

Cooke v Greenhouse Hudson, LLC
2024 NY Slip Op 35645(U)
May 8, 2024
Supreme Court, Columbia County
Docket Number: Index No. E012022018190
Judge: Daniel C. Lynch
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF COLUMBIA

ERIN GOLDMAN COOKE,

Plaintiff,

-against-

DECISION AND ORDER

Index No.: E012022018190

RJI No.:

GREENHOUSE HUDSON, LLC,
GREEN STREET FLORAL, LLC,
JENNIFOR MOJO, individually as
aider and abettor, and DAVID MOJO,
individually as aider and abettor,

Defendants.

GREEN STREET FLORAL, LLC

Third-Party Plaintiff,

-against-

ERIN GOLDMAN COOKE,

Counterclaim Defendant,

-and-

G.G. & g. FLOWER CO., LLC and
DARRYN COOKE,

Third-Party Defendants.

APPEARANCES: Carlo A.C. de Oliveira, Esq.
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*Attorneys for Plaintiff and
Third-Party Defendants*
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LYNCH, J.:

This litigation arises out of a dispute surrounding the purchase of a retail flower shop (hereinafter “the Business”) by defendants Jennifer and David Mojo (hereinafter “the Mojos”) from plaintiff. Defendant Green Street Floral, LLC now operates the Business and defendant Greenhouse Hudson, LLC (collectively hereinafter “the LLC defendants”) owns the real property where it is located. As part of the sale, the Mojos entered into a post-closing employment agreement with plaintiff in September 2021 to manage the Business on the Mojos’ behalf until June 30, 2022. In December 2021, plaintiff informed the Mojos that she had underlying health issues rendering her vulnerable to COVID-19 and sought their consent to operate the Business remotely, but the parties were unable to come to an agreement, and on February 13, 2022, plaintiff informed the Mojos that she was terminating her employment the next day. Plaintiff thereafter commenced the instant action, seeking damages for unlawful discrimination, breach of contract and retaliation. In their answer, defendants counterclaimed against plaintiff and commenced actions against third-party defendants G.G. & G. Flower Co., LLC (hereinafter GGG) and Darryn Cooke, seeking damages for statements by plaintiff that allegedly interfered with the Business, for GGG’s bad faith in the sale of the Business and for Darryn Cooke’s failure to provide 12 months of computer support services he had billed Green Street in advance for.

In July 2023, plaintiff demanded that defendants produce bank statements from the Business’ accounts for 2021 to 2023, tax returns for the Mojos and the LLC defendants for the same time period, point of sale information for the Business, profit and loss statements, travel and entertainment expenses referenced in the Mojos’ tax returns and invoices for repairs on the building

occupied by the Business (NYSCEF Doc. No. 132). Defendants objected, arguing that these requests were overbroad, vague, unduly burdensome, irrelevant and sought confidential information, and plaintiff moved to compel their disclosure. In November 2023, this Court (McGinty, J.) denied plaintiff's motion (hereinafter the November Decision and Order), noting that the counterclaims "relate solely to the conduct of the counterclaim defendants and services provided [by the Business] to Bates & Anderson Funeral Services" and finding that "[t]he tax returns sought are not limited to the activities of the Business, but instead encompass the Mojo's personal returns" (NYSCEF Doc. No. 133: 7-8). The Court further held that "the demands for point-of-sale data [and] profit and loss statements," as well as the other demands, were overbroad and burdensome (NYSCEF Doc. No. 133: 8).¹

In February 2024, plaintiff issued a subpoena (hereinafter the February 2024 subpoena) that would compel a non-party accounting firm located in California to disclose (1) all correspondence between the Mojos, the LLC defendants and the accounting firm regarding the accounting of Green Street and the Business; (2) copies of the firm's working file, including tax returns, for Green Street, (3) copies of financial statements for Green Street for 2021 through 2024; (4) copies of internal accounting records for Green Street for 2021 through 2024; (5) copies of "all documents" supplied by the Mojos to the accounting firm regarding Green Street; (6) copies of Green Street's profit and loss statements from January 2021 through January 9, 2024; and (7) copies of documents stating the income of any individual member of Green Street from 2021 through 2024 (NYSCEF Doc. No. 131: 8). Defendants moved, by order to show cause, to quash the subpoena, which this Court signed, staying the execution of the February subpoena (NYSCEF

¹ Plaintiff has appealed the November 2023 Decision and Order to the Appellate Division, Third Department, of the Supreme Court of the State of New York (NYSCEF Doc. No. 116).

Doc. No. 200). Defendants argue that the documents sought in the February subpoena are essentially the same as those whose disclosure Judge McGinty refused to compel, and the subpoena is an attempt to circumvent her ruling. Plaintiff responds that the subpoena is not an attempt to circumvent Judge McGinty's ruling, as that decision did not preclude plaintiff from issuing subpoenas to non-parties who possess relevant evidence.

The information sought by plaintiff in the February 2024 subpoena is essentially identical to the information sought in plaintiff's July 2023 discovery demand. In July 2023, plaintiff sought bank statements from the Business for 2021 through 2024; she now seeks financial statements and accounting records for Green Street, which operates the Business, for the same years. Her first demand sought tax returns for the Mojors and the LLC defendants; the February 2024 subpoena seeks tax returns for Green Street and documents stating the income of any individual members of Green Street, of which there is only one – defendant Jennifer Mojo. Finally, the 2023 demand sought point of sale information, profit and loss statements for the Business and information on the Mojors' travel and entertainment expenses, while the February 2024 subpoena seeks all correspondence from the Mojors regarding the accounting of Green Street and the business, as well as Green Street's profit and loss statements. Distilling the February 2024 subpoena down to the essence of the information it seeks, it is merely a rewording of the denied July 2023 request, directed to a nonparty, seeking disclosure of the same underlying facts as that denied discovery demand. As Supreme Court (McGinty, J.) has already found these demands for the financial records of the Business and the Mojors overbroad and burdensome, it is clear that the February 2024 subpoena is “an attempt to circumvent [Judge McGinty's] order” and so it is improper (*Fugazy v Fugazy*, 210 AD3d 653, 657 [2d Dept 2022]).

Moreover, the discovery deadline in this case was September 29, 2023 (NYSCEF Doc. No. 134). Following the issuance of the November Decision and Order, Judge McGinty extended the deadlines for depositions and dispositive motions to January 31, 2024 and March 18, 2024, respectively (NYSCEF Doc. No. 135), but made no alterations to the deadline for the completion of discovery. The subpoena in question here was issued on February 13, 2024, months after both the discovery deadline and the November Decision and Order, without leave of the Court. Though plaintiff did not have time to issue this subpoena within the discovery timeline following the November Decision and Order (*compare Reus v ETC Hous. Corp.*, 203 AD3d 1281, 1283 [3d Dept 2022], *lv dismissed* 39 NY3d 1059 [2023]), plaintiff's remedy was to seek Court permission to do so, not simply issue an untimely subpoena without leave of the Court (*see* CPLR 3104 [a]). Therefore, for this reason also, plaintiff's February 2024 subpoena should be quashed (*see* 22 NYCRR 202.12 [f]; *Reus v ETC Hous. Corp.*, 203 AD3d at 1283).

Lastly, plaintiff argues that defendant failed to engage in a good faith effort to resolve the issues surrounding the subpoena prior to making the instant motion to quash, in violation of 22 NYCRR §§ 202.7 (c) and 202.20-f (b). While defense counsel failed to respond to an offer by plaintiff's counsel to schedule a telephone conference to discuss the matter, defense counsel's affirmation shows that he reached out to plaintiff's counsel regarding the subpoena, and that plaintiff's counsel provided a detailed response in support of plaintiff's right to issue the subpoena. Furthermore, the Court held a conference to discuss defendants' motion to quash the February 2024 subpoena with both attorneys prior to signing defendants' Order to Show Cause. As such, the parties engaged in a diligent effort to resolve the dispute, and so the Court is not required to deny defendants' motion to quash for failure to comply with 22 NYCRR §§ 202.7 (c) and 202.20-f (b) (*see Adler v Oxford Health Plans [NY], Inc.*, 216 AD3d 710, 711-712 [2d Dept

2023]; *Matter of City of Troy v Assessor of the Town of Brunswick*, 145 AD3d 1241, 1245 [3d Dept 2016]).

The Court declines to award counsel fees to defendants, as plaintiff's attempted issuance of the February 2024 subpoena does not rise to the level of sanctionable frivolous conduct (*see* 22 NYCRR § 130.1-1 [c]).

Any remaining arguments not specifically addressed herein have been considered and found to be unpersuasive or need not be reached in light of this determination. Accordingly, it is hereby

ORDERED that defendants' motion to quash plaintiff's subpoena is granted; and it is further

ORDERED that defendants' request for counsel fees is denied.

This memorandum constitutes the Decision and Order of the Court. The original Decision and Order is being uploaded to the NYSCEF system for filing and entry by the Columbia County Clerk. The signing of this Decision and Order and uploading to the NYSCEF system shall not constitute filing, entry, service, or notice of entry under CPLR 2220 and § 202.5-b(h)(2) of the Uniform Rules for the New York State Trial Courts. Counsel is not relieved from the applicable provisions of those rules with respect to service and notice of entry of the Decision and Order.

SO ORDERED.

ENTER.

Dated: May 8, 2024
Albany, New York


HON. DANIEL C. LYNCH, J.S.C.

PAPERS CONSIDERED:

1. Affirmation of Good Faith of Edward J. Phillips, Esq., dated February 21, 2024, together with exhibits A – B;

2. Affirmation in Support of Order to Show Cause of Edward J. Phillips, Esq., dated February 21, 2024, together with exhibits A – E; and
3. Affirmation in Opposition to Motion of Carlo A.C. de Oliveira, Esq., dated March 20, 2024, together with Letter/Correspondence to Court (NYSCEF Doc. No. 136); and
4. Memorandum of Law in Opposition to Motion of Carlo A.C. de Oliveira, Esq., dated March 20, 2024.

To:

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