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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN PART 21

Justice

Index Number : 102660/2012
KAPON, JOHN
vs.
KOCH, WILLIAM I.
SEQUENCE NUMBER : 001
QUASH SUBPOENA, FIX CONDITIONS

INDEX NO. 102660/12

MOTION DATE 7/16/12

MOTION SEQ. NO. 001

The following papers, numbered 1 to 11 were read on this petition to quash subpoenas

Notice of Petition; Petition — Exhibits 1-2; Affirmation – Exhibits 1-31; Affirmation of Service	No(s). 1; 2; 3; 4
Answer–Affirmation of Service; Affidavit— Exhibits A-O	No(s). 5-6; 7
Reply Affirmation — Exhibits 1-4; Affirmation of Service	No(s). 8; 9
Supplemental Affidavit–Exhibit A	No(s). 10
Letter dated July 31, 2012–Exhibit A	No(s). 11

Upon the foregoing papers, the petition to quash subpoenas is decided in accordance with the annexed memorandum decision, order, and judgment.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 10/15/12
New York, New York

, J.S.C.

1. Check one: ..... ■ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. Check if appropriate:..... PETITION IS: ☐ GRANTED ■ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check if appropriate:..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

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In the Matter of a Petition to Quash Subpoena Ad Testificandum and/or for a Protective Order

JOHN KAPON and JUSTIN CHRISTOPH,

Petitioners,

- against -

WILLIAM I. KOCH,

Respondent,

Index No. 102660/2012

Decision and Judgment

In Connection with an action pending in the Superior Court of the State of California entitled:

William I. Koch v Rudy Kurniawan, BC421581

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HON. MICHAEL D. STALLMAN, J.:

Petitioners seek to quash subpoenas issued to them to obtain discovery in connection with an action brought in California. Alternatively, petitioners seek a protective order limiting the scope of their depositions and the use of the discovery obtained. Respondent opposes the petition.

BACKGROUND

Petitioner John Kapon is the chief executive officer of Acker, Merrall & Condit Company (AMC), known as a leading retailer and auctioneer of fine and rare wines. Petitioner Justin Christoph is an AMC employee. Subpoenas ad testificandum and duces tecum were issued to Kapon and Christoph to obtain discovery in connection

with an action against Rudy Kurniawan, brought in the Superior Court of the State California in Los Angeles County, *Koch v Kurniawan*, Case No. BC421581 (the California Action). (Weinberg-Brodt Affirm., Exs 1, 2).

In the California Action, Koch alleges that Kurniawan knowingly and intentionally sold him 149 bottles of counterfeit wine through private sales and auctions held by AMC. (*See* Weinberg-Brodt Affirm., Ex 3 [California Action complaint].) According to Koch, Kurniawan made material misrepresentations about the producer and vintage of the bottles purchased, and Koch purchased these wines from AMC, allegedly relying on Kurniawan's misrepresentations. The California Action complaint ostensibly alleges four causes of action against Kurniawan, three of which are based on the California Business and Professions Code.

On April 23, 2008, Koch commenced an action against AMC in Supreme Court, New York County, *Koch v Acker, Merrall & Condit Company*, Index No. 601220/2008. By a so-ordered stipulation dated October 27, 2009, the parties in that action set March 12, 2010 as the discovery cut-off date. (Weinberg-Brodt Affirm., Ex 15.) Of the five causes of action originally asserted, only two remain.[1] Koch

[1] By decision and order dated April 8, 2009, Justice Shulman granted AMC's motion to dismiss only the first and fifth causes of action. (Weinberg-Brodt Affirm., Ex 9.) On appeal, the Appellate Division reversed Justice Shulman's decision, as appealed from, and dismissed the second and third causes of action as well. (*Koch v Acker, Merrall & Condit Co.*, 73 AD3d 661 [1st Dept 2010].) The parties then stipulated to discontinue the fourth cause of action with prejudice, but without prejudice to the second and third causes of action, which were being

apparently moved for leave to amend the complaint, and the motion is currently returnable on October 15, 2012.

Meanwhile, it is undisputed that, on or about March 8, 2012, Kurniawan was arrested and charged with wire fraud and mail fraud, for, among other things, allegedly attempting to sell counterfeit wine. (*See* Weinberg-Brodt Affirm., Ex 5.) Kurniawan moved for a stay of the California Action based on the federal criminal charges, stating that he was denied bail and that he was incarcerated at a federal detention facility in New York, New York. (*See* Foran Aff., Ex K.)[2]

Petitioner Kapon has objected to the subpoena issued to him. (Foran Aff., Ex C.) Petitioners now seek to quash the subpoenas issued to petitioners "only to the extent they seek Petitioners' deposition testimony." (Reply Mem. at 4; see also Notice of Petition; Petition.) In the alternative, petitioners seek a protective order staying their depositions until the parties in the California Action are deposed, limiting the scope of petitioners' depositions, limiting the use of the non-party deposition testimony, and permitting petitioners to designate portions of the deposition testimony as "Confidential."

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appealed to the Court of Appeals. (Weinberg-Brodt Affirm., Ex 11.) By decision dated March 27, 2012, the Court of Appeals reversed the Appellate Division's decision and reinstated the second and third causes of action. (*Koch v Acker, Merrall & Condit Co.*, 18 NY3d 940 [2012].)

[2] According to petitioners, Kurniawan's motion to stay was denied on an *ex parte* basis, but a full hearing on the motion was set for June 16, 2012. (Weinberg-Brodt Affirm. ¶ 42.)

I.

New York adopted the Uniform Interstate Depositions and Discovery Act, effective January 1, 2011, added as CPLR 3119. CPLR 3119 provides that out-of-state subpoenas can be submitted to an attorney licensed to practice in New York, who may then issue a subpoena pursuant to CPLR 3119. (CPLR 3211 [b][4].) CPLR 3119 (e) provides, "An application to the court for a protective order or to enforce, quash, or modify a subpoena issued under this section must comply with the rules or statutes of this state and be submitted to the court in the county in which discovery is to be conducted."

> "The legislative history further indicates that the statute contemplated that the scope of the examination under the subpoena would be determined by the state in which the action for which the discovery sought is pending, but that discovery pursuant to the subpoena, as well as any motions to quash, enforce, or modify a subpoena would comply with the rules of New York State (Sponsor's Mem. in Support, Bill Jacket, L. 2009, ch. 29, Bill No. S4256)."

(*Matter of New York Counsel for State of Cal. Franchise Tax Bd.* [*U.S. Philips Corp.-Haken-Tamoshunas*], 33 Misc 3d 500, 506 [Sup Ct, Westchester County 2011].)

As petitioners indicate, CPLR 3101 (a) (4) requires that a nonparty served with a subpoena be given notice "stating the circumstances or reasons such disclosure is sought or required." (*Velez v Hunts Point Multi-Service Ctr., Inc.*, 29 AD3d 104 [1st Dept 2006] [CPLR 3101 (a) (4) applies to non-party subpoenas].) "The purpose of

such requirement is presumably to afford a nonparty who has no idea of the parties' dispute or a party affected by such request an opportunity to decide how to respond." (*Velez*, 29 AD3d at 111.) Here, the attachments to the out-of-state subpoenas purport to annex the amended complaint in the California Action as an exhibit. Thus, petitioners were no strangers to the dispute between Koch and Kurniawan in the California action. Petitioners do not argue that they are prejudiced by any purportedly deficient notice. Even assuming that notice was lacking, any such deficiency in the notice has been cured in respondent's papers. (*See Velez*, 29 AD3d at 111. ["given the evidence presented by Hunts Point in opposition, the motions to quash the subpoenas should have been denied."].)

Next, petitioners argue that the subpoenas should be quashed because Koch does not demonstrate that the disclosure cannot be obtained from any other source, or that Koch should at least seek discovery first from Kurniawan before resorting to discovery from non-parties. Petitioners further believe that the subpoenas are being improperly used to obtain discovery for use in the New York action, where discovery has since closed, because AMC is not a party to the California Action.

Prior to 1984, CPLR 3101 permitted disclosure from a nonparty only "where the court on motion determines that there are adequate special circumstances." *(Cirale v 80 Pine St. Corp.*, 35 NY2d 113, 116 [1974], quoting CPLR 3101 [former

(a) (4)]). "Special circumstances" meant more than the standard of "material and necessary" (*see id.*); "special circumstances" "ordinarily means the information was not available from other sources". (6-3101 Weinstein-Korn-Miller, NY Civ Prac CPLR ¶ 3101.33a.)

In 1984, the Legislature eliminated the language "on motion" and "special circumstances" from CPLR 3101 (a) (4). (L 1984, ch 294, § 2 [eff Sept. 1, 1984].) CPLR 3101 (a) (4) now reads that non-party disclosure is obtained "upon notice stating the circumstances or reasons such disclosure is sought or required." It appeared clear that "special circumstances" were no longer required for non-party disclosure. However, in a series of cases, the Appellate Division, Second Department seemed to revive the "special circumstances" requirement, which created a split between the First and Second Departments. (*See Dioguardi v St. John's Riverside Hosp.*, 144 AD2d 333 [2d Dept 1988].)

In *Schroder v Consolidated Edison Company* (249 AD2d 69 [1st Dept 1998]), the Appellate Division, First Department expressly rejected the "special circumstances" requirement for non-party discovery:

> "There is no longer any necessity for 'special circumstances' [citation omitted]. The Second Department cases cited by plaintiff in support of her argument that the 'special circumstances' requirement survived the 1984 amendment of CPLR 3101 (a) (4) (*see, e.g., Dioguardi v St. John's Riverside Hosp.*, 144 AD2d 333, 334) are in conflict with this Court's

own decisions and are therefore not followed."

(*Schroder*, 249 AD2d at 70.)

However, the Appellate Division, First Department followed *Dioguardi* in *Tannenbaum v City of New York* (30 AD3d 357 [1st Dept 2006]) and appeared to reintroduce the "special circumstances" requirement, stating, "The court properly exercised its discretion in denying the request to depose nonparty Judge Adler, *since plaintiff failed to show special circumstances* or that the information sought was relevant and *could not be obtained from other sources*." (*Id.* at 358-359 [emphasis supplied]; *see also Reich v Reich*, 36 AD3d 506 [1st Dept 2007] ["Defendant has not shown that the information sought from Alfred May is not obtainable from other sources"].)

In 2010, the Appellate Division, Second Department renounced the "special circumstances" requirement, stating:

> "In light of its elimination from CPLR 3101 (a) (4), we disapprove further application of the 'special circumstances' standard in our cases, except with respect to the limited area in which it remains in the statutory language, i.e., with regard to certain discovery from expert witnesses (see CPLR 3101 [d] [1] [iii]). On a motion to quash a subpoena duces tecum or for a protective order, in assessing whether the circumstances or reasons for a particular demand warrant discovery from a nonparty, those circumstances and reasons need not be shown to be 'special circumstances.'"

(*Kooper v Kooper*, 74 AD3d 6, 17 [2d Dept 2010].) Although such language would

suggest that *Dioguardi* was overruled, the Appellate Division, Second Department also stated, "We emphasize, however, that our cases have consistently adhered to the principle that '[m]ore than mere relevance and materiality is necessary to warrant disclosure from a nonparty.'" (*Kooper*, 74 AD3d at 22 [citing *Digouardi* and *Tannenbaum*].)

It is unclear whether the Appellate Division, First Department's decisions in *Tannenbaum* and *Reich* impliedly overruled *Schroder*, or whether these recent cases reflect the resurgence of a judicial unease in burdening non-parties with discovery, causing a tension with the legislative intent of the 1984 amendment. Certainly, these cases have put *Schroder* in question.[3]

On this petition, it is academic whether *Schroder* remains good law, or whether the party seeking discovery from a non-party must show that the relevant information sought could not be obtained from other sources. Respondent has demonstrated that the information he seeks from petitioners is not reasonably available either from Kurniawan, or from any other source. In the California Action, Kurniawan has argued for a stay of the action based on the federal criminal proceeding, stating, "It

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[3] "In light of the its recent decisions in *Tannenbaum* and *Ramsey* [*v New York Univ. Hosp. Ctr.*, 14 AD3d 349 (1st Dept 2005)], the First Department's position regarding special circumstances would seem to be unclear despite its statement in its 1998 *Schroder* decision." (6-3101 Weinstein-Korn-Miller, NY Civ Prac CPLR ¶ 3101.33a.)

will be impossible for this Defendant to respond to discovery or otherwise participate meaningfully in this civil action . . . without implicating his Fifth Amendment rights against self-incrimination or potentially prejudicing his criminal defense." (Foran Aff., Ex K.) Given Kurniawan's position, respondent should not be required to depose Kurniawan before taking petitioners' non-party depositions. As respondent indicates, New York has no absolute rule that party depositions must be completed before non-party depositions.

Therefore, the branch of the petition seeking to quash petitioners' depositions is denied.

II.

Petitioners also seek a protective order limiting the scope of their depositions and the use of their depositions. First, petitioners seek to limit their depositions to matters at issue in the California Action, which petitioners contend is discovery relating to Kurniawan's or Koch's conduct or statements concerning the 149 bottles of wine. (Petitioners' Mem. at 14.) Petitioners maintain that "questions about AMC's historical internal practices or procedures, and about what AMC did to inspect and evaluate wines Kurniawan consigned to it in 2005 and 2006 (or thereafter) . . are simply not proper subjects for Koch's non-party depositions of Petitioners." (*Id.* at 15.) Second, petitioners seek to limit the use of their deposition testimony to the

California Action only, and also seek an order stating that petitioners are entitled to rely on the terms of a protective order issued in the California Action.

The branch of the petition seeking a protective order is denied, without prejudice to an application made to the California court in the California Action. "CPLR 3101(a), which establishes the broad scope of disclosure in CPLR Article 31 and mandates full disclosure of all matter material and necessary in the prosecution or defense of an action, 'sounds the keynote for the entire article and has pervasive bearing on all of it.'" (*Velez,* 29 AD3d at 108 [citation omitted].) "The words, 'material and necessary', are, in our view, to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason." (*Allen v Crowell-Collier Pub. Co.,* 21 NY2d 403, 406 [1968].) Courts have also articulated the "material and necessary" standard to include not only relevant evidence, but also discovery of matters "reasonably calculated to lead to the discovery of information bearing on the claims." (*Foster v Herbert Slepoy Corp.,* 74 AD3d 1139, 1140 [2d Dept 2010]; *see e.g. Cronin v Gramercy Five Assocs.*, 233 AD2d 263 [1st Dept 1996] [disclosure may contain information reasonably calculated to lead to relevant evidence].)

There is no meaningful way for this Court to delineate, in advance, the matters

which might be impermissible lines of inquiry at the non-party depositions, without a deeper understanding of the causes of action based on the California law, which petitioners have not given. Based on the pleadings given to this Court, this Court cannot say that questions regarding AMC's "historical internal practices or procedures" would be irrelevant or not be reasonably calculated to lead to admissible evidence as to the issues of the fraud allegations against Kurniawan in the California Action.

A limitation on the use of the non-party depositions beyond their use in the California Action should be made to the California court, because the non-party depositions are being taken as part of discovery in the California Action. Petitioners' concerns that the deposition testimony could be disclosed to the press, or appear in a future book by Koch, are all concerns that can be raised before the California judge who presides over discovery in the California Action.

The Court points out that CPLR 3116 (b) provides that deposition transcripts are filed with the Clerk of the Court where the case is to be tried, unless the parties waive filing of the original. "Under New York law, there is a broad presumption that the public is entitled to access to judicial proceedings and court records." (*Mosallem v Berenson*, 76 AD3d 345, 348 [1st Dept 2010].) Thus, if the action had been commenced in New York, and if the parties did not agree to waive the filing of the

transcripts, the transcripts of the non-party depositions would have been a matter of public record.

Although petitioners initially contended that a protective order was issued on March 12, 2012, it now appears undisputed that the California court did not issue such a protective order. (Foran Suppl. Aff., Ex A.)[4] Petitioners nevertheless argue that this Court should issue a confidentiality order to protect witnesses in New York from divulging highly confidential information.

Obviously, petitioners are not in a position to know whether confidential information would be disclosed during the non-party depositions until questions are posed, the answers to which would reveal allegedly confidential information. However, "protective orders should be limited to trade or business secrets and are required to be specific." (*Mann v Cooper Tire Co.*, 33 AD3d 24 [1st Dept 2006], citing

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[4] Petitioners submitted what appears to be a protective order that was submitted as a proposed order and apparently signed by the Hon. Teresa Sanchez-Gordon, Los Angeles Superior Court Judge, and dated March 12, 2012. (Weinberg-Brodt Affirm., Ex 28.) According to respondent, a discovery referee in the California Action recommended that the proposed protective order be entered in a March 5, 2012 recommendation. (Foran Aff. ¶ 9). Petitioners state that, after Judge Sanchez-Gordon executed the proposed protective order, Koch objected to the report and recommendation of the discovery referee (Weinberg-Brodt Affirm. at 9 n 1.)

Respondent states that Judge Robert H. O'Brien rejected the discovery referee's recommendation and instead entered a "modified protective order." (Foran Suppl. Aff. ¶ 3.) Respondent thus maintains that "[t]he California Court did not issue any confidentiality order." (Foran Suppl. Aff. ¶ 4.) Petitioners do not apparently dispute respondent's assertions that the discovery referee's recommendation to adopt the proposed protective order was rejected. (*See* Foran Suppl. Aff., Ex A).

Therefore, for the purpose of this petition, the Court must presume that the effect of Judge O'Brien's decision was to cancel the protective order signed by Judge Sanchez-Gordon.

Bristol, Litynski, Wojcik v Town of Queensbury, 166 AD2d 772, 773-774 [3d Dept 1990].) The protective order that petitioners propose, which is based on a comprehensive model confidentiality agreement created by the a committee of the Association of the Bar of the City of the New York, goes beyond the scope expressed in *Mann.*

Nevertheless, petitioners' concerns about being required to disclose confidential information during their non-party definitions are not unfounded, in light of the Appellate Division, Fourth Department's decision in *Thompson v Mather* (70 AD3d 1436 [4th Dept 2010]). In *Thompson*, the Appellate Division, Fourth Department held:

> "We agree with plaintiff that counsel for a nonparty witness does not have a right to object during or otherwise to participate in a pre-trial deposition. CPLR 3113 (c) provides that the examination and cross-examination of deposition witnesses 'shall proceed as permitted in the trial of actions in open court.'"

(*Id.* at 1438.) In *Sciara v Surgical Associates of Western New York, P.C.*, Justice Curran examined Thompson at length:

> "*Thompson* should be read in light of its facts. There, the Fourth Department addressed attempts by a nonparty witness's counsel to object to form and relevance. The relief requested by plaintiff on the motion involved in Thompson excepted out objections for 'privileged matters' and questions deemed 'abusive or harassing' [citation omitted]. Thus, the

> facts in Thompson do not support a conclusion that counsel for a nonparty witness is prohibited from protecting his or her client from an invasion of a privilege or plainly improper questioning causing significant prejudice if answered.
>
> Uniform Rules §§ 221.2 and 221.3 are not limited to parties but apply to 'deponents.' Thus, in the event that a question posed to a nonparty fits within the three exceptions listed in § 221.2, the nonparty's attorney is entitled to follow the procedures set forth in §§ 221.2 and 221.3."

(*Sciara v Surgical Assocs. of W. N.Y., P.C.*, 32 Misc 3d 904, 913 [Sup Ct, Erie County].) Thus, at the very least, counsel for a non-party witness at a deposition may object under the permitted exceptions set forth in the Uniform Rules for the Conduct of Depositions. (22 NYCRR 221.1 et seq.)

In the Court's view, the right of Kapon's counsel or Christoph's counsel to object at their non-party depositions pursuant to the Uniform Rules for the Conduct of Depositions does not provide reassurance against disclosure of the confidential information or trade secrets of AMC. After all, Kapon and Christopher were named individually in the subpoenas, and any significant prejudice caused in the event that a question calls for disclosure of AMC's confidential information or trade secrets would fall upon AMC.

Therefore, this Court will permit Kapon's counsel and Christoph's counsel to object and the witnesses to decline to answer any question at the deposition on the

ground that the answer would divulge confidential information or trade secrets of AMC. Every such question to which this objection is raised shall be marked for a ruling, which shall be made upon respondent's motion.

In the alternative, petitioners and respondent may agree to appoint a private referee/special master to determine any objections raised at the non-party depositions.

The branch of the petition seeking a protective order is therefore denied, without prejudice to an application made in the California Action.

CONCLUSION

Accordingly, it is hereby

ADJUDGED that the petition to quash subpoenas ad testificandum and duces tecum issued to John Kapon and Justin Christoph, or in the alternative, for a protective order, is denied, and the proceeding is dismissed; and it is further

ORDERED that petitioners shall appear for depositions, taken stenographically and by video, at the offices of Morvillo, Abramowitz, Grand, Iason, Anello & Bohrer, PC, 565 Fifth Avenue, New York, New York 10017, within 60 days of service of a copy of this decision, order, and judgment with notice of entry, subject to any stay or adjournment ordered by the California court or a justice of this Court. As per the subpoenas, the depositions shall commence at 10:00 a.m.; and it is further

ORDERED that, in addition the procedures set forth in the Uniform Rules for

the Conduct of Depositions, petitioners are permitted to object and decline to answer questions posed at their depositions on the ground that the answer would divulge confidential information or trade secrets of AMC.

Dated: October 15, 2012
New York, New York

ENTER:

J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).