

**Schearer v Fitzgerald**

2024 NY Slip Op 31678(U)

May 8, 2024

Supreme Court, Kings County

Docket Number: Index No. 514920/2020

Judge: Sabrina B. Kraus

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
KINGS COUNTY**

PRESENT: HON. SABRINA B. KRAUS PART 57

Justice

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INDEX NO. 514920/2020

ELIZABETH SCHEARER,

MOTION SEQ NO. 010

Plaintiff,

**DECISION AND ORDER ON  
MOTION**

ALBION FITZGERALD

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 010) 164 – 178; 183 - 199 were read on this motion to/for ORDER OF PROTECTION.

**PENDING MOTION**

Plaintiff moves for an order: (1) pursuant to CPLR § 3103, preventing Defendant from deposing non-party witnesses Norman James Schearer (“James Schearer”) and Norman Schearer, and further deposing non-party witness Catherine Cline; (2) pursuant to CPLR § 2304, quashing the subpoenas of non-party witnesses James Schearer and Norman Schearer; (3) pursuant to 22 NYCRR 130-1.1, granting sanctions against Defendant and his counsel for their alleged frivolous.

The motion is granted to the extent set forth below.

**DISCUSSION**

A party to a lawsuit has standing to move to quash and seek a protective order regarding a subpoena of a non-party. *See Slapo v. Winthrop Univ. Hosp.*, 186 A.D.3d 1281, 1282 (2d Dept. 2020); *M&T Bank Corp. v. Moody’s Invs. Servs., Inc.*, 191 A.D.3d 1288, 1290 (4th Dept. 2021)

Additionally, pursuant to CPLR § 3103(a), a “court may at any time on its own initiative, or on motion of any party . . . make a protective order denying, limiting, conditioning or regulating the use of any disclosure device” in order to “prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.” Upon service of a motion for a protective order, the “disclosure of the particular matter in dispute” shall be suspended. See CPLR § 3103(b).

“A party or nonparty moving to quash a subpoena has the initial burden of establishing either that the requested disclosure ‘is utterly irrelevant to the action or that the futility of the process to uncover anything legitimate is inevitable or obvious’ ” (*Hudson City Sav. Bank v. 59 Sands Point, LLC*, 153 A.D.3d 611, 612–613, 57 N.Y.S.3d 398, quoting *Matter of Kapon v. Koch*, 23 N.Y.3d 32, 34, 988 N.Y.S.2d 559, 11 N.E.3d 709 [internal quotation marks omitted]). “ ‘Should the [movant] meet this burden, the subpoenaing party must then establish that the discovery sought is material and necessary to the prosecution or defense of [the] action’ ” (*Hudson City Sav. Bank v. 59 Sands Point, LLC*, 153 A.D.3d at 613, 57 N.Y.S.3d 398, quoting *Matter of Kapon v. Koch*, 23 N.Y.3d at 34, 988 N.Y.S.2d 559, 11 N.E.3d 709 [internal quotation marks omitted]).

*Wells Fargo Bank, N.A. v. Confino*, 175 A.D.3d 533, 534–35 (2019).

In large part, Defendant argues he needs to depose Plaintiff’s son, daughter, and former spouse to attack the credibility of Plaintiff. However, the Court notes that such testimony, even if it were to be elicited, would likely not be admissible at trial, as a witness such as Plaintiff cannot be impeached by calling other witnesses just to attack her credibility. *Halloran v Virginia Chemicals, Inc.* 41 NY2d 386 (1977); *In re Blaize F 50 AD3d 1182* (2008).

Thus, the Court finds that Plaintiff has met its initial burden in seeking to quash the subpoenas and that Defendant has failed to show that this requested discovery is material and necessary to the defense of the action. *Valdez v Sharby* 258 AD2d 458 (1999) (*subpoena issued seeking information to impeach general credibility properly quashed*).

***Catherine Cline Subpoena***

Catherine Cline has already been deposed by Defendant. During the deposition Defendant's counsel engaged in improper and irrelevant questioning about Ms. Cline's personal and sex life that this Court found could had no legitimate purpose and bordered on harassment. After being admonished by the Court and told to refrain from asking Ms. Cline about her sex life, Defendant's counsel proceeded on other irrelevant and improper inquiries concerning matters such as: Ms. Cline's own medical history as a teenager; her own history of drug and alcohol use as teenager; her knowledge of Plaintiff's medical conditions that are not at issue in this matter; whether Plaintiff looked for men that had money; whether one of Plaintiff's ex-boyfriends ever told Ms. Cline to withhold being sexually intimate unless they spent a lot of money on her; and whether one of Plaintiff's ex-boyfriends ever touched Ms. Cline's body.

Eventually, as result of this improper line of questioning, Ms. Cline decided that she did not want to continue further without having an attorney present.

The Court finds that Defendant has through its conduct waived the right to any further deposition of or discovery from Ms. Cline. Defendant has already asked, and Ms. Cline has already testified concerning all arguably relevant knowledge that she has to this matter. Therefore, the Court finds that a protective order should be issued preventing her from being deposed further. *See Jones v. Maples*, 257 A.D.2d 53, 57-58 (1st Dept. 1999).

***The Motion to Quash the Subpoenas to  
James Schearer and Norman Schearer is Granted***

Defendant in addition to taking the deposition of Plaintiff's daughter seeks to take the deposition of her son James Schearer and her ex-husband Norman Schearer.

A party issuing a subpoena is required to “first sufficiently state the ‘circumstances or reasons’ underlying the subpoena (either on the face of the subpoena itself or in a notice accompanying it) . . .” *See Matter of Kapon v. Koch*, 23 N.Y.3d 32, 34 (2014) (emphasis added). Only then must the party seeking to quash the subpoena “establish either that the discovery sought is ‘utterly irrelevant’ to the action or that the ‘futility of the process to uncover anything legitimate is inevitable or obvious.’” *See Matter of Kapon*, 23 N.Y.3d at 34.

The subpoena issued to James Schearer is facially invalid as Defendant acknowledges that the stated purpose, that Plaintiff informed him about the allegations in her complaint is false. CPLR 3101(a)(4). Plaintiff was not asked, nor did she testify, that she informed her son about the allegations in her complaint, nor is that included in any of her discovery responses. The same is true of her ex-husband.

Indeed, Plaintiff’s claim that by deposing her children and former spouse Defendant seeks only to harass Plaintiff and shame her among her family members is borne out by the conduct of Defendant.

Plaintiff has stipulated that she will not be calling James Schearer as a witness at trial.

The discovery sought through the subpoena of Norman Schearer is utterly irrelevant to the action. Norman Schearer did not marry Plaintiff until almost two decades after the alleged abuse; he got divorced from Plaintiff almost three decades before this lawsuit was filed; and Plaintiff has never informed him about the allegations herein.

### ***Prospective Subpoenas***

Finally, in connection with oral argument on the pending motion, the Court also held a conference with the parties regarding a subpoena Defendant has issued for Plaintiff’s former priest, and because Defendant has expressed an intent to subpoena the individual who is alleged to have

sexually abused Plaintiff's children 20 years ago, and contacted the physician of Plaintiff's former spouse without authorization from Plaintiff.

As to the deposition of the Priest, the Court declines to make any ruling on that point without a formal motion by the parties, and the parties did indicate it was possible they would resolve the issue without court intervention.

However, pursuant to CPLR § 3103(a) the Court will now require that Defendant move for leave of court before issuing any further discovery subpoenas in this action.

***Sanctions Are Denied***

The Court is not inclined to impose sanctions on Defense counsel at this juncture. The Court finds that while Defendant's arguments did not carry the day they were never the less not made in bad faith.

Finally, as this is a Kings County Case, and the note of issue has been filed, the case will be reassigned to a Kings County Judge for trial, and any further post note motions.

WHEREFORE it is hereby:

ORDERED that the subpoenas issued as to James and Norman Schearer are quashed and Plaintiff's motion for a protective order preventing Defendant from taking their depositions is granted; and it is further

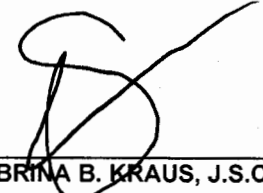
ORDERED that Defendant must seek leave of court by motion before issuing any further discovery subpoenas for additional witness testimony in this action;

ORDERED that Plaintiff's motion preventing any further deposition of Ms. Cline is granted; and it is further

ORDERED that Plaintiff's motion for sanctions is denied; and it is further

ORDERED that this matter is remitted to the General Clerk's Office for assignment to CVA Justice in Kings County for Trial.

This constitutes the decision and order of this Court.

<u>5/8/24</u> DATE	 SABRINA B. KRAUS, J.S.C.			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input checked="" type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE