffs’ efforts to establish the fraudulent activities of the Defendants. Plaintiffs further argue the documents requested in the subpoenas would provide information to trace Defendants’ assets, and would confirm what happened to Advantage Plastics’ leases, customers, and bank accounts as it was being rendered judgment proof.

#### **Defendants’ Reply in Further Support of Motion and Opposition to Cross-Motion**

In reply to the Defendants’ motion to quash, and in opposition to the plaintiffs’ cross-motion, Defendants argue Plaintiffs failed to articulate any relationship between the documents and information sought in its non-party subpoenas. Additionally, Defendants assert Plaintiffs’ motion to compel should be denied because Defendants have complied with their discovery obligations by producing nearly 1,000 pages of discovery in response to Plaintiffs’ document demands, and tax information that is within Defendants’ possession. Defendants argue Plaintiffs ignore the voluminous nature of their requests since Plaintiffs are seeking documents from fifteen

years ago. Defendants contend they have not withheld any documents and continue to perform searches for responsive documents.

### **Plaintiffs' Reply in Further Support of Cross-Motion**

In further support of their cross-motion to compel, Plaintiffs assert, *inter alia*, discovery should be broad in order to expose the Defendants' alleged fraud and to locate assets necessary to satisfy the judgment. Specifically, Plaintiffs contend that Advantage Plastics previously disclosed documents stating the gross sales revenue of Advantage Plastics was \$15,751,409.00 in 2008, however, the gross sales revenue drastically reduced to \$25,000.00 in 2012. Therefore, Plaintiffs contend that the documents requested in the subpoenas are necessary documents to trace the revenues, including the real and personal assets from Advantage Plastics to the Defendants.

### **Discussion**

*CPLR §2304* requires a motion to quash, fix conditions or modify a subpoena shall be made promptly in the court in which the subpoena is returnable...[r]easonable conditions may be imposed upon the granting or denial of a motion to quash or modify. *See, CPLR §2304*. Motions to quash under *CPLR §2304* are often accompanied by motions for a protective order under *CPLR §3103(a)*. *See also, McDaid v. Semegran*, 841 N.Y.S.2d 826 (N.Y. Sup. Ct. 2007). Under *CPLR §3103(a)*, protective orders regulating the use of disclosure devices can be granted by the court to “prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.” The court can issue a protective order “on its own initiative, or on motion of any party or of any person from whom discovery is sought.” *Id.* The court must “strike a balance by weighing the parties’ conflicting interests in light of the facts of the particular case before it.” *See, Fuchs v. Volz*, 190 N.Y.S.3d 270 (N.Y. Sup. Ct. 2023).

*CPLR §3103* requires full disclosure of all matter material and necessary in the prosecution or defense of an action,” and the person seeking to quash a subpoena bears “the burden of establishing that the requested documents and records are utterly irrelevant.” *CPLR §3103; Ledonne v. Orsid Realty Corp.*, 83 A.D.3d 598 (2011). In addition, *CPLR §3103(a)* permits “any person from whom or about whom discovery is sought,” i.e., a nonparty, to move for “a protective order denying, limiting, conditioning or regulating the use of any disclosure device.” *CPLR §3103(a)*.

A party may obtain discovery from a nonparty in possession of material and necessary evidence, so long as the nonparty is apprised of the circumstances or reasons requiring disclosure.

*See, CPLR §3101(a)(4).* The notice requirement of *CPLR §3101(a)(4)* “obligates the subpoenaing party to state, either on the face of the subpoena or in a notice accompanying it, “the circumstances or reasons such disclosure is sought or required.” *Bianchi v. Galster Mgmt. Corp.*, 15 N.Y.S.3d 189 (2d Dep’t 2015). “Discovery requests that tend to broaden the scope of litigation and intrude upon the rights to privacy should not be permitted unless there is a showing that the need for disclosure outweighs the importance of protecting non-parties’ privacy. *See, Bankers Consec Life Ins. Co. v. KPMG LLP*, 185 N.Y.S.3d 651 (N.Y. Sup. Ct. 2023).

Here, this Court finds that Plaintiffs satisfied their burden under *CPLR §3124* because plaintiffs submitted the required requests and notices to defendants regarding the various deficiencies within defendants’ document production. Failure to produce the requested documents allows Plaintiffs to move to compel compliance or a response. (*See, NYSCEF Doc No. 94*). Additionally, the requesting party must demonstrate that the discovery it seeks “will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims” (*Vyas v. Campbell*, 4AD3d 417, 418 [2nd Dep’t 2004]). Further, if there is “any possibility that the information is sought in good faith for possible use as evidence-in-chief or in rebuttal or for cross-examination, it should be considered ‘evidence material in the prosecution or defense’” (*Allen*, 21 NY2d at 407). New York law “observes a very liberal discovery policy as regards to motions to compel pursuant to *CPLR §3124*” (*Gottwald v. Geragos*, 61 Misc 3d 1214(A), at \*9 [NY Cnty 2018]). (*See, Bankers Consec Life Ins. Co. v. KPMG LLP*, 185 N.Y.S.3d 651 (N.Y. Sup. Ct. 2023).

Moreover, movant defendants’ motion to quash fails because contrary to defendants’ arguments, this Court finds there is a connection between the former owner Dovid Smetana and the properties Dovid Smetana once owned at the time of the 2018 money judgement, granted by the Court. More specifically, defendants’ motion to quash fails because Plaintiffs are requesting documents involving properties where Defendant Advantage Wholesale entered into written leases originally held by Advantage Plastics. The Court finds the documents sought by Plaintiff are in good faith and that the discovery Plaintiffs seek will result in the disclosure of relevant evidence. *Id.*

Here, this Court finds the Plaintiffs’ cross motion to compel is granted because there appears on the face of the documents to be a nexus between the corporations and defendant David

Smetana. More specifically, the Decision and Order by Hon. Frank P. Nervo dated December 21, 2021, which states “the individual Smetana defendants are owners of Advantage Wholesale, and indisputably would benefit from any transfer of Advantage Plastics’ assets to Advantage Wholesale; consequently, plaintiff’s complaint alleging fraudulent transfers of same sufficiently pleads a cause of action against the individual defendants”.

Lastly, this court recognizes a judgment was entered in 2018, and defendants have yet to satisfy the judgment and now have failed to provide discovery. As such, Plaintiff’s motion to compel is granted for the reasons stated *supra*, and defendants’ motion for a protective order is denied.

Accordingly, it is hereby

**ORDERED**, that Defendants, Advantage Wholesale Supply LLC, Dovid Smetana, and Malkie Smetana’s, motion to quash Plaintiffs’ Subpoenas Duces Tecum upon various non-party entities, is DENIED; and it is further

**ORDERED** that Defendants’, Advantage Wholesale Supply LLC, Dovid Smetana, and Malkie Smetana’s, request for sanctions is DENIED in the court’s discretion; and it is further

**ORDERED** that Plaintiffs’ cross motion to compel responses against Defendants’, Advantage Wholesale Supply LLC, Dovid Smetana, and Malkie Smetana, is GRANTED; and it is further

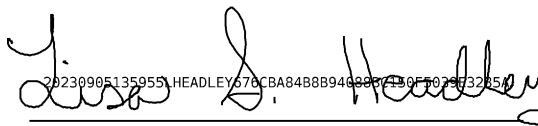
**ORDERED** that Defendants Advantage Wholesale Supply LLC, Dovid Smetana, and Malkie Smetana’s motion for a protective order is DENIED; and it is further

**ORDERED** that within 30 days of entry, Defendants Advantage Wholesale Supply LLC, Dovid Smetana, and Malkie Smetana, shall serve a copy of this decision/order upon all parties with notice of entry.

**ORDERED**, that any relief not expressly addressed herein has nonetheless been considered.

This constitutes the Decision and Order of the Court.

9/5/2023  
DATE

  
LISA S. HEADLEY, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE