

Mori v Riomar Corp.

2024 NY Slip Op 32136(U)

June 25, 2024

Supreme Court, New York County

Docket Number: Index No. 154687/2020

Judge: David B. Cohen

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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. DAVID B. COHEN

PART 58

Justice

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INDEX NO. 154687/2020

HENRY MORI,

MOTION SEQ. NO. 007 008

Plaintiff,

- v -

RIOMAR CORP., MARTHA SILVA FRANSA, KANA
RESTAURANT, D/B/A KANA, D/B/A KANA TAPAS BAR
AND RESTAURANT, ALEJANDRO VEGA, and JOHN DOE,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 007) 187, 188, 189, 190, 193, 204, 206

were read on this motion to/for REARGUMENT/RECONSIDERATION.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 195, 196, 197, 198, 199, 200, 201, 202, 203, 205, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219

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

In this intentional tort and negligence action, plaintiff moves, pursuant to CPLR 2221(d), for leave to reargue his cross-motion for an extension of time to serve and, upon reargument, for an order granting the cross-motion. Defendants move to quash a subpoena duces tecum issued by plaintiff against nonparty Serrano Tax & Business Services, Inc. (Serrano), and plaintiff cross-moves to compel Serrano to comply with the subpoena.

I. Factual and Procedural Background

As set forth in this Court’s December 14, 2023 order (NYSCEF Doc No. 184), plaintiff commenced this action in June 2020 after he was allegedly injured from an assault by employees of defendant Kana Restaurant, which was then allegedly owned by, among others, defendants Armando Orofina and Andres Vega (Doc No. 1). Shortly thereafter, plaintiff allegedly served Orofina and Vega (Doc Nos. 6 and 9). After subsequent motion practice, by decision and order

entered January 20, 2022, plaintiff was directed to complete service on Orofina and Vega within 30 days of service of the January 2022 order with notice of entry (Doc No. 84). Plaintiff then allegedly served Orofina and Vega, which constituted his third attempt to serve them (Doc Nos. 91-92).

Defendants then moved to dismiss the complaint against Orofina and Vega, arguing that plaintiff failed to properly serve them in accordance with the January 2022 order (Doc Nos. 93-94). Plaintiff opposed the motion and cross-moved for an order granting him a second extension of time to serve Orofina and Vega should service be deemed incomplete (Doc No. 110), which defendants opposed (Doc No. 115). By decision and order entered September 19, 2022, the motions were held in abeyance “pending the outcome of a traverse hearing regarding the propriety of service” (Doc No. 121). The matter was then referred to Special Referee Jeremy R. Feinberg to conduct the traverse hearing and “to hear and determine the issue of service of process.”

In April 2023, over the course of two days, Special Referee Feinberg held the traverse hearing and heard testimony from defendants and the owner of the process service agency used by plaintiff to purportedly serve Orofina and Vega. Although he found all of the testifying witnesses credible, he ultimately concluded that plaintiff “failed to meet his burden of demonstrating proper service of the summons and complaint on [Orofina and Vega] by a preponderance of the evidence” (Doc No. 182).

By decision and order, dated December 14, 2023, defendants’ motion to dismiss was granted and plaintiff’s cross-motion was denied (Doc No. 184). Regarding plaintiff’s cross-motion, it was determined that plaintiff failed to show good cause for an extension of time to serve or why granting such an extension was in the interest of justice.

Shortly thereafter, plaintiff served a nonparty subpoena duces tecum upon Serrano seeking, among other things, the following items:

1. Defendants' "payroll records" from around the date of plaintiff's incident including "names, pay rates, hours worked, overtime details, and any bonuses or deductions,"
2. A complete roster of defendants' employees,
3. "All tax records" from 2019 and 2020,
4. "All shift schedules and timesheets, including detailed clock-in and clock-out records,"
5. All W-9s or 1099s from 2019 and 2020,
6. "Any financial sections of personnel files" from 2019,
7. Insurance policies in place at the time of plaintiff's incident,
8. Any contracts and financial records regarding contract agencies used in hiring employees,
9. "Any financial communications between the bar management and staff or external parties" regarding plaintiff's incident,
10. Records of "bonuses or incentives paid to all employees" from 2019 and 2020.

(Doc No. 201).

Defendants move to quash the nonparty subpoena (Doc No. 195). Plaintiff opposes the motion and cross-moves to compel Serrano to comply with it (Doc Nos. 207-208), which defendants oppose (Doc No. 215). Plaintiff also moves for leave to reargue his prior cross-motion for an extension of time to serve (Doc No. 187), which defendants oppose (Doc No. 204).

II. Legal Analysis and Conclusions

A. Plaintiff's Motion for Leave to Reargue

Plaintiff contends that he should be granted leave to reargue because this Court erred by concluding that he failed to show good cause for an extension, as he was diligent in his multiple attempts at service of process. He also contends that this Court erred in determining that an

extension was not warranted in the interest of justice, because a balancing of the equities involved here favors allowing him an opportunity to continue the action. Defendants argue in opposition that plaintiff's motion should be denied because his failure to attach all of the underlying motion papers renders the motion procedurally defective. They also argue that he failed to demonstrate that this Court overlooked any facts or misapprehended the law. In reply, plaintiff maintains that an extension is warranted based on good cause shown or in the interest of justice.

"A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and may be granted only upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision" (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992] [internal quotation marks and citations omitted], *lv dismissed and denied* 80 NY2d 1005 [1992]; *see Foley v Roche*, 68 AD2d 558, 567-568 [1st Dept 1979]).

In his moving papers, plaintiff fails to identify any facts overlooked or any law misapprehended in the January 2022 order denying his cross-motion for an extension of time to serve. His contentions amount to a mere disagreement with this Court's prior determinations regarding good cause and the interest of justice. "Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided" (*Matter of Setters v AI Props. & Devs. (USA) Corp.*, 139 AD3d 492, 492 [1st Dept 2016]; *see Mangine v Keller*, 182 AD2d 476, 477 [1st Dept 1992]). Therefore, plaintiff's motion for leave to reargue is denied (*see Matter of Setters*, 139 AD3d at 492).

B. Defendants' Motion to Quash the Subpoenas

Defendants contend that the nonparty subpoena duces tecum should be quashed because it is "overly broad, unduly burdensome, ambiguous[,] and not calculated to lead to evidence" that is

material and necessary. They further maintain that the information plaintiff seeks through the subpoena has already been provided. Plaintiff argues in opposition that defendants have no standing to challenge the subpoena, and that the information sought is relevant.

Plaintiff's contention that defendants lack standing to challenge is unavailing. "A person other than one to whom a subpoena is directed has standing to move to quash the subpoena where he or she has a proprietary interest in the subject documents or where they involve privileged communications" (*Hyatt v State of Cal. Franchise Tax Bd.*, 105 AD3d 186, 195 [2d Dept 2013] [citations omitted]; see *Matter of Radio Drama Network, Inc.*, 214 AD3d 461, 463 [1st Dept 2023]). Defendants certainly have a proprietary interest in their financial records and private contracts, and thus, they have standing to challenge the nonparty subpoena at issue here. In any event, it is well established that "a court has power, even without any motions by the parties, to control discovery" and determine whether to quash nonparty subpoenas (*Feiner & Lavy, P.C. v Zohar*, 210 AD3d 408, 408 [1st Dept 2022]).

Regarding defendants' contentions, "[a]n application to quash a subpoena should be granted only 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" (*Anheuser-Busch, Inc. v Abrams*, 71 NY2d 327, 331-332 [1988] [internal quotation marks, brackets, and citations omitted]), and defendants, as the parties seeking to quash the subpoena, bear the burden of making that showing (see e.g. *Wells Fargo Bank N.A. v Andalex Aviation II, LLC*, 173 AD3d 418, 419 [1st Dept 2019] [affirming denial of motion because "movant failed to carry her prima facie burden of showing that the discovery sought was irrelevant"]).

Here, defendants have demonstrated that most, but not all, of the information sought by plaintiff is utterly irrelevant. In his complaint, plaintiff alleged that an unnamed defendant John

Doe assaulted him and that defendants were negligent in the hiring, training, and supervision of their employees. “Recovery on a negligent hiring and supervision theory requires a showing that the employer was on notice of a propensity to commit the alleged acts,” and such notice exists “if a reasonably prudent employer, exercising ordinary care under the circumstances, would have been aware of the employee’s propensity to engage in the injury-causing conduct” (*Gupta v YM Pro Corp*, 220 AD3d 442, 442 [1st Dept 2023] [internal quotation marks and citations omitted]).

Many of the items sought by plaintiff are utterly irrelevant to showing that defendants were on notice about any employee propensities. Plaintiff’s subpoena seeks, among other things, information about pay rates, overtime work, bonuses, tax records, financial sections of personnel files, all of which have no bearing on an employee’s propensity to potentially injure a patron by assaulting them. The only information sought by the subpoena material and necessary to plaintiff’s negligent hiring, training, and supervision claims are employee identification details such as name, title, dates of employment, and contact information, employee work schedules like shift schedules and timesheets, and agreements with external agencies regarding hiring practices.

Further, to the extent that plaintiff is using the subpoena as a means to identify which employee was the unnamed John Doe who allegedly assaulted him, the same relevancy determination applies—employee pay rates, bonuses, and other financial information are utterly irrelevant to identifying that individual. Therefore, defendants’ motion to quash is granted to the extent that Serrano is only required to respond to item numbers 2, 4, and 8 in the subpoena (*see Brook v Peconic Bay Med. Ctr.*, 162 AD3d 503, 504 [1st Dept 2018] [affirming motion court’s quashing of subpoena against nonparty because defendant medical center’s treatment of other doctors suspected of malpractice not relevant to plaintiff’s claims regarding his discipline, as plaintiff was never disciplined for malpractice]; *Lupe Dev. Partners, LLC v Pacific Flats I, LLC*,

118 AD3d 645, 645 [1st Dept 2014] [affirming motion court’s quashing of subpoena seeking information about nonparty’s assets because the assets were not relevant to plaintiff’s claims in the underlying action], *lv dismissed* 24 NY3d 998 [2014]).

C. Plaintiff’s Cross-Motion to Compel

Based on the findings above that portions of the nonparty subpoena seek information that is material and necessary, plaintiff’s cross-motion is granted, and Serrano is directed to comply with items 2, 4, and 8 of the subpoena.

Accordingly, it is hereby:

ORDERED that plaintiff’s motion (Seq. 007) for leave to reargue is denied; and it is further

ORDERED that defendants’ motion (Seq. 008) to quash the subpoena duces tecum served upon nonparty Serrano Tax & Business Services, Inc. is partially granted, the subpoena is quashed with respect to items 1, 3, 5-7, and 9-11, and the subpoenaed party shall produce any documents related to items 2, 4, and 8 in response; and it is further

ORDERED that plaintiff’s cross-motion (Seq. 008) to compel nonparty Serrano Tax & Business Services, Inc. to comply with the subpoena is partially granted, and Serrano is directed to respond to the subpoena within 30 days of service of notice of entry of this order.

HON. DAVID B. COHEN
[Signature]
J.S.C.

6/25/2024

DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE