

Johnson v AON Risk Servs. Northeast, Inc.
2018 NY Slip Op 30677(U)
April 12, 2018
Supreme Court, New York County
Docket Number: 653611/2016
Judge: Kathryn E. Freed
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED

PART 2

Justice

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KATHLEEN K. JOHNSON AND JUDITH WOODARD,
INDIVIDUALLY AND AS TRUSTEES OF THE ANNABELL M.
PALMER FAMILY TRUST,

INDEX NO. 653611/2016

Plaintiffs,

MOTION SEQ. NO. 001

- v -

AON RISK SERVICES NORTHEAST, INC.,

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45

were read on this motion to/for CONTEMPT.

In June 2017, plaintiffs' counsel served non-party UBS AG with a subpoena duces tecum and a notice to take deposition upon oral examination. Plaintiffs now move, by order to show cause, to hold UBS AG in contempt for failure to comply with the subpoena and notice of deposition. UBS AG cross-moves to quash the subpoena and notice of deposition. For the reasons that follow, the cross motion is granted and the motion is denied.

Plaintiffs allege that, in August 1998, Annabell Palmer (hereinafter decedent), caused \$4 million to be deposited in an account maintained in Switzerland by non-party UBS AG, to be used by Solicitor Ellis Brown for the purchase of medium-term notes. The papers contain a document evincing a wire transfer to a UBS AG account bearing decedent's name. Brown's name appears nowhere on the documents relating to the wire transfer itself. Plaintiffs have not come forward with documentary evidence or an explanation as to how they know that the wire transfer or the account was for Brown's use for the purchase of medium-term notes. They claim

that the money has never been properly accounted for. However, they have not come forward with any correspondence relating to requests for an accounting either from decedent or any other individual, nor do they claim that any such correspondence or proof exists.

Plaintiffs claim that the alleged losses incurred by decedent are covered by an insurance policy issued by defendant that allegedly covered Brown's activities, and they seek a judicial declaration to that effect. The only proof in support of the existence of the insurance policy is a single-page fax dated January 8, 1998, apparently from a person named Robin Baily, who appears to have worked for defendant, to Brown. The actual insurance policy and its terms are not in any of the documents before the court, and plaintiffs have not explained why they think that the policy would have covered the losses or, indeed, that the policy bears any relationship to decedent. Nothing in the papers even alleges how decedent and Brown came to know one another.

Plaintiffs claim to be decedent's assignees or authorized by a power of attorney to make this claim on behalf of decedent. They do not support this contention with any documentation. The papers before this Court do not contain the trust documents or any documentation reflecting such an assignment or power of attorney, much less one that could survive decedent's death. (See General Obligations Law § 5-1511 [1] [a].) It is particularly puzzling, and plaintiffs have not explained, how this action can proceed in the absence of decedent's estate.

Turning to the instant application, plaintiffs' contention that UBS AG's cross motion is untimely is without merit, since UBS AG provided adequate objections to the subpoena, and the burden is on the party serving the subpoena to initiate a judicial enforcement mechanism – not on the party seeking to avoid enforcement to move to quash. (See CPLR 3122 [a] [1]; *Rubino v 330*

Madison Co., LLC, 39 Misc 3d 450, 451-452 [Sup Ct, NY County 2013, Ling-Cohan, J.]; Siegel, NY Prac § 362 at 685 [6th ed 2018].)

“An application to quash a subpoena should be granted only where the futility of the process to uncover anything legitimate is inevitable or obvious . . . or where the information sought is utterly irrelevant to any proper inquiry.” (*Matter of Kapon v Koch*, 23 NY3d 32, 38 [2014] [internal quotation marks, brackets and citations omitted]; see *Alpert v Alpert*, 151 AD3d 541, 542 [1st Dept 2017]; *State of N.Y. ex rel. Murray v Baumslag*, 134 AD3d 451, 452 [1st Dept 2015].) Since this Court can discern nothing resembling a timely cause of action on the face of the pleadings, or any relationship between the alleged 1998 transfer, the alleged defalcations, the alleged insurance policy, or, indeed, that plaintiffs have a right to collect on behalf of decedent, it finds that the subpoenas are utterly irrelevant to any proper inquiry.¹ The Court therefore has no occasion to turn to UBS AG’s alternative arguments and, in the absence of a valid subpoena to enforce, the motion for contempt must be denied.

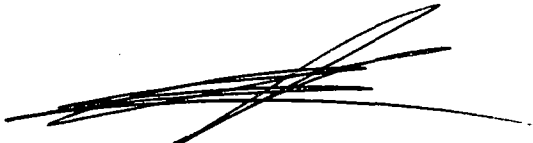
Accordingly, it is hereby:

¹ This Court notes that the Appellate Division, First Department has previously found, on plaintiffs’ prior application for pre-action discovery against UBS AG, that they “failed to demonstrate that they have a meritorious cause of action and that the information they seek is material and necessary to an actionable wrong.” (*Matter of Johnson v Union Bank of Switzerland, AG*, 150 AD3d 436 [1st Dept 2017] [internal quotation marks and citation omitted].)

ORDERED that the cross motion by UBS AG to quash the subpoena and notice of deposition is granted; and it is further

ORDERED that the motion to hold non-party UBS AG in contempt is denied, as moot.

4/12/2018
DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input checked="" type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	DO NOT POST	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	