

Matter of Lehan v Montgomery

2024 NY Slip Op 34831(U)

September 26, 2024

Supreme Court, Suffolk County

Docket Number: Index No. 617825/2018

Judge: James Hudson

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**Supreme Court of the State of New York
County of Suffolk
Commercial Division Part XLVI
Memorandum Decision**

PRESENT:

HON. JAMES HUDSON
Acting Justice of the Supreme Court

MOTION DATE: 09/04/2024
SUBMIT DATE: 09/23/2024
Mot. Seq. #: **005 - MD**

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In the Matter of the Application of RONALD
LEHAN, individually and on behalf of DHCW,
INC. d/b/a DIX HILLS CAR WASH,

Petitioner,

-against-

ROBERT MONTGOMERY a/k/a BOB
MONTRGOMERY,

Respondent.
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Ronald Lehan, individually and on behalf of DHCW, Inc. d/b/a Dix Hills Car Wash (“DHCW”), requests an order pursuant to **CPLR 3126**: 1) precluding the testimony of non-party Dorothy Montgomery because of her failure to appear at an examination before trial pursuant to a lawfully issued judicial subpoena; and 2) precluding the offering of any evidence at trial concerning a loan from Dorothy Montgomery to DHCW or respondent Robert Montgomery because of his failure to produce records in response to the post-EBT demands of DHCW.

This is an action for the dissolution of DHCW, a closely-held domestic corporation, operating a retail car wash in Huntington, NY. The principals of DHCW are Ronald Lehan, who holds a 22% interest, and Robert Montgomery, who holds a 78% interest. In or around

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September 15th, 2015, the principals entered into a contract which provided that Mr. Lehan would receive 22% of the corporation shares and profits along with distributions and a salary. Mr. Lehan was the operator of the car wash until his December 18th, 2017 departure. Mr. Lehan alleges that Mr. Montgomery engaged in illegal, oppressive and fraudulent conduct in the operation of DHCW, to his financial detriment. Mr. Lehan claims that he was frozen out of that business beginning November 2015 and continuing through the February 2022 sale of the business. On June 28th, 2024, Petitioner's counsel filed a note of issue and certificate of readiness (NYSCEF Doc. No. 76). The record indicates that the note of issue is marked "returned for correction". There is no record of a corrected note of issue. The case is scheduled for an October 7th -10th, 2024 bench trial. The trial cannot proceed in the absence of a note of issue and certificate of readiness. The petitioner filed the instant motion as a motion in limine. A ruling on a motion in limine, made in advance of trial on motion papers, constitutes an advisory opinion. Such an order is not appealable as of right or by permission (*Desantis v. Desantis*, 225 AD3d 839, 840, 208 NYS3d 639 [2d Dept March 27, 2024]). The Court will consider the instant filing as a motion to preclude, not as a motion in limine.

Generally, the scope of pre-trial discovery is broad; with specific exceptions for material determined to be privileged and that which is an attorney's work product. **CPLR 3101 (a)** mandates full disclosure of all matters material and necessary to an action, consistent with "New York's policy of permitting open and far-reaching pretrial discovery" (*Neves v. Port Authority of New York and New Jersey*, 265 AD2d 393, 394, 697 NYS2d

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85 [2d Dept 1999]; *M.C. v. Sylvia Marsh Equities, Inc.*, 103 AD3d 676, 959 NYS2d 280 [2d Dept 2013]).

It is within the sound discretion of the Court to resolve discovery disputes (*Carmona v. HUB Props. Trust*, 186 AD3d 1485, 1486, 131 NYS3d 710 [2d Dept 2020]). The Court must balance the need for discovery against the burden of its production (*O'Neill v. Oakgrove Constr.*, 71 NY2d 521, 529, 528 NYS2d 1, 523 NE2d 277, *rearg denied* 72 NY2d 910, 532 NYS2d 785, 528 NE2d 1231 [1988]). The Court must liberally interpret whether the disclosure sought is material and necessary. That phrase has been held to include “facts bearing upon the controversy which will assist in the preparation for trial...the test is one of usefulness and reason” (*Harrison v. Bayley Seton Hosp., Inc.*, 219 AD2d 584, 584, 631 NYS2d 182 [2d Dept 1995]). Discovery which is sought in good faith or for use as evidence or in rebuttal, or for purposes of cross-examination, is permitted (*Allen v. Crowell-Collier Publ. Co.*, 21 NY2d 403, 406, 288 NYS2d 449, 235 NE2d 430 [1968]). Discovery demands which are overly broad or tend to confuse pertinent case issues should be denied (*Brandes v. North Shore University Hosp.*, 1 AD3d 550, 767 NYS2d 999 [2d Dept 2003]). The Court’s review is limited to determining where there has been an abuse of the discovery process (*Kavanagh v. Ogden Allied Maintenance Corp.*, 92 NY2d 952, 954, 683 NYS2d 156, 705 NE2d 1197 [1998]).

The Court will first consider the petitioner’s request for preclusion of testimony by non-party Dorothy Montgomery because she did not appear for an EBT pursuant to a judicial subpoena.

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To invoke the drastic remedy of preclusion, it must be demonstrated that the offending party's lack of cooperation was willful, deliberate, and contumacious. The willful or contumacious nature of that conduct can be inferred from repeated failure to comply with discovery demands without a reasonable excuse (*Decius v. 1362 Ocean, LLC*, 222 AD3d 617, 618, 202 NYS3d 163 [2d Dept 2023]). In the event the movant does not show willful or contumacious refusal on the part of a witness, preclusion will be denied (*Perez v. Tedesco*, 214 AD3d 1010, 1012, 186 NYS3d 666 [2d Dept 2023]).

On May 8th, 2023, DHCW effected personal service of its subpoena upon Dorothy Montgomery (NYSCEF Doc. No. 84).

Counsel for DHCW argues that counsel for Mr. Montgomery also represents Ms. Montgomery. In opposition, counsel for Mr. Montgomery states that he does not and was merely "assisting" in her compliance with the non-party subpoena. The record reflects that counsel represents Robert Montgomery. There is no notice of appearance on behalf of Dorothy Montgomery; nor any other filing attesting to that representation.

On May 22nd, 2023, counsel for Mr. Lehan served his demand for discovery and inspection following the EBT of Robert Montgomery (NYSCEF Doc. No. 82). It included a demand for the production of "copies of all notes payable to Dorothy Montgomery and all checks received from Dorothy Montgomery by DHCW, Inc. of Bob 1232 Jericho Corp." (NYSCEF Doc. No. 82, paragraph 11). In his July 26th, 2023 e-mail to counsel for Mr. Montgomery, counsel for Mr. Lehan states that he will not conduct the scheduled July 27th, 2023 EBT of Ms. Montgomery in the absence of the production of the noted documents. Counsel for Mr. Lehan continued, stating that, if the demanded documents were not

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produced by August 4th, 2023, “. . . I will submit a subpoena for her testimony to be “So Ordered” (NYSCEF Doc. No. 85). There is no record that this was ever done. There is no record of a motion to compel her attendance at an EBT or for the production of documents.

On August 10th, 2023, Justice Emerson issued a compliance conference order signed by counsel which certified the case as being ready for trial (NYSCEF Doc. No. 75). That order terminated case discovery.

In his instant motion, petitioner’s counsel does not argue that Ms. Montgomery willfully or contumaciously refused to be deposed. He states, “Respondents must also be precluded from calling Dorothy Montgomery as a witness because she failed to respond to a lawfully issued subpoena” (NYSCEF Doc. No. 79, at 12). The petitioner has not adequately demonstrated entitlement to the requested preclusion, which will be denied.

The Court will next consider the request for preclusion of Mr. Montgomery offering any evidence at trial concerning a loan from Dorothy Montgomery to DHCW, Inc. d/b/a Dix Hills Car Wash or Robert Montgomery.

22 NYCRR 202.7 (a) requires that all motions relating to disclosure must include an affirmation by movant counsel that they have conferred with their adversary and made a good faith effort to resolve the issues raised by the motion. **22 NYCRR 202.20-f**, which is based upon **Commercial Division Rule 14**, states that, absent exigent circumstances, prior to contacting the Court regarding a disclosure dispute, counsel must first confer in good faith to resolve all discovery disputes. The supporting affirmation must attest to counsel having conducted in-person or telephonic conferences, stating the date and time of each conference, the persons participating, and the length of each conference. If the

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moving party was unable to conduct a conference due to the unreasonable failure or refusal of an adverse party, the movant must detail his efforts to obtain a conference and set forth the responses received (**22 NYCRR 202.20-f [b]**).

The affirmation in support does not comply with **22 NYCRR 202.20-f (b)**. The requested relief will be denied.

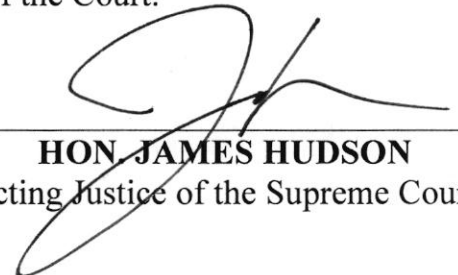
Accordingly, it is

ORDERED, that the motion (seq. no. 005) by petitioner Ronald Lehan, individually and on behalf of DHCW, Inc. d/b/a Dix Hills Car Wash, which requests pursuant to **CPLR 3126**, preclusion of testimony at trial by non-party Dorothy Montgomery because of her failure to appear at an examination before trial pursuant to a lawfully issued judicial subpoena, is denied; and it is further

ORDERED, that the request that the respondent, Robert Montgomery a/k/a Bob Montgomery, be precluded from offering any evidence at trial concerning a loan from Dorothy Montgomery to the petitioner or to Robert Montgomery, due to his failure to produce records in response to the post-EBT demands of the petitioner, is denied.

This memorandum also constitutes the Order of the Court.

Dated: September 26th, 2024
Riverhead, NY



HON. JAMES HUDSON
Acting Justice of the Supreme Court