

F&O Newport Beach, LLC v Doe
2016 NY Slip Op 31667(U)
August 31, 2016
Supreme Court, New York County
Docket Number: 155155/2016
Judge: Lucy Billings
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F&O NEWPORT BEACH, LLC d/b/a
FIG & OLIVE, and F&O MELROSE PLACE,
INC. d/b/a FIG & OLIVE,

Index No. 155155/2016

Petitioners

- against -

DECISION AND ORDER

JANE DOE,

Respondent

In the Matter of a Petition to Quash
and for a Protective Order Against
the Subpoena ad Testificandum of
Paul Salkind

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LUCY BILLINGS, J.S.C.:

Petitioners, respondent's former employers, seek to quash her subpoena for the second deposition of a nonparty witness, a resident of New York, or a protective order against his deposition, in an action scheduled for trial September 28, 2016, in the California Superior Court for Los Angeles County.

C.P.L.R. §§ 2304, 3103(a), 3119(e). Respondent sues petitioners in California for rape by her supervisor, sexual battery and harassment, intentional and negligent infliction of emotional distress, a hostile work environment, retaliation, failure to prevent sexual harassment and retaliation, and negligent supervision of the offending supervisor during her former employment. The deposition witness, Paul Salkind, was petitioners' former Human Resources Director whose own employment, according to his first deposition, petitioners also

terminated, due to respondent's lawsuit and petitioners' perception of his deficient job performance during her employment. With the responsibility to implement petitioners' policies and procedures to prevent sexual harassment and retaliation, as petitioners' sole investigator into respondent's report of her supervisor's offenses, and having been involved in the employers' disciplinary action against employees regarding the offending conduct, Salkind is a key witness relevant to her claims. He is sole person who interviewed the alleged offender, who since has invoked his privilege against self-incrimination. Salkind also may be favorable to respondent in light of his own discharge. He is particularly important, moreover, because as a New York resident he may not be subpoenaed as a witness at the trial, so respondent must use his deposition in place of his trial testimony.

I. SALKIND'S FIRST DEPOSITION

When respondent first sought to depose Salkind, petitioners' attorney did not permit respondent's attorney to communicate with Salkind and promised to arrange for his voluntary appearance at a deposition, but he resisted and did not agree to appear voluntarily unless the deposition was limited to three hours for both attorneys' examinations. He attests that he would not have appeared voluntarily for his first deposition had it not been limited to three hours. Respondent's attorney agreed to the limitation, 1.5 hours per attorney, in consideration for being relieved of the burden of obtaining a subpoena in New York to

compel Salkind's deposition.

Respondent's attorney realized, however, that the importance of Salkind's testimony, the breadth of issues his testimony would cover, and respondent's inability to anticipate the likely contents well might prevent her from completing her examination in 1.5 or even two hours. Therefore, three days before the deposition scheduled September 25, 2015, respondent's attorney notified petitioners' and Salkind's attorney that, if Salkind would not permit his deposition to exceed three hours, respondent would forgo the scheduled deposition and obtain a subpoena in New York to compel his deposition. Respondent's attorney asked his attorney inquire of Salkind and to respond if a longer deposition "was going to be a problem," so that respondent might pursue her alternative course of action. Aff. of Laura C. Hess ¶¶ 14, 29. When respondent received no response, she proceeded with Salkind's deposition, assuming the limitation of three hours was flexible. After three hours, however, Salkind abruptly left the deposition before respondent's attorney concluded her questioning.

II. JUSTIFICATION FOR SALKIND'S SECOND DEPOSITION

Now Salkind is not agreeing to appear voluntarily, so no time limit based on his agreement applies. Had respondent completed her questioning of Salkind within the time allotted to her September 25, 2015, she would not have needed to continue the deposition. Now, to continue the deposition, she must proceed through the burdensome process of obtaining a subpoena in New

York to compel his deposition.

For this reason alone, not to mention the breadth and importance of Salkind's testimony and respondent's amendment of her claims since his first deposition, respondent justifies his second deposition. The added claims include the failure to prevent sexual harassment, the failure to prevent retaliation, and negligent supervision, which directly implicate Salkind, and about which respondent was not permitted to question him at his first deposition, since they exceeded the scope of her prior complaint.

Most significantly, when respondent subpoenaed Salkind for a second deposition in California, petitioners, defendants in the California court, moved there to quash and for a protective order against the subpoena on the same grounds as the petition here. Respondent, plaintiff there, justified the second deposition on the same grounds delineated above. On this basis, the California court already decided that the deposition is justified and may proceed, as long as respondent followed the procedures for deposing Salkind in New York, which she now has done. C.P.L.R. §§ 3101(a)(4), 3119.

III. RESPONDENT'S PROCEDURAL COMPLIANCE

Petitioners' only procedural ground for their petition is that respondent's subpoena fails to satisfy the threshold showing specified by C.P.L.R. § 3101(a)(4), of "circumstances or reasons such disclosure is sought or required." Kapon v. Koch, 23 N.Y.3d 32, 39 (2014). The nonparty is entitled to know the parties'

claims or defenses to which the nonparty's disclosure may be relevant. Id. at 37, 39; Ledonne v. Orsid Realty Corp., 83 A.D.3d 598, 599 (1st Dep't 2011); Reyes v. Riverside Park Community (Stage I), Inc., 47 A.D.3d 599, 599-600 (1st Dep't 2008); Velez v. Hunts Point Multi-Serv. Ctr., Inc., 29 A.D.3d 104, 110 (1st Dep't 2006).

Respondent's subpoena briefly describes the defendants in the California action, but fails to specify why Salkind's testimony is relevant to the claims or defenses in the action. Respondent did specify, however, in opposing this petition, in opposing petitioners' prior motion for the same relief in California, in all her communications to Salkind through his attorney preparatory and secondary to his first deposition, and at the prior deposition, the claims and defenses to which Salkind's testimony is relevant and how. Velez v. Hunts Point Multi-Serv. Ctr., Inc., 29 A.D.3d at 111. It defies credibility that Salkind himself and through his attorney is in any way unaware of the "circumstances or reasons" his deposition is sought. C.P.L.R. § 3101(a)(4); Kapon v. Koch, 23 N.Y.3d at 39.

Finally, since neither petitioners nor Salkind ever notified respondent that he required explanation why his deposition was sought or why it is relevant to the California action's claims or defenses, nor have petitioners shown any prejudice from respondent's earlier and later explanations, they have waived C.P.L.R. § 3101(a)(4)'s extra requirement applicable to nonparties. Velez v. Hunts Point Multi-Serv. Ctr., Inc., 29

A.D.3d at 112. Therefore the court denies the petition to quash respondent's subpoena for the second deposition of nonparty witness Paul Salkind in New York or for a protective order against his deposition. C.P.L.R. §§ 2304, 3103(a), 3119(e). Salkind shall appear for his continued deposition at the place and time agreed by the parties, September 9, 2016, because his testimony bears directly on respondent's claims and petitioners' defenses in the California action and is not duplicative of other disclosure obtained by respondent. C.P.L.R. § 3124; Kapon v. Koch, 23 N.Y.3d at 37; Velez v. Hunts Point Multi-Serv. Ctr., Inc., 29 A.D.3d at 112-13.

IV. RESPONDENT'S ATTORNEY'S FEES AND EXPENSES

In answer to the petition, but through neither a counterclaim nor a motion, respondent seeks sanctions against petitioners in the form of her attorney's fees and expenses in opposing the petition, based on petitioners' concealment of the California court's prior decision that Salkind's deposition is justified and may proceed. 22 N.Y.C.R.R. § 130-1.1. While this concealment of a material fact was misleading and is not to be condoned, petitioners did not affirmatively set forth "material factual statements that are false," for which the court may impose sanctions. 22 N.Y.C.R.R. § 130-1.1(c)(3). Petitioners focussed instead on the California court's qualification of its decision, that Salkind's deposition was to proceed as long as respondent followed the procedures for deposing Salkind in New York. C.P.L.R. §§ 3101(a)(4), 3119. Petitioners' request for

relief then presented their ground why respondent had not followed those procedures: her subpoena failed to specify the "circumstances or reasons" Salkind's deposition was sought. C.P.L.R. § 3101(a)(4).

The absence of a motion for sanctions further constrains the court from now finding that petitioners' claim was frivolous so as to warrant sanctions, especially when their claim was not completely lacking in merit, 22 N.Y.C.R.R. § 130-1.1(c) and (d), since respondent's subpoena itself did fail to specify the "circumstances or reasons" Salkind's deposition was sought. C.P.L.R. § 3101(a)(4). E.g., Matter of Lawrence, 79 A.D.3d 417, 417 (1st Dep't 2010); Landes v. Landes, 248 A.D.2d 268, 269 (1st Dep't 1998); Corrigan v. Orosco, 84 A.D.3d 955, 956 (2d Dep't 2011); Greenwood Trust Co. v. Roylance, 280 A.D.2d 848, 849 (3d Dep't 2001). See NYCTL 1997-1 Trust v. Seijas, 307 A.D.2d 876, 877 (1st Dep't 2003); Rudansky v. Giorgio Armani, S.p.A., 306 A.D.2d 174, 174 (1st Dep't 2003). Therefore the court denies this request for relief by respondent.

V. CONCLUSION

Respondent does cross-move to admit attorney Laura Hess pro hac vice to represent respondent in this proceeding. The court grants respondent's cross-motion without opposition. 22 N.Y.C.R.R. §§ 520(a)(1) and (c), 602(a).

Petitioner also sought to use the pseudonym "Jane Doe" for respondent, permitting her to proceed here anonymously. She has used the pseudonym "Jane Doe" and been permitted to proceed

anonymously in the California court. After notice and a hearing, no party or nonparty opposes her proceeding similarly here. Therefore the court continues the court's order (Scarpulla, J.) dated June 23, 2016, permitting all documents filed in this action to use the pseudonym "Jane Doe" for respondent and permitting her to proceed anonymously.

To recapitulate, for the reasons explained above, the court denies the petition to quash respondent's subpoena to Paul Salkind or for a protective order against his deposition, C.P.L.R. §§ 2304, 3103(a), 3119(e), and compels him to appear for a deposition September 9, 2016. C.P.L.R. §§ 3119(e), 3124. The court grants the petition only insofar as it seeks to use the pseudonym "Jane Doe" without opposition and otherwise dismisses this proceeding. The court also grants respondent's cross-motion to admit attorney Laura Hess pro hac vice to represent respondent in this proceeding without opposition, 22 N.Y.C.R.R. §§ 520(a)(1) and (c), 602(a), but denies respondent's request for sanctions in the form of her attorney's fees and expenses in opposing the petition. 22 N.Y.C.R.R. § 130-1.1. This decision constitutes the court's order and judgment.

DATED: August 31, 2016

Lucy Billings

LUCY BILLINGS, J.S.C.

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