SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. VERNA L. SAUNDERS, JSC** **PART 36**
Justice

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STIKEMAN ELLIOTT LLP,
Petitioner,

- v -

OL PRIVATE COUNSEL, LLC,
Respondent.

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INDEX NO. 153406/2024

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 10, 11, 12, 13, 14, 15, 16, 21, 22, 24, 25, 26, 27

were read on this motion to/for **QUASH SUBPOENA**.

Petitioner, a Canada-based law firm with a satellite office in New York City, alleges that it has been subject to respondent's out-of-state subpoena seeking production of documents in connection with an action pending in the Third Judicial District Court of Salt Lake County, State of Utah (the "Utah Action"). The Utah Action—the underlying case giving rise to the subpoena—is an action between Ephraim Olson (hereinafter, "Ephraim"), a Utah resident, his father, Thomas Olson (hereinafter, "Thomas"), and Thomas' law firm, OLPC (respondent). In that action, Ephraim is asserting claims for an alleged failure to pay wages and Thomas is asserting counterclaims for breach of fiduciary duty and malpractice based on claims that Ephraim allegedly provided privileged and confidential documents belonging to respondent to a lawyer for Ephraim's mother, Carolyn Olson, who is involved in a divorce proceeding with Thomas. According to petitioner, the subpoena is invalid, seeks irrelevant and privileged information, and improperly attempts to evade the requirements for seeking documents from petitioner's Canada office. Petitioner asserts that as a non-party to the Utah Action, the subpoena is burdensome and unnecessary and should, therefore, be quashed (NYSCEF Doc. No. 1, *petition*).

Petitioner moves, pursuant to CPLR 3119(e), 3103(a) and 2304, for a protective order and to quash respondent's out-of-state subpoena seeking production of documents from petitioner in connection with the pending Utah Action. According to petitioner, while its Calgary office represents Ephraim in an action in Alberta, Canada, the subpoena at issue is procedurally improper because it seeks privileged communications between Ephraim and his attorneys in the Calgary office. The subpoena is facially overbroad, argues petitioner, as it requests "any and all documents" concerning eight categories of documents that refer to or concern any communications with Ephraim from January 2018 through the present. Petitioner asserts that none of the documents sought relate to allegations and claims in the Utah Action and therefore, the subpoena should be quashed because it seeks information that are neither material nor necessary. According to petitioner, requests 2, 3, 4, 5, 6, 7, and 8 in the subpoena all seek documents, communications, and information relating to Ephraim's siblings Naomi Burton, Elijah Olson, Isaiah Olson, Hyrum Olson, and Bruce Lemons, none of whom are mentioned in

the complaint in the Utah Action. Next, petitioner articulates that the documents sought could be obtained from Ephraim, who is a party to the Utah Action, or from his siblings to whom discovery requests have been made in a related federal action in Utah.

Furthermore, petitioner asserts that the only responsive documents that it may have are likely attorney-client communications with Ephraim and it would be unduly burdensome for petitioner to review and sort out any documents it may have that are not privileged. To the extent Ephraim's communications with petitioner included other individuals on the correspondence, argues petitioner, those communications are also privileged pursuant to the common interest privilege. Petitioner posits that Ephraim, Naomi Burton, Carolyn Olson, Isaiah Olson, and Elijah Olson share common legal interests related to the divorce proceedings between Thomas and Carolyn Olson. Petitioner also maintains that it has represented Naomi Burton in Alberta in litigation unrelated to the Utah Action, and its correspondence with Naomi Burton therefore, would likewise be privileged. Lastly, petitioner notes that the subpoena should be quashed because where, as here, a party seeks to compel evidence located in Canada for use in a United States proceeding, respondent must do so by obtaining a letter rogatory from a United States court, which the appropriate Canadian court may enforce (NYSCEF Doc. No. 10, *petitioner's memo of law*). In support of the application, petitioner attaches a copy of the subpoena at issue, complaint, and answer with counterclaim in the Utah Action (NYSCEF Doc. Nos. 5-7).

Respondent opposes the motion contending that the petition to quash the subpoena and the request for a protective order should be denied. Petitioner also cross-moves, pursuant to CPLR 3124, for an order compelling compliance with the subpoena. Respondent argues that contrary to petitioner's claim that the subpoena seeks irrelevant and immaterial information, the subpoena rather seeks documents at the heart of respondent's counterclaim in the Utah Action, which is that Ephraim improperly disseminated respondent's privileged and confidential documents to third parties, including to petitioner, to be used in proceedings involving Thomas and respondent. To prove the counterclaim, claims respondent, it seeks documents and other evidence showing, *inter alia*, what information was disseminated, how and when the confidential information was disseminated, to whom it was disseminated, and where and how the information has since been used in various legal proceedings. Respondent asserts that it seeks documents containing communications involving not only Ephraim, but also Ephraim's siblings because the privileged and confidential documents have been used by Ephraim's siblings, and their lawyers in various proceedings. Next, respondent argues that the documents sought are described with reasonable particularity limited to relevant issues during the relevant time frame. Hence, argues respondent, its use of the "any and all" phraseology in the subpoena does not necessarily make the request overbroad. Next, respondents asserts that it is not obliged to obtain the requested documents from Ephraim and others insofar as New York courts have established that it is not necessary for subpoenaing parties to show the requested documents could not be obtained elsewhere. Hence, petitioner is not relieved of its obligation to respond to the subpoena, contends respondent. Also, respondent asserts that to the extent the subpoena implicates any privileged communications, petitioner should provide a privilege log and description of any privilege, in addition to producing the non-privileged documents. Concerning the claim that Ephraim's communications with petitioner involving his siblings, are protected by the "common interest privilege", respondent articulates that petitioner does not explain how any

communications involving it, Ephraim, and others that it does not represent in any Utah or Canadian actions and/or who are not co-litigants in those actions would have been for the purpose of providing legal advice and furthering a common legal interest between all such parties. Next, respondent contends that since the subpoena was properly served upon petitioner's New York office, petitioner has the practical ability to obtain the documents sought, and therefore, respondent is not required to obtain a letter rogatory requesting a Canadian court to compel production. Lastly, respondent asserts that the application to quash the subpoena is untimely because the application was not promptly filed. Insofar as the motion to quash was filed after the initial return date of the subpoena, respondent argues that the motion to quash should be denied as untimely (NYSCEF Doc. No. 12, *respondent's memo of law in opposition and in support of motion to compel*).

Pursuant to CPLR 3101(a)(4), "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof by. . . [a]ny other person, upon notice stating the circumstances or reasons such disclosure is sought or required" (CPRL 3101[a][4]). "An 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" (*Kapon v Koch*, 23 NY3d 32, 38 [2014] [internal citations and quotation marks omitted]). Section 3101(a)(4) does not require the subpoenaing party to demonstrate that it cannot obtain the requested disclosure from any other source (*id.*). If the subpoena complies with the notice requirements, and the disclosure sought is relevant to the prosecution or defense of an action, the motion to quash the subpoena should be denied (*id.*). "A party seeking discovery must satisfy the threshold requirement that the request is reasonably calculated to yield information that is 'material and necessary'—i.e., relevant" (*Forman v Henkin*, 30 NY3d 656, 661, 70 [2018] (quoting CPLR 3101[a]). "An application to quash a subpoena should be granted [o]nly 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" (*Kapon*, 23 NY3d at 38).

Here, petitioner's application for a protective order and to quash respondent's out-of-state subpoena is denied and respondent's application for an order compelling compliance with the subpoena is granted. Petitioner has failed to demonstrate that the subpoena is improper since it seeks "to compel the production of specific documents that are relevant and material to facts at issue in a pending judicial proceeding" (see *Velez v Hunts Point Multi-Serv. Ctr., Inc.*, 29 AD3d 104, 112 [1st Dept 2006]). The subpoena seeks documents at the heart of respondent's counterclaim in the Utah Action, which pertains to allegations that Ephraim improperly disseminated respondent's privileged and confidential documents to third parties, including to petitioner, to be used against and in proceedings involving Thomas and respondent. A review of the subpoena reveals that it seeks information from January 2018 through the present obtained by Ephraim in his employment with respondent, shared with petitioner and used by Ephraim, his siblings, and Carolyn Olson in litigation. Contrary to petitioner's contention that respondent's use of the term "any and all," in the wording of the discovery demand is overbroad, and violates the specified with reasonable particularity requirement of CPLR 3120(a), a review of the subpoena demonstrates that respondent seeks specific and tailored information within a defined timeframe (see *Engel v Hagedorn*, 170 AD2d 301, 301 [1st Dept 2010]. It has been well-established that "to hold that items lack specificity simply because they start with the word

'[a]ll', would be to exalt form over substance and to frustrate the liberal discovery provisions which Article 31 of the CPLR was designed to accomplish" (see *Scheinfeld v Burlant*, 98 AD2d 603, 603 [1st Dept 1983]).

Next, petitioner's argument that it should be relieved of its response obligations because nearly all the responsive documents are privileged and/or protected under the common interest doctrine is without merit. To the extent petitioner believes the subpoena implicates any privileged communications, it should provide a privilege log specifying the nature of the contents of the documents, who prepared the records and the basis for the claimed privilege (see *Park Assocs. v N.Y. State Ag (In re Subpoena Duces Tecum to Jane Doe)*, 99 NY2d 434, 442 [2003]).

Furthermore, petitioner fails to persuade the court that the information sought by the subpoena is protected by the common interest privilege. "The common interest privilege is an exception to the rule that the presence of a third party will waive a claim that a communication is confidential. It requires that the communication otherwise qualify for protection under the attorney-client privilege and that it be made for the purpose of furthering a legal interest or strategy common to the parties asserting it" (*Matter of San Diego Gas & Elec. Co. v Morgan Stanley Senior Funding, Inc.*, 136 AD3d 547, 548 [1st Dept 2016]). The Court of Appeals has explained that under the common interest privilege, "[d]isclosure is privileged between codefendants, coplaintiffs or persons who reasonably anticipate that they will become colitigants, because such disclosures are deemed necessary to mount a common claim or defense, at a time when parties are most likely to expect discovery requests and their legal interests are sufficiently aligned that the counsel of each is in effect the counsel of all" (see *Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 27 NY3d 616, 628 [2016]). On this application, petitioner does not explain how the common interest privilege applies to its communications involving Ephraim and other third parties, whom petitioner does not claim to represent in any Utah or Canadian actions and/or who are not co-litigants in those actions.

Lastly, petitioner's contention that respondent must obtain a letter rogatory requesting a Canadian court to compel production because the records sought are in the custody of petitioner's office in Canada is unavailing. Notwithstanding petitioner's avowal, that its New York location is that of merely a 'satellite office' which houses limited staff, in the context of expansive rules of disclosure in New York State, a party's practical ability to obtain documents is the determinative factor that weighs in favor of compelling disclosure. Hence, courts have interpreted "possession, custody or control to mean constructive" and "control does not require that the party have legal ownership or actual physical possession of the documents at issue; rather, documents are considered to be under a party's control when that party has the right, authority, or practical ability to obtain the documents from a non-party to the action" (see *Commonwealth of the N. Mariana Is. v Canadian Imperial Bank of Commerce*, 21 NY3d 55, 63 [2013]). Petitioner does not argue that it lacks the ability to request or access the information requested and therefore, petitioner can produce the subpoenaed information as served through its New York office. All other arguments have been considered and are either without merit or need not be addressed given the findings above. Accordingly, it is hereby

ORDERED that petitioner's motion to quash and for a protective order is denied; and it is further

ORDERED that respondent's cross-motion for compliance with the subpoena is granted; and it is further

ORDERED that, to the extent petitioner believes the subpoena implicates any privileged documents, it should provide a privilege log specifying the nature of the contents of the documents, who prepared the records and the basis for the claimed privilege; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for respondent shall serve a copy of this decision and order, with notice of entry, upon petitioner.

This constitutes the decision and order of this court.

February 14, 2025

HON. VERNA L. SAUNDERS, JSC

CHECK ONE:	[X]	**CASE DISPOSED**		[ ]	**NON-FINAL DISPOSITION**		
	[ ]	**GRANTED**	[ ] **DENIED**	[ ]	**GRANTED IN PART**	[X]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**