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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN M. KENNEY J.S.C. Justice

PART 8

Index Number : 108317/2009
WHALEN, JOAN MARIE
VS.
DONNA KARAN INTERNATIONAL
SEQUENCE NUMBER : 002
QUASH SUBPOENA, FIX CONDITIONS

INDEX NO. 108317/09
MOTION DATE 11/10/11
MOTION SEQ. NO. 002

The following papers, numbered 1 to 14, were read on this motion to quash

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). 1-7
Answering Affidavits — Exhibits ____ | No(s). 8-13
Replying Affidavits ____ | No(s). 14

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

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

Dated: December 7, 2011

JOAN M. KENNEY, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION 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 8

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JOAN MARIE WHALEN and RICHARD WHALEN,
Plaintiff,

- against -

DONNA KARAN INTERNATIONAL, INC., DKNY MADISON and PLAZA MADISON ASSOCIATES,
Defendants.

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DECISION AND ORDER
Index Number: 108317/09
Cal.: 11/010/2011
Motion Seq. No.: 002

KENNEY, JOAN M., J.

Appearances

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Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion to quash:

Papers	**Numbered**
Notice of Motion, Affirmation & Exhibits	1 - 7
Affirmation in Opposition & Exhibits	8 - 13
Reply Affirmation	14

In this personal injury action, plaintiffs, Joan Marie Whalen and Richard Whalen (collectively, the Whalens) seek an Order, pursuant to CPLR 2304, quashing a subpoena served upon Mr. Stephen M. Smith of Stephen M. Smith & Company, LLC (Smith) by defendants Donna Karan International, Inc., DKNY Madison and Plaza Madison Associates (collectively, DKNY).

FACTUAL AND PROCEDURAL BACKGROUND

Briefly, on January 14, 2009, Mrs. Joan Marie Whalen (Mrs. Whalen) allegedly fell when she attempted to descend a two-step riser attached to a staircase at the Donna Karan retail store located at 655 Madison Avenue, New York, New York. The Whalens commenced this action claiming lost income from Mrs. Whalen's business, Joan Whalen Fine Art (Whalen Fine Art). It is undisputed that the Whalens also collectively own a company, Whalen Consulting Group II (Whalen Consulting).

When asked at Mrs. Whalen's deposition what economic losses she incurred individually or on behalf of Whalen Fine Art, Mrs. Whalen's attorney, Ms. Patricia Sullivan (Sullivan), repeatedly

objected on the grounds that "it is probably a better question for a financial professional" (*see* Deposition of Mrs. Joan Marie Whalen, Ex. "5" attached to opposition papers at 81-82) and "we will leave that up to the accountants and financial people to answer" (Whalen depo. at 11-13).

On September 19, 2011, DKNY served a *subpoena duces tecum* and *ad testificadum* (the Smith subpoena) on the Whalens' accountant, Smith. Although the Whalens assert in their motion papers that, if deposed, Smith's will testify as an expert, it is undisputed that the Whalens have not served a formal notice, pursuant to CPLR 3101 (d), that Smith will be called as an expert at trial.

It is undisputed that the Whalens produced a letter, dated July 31, 2009, from Smith which lists the business income of Mrs. Whalen and Whalen Fine Arts from 2004 through 2009 (see Ex. "2" attached to notice of motion).

ARGUMENTS

The Whalens argue that the Smith subpoena should be quashed because:1) the Smith subpoena is procedurally defective based on DKNY's failure to notice all parties of the subpoena and state a reason why Smith's deposition was sought; and 2) DKNY has failed to demonstrate "special circumstances" justifying a deposition of Smith when Mrs. Whalen has already testified to her loss of earnings, produced tax returns for Whalen Consulting Group II, and Smith may be called as an expert at trial.

DKNY contends that this Court deny the motion to quash since: 1) Whalens' counsel was noticed as soon as possible after Smith was served; 2) defects, if any, in the subpoena's notice and reasons are not fatal; 3) Smith's deposition is material and necessary to the Whalens' loss of earnings claim; 4) a showing of "special circumstances" is no longer necessary since Smith was never formally noticed as an expert; and 5) even if the "special circumstances" showing applies, both Mrs. Whalen and counsel deferred inquiries regarding her lost income claim to Smith at Mrs. Whalen's deposition.

DISCUSSION

When subpoenaing a nonparty witness to appear for deposition and produce documents in conjunction with that deposition, a subpoena pursuant to CPLR 3211 is the appropriate device (*see*

Velez v Hunts Point Multi-Service Ctr., Inc., 29 AD3d 104, 111 [1st Dept 2006]). A copy of this subpoena must be promptly served on all parties who have appeared in the civil action (CPLR 2303[a]). Although this subpoena must also state the circumstances or reasons why disclosure is sought or required pursuant to CPLR 3101 (a) (4), the First Department has held that, upon a showing that the discovery is needed, relevant, and would not constitute an undue burden, the failure to comply with § 3101 (a) (4)'s notice requirements is not fatally defective since "the purpose of such a 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" (*see Velez*, 29 AD3d at 111).

Here, the Whalens have failed to demonstrate that the Smith subpoena is procedurally defective based on either the timing of the notice to the Whalen's counsel or the subpoena's purported failure to state the reasons for seeking *inter alia* Smith's deposition. As to timing, the Smith subpoena was served on September 19, 2011 for Smith's appearance on October 16, 2011 (*see* Smith subpoena and Affidavit of Service of Andre Meisel, Ex. "1" attached to opposition papers). Counsel for DKNY swears by affirmation that she did not receive notification of completion of service until the latter portion of the week of September 19, 2011 (*see* Affirmation of Ms. Susan White, Esq. attached to opposition papers ¶ 6). Ms. Katherine Hargas, Esq., counsel for the Whalens, admits in her affirmation that she was first notified of the Smith subpoena on September 28, 2011 - more than two weeks before Smith was subpoenaed to appear (*see* Hargas Affirm. attached to notice of motion ¶ 3). Based on the chronology of events and the Whalens' failure to support the timeliness argument in its reply papers with caselaw, this Court finds that the parties were promptly served with notice pursuant to CPLR 2303 (a).

Additionally, DKNY has sufficiently demonstrated that the testimony of Smith is relevant to the Whalens' lost earnings claim and will assist DKNY's counsel in preparing for trial with respect to damages (*see In re New York County DES Litigation*, 171 AD2d 119, 123-124 [1st Dept 1991]). At her deposition, Mrs. Whalen stated that she lacked knowledge about her 2009 lost income and, when asked about tax returns to support this claim, deferred defense counsel to Smith. Indeed, even Mrs. Whalen's counsel deferred questions regarding Mrs. Whalen's loss earnings claim

to "accountants and financial people to answer." These statements amount to an acknowledgment by both Mrs. Whalen and her counsel that it was Smith, not herself, who was in the best position to testify as to the lost income from Whalen Fine Art.

Although the Whalens eventually provided Internal Revenue Service authorizations for the Whalens' personal and business income tax returns for 2004 through 2010 and their corporate income tax returns for 1997 through 2009, Ms. Hargas states by affirmation that these tax returns on their face do not distinguish between revenue generated by Whalen Fine Arts, from its parent company, Whalen Consulting Group II (*see* Hargas Affirm. ¶ 34). While these tax returns were not appended to the opposition papers, the Whalens failed to attach those tax returns to their reply papers to rehabilitate Mrs. Hargas' assertions that Smith is in the best position to distinguish between the incomes of these companies (*see e.g. Velez, Inc.*, 29 AD3d at 112 ["burden of establishing that the requested documents and records are utterly irrelevant is on the person being subpoened"]). Therefore, this Court finds adequate support for DKNY's argument that Smith's testimony is material and necessary to this case.

The parties dispute whether the nature of Smith's testimony will be one of an expert or fact and if DKNY must make a showing of "special circumstances" to justify the Smith subpoena. However, this Court finds that, even if Smith's testimony is expert in nature, DKNY has abrogated its need to demonstrate "special circumstances" since both Mrs. Whalen and her counsel deferred DKNY's loss of earnings inquiries to Smith - the same individual whose subpoena the Whalens now seek to quash (*see Tannenbaum v City of New York*, 30 AD3d 357, 358-359 [1st Dept 2006] [finding disclosure to be permissible in an instance where "the information sought was relevant and could not be obtained from other sources"]). Thus, the Whalens have failed to demonstrate their entitlement to the relief sought. Accordingly, it is:

ORDERED that plaintiffs' motion is denied in its entirety; and it is further

ORDERED that the parties are directed to proceed to mediation.

Dated: December 9, 2011

E N T E R

Hon. Joan M. Kenney
J.S.C.