SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 48

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MANO ENTERPRISES, INC.,

Plaintiff,

-against-

METROPOLITAN LIFE INSURANCE COMPANY,

Defendant.

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Index No.: 652486/2013

Mtn Seq. No. 007

DECISION AND ORDER

JEFFREY K. OING, J.:

Plaintiff Mano Enterprises, Inc. moves to quash the non-party witness subpoena issued upon Marcos T. Molina pursuant to CPLR 2304; for a protective order pursuant to CPLR 3103; and for sanctions and attorneys' fees pursuant to 22 NYCRR § 130-1.1. Alternatively, plaintiff moves for a stay of the Molina subpoena until after such time as the party depositions are completed and after any appeal concerning the instant motion.

Background

This action is for breach of the terms of a life insurance policy. Plaintiff claims that defendant wrongfully prevented plaintiff from assigning the policy at issue to a third party which resulted in the lapse of the policy due to nonpayment of premium. The Appellate Division, First Department has previously held that "[t]here is an issue of fact as to whether defendant appropriately refused to process the assignment of the policy" (Mano Enterprises, Inc. v Metropolitan Life Ins. Co., 143 AD3d

597 [1st Dept 2016] citing Ashwood Capital, Inc. v OTG Mgmt, Inc., 99 AD3d 1, 7-8 [1st Dept 2012]). Familiarity with the underlying facts is presumed.

Discussion

This motion concerns a subpoena dated December 2, 2016 signed by defense counsel seeking documents from and the deposition of Molina, the insured of the policy at issue herein. By two letters dated December 14 and 19, 2016, plaintiff has previously requested that MetLife withdraw its subpoena (Devereaux Affirm., Exs. 6 & 7). Plaintiff claims that the testimony of Molina is "utterly irrelevant" to this action because MetLife has already admitted in its answer that the assignment of the policy to plaintiff was validly made and, as such, plaintiff's ownership of the policy cannot be disputed.

In opposition, MetLife contends that plaintiff has already conceded that Molina's testimony is "material and necessary" by opposing MetLife's prior motion to stay discovery on the basis that any stay would be prejudicial in light of the fact that the insured "is approximately 84 or 85 years of age and his testimony would be material and necessary" (Ptf. Affirm. in Opp., ¶ 21, Mtn Seq. No. 004, NYSCEF Doc. No. 163). MetLife also argues that, in any event, plaintiff lacks standing to bring the instant motion to quash.

Pursuant to CPLR 3103(a), "[t]he Court may at any time on its own initiative, or on motion of any party or of any person from whom or about whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device" in order to "prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts." The specific CPLR provision governing motions to quash is CPLR 2304, which provides that:

> A motion to quash, fix conditions or modify a subpoena shall be made promptly in the court in which the subpoena is returnable. If the subpoena is not returnable in a court, a request to withdraw or modify the subpoena shall first be made to the person who issued it and a motion to quash, fix conditions or modify may thereafter be made in the supreme court; ... Reasonable conditions may be imposed upon the granting or denial of a motion to quash or modify.

Although CPLR 2304 does not specifically address the question of who has standing to bring a motion to quash in the same way that CPLR 3103(a) does, courts have held that, "[a] person other than one to whom a subpoena is directed has standing to move to quash the subpoena where he or she has a proprietary interest in the subject documents or where they involve privileged communications" (e.g., Hyatt v State of CA Franchise Tax Bd., 105 AD3d 186, 194-195 [2d Dept 2013] [citations omitted]). In any event, because of the express language of

3103(a), a court may always entertain a motion for a protective order with respect to the subject matter of a subpoena and, in fact, may even do so without any motion at all "on its own initiative."

Assuming that a subpoena is facially sufficient, i.e., it satisfies the minimal requirements of CPLR 3101(a)(4) and states the "circumstances or reasons" for seeking disclosure either on its face or in an accompanying notice, "[a]n 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 sough is 'utterly irrelevant to any proper inquiry'" (Kapon v Koch, 23 NY3d 32, 38, 39 [2014]). If the movant meets this burden, the burden then shifts to the subpoenaing party to establish that the discovery sought is material and necessary to the prosecution or defense of the action. In other words, the discovery sought must be relevant.

Here, there is no question that MetLife's subpoena is facially sufficient. Page two of the subpoena explains that the "non-party production of documents is due to the fact that [Molina] is a recipient of documentation and information provided by Plaintiff and/or Defendant concerning the contract(s) at issue in the present litigation and surrounding circumstance" (Devereaux Affirm., Ex. 5, p. 2). Moreover, as MetLife points

out, plaintiff itself has previously indicated that it considered Molina's testimony "material and necessary" to this action. Plaintiff's response that this statement is being "taken out of context" because it was made in opposition to a motion for a stay is not persuasive. Plaintiff cannot have it both ways -- Molina's testimony cannot be "material and necessary" only when it suits plaintiff's needs to oppose a motion to stay, and not "material and necessary" when sought when defendant seeks such testimony and documentation.

Likewise, plaintiff's contention that MetLife should not be permitted to take Molina's deposition because the initial assignment of the policy to plaintiff is not at issue is unavailing. Given the present record, plaintiff's bald contention "is not sufficient to establish that the discovery sought is utterly irrelevant to the action or that the futility of the process to uncover anything legitimate is inevitable or obvious" (Menkes v Beth Abraham Health Servs., 120 AD3d 408, 415 [1st Dept 2014] [quotation and citation omitted] [denying motion to quash subpoena of non-party witness despite long passage of time and sworn witness affidavit denying any relevant knowledge]). In light of the broad standard applicable to discovery in this State pursuant to CPLR 3101, plaintiff's motion to quash the subpoena is denied. This Court, however, is mindful

of the fact that Molina is a non-party and is of advance age. As such, any deposition of him is limited to no more than one day, with the parties directed to take breaks as needed to accommodate the witness. To the extent that plaintiff's opposition was based on the argument that party depositions should take place first, the Court agrees and it is ordered that Molina's deposition will not take place until after all party depositions have been completed. In addition, as prescribed by CPLR 3122(d), ["t]he reasonable production expenses of a non-party witness shall be defrayed by the party seeking discovery," i.e., MetLife.

Accordingly, it is hereby

ORDERED that the branch of plaintiff's motion seeking to quash the Marcus T. Molina's subpoena and for a protective order is denied; and it is further

ORDERED that the branch of the plaintiff's motion for a stay of this decision and order is granted only insofar as Molina's deposition will take place after all party depositions are completed; and it is further

ORDERED that the branch of plaintiff's motion seeking the imposition of sanctions and attorney's fees is denied; and it is further

ORDERED that the branch of plaintiff's motion for a stay of this decision and order pending appeal is denied.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 5/31/17

HON. JEFFREY K. OING, J.S.C.