

Hersko v Hersko

2024 NY Slip Op 31748(U)

May 14, 2024

Supreme Court, Kings County

Docket Number: Index No. 519449/2021

Judge: Lisa S. Ottley

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS – PART 24

-----x
BARRY HERSKO

Mot. Seq. # 5

Plaintiff,

Index # 519449/2021

-against-

DECISION AND ORDER

MORRIS HERSKO and SARA G. HERSKO,

Defendants.
-----x

HON. LISA S. OTTLEY

KINGS COUNTY CLERK
FILED
2024 MAY 20 AM 9:43

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Notice of Motion to quash a subpoena and for a protective order submitted on February 1, 2024.

Papers	Numbered
Notice of Motion and Affirmation	1&2 (Exh. A; T-X)
Affirmation/Affidavit in Opposition.....	4[Exh. A-B]
Memorandum of Law.....	3; 5
Reply Memorandum of Law.....	6

Plaintiff moves pursuant to CPLR § 2304 for an order quashing the subpoena served on behalf of plaintiff on TD Holdings, N.A. and pursuant to CPLR § 3103 for a protective order. Defendants oppose plaintiff's motion on the grounds that the subpoena seeks relevant documents and information and is not overly broad.

The plaintiff alleges he loaned the defendants approximately \$699,998.00 through four separate transfers. According to the second amended complaint, since 2008 the defendants owned a condominium located at 2039 57th Street in Kings County and in 2010 secured a \$300,000.00 credit line mortgage from TD bank. In 2011, the plaintiff alleges he loaned the defendants \$190,000.00 to help them purchase a house located at 1963 63rd Street in Kings County. The loan was wired at plaintiff's direction from his attorney's escrow account in the amount of \$190,000.00 and was received by the defendants. The defendants purchased the house in February 2012. In March 2012, the plaintiff alleges he loaned the defendants an additional \$169,834.45, which was paid directly to the TD bank condominium mortgage by plaintiff's attorney from the same escrow account. As alleged in the second amended complaint, these funds paid to TD bank were used to pay off the condominium mortgage, which would then enable the defendants to sell the condominium and repay the plaintiff. The plaintiff further alleges that the following week he loaned the defendants another \$90,163.55, which was also intended to pay off the condominium mortgage. These funds were also directly paid to TD bank by plaintiff's attorney from the same escrow account. In March 2014, plaintiff alleges that he

loaned the defendants another \$250,000.00, which was also used to pay off the condominium mortgage. Again, these funds were also paid directly to TD bank by plaintiff's attorney from the same escrow account. The plaintiff alleges that the defendants promised to secure the loan payments with the condominium but concede that such guaranty was never reduced to a writing. The loan payments were never repaid to the plaintiff and title to the condominium was never transferred to the plaintiff. Plaintiff commenced this lawsuit alleging breach of contract and the imposition of a constructive trust.

Previously, plaintiff sought defendants' bank records related to these four loans through a motion to compel discovery. Plaintiff argued that the money "loaned to the defendants was used to pay down the mortgage on the condominium and to facilitate the purchase of the house." As reflected in the decision and order, dated March 14, 2024, the court denied plaintiff's motion to compel ruling that the bank statements sought were not relevant as they could not establish that the transfers made were loans.

Discussion

In support of their motion, defendants argue that the subpoena is overbroad and seeks wholly irrelevant information. Specifically, defendants argue that it is an abuse of the discovery process for plaintiff to subpoena all the defendants' TD bank accounts, from January 1, 2008, to the present, including copies of all statements, check images, deposit slips, and other documentation concerning the accounts and account holders. Plaintiff has subpoenaed said records despite having knowledge of the specific mortgage account number, dates of alleged loans, where the alleged wire transfers emanated, and who initiated the alleged wire transfers. Defendants further argue that the subpoenaed records and financial documentation have no bearing on the issues in this matter in that the defendants' assets, liabilities, income, financial resources, and financial circumstances are wholly irrelevant to the allegations herein. The subpoenaed records will reveal all the defendants' personal and financial transactions without providing evidence of plaintiff's allegations. Lastly, plaintiff has affirmatively stated that the alleged transactions are memorialized in his own records, which would be better proof than a fishing expedition of defendants' financial history since 2008.

In opposition, defendants argue that the subpoena seeks, inter alia, monthly account statements, copies of checks, and deposit information from defendants' TD bank accounts, including the TD mortgage, which documents go directly to the existence of the alleged loans, and thus seeks documents that are material and necessary to plaintiff's claims. Defendants further argue that the defendants use of the proceeds of the TD mortgage, and whether they were used to pay for any portion of the condominium or house, instead of being used to pay back the plaintiff's loan, are relevant factors here. The subpoenaed documents are relevant to the plaintiff's claims and defenses, specifically, the claim that plaintiff loaned money to the defendants to pay down the TD mortgage. Plaintiff argues that the subpoena is not overly broad as it contains just five document requests, consisting of documents concerning the TD mortgage; documents concerning the use of the proceeds of the TD mortgage; documents reflecting payments made to plaintiff or any person acting on his behalf; and documents reflecting the

financial activity of the properties. Lastly, the court's decision and Order, dated October 31, 2023, denying plaintiff's motion to extend the deadline to conduct party depositions does not support quashing the subpoena.

A person served with a notice or a subpoena attendant to disclosure may move either to obtain a protective order pursuant to CPLR 3103, or to quash or modify the subpoena pursuant to CPLR 2304. An application to quash a subpoena should only be granted where the futility of the process to uncover anything legitimate is inevitable or obvious or where the information sought is utterly irrelevant to any proper inquiry. See, Matter of Kapon, 23 N.Y.3d 32, 988 N.Y.S.2d 559 (2014); Anheuser-Busch, Inc. v. Abrams, 71 N.Y.2d 327, 525 N.Y.S.2d 816 (1988). The person challenging a subpoena bears the burden of demonstrating a lack of authority, relevancy, or factual basis for its issuance. See, Fulton Commons Care Center, Inc. v. James, __N.Y.S.3d__, 2024 WL 1895865 (2nd Dept., 2024).

CPLR §3101(a) provides, inter alia, there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof. See, CPLR §3101(a). "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." See, Hudson City Sav. Bank v. 59 Sands Point, LLC, 53 A.D.3d 613, 57 N.Y.S.3d 399 (2nd Dept., 2017), quoting Matter of Kapon, *supra*.

CPLR 3103(a) provides as follows: The court may at any time on its own initiative, or on motion of any party or of any person from whom or about whom discovery is sought, make a protective order denying, limiting, conditioning, or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.

Pursuant to CPLR 2304, a motion to quash may be made on behalf of a non-party witness by the witness or the witness' lawyer, or by one of the parties or a party's lawyer. (See, Siegel, Practice Commentaries, McKinney's Cons Laws of NY Book 7B, CPLR 2304. Similarly, CPLR 3103(a) not only permits a non-party witness to seek such an order in his/her own right, but also permits any party opposing the disclosure to make the motion on behalf of the non-party.

In this case, it is undisputed that subject funds were transferred from the plaintiff via his attorney's escrow account to the defendants or the defendants' mortgage company. However, plaintiff argues that the subject transfers were loans to the defendant, while the defendants argue that they were gifts. As such, the ultimate issue in this matter is whether the transfers constituted loans or gifts. Moreover, plaintiff is relying on an oral promise as a contract to repay the alleged loans or transfer title of the condominium to plaintiff, and there is no documentary evidence, such as a promissory note to support the existence of the loans.

The only meaningful distinction between the mechanisms seeking disclosure from parties and non-parties is that the typical mechanism of securing discovery from a nonparty involves the issuance of a subpoena with notice, pursuant to CPLR § 3101 (a)(4). See, Matter of Kapon, *supra*.

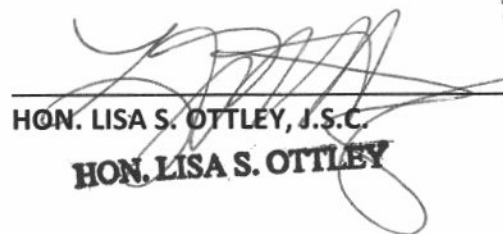
The subpoenaed financial records are encapsulated within the financial records requested in the motion to compel as both are seeking the defendants' bank and mortgage statements. Accordingly, there is no meaningful distinction between the financial records sought from the party defendants through their previously denied motion to compel and the financial records sought from the non-party TD bank through a subpoena. As to plaintiff's motion to compel, the Court held in its decision and order, dated March 14, 2024, that the bank/mortgage statements sought were not relevant as they could not establish that the transfers made were loans. (See, decision and order of J. Leon Ruchelsman).

Similarly, the court finds that the defendants have met their initial burden of establishing that the requested subpoena disclosure is utterly irrelevant since it would merely confirm undisputed facts. See, Savino v Savino, 218 A.D.3d 508, 193 N.Y.S.3d 144 (2nd Dept., 2023). The subpoenaed records would uncover how the defendants spent the funds transferred to them, which is not relevant to ascertaining whether the transfers were loans. In turn, plaintiff has failed to establish that the discovery sought is material and necessary to the prosecution or defense of the action. See, Forman v Henkin, 30 N.Y.3d 656, 70 N.Y.S.3d 157 (2018).

Accordingly, defendants' motion to quash the subpoena and for a protective order is hereby granted in the entirety.

This constitutes the decision and order of this Court.

Dated: Brooklyn, New York
May 14, 2024


HON. LISA S. OTTLEY, J.S.C.
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