

**Rui Ma v Guo Wengui**

2023 NY Slip Op 34061(U)

November 16, 2023

Supreme Court, New York County

Docket Number: Index No. 158140/2017

Judge: Frank P. Nervo

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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. FRANK P. NERVO PART 04**

*Justice*

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RUI MA,

Plaintiff,

- v -

GUO WENGUI, GOLDEN SPRING (NEW YORK) LTD.,

Defendant.

**INDEX NO.** 158140/2017

01/25/2022,  
01/25/2022,  
01/25/2022,  
02/15/2022

**MOTION DATE** 02/15/2022

**MOTION SEQ. NO.** 002 003 004  
005

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 54, 55, 56, 57, 67, 68, 71, 80, 81, 82, 83, 84, 91, 101, 125, 127, 133

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

The following e-filed documents, listed by NYSCEF document number (Motion 003) 58, 59, 60, 61, 62, 69, 70, 72, 85, 86, 87, 88, 89, 92, 128, 134

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

The following e-filed documents, listed by NYSCEF document number (Motion 004) 64, 65, 66, 74, 75, 76, 77, 78, 79, 90, 129, 135

were read on this motion to/for EXTEND - TIME.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 94, 95, 96, 97, 100, 102, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 130, 136

were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE/JURY  
DEMAND/FROM TRIAL CALENDAR.

Oral argument on the above motions was adjourned at the parties' request. Thereafter, defendants sought an additional adjournment on the fully submitted motions in light of defense counsel's anticipated application to be relieved as counsel (NYSCEF Doc. No. 131). The Court, by interim order, vacated oral argument and advised that it would take the motions on submission without argument. Defense counsel's motion to be relieved was

denied as academic, defendants having filed a notice of substitution of counsel (NYSCEF Doc. No. 144). This decision and order results.

### MOTION SEQUENCES 002 AND 003 – QUASH SUBPOENA

CPLR § 2304 requires a motion to quash a subpoena be made promptly, thus, making the issue of timeliness *sui generis*. Where a motion to quash is made returnable after the return date of the subpoena, the motion risks futility if the subpoena is obeyed (*Brunswick Hospital Center, Inc. v. Hynes*, 52 NY2d 333, 339, “a motion to quash or vacate no longer is available”; see also *Santangelo v. People*, 38 NY2d 536, 539 “motion to quash ... should be made prior to the return date”). Although the instant subpoena’s original date has passed, the parties adjourned compliance with same pending this motion. Accordingly, the motion is timely.

A party seeking discovery from a nonparty must state the “circumstances or reasons” underlying the subpoena, on its face, and the party seeking to quash the subpoena must establish the material sought is “utterly irrelevant” or “the futility of the process to uncover anything legitimate is inevitable or obvious” (*Kapon v. Koch*, 23 NY3d 32, 34 [2014]). Should the witness opposing the subpoena make such a showing, the burden shifts to subpoenaing party to establish the material sought is “material and necessary” to the action (*id.* at 34).

Here the subpoenas at issue require compliance by January 11 and 12, 2022, nearly two years ago (NYSCEF Doc. Nos. 56, 60, and 61).<sup>1</sup> The motions to

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<sup>1</sup> The return date of the Frankel Subpoena is uncertain, as the method of service of same is unknown the Court cannot calculate whether additional time to comply should be added to

quash were filed on January 10, 2022, two days before the subpoenas were returnable. Furthermore, the motions to quash were not made returnable, in the first stance prior to adjournments, until January 31, 2022, 19 days after the subpoenas required compliance. The motions to quash were finally made returnable nearly two years after the compliance deadlines. Accordingly, denial of the motions to quash would ordinarily be appropriate as untimely.

However, the substance of the subpoenas is wildly inappropriate, seeking discovery and depositions of plaintiff's current counsel. The deposition of a party's attorney requires special circumstances (*Gottfried v. Gottfried Baking Co.*, 4 AD2d 1031 [1st Dept 1957]) and is disfavored (*Liberty Petroleum Realty, LLC v. Gulf Oil, L.P.*, 164 AD3d 401 [1st Dept 2018]). Deposing an adversary's counsel "hardly seems calculated to assist preparation for trial"; is "offensive to our conception of the adversarial process"; and "raises at least the possibility of attorney disqualification" (*Liberty Petroleum Realty, LLC, supra*; citing *Equitable Life Assur. Socy. of U.S. v. Rocanova*, 207 AD2d 294 [1st Dept 1994]; *Giannicos v. Bellevue Hosp. Med. Center*, 7 Misc.3d [Sup. Ct.] [Bransten, J.]; *S ∅ S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp.*, 69 NY2d 437 [1987]). Notably absent from defendants' answers is any allegation of a conspiracy involving plaintiff's counsel or any of the other grounds upon which they now seek the deposition of plaintiff's counsel. Accordingly, there is no "good faith basis" for deposition or discovery from plaintiff's counsel, as required (*id.*; *Matter of Winston*, 238 AD2d 345 [2d Dept 1997]).

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the subpoena for fail service. In any event, the subpoena is likewise returnable sometime in late December 2022 or early January 2022.

MOTION SEQUENCES 004 AND 005 – VACATE NOTE OF ISSUE & EXTEND TIME

A motion to strike a note of issue must generally be brought within 20 days of the filing of the note of issue, absent unusual or unanticipated circumstances causing prejudice (22 NYCRR 202.21[d] and [e]; *Audiovox Corp. v. Benyamini*, 265 AD2d 135 [2d Dept 2000]). “While a note of issue will generally be stricken if the case is not ready for trial, the motion to strike can be denied where the parties had sufficient time to complete discovery” (*Ireland v. Geico Corp.*, 2 AD3d 917 [3d Dept 2003]; *Kropp v. Town of Shandaken*, 91 AD3d 1087 [3d Dept 2012]).

Having failed to establish that deposing plaintiff’s counsel is necessary or material to their defense, and having failed to raise any other discovery which is alleged to be incomplete, defendants have not provided a sufficient basis to strike or vacate the Note of Issue (*Legacy Builders/Developers Corp. v. Hollis Care Group, Inc.*, 162 AD3d 649 [2d Dept 2018]). Likewise, defendants have not provided a sufficient basis to extend the note of issue (*id.*). Following the transfer of this matter to this Part, the Court issued several conference orders providing significant time to complete discovery (*see e.g.* NYSCEF Doc. Nos. 52 & 53). Furthermore, prior to the transfer of this matter, the Court issued no fewer than 12 conference orders addressing discovery over a four-year period. Therefore, the motion to strike the note of issue is denied as is the motion to extend time to re-file same.

[continued on following page]

Accordingly, it is

**ORDERED** that motion sequences 002 and 003 are granted and a protective order issues. The subpoenaed parties shall not respond to the subpoena nor appear for deposition; and it is further

**ORDERED** that motion sequence 004 and 005 are denied.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT

11/16/2023  
DATE

  
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HON. FRANK P. NERVO  
J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

J.S.C.  
OTHER  
REFERENCE