

Matter of Offit Kurman P.A.

2025 NY Slip Op 33308(U)

September 2, 2025

Supreme Court, New York County

Docket Number: Index No. 151034/2025

Judge: Emily Morales-Minerva

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EMILY MORALES-MINERVA PART 42M

Justice

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INDEX NO. 151034/2025

IN RE THE MATTER OF THE APPLICATION OF OFFIT KURMAN P.A.

MOTION DATE N/A

Petitioner,

MOTION SEQ. NO. 001

- v -

TO ENFORCE CPLR 3119 SUBPOENA SERVED UPON SGP BIOENERGY HOLDINGS, LLC,

DECISION + ORDER ON MOTION

Non-Party Respondent.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 23, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 55, 56, 57, 58

were read on this motion to/for

DISCOVERY

APPEARANCES:

Offit Kurman, P.A., Hackensack, NJ (Louis Derek Tambaro, Esq., of counsel), for petitioner.

DLA Piper LLP, New York, NY (Marc Aaron Silverman, Esq., of counsel), for non-party respondent.

EMILY MORALES-MINERVA, J.S.C.

Petitioner OFFIT KURMAN P.A. commenced this proceeding, by petition and order to show cause (motion seq. no. 001), pursuant to CPLR § 3119, which governs uniform interstate depositions and discovery; CPLR § 2308, which governs disobedience of a subpoena; and CPLR § 3124, which governs failure to disclose and motions to compel disclosure. In doing so, petitioner moves this court to enforce a subpoena duces tecum of the Pennsylvania Court of Common Pleas, Commerce Part, Philadelphia County

against respondent SGP ENERGY HOLDINGS, LLC. Petitioner also seeks to impose costs and penalties on respondent, including attorneys' fees and costs incurred in making the instant application.

Respondent appears and opposes the petition and order to show cause.

The matter was returnable for oral arguments in Part 42M, 111 Centre Street, New York, New York, on May 09, 2025, at 10:30 A.M. At the call of the calendar, all parties appeared, by their respective counsel, and the parties made their positions heard on record. Thereafter, the Court reserved decision.

Now, for the reasons stated below, the Court denies the order to show cause (mot. seq. no. 001) and dismisses the petition without prejudice.

BACKGROUND

PENNSYLVANIA STATE ACTION

Petitioner OFFIT KURMAN P.A. is a party in the following civil action pending in the Pennsylvania Court of Common Pleas, Commerce Part, Philadelphia County: Offit Kurman, P.A. v S.G. Preston Company, Case No. 04329 (see New York State Courts Electronic Filing System [NYSCEF] Doc. No. 001, Petition). Under

the banner of that case, petitioner served a Notice of Intent to serve a subpoena duces tecum upon respondent SGP BIOENERGY HOLDINGS, LLC, who is not a party before the Pennsylvania Court (id.). Petitioner's reasons for doing so include that a prominent shareholder of S.G. Preston Company (S.G. Preston) -- who is a party in the Pennsylvania action -- owns respondent, and that respondent has information material to the Pennsylvania litigation there (see id., at ¶¶ 3 and 58).

In the same action, S.G. Preston -- non-party to this proceeding -- filed objections to the notice of intent to serve a subpoena and moved for a protective order to prevent the issuance of the subpoena against respondent. In reply, petitioner filed a motion to strike the objections with the Pennsylvania Court (see id.). Respondent did not appear on the applications before the Pennsylvania Court and may not have been served with notice of the application.

Following a hearing on the objections and the motion to strike, the Pennsylvania Court of Common Pleas (A.F. Feltman, S.J.), granted plaintiff's motion to strike S.G. Preston's objections to the Notice of Intent to serve a subpoena directed to respondent, denied S.G. Preston's motion for a protective order, and struck the entirety of S.G. Preston's objections (see

NYSCEF Doc. No. 005, Decision and Order, dated July 31, 2024, Exhibit 3 to Petition).¹

Thereafter, on August 28, 2024, petitioner purports to have served the subpoena duces tecum of the Pennsylvania Court upon respondent at its principal place of business, 85 Broad Street, 17th Floor, New York, New York 10004 (see NYSCEF Doc. No. 001, Complaint, § 6; see also NYSCEF Doc. No. 10, Affidavit of Service, Exhibit 8 to the Petition). Respondent did not produce the documents requested or otherwise object to the same by the subpoena's return date, September 18, 2024 (see NYSCEF Doc. No. 001, Petition, §§ 7 and 39). Thereafter, petitioner sought remedy in this Court.

NEW YORK STATE PROCEEDING

Petitioner moves, pursuant to CPLR § 3119, 2308, and 3124, for orders (1) compelling respondent to immediately produce the documents sought in the subpoena duces tecum, and (2) imposing costs and penalties on respondent, including attorneys' fees and costs incurred in making the instant application. Respondent opposes the petition and order to show

¹S.G. Preston filed a notice of appeal of the July 31, 2024, decision and order (see NYSCEF Doc. No. 001, Complaint). The Pennsylvania Superior Court quashed the appeal, and left the July 31, 2024, order of the Pennsylvania Court undisturbed (see NYSCEF Doc No. 13, Decision and Order, Superior Court of Pennsylvania, Philadelphia County Civil Division).

cause in its entirety arguing, among other things, that petitioner did not properly serve the subpoena on it (mot. seq. no. 001).

On the return date of the petition and order to show cause (mot. seq. no. 001), respondent, on record, consented to service of the subpoena duces tecum in court and made, for the first time, an oral request that petitioner modify the scope of the out-of-state subpoena.² Petitioner countered that the Pennsylvania Court issued the subpoena, rejecting S.G. Preston's objections as to the material's relevance to the action and that such arguments should not be entertained anew in this court.

ANALYSIS

The Uniform Interstate Depositions and Discovery Act, which is codified under CPLR § 3119, "provides a streamlined mechanism for disclosure in New York for use [of the discovery] in an action that is pending in another state or territory within the United States" (Matter of Kapon v Koch, 23 NY3d 32, 35 [2014], citing CPLR § 3119 [a] [3] [defining "State"], [b] [governing

² Respondent raised no issue and no challenge to the subpoena meeting the notice requirement pursuant to CPLR 3101 (a)(4) (see e.g. Matter of Kapon v. Koch, 23 NY3d 32, 35 [2012]). Prior to accepting service, on the record, without objection to the notice requirement, respondent only argued lack of proper service because petitioner delivered the subpoena to a "communal receptionist or mail clerk" and did not send the subpoena to non-party respondent's "counsel or attempt to meet and confer" (NYSCEF Doc. No. 27, memorandum of law in opposition, dated February 18, 2025, at 2; see also id., at 8-9).

issuance of subpoena pursuant to CPLR § 3119], and [c] [governing service of a subpoena issued pursuant to CPLR § 3119]). This Act permits the issuance of a subpoena in this State for service upon a person or entity to which an out-of-state subpoena is directed (see generally CPLR § 3119 [b] [2]).

Generally, to obtain such a subpoena, a party must submit an out-of-state subpoena to the county clerk in the county within which discovery is sought and, in accordance with court procedure and Article 23 of the CPLR, the clerk shall issue the subpoena (see CPLR § 3119 [b]).

In the alternative, as done here, a party may obtain a subpoena for use in an out-of-state action, by retaining an attorney licensed to practice in New York State who, upon receiving the original and true copy of the out-of-state subpoena, may issue the subpoena for service upon a person or entity to which the out-of-state subpoena is directed (see CPLR § 3119 [a] [1] [defining an out-of-state subpoena]; [b] [governing issuance of subpoena]; see also NYSCEF Doc. No. 003, New York Subpoena Duces Tecum).

A subpoena issued in this manner must "incorporate the terms used in the out-of-state subpoena" and must "contain or be accompanied by the names, addresses and telephone numbers of all counsel of record in the proceeding to which the subpoena

relates" and any unrepresented party (CPLR § 3119 [b] [3])).

Further, a party must serve such subpoena "in the same manner as a summons in compliance with [CPLR § 2302 and 2303]" (CPLR § 3119 [c]).³

Service of a summons on a domestic or foreign corporation and, therefore, service of a subpoena duces tecum on the same, pursuant to CPLR § 3119, "shall be made by delivering the summons . . . to an agent authorized by appointment or law to receive service" (CPLR § 311 [a] [1]).

Here, respondent disputes that petitioner properly executed such service on it. While respondent subsequently accepted service of the subject subpoena duces tecum in court, the issue of proper service in the first instance is not moot. That is because an application to compel compliance with a subpoena, pursuant to CPLR § 3119 (e), does not lie without a prima facie showing of proper service of the subpoena (see generally Sky Coverage Inc. v Alewex, Inc., 194 AD3d 587, 588 [1st Dept 2021] [affirming denial of a motion to compel, holding "[a]ny motion to compel compliance with a subpoena must, as a threshold matter, be supported by a prima facie showing of proper service of the subpoena"]; see also CPLR § 3119 [e] [providing, as

³ CPLR § 2302 governs the authority to issue a subpoena generally, and CPLR § 2303 governs service of a subpoena generally; it provides, among other things, that a "subpoena duces tecum shall be served in the same manner as a summons" with exceptions not applicable here.

pertinent to this point, that an application to the court to enforce "a subpoena issued under this section must comply with the rules or statutes of this state"])).

Therefore, the court shall address the threshold issue of service of the subject subpoena duces tecum. The affirmation of such service merely provides that the process server "personally deliver[ed] and le[ft] the same with LAKESHA DUBOSE, who works in the mailroom of [respondent] and is authorized by appointment to receive service for that company" (NYSCEF Doc. No. 10, Affirmation of Service).

This statement is insufficient on its face to establish a presumption of proper service (see People v Ultimate Security Force, Inc., 2017 NY Misc LEXIS 1287, *9, 2017 NY Slip Op 30690[U] [Sup Ct NY County 2017] [delivery of papers to a receptionist, whom the process server conclusorily states is an officer of the corporations or other agent authorized to receive service for the corporations, is insufficient proof that the corporation was served personally and properly]; cf. Stillwater Asset Mgt., LLC v. 3rd & 36th St. LLC, 2023 NY Misc LEXIS 2326, *5, 2023 NY Slip Op 31570[U] [Sup Ct NY County 2023] [affidavit of service, pursuant to CPLR § 311-a, sufficient to establish a presumption of service where the process server attested in the affidavit of service to delivering the documents to a person "who informed deponent that he holds the position of

a Mailroom Supervisor with that company and is authorized by appointment to receive service"])).

Therefore, petitioner's motion (seq. no. 001) to compel compliance with the subpoena, pursuant to CPLR § 3214, and to hold respondent in contempt for failure to comply with the subpoena, pursuant to CPLR § 2308, must be denied.⁴

Petitioner's application for attorneys' fees is also unavailing. It is well settled that "[u]nder the American Rule, [even] a prevailing party in litigation generally may not recover attorney's fees from the losing party . . . unless an award is authorized by agreement between the parties, statute or court rule" (Sage Sys., Inc. v Liss, 39 NY3d 27, 29 [2022], citing Hooper Assoc. v AGS Computers, 74 NY2d 487, 491 [1989])). Here, petitioner has not established the existence of such authorization.

While the Court denies the subject motion entirely, the Court's denial is without prejudice and with notice that respondent has failed to comply with CPLR § 3122,⁵ which

⁴ CPLR § 3124 provides, "If a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, except a notice to admit under section 3123, the party seeking disclosure may move to compel compliance or a response."

CPLR § 2308 governs disobedience of subpoena and provides, among other things, that "[f]ailure to comply with a subpoena issued by a judge, clerk or officer of the court shall be punishable as contempt of court."

⁵ CPLR § 3122 provides:

"(a) . . . Within twenty days of service of a . . . subpoena duces tecum . . . the . . . person to whom the . . . subpoena . . . is directed, if that . . . person objects to

provides, among other things, that the recipient of a subpoena serve a response (see also CPLR § 3119 [e] ["An application to the court . . . to . . . modify a subpoena issued under this section must comply with the rules or statutes of this state"])). Service of the subpoena on respondent was completed on May 09, 2025, and -- in the four months since -- respondent has taken no further steps towards a solution. This is despite stating on record that it was not seeking to quash the subpoena, but to limit the scope of materials sought. Finally, respondent has not made an application for an order extending the time for doing such (see CPLR § 2004 [governing extensions of time generally]).

Accordingly, it is hereby

ORDERED that petitioner's motion, by order to show cause (seq. no. 001), is denied without prejudice; it is further

the disclosure, inspection or examination, shall serve a response which shall state with reasonable particularity the reasons for each objection. If objection is made to part of an item or category, the part shall be specified . . .

"(b) Whenever a person is required pursuant to such . . . subpoena duces tecum . . . to produce documents for inspection, and where such person withholds one or more documents that appear to be within the category of the documents required by the . . . subpoena duces tecum . . . to be produced, such person shall give notice to the party seeking the production and inspection of the documents that one or more such documents are being withheld. This notice shall indicate the legal ground for withholding each such document, and shall provide the following information as to each such document, unless the party withholding the document states that divulgence of such information would cause disclosure of the allegedly privileged information: (1) the type of document; (2) the general subject matter of the document; (3) the date of the document; and (4) such other information as is sufficient to identify the document . . .

"(d) . . . The reasonable production expenses of a non-party witness shall be defrayed by the party seeking discovery."

ORDERED that the petition is dismissed without prejudice;
and it is further

ORDERED that the Clerk of Court shall mark the file
accordingly.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

9/2/2025
DATE


EMILY/MORALES-MINERVA, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE