

McMann v Holop

2024 NY Slip Op 34836(U)

September 4, 2024

Supreme Court, Suffolk County

Docket Number: Index No. 204416/2022

Judge: James Hudson

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INDEX NO.: 204416/2022

**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: 6/28/24
SUBMIT DATE: 7/10/24
Mot. Seq. #: **005 – MG**

-----X
CINDY McMANN; KEVIN McMANN and MCC
BAGELS, INC.,

Plaintiffs,

PAUL J. MARGIOTTA, ESQ.
Attorney for Plaintiffs Cindy McMann
and MCC Bagels, Inc.
165 South Wellwood Avenue
Lindenhurst, NY 11757

-against-

MILAGROS ROGERS, ESQ.
Attorney for Plaintiff Kevin McMann
49 Doncaster Avenue
West Islip, NY 11795

ANTHONY HOLOP,

Defendant.
-----X

CAMPANELLI & ASSOCIATES, P.C.
Attorneys for the Defendant
1757 Merrick Avenue, Suite 204
Merrick, NY 11566

The plaintiffs request an order, pursuant to **CPLR 2304**, to quash defendant Anthony Holop’s subpoena issued to Michael Cox, Esq.

This is an action concerning the ownership of a bagel bakery and retail store located in Lindenhurst, New York. By order dated April 30th, 2024, this Court denied Holop’s motion for summary judgment on the third cause of action for unjust enrichment, finding that “[t]he parties’ multiple agreements contain inconsistent and ambiguous language and terms,” raising triable issues of fact regarding the ownership of MCC Bagels, Inc. (MCC).

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By said order, the Court notes that in his opposition, Mr. McMann argues, inter alia, that “he was under the influence of narcotics and alcohol when he executed the documents and did not understand what he may have signed.” The aforementioned multiple agreements include a handwritten agreement dated July 16th, 2013 (NYSCEF Doc No. 111), a stock sale and purchase agreement dated July 27th, 2013 between Kevin McMann and Adam Backhaus (Doc No. 118), and a share ownership agreement dated June 20th, 2017 (Doc No. 41). The record also reveals that there are two other agreements regarding share ownership, a stock sale and purchase agreement dated July 27th, 2013 between Mr. McMann and Mr. Holop (Doc No. 167) and an agreement dated September 21st, 2015 between Mr. McMann and Holop (Doc No. 169).

Subsequently, Holop has issued a subpoena to Michael Cox, Esq. (Doc No. 194), counsel who represented Mr. McMann and MCC in a related action entitled *Adam Backhaus, plaintiff, against Kevin McMann, Anthony Holop and MCC Bagels, Inc., defendants*, under index No. 62513/2014. The subpoena indicates that a deposition of Mr. Cox is necessary because he has “specific knowledge regarding the share ownership agreement” that is material to this action.

Although the nonparty bears the initial burden of proof on a motion to quash, **CPLR 3101 (a)(4)**’s notice requirement nonetheless obligates the subpoenaing party to state, either on the face of the subpoena or in a notice accompanying it, “the circumstances or reasons such disclosure is sought or required” (**CPLR 3101 (a)(4)**; see *Matter of Kapon v Koch*, 23 NY3d 32, 988 NYS2d 559 [2014]; *Nunez v Peikarian*, 208 AD3d 670, 671, 173 NYS3d 60 [2d Dept 2022]). Only then a party or nonparty moving to quash a subpoena

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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 (*see U.S. Bank Trust, N.A. v Carter*, 204 AD3d 727, 728, 166 NYS3d 650 [2d Dept 2022]; *Wells Fargo Bank, N.A. v Confino*, 175 AD3d 533, 109 NYS3d 175 [2d Dept 2019]). “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” (*Matter of Kapon v Koch, supra*; *see Elavon, Inc. v Meyer*, 203 AD3d 1030, 162 NYS3d 758 [2d Dept 2022]; *Lima v Ancona*, 192 AD3d 1093, 141 NYS3d 368 [2d Dept 2021]). “Where disclosure is sought against a nonparty, more stringent requirements are imposed on the party seeking disclosure” (*Velez v Hunts Point Multi-Serv. Ctr., Inc.*, 29 AD3d 104, 811 NYS2d 5 [1st Dept 2006]).

Here, the Court finds that although the subpoena indicates Mr. Cox has specific knowledge regarding the share ownership agreement, it did not specifically indicate which share ownership agreement it is referring to because the aforementioned five agreements in the record were engaged in the ownership of the MCC shares.

In any event, even assuming that the subpoena refers to the share ownership agreement dated June 20th, 2017, there is nothing in the record to suggest that Mr. Cox drafted the agreement or was present when his client, Mr. McMann, signed it. The email communication dated June 19th, 2017 between Mr. Cox and Francesco Tini, Esq., a counsel who represented Holop in the Bachhous action under index No. 62513/2014, which was attached to said agreement, stated that “Tini . . . wrote: Michael, please see executed copy of shareholders agreement. have your client sign and sent back to me” (NYSCEF Doc No.

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41). In his correspondence to Mr. Tini's email, Mr. Cox stated in his email dated June 20th, 2017 that "Gentlemen: Attached is the shareholder Agreement executed by my client" (*id.*).

Therefore, the Court finds that the subpoena seeking the testimony of Mr. Cox is palpably improper, lacking in required specificity (*see generally Pascual v Rustic Woods Homeowners Assn., Inc.*, 173 AD3d 757, 104 NYS3d 110 [2d Dept 2019]; *see U.S. Bank Trust, N.A. v Carter, supra; Faust Harrison Pianos, Inc. v Bukai*, 2013 NY Misc Lexis 7333 [Sup Ct, Westchester County 2013]). In any event, even assuming that the subpoena is proper, the plaintiffs met their initial burden of establishing that Mr. Cox's deposition requested by the defendant was utterly irrelevant to the remaining issues in this action because no record indicates that Mr. Cox's was involved in drafting the June 20th, 2017 share ownership agreement or that he was present when it was signed by Mr. McMann (*see Elavon, Inc. v Meyer, supra*).

In opposition, the defendant alleges that Mr. Cox's deposition will likely help to clarify the facts as to whether Mr. McMann was under the influence of drugs and/or alcohol at the time he allegedly signed the share ownership agreement. First, the Court finds that the defendant failed to demonstrate that Mr. Cox is qualified as an expert to testify as to Mr. McMann's mental condition or capacity (*see People v Linden*, 52 Misc 3d 134[A], 41 NYS3d 720 [App Term, 2d Dept, 9th & 10th Jud Dists 2016]). The Court agrees with the plaintiffs' contention that "Mr. Cox's belief of what Kevin McMann understood or was capable of understanding is not relevant in this situation" (NYSCEF Doc No. 191). Moreover, the plaintiffs' counsel's affirmation alleges that "Mr. Cox was not present when

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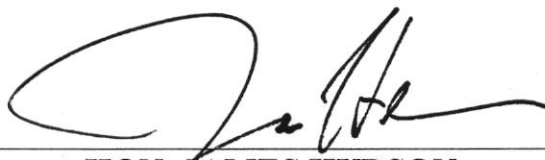
the half piece of paper was allegedly signed by Holop and Kevin” (*id.*). Thus, the defendant failed to establish that the requested disclosure is material and necessary to its defense of this action (*see Lurie v Lurie*, 226 AD3d 992, 210 NYS3d 427 [2d Dept 2024]; *Elavon, Inc. v Meyer, supra*).

Accordingly, it is

ORDERED, that the motion (seq. no. 005) by the plaintiffs, which request an order, pursuant to **CPLR 2304**, to quash defendant’s subpoena issued to Michael Cox, Esq., is granted.

This memorandum also constitutes the Order of the Court.

Dated: September 4th, 2024
Riverhead, NY



HON. JAMES HUDSON
Acting Justice of the Supreme Court