

Isaac Hersko Revocable Trust v Weisel

2024 NY Slip Op 31717(U)

May 16, 2024

Supreme Court, Kings County

Docket Number: Index No. 510953/2022

Judge: Leon Ruchelsman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: CCP

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THE ISAAC HERSKO REVOCABLE TRUST WITH
MORRIS HERSKO AS TRUSTEE, DENISSI HERSKO, &
WE ALL CARE INC. a/k/a WE CARE,

Plaintiffs, Decision and order

- against -

Index No. 510953/2022

ABRAHAM WEISEL,

Defendant,

May 16, 2024

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PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #7

The defendant has moved seeking to quash subpoenas served. The plaintiffs have opposed the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

The lawsuit was filed by the plaintiff against his former attorney alleging a breach of fiduciary duty and malpractice. The complaint alleges the defendant represented the plaintiff in various real estate matters and lending contracts, along with his brother Barry Hersko, since 2007. The complaint alleges the defendant permitted and authorized Barry to withdrawn \$45,000,000 million from the joint account managed by defendant without the plaintiff's knowledge or consent. The plaintiff's have served seventeen subpoenas on various financial institutions and other entities and one subpoena upon Flagstar seeking information relevant to various business transactions allegedly engaged in by Isaac. The defendant has moved to quash the subpoena on various

grounds including relevancy. As noted the motion is opposed.

Conclusions of Law

In Kapon v. Koch, 23 NY3d 32, 988 NYS2d 559 [2014] the court held that third party subpoenas may be served whenever the information sought is 'material and necessary' "of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity" (id). The court noted that "so long as the disclosure sought is relevant to the prosecution or defense of an action, it must be provided by the nonparty" (id). Thus, "disclosure from a nonparty requires no more than a showing that the requested information is relevant to the prosecution or defense of the action" (see, Bianchi v. Galster Management Corp., 131 AD3d 558, 15 NYS3d 189 [2d Dept., 2015], CPLR §3103(a)). A party seeking to vacate or quash a third party subpoena has a burden establishing the information is "utterly irrelevant" or "the futility of the process to uncover anything legitimate is inevitable or obvious" (Anheuser-Busch Inc., v. Abrams, 71 NY2d 327, 525 NYS2d 816 [1988]).

Preliminarily, there are questions whether a customer of a bank even maintains standing to challenge subpoenas served upon the bank seeking the customer's banking information (see, Norkin

v. Hoey, 181 AD2d 248, 586 NYS2d 926 [1st Dept., 1992]). As the court noted in AO Asset Management LLC v. Levine, 111 AD3d 245, 974 NYS2d 332 [1st Dept., 2013] "a depositor has no ownership or other interest in a bank's records of his accounts. Thus, he has no standing to object to a subpoena directed at them" and that this "proposition remains true, even more strongly, in the civil context" (id, see, also, Medequa LLC v. O'Neill & Partners LLC, 2022 WL 16852214 [S.D.N.Y. 2022]).

In any event, considering the propriety of the motion for bank statements and documents from other entities, the defendant argue the subpoenas are improper and they should be quashed. First, there is no merit to the argument the subpoenas did not provide sufficient time in which to comply. The subpoenas were served over a year ago. Any question regarding the time of compliance is surely no longer relevant. Equally unavailing are questions whether the subpoenas are facially defective since the contents sought are disputed by the defendant. Merely disputing the facts is not a basis upon which to quash subpoenas and fails to establish the information sought is utterly irrelevant.

The plaintiff alleges the defendant assisted and facilitated Barry's ability to withdraw funds from the account he managed and which the plaintiff asserts they half own. The plaintiffs have the right to pursue those claims and examine the bank records and

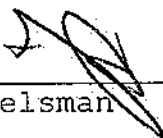
other documents contained within the subpoenas and to examine the flow of funds in efforts to trace their whereabouts. The defendant further argues the subject matter of the subpoenas are overbroad and irrelevant and do not advance any of the contentions in this lawsuit. However, the allegations of defendants mismanagement of funds is the central issue in this lawsuit and thus the plaintiff maintain a right to inspect the bank statements and other relevant documents noted to further pursue their claims. Of course the viability of these claims will indeed be tested through further discovery and perhaps a trial. However, at this juncture the requests are proper.

Therefore, the motion seeking to quash any of the subpoenas or for a protective order is denied.

So ordered.

ENTER:

DATED: May 16, 2024.
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC