To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

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MARIA-TERESA RIVERA-MEJIA,

Plaintiff,

-against-

DR. ERIKA T. SCHWARTZ and GINA CALDERON,

Defendants.

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DECISION AND ORDER

Index No.: 51908/2017
Decision Date: Jan. 8, 2018
Motion Seq.: 5

LEFKOWITZ, J.

The following papers were read on plaintiff's motion for an order: (1) pursuant to CPLR 3103(a), for a protective order against defendants inquiring into plaintiff's banking records and marital records; (2) pursuant to CPLR 2304, quashing defendants' subpoenas on nonparty Chase Bank, plaintiff's financial institution and on nonparty Village of Mount Kisco for plaintiff's marital records; (3) pursuant to CPLR 3126(1), deeming plaintiff's identity for purposes of this proceeding resolved in plaintiff's favor; (4) pursuant to CPLR 3126(2), barring defendants from asserting that plaintiff is proceeding under a false name; and (5) attorneys fees in the amount of $5,425 in connection with the making of this motion:

Order to Show Cause, Affirmation in Support, Exhibits 1-10
Memorandum of Law in Support
Affirmation in Opposition, Affidavit in Opposition
Memorandum of Law in Opposition
Affidavits of Service

Upon the foregoing papers and proceedings held on January 8, 2018, this motion is determined as follows:

As this Court (Lefkowitz, J.) most recently enumerated in its Decision and Order dated October 30, 2017 (hereinafter "Underlying Order"), plaintiff commenced this action on February 12, 2017, to recover unpaid wages that she alleges defendant Schwartz owed her for work plaintiff performed as Schwartz's domestic housekeeper between 2009 and 2016; Schwartz's assistant Calderon also is a party defendant in this action. As relevant here, the Underlying Order noted defendants' concession in the papers relating thereto that "plaintiff's identity no longer is an issue substantially in dispute," and that defendants' assertions that "plaintiff committed identity fraud and submitted fraudulent documents concerning her identity are speculative." Partly on that basis, the Underlying Order granted plaintiff's motion for a protective order pursuant to CPLR 3103(a) against further discovery of plaintiff's immigration status, and denied

defendants' motion to compel disclosure of plaintiff's tax and banking records "without prejudice to a further such motion on good grounds shown after party depositions in accordance with the Differentiated Case Management rules of this Court." The issue of plaintiff's identity apparently being resolved at least for initial discovery purposes, the Underlying Order then set a schedule to proceed with party depositions without the issue of plaintiff's identity being a substantial impediment thereto. Defendants did not move to renew, reargue, stay or appeal the Underlying Order.

Notwithstanding the foregoing, party depositions have not yet been completed. This Court held a further Compliance Conference on November 13, 2017, pursuant to which this Court (Lefkowitz, J.) so-ordered a Compliance Conference report directing defendants to tender certain remaining documentary discovery without objection based on plaintiff's identity and then to proceed with party depositions (NYSCEF Doc. 61). Again there was not compliance, and this Court (Lefkowitz, J.) so-ordered a further Compliance Conference report on November 29, 2017, directing party depositions to be completed by December 8, 2017, with "no further extensions" allowed (NYSCEF Doc. 63). In the interim, defendants served a subpoena on nonparty Chase Bank seeking discovery of plaintiff's bank records, and plaintiff sought to quash such subpoena. With the instant Order to Show Cause pending, this Court (Scheinkman, J.)[1] so-ordered a third interim Compliance Conference report ordering that plaintiff's deposition be completed on January 15, 2018, and defendants to be deposed on January 19, 2018, and directing that these depositions not be further adjourned (NYSCEF Doc. 71). Such latter Compliance Conference order specifically directed that any subsequent judicial determination of the then-pending Order to Show Cause would govern such depositions (*see id.*).

Pursuant to a briefing schedule, plaintiff moved by Order to Show Cause on December 1, 2017, for various relief, including (1) pursuant to CPLR 3103(a), for a protective order against defendants inquiring into plaintiff's banking records and marital records; (2) pursuant to CPLR 2304, quashing defendants' subpoena on nonparty Chase Bank, plaintiff's financial institution, and on nonparty Village of Mount Kisco for plaintiff's marital records; (3) pursuant to CPLR 3126(1), deeming plaintiff's identity for purposes of this proceeding resolved in plaintiff's favor; (4) pursuant to CPLR 3126(2), barring defendants from asserting that plaintiff is proceeding under a false name; and (5) attorneys fees in the amount of $5,425 in connection with the making of this motion.

The Challenged Subpoena

Defendants' subpoena on nonparty Chase Bank, attached as Exhibit 3 to plaintiff's motion papers, seeks:

> 1. Copies of each and every monthly account statement, from January 5, 2009 to the present, for any and all open or closed checking,

[1]Since the date of such Order, Judge Scheinkman has been appointed Presiding Justice of the Appellate Division, Second Department.

savings, or other deposit accounts that are, or were at any time, in the name of or under signature authority of any of the below listed persons or entities:

a. Maria-Teresa Rivera-Mejia, residing at 44 N. Moger Ave., Mount Kisco, N.Y. 10549;

b. Teresa Mendez, residing at 44 N. Moger Ave., Mount Kisco, N.Y. 10549.

2. Copies of any and all documents used to open or maintain any of the above accounts, including, but not limited to, account applications, signature cards, identification, proof of residency and initial deposit.

Defendants' subpoena is dated "December 18, 2014," which date appears to be a typographical error.[2] There appears to be no actual subpoena on the Village of Mount Kisco pending at this time.

Party Arguments

In support hereof, plaintiff asserts that the challenged subpoena is yet another defense fishing expedition. Plaintiff avers that it flatly violates the Underlying Order by re-opening the issue of plaintiff's identity, which plaintiff argues defendants conceded for purposes of this action. Plaintiff further asserts that plaintiff has tendered additional proof of plaintiff's identity, including plaintiff's marriage certificate and copies of bank records that, plaintiff avers, shows multiple deposits of $600.00 from defendant Schwartz to plaintiff for wages (*see* Pls Exh. 8). Plaintiff further argues that seeking the identity records by which plaintiff opened the Chase account is specifically covered by the Underlying Order's protective order against such disclosure – inasmuch as plaintiff's interrogatory responses attested that plaintiff used her immigration and citizenship papers to open the bank account – and defendants are trying to use this nonparty discovery vehicle to evade this Court's protective order. In any event, plaintiff argues that these materials are not reasonably calculated to lead to discoverable evidence.

On this basis, plaintiff exhorts this Court to conclude that defendant's nonparty subpoena, like the discovery disallowed under the Underlying Order, is nothing more than a further attempt at harassing plaintiff in retaliation for plaintiff bringing this lost wage claim. Plaintiff asserts that defense counsel's attempted end-run around this Court's protective order is sanctionable under Rule 130-1.1, and that plaintiff's counsel should receive attorney's fees for bringing and prosecuting this motion. As a further consequence, plaintiff asks this Court to broaden the CPLR 3103(a) protective order to bar defendants from making any further discovery inquiries based on false name or false identity.

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[2]Moreover, plaintiff's counsel avers that he received the subpoena only on November 28, 2017.

In the alternative, plaintiff asserts that the subpoena is facially defective under CPLR 3101(a)(4) in that it fails to provide proper notice to the recipient about the basis for the subpoena. Plaintiff avers that the proponent of a nonparty subpoena must state therein, or in a notice accompanying it, "the circumstances or reasons such disclosure is sought or required" (*Matter of Kapon v Koch*, 23 NY3d 32, 39 [2014]). Defendants having failed to do so, plaintiff argues, the subpoena is technically defective and must be quashed.

In opposition, defense counsel charges that plaintiff's counsel has made "materially false statements" in relation to the Underlying Order. Defense counsel asserts that the Underlying Order bars discovery only to the extent of plaintiff's immigration status, not financial records. Defense counsel further asserts that plaintiff's counsel failed to seek an amicable resolution of this dispute in good faith – for instance, by limiting the scope of the challenged subpoena – before seeking motion practice. Defense counsel also avers that the documents supporting how plaintiff opened her bank account, namely "her tax-id (*sic*) and passport," cannot "reasonably be considered discovery of plaintiff's immigration status, as prohibited by [this Court's] protective order." Defense counsel further attests that, based on his own conversation with a representative of Chase Bank, plaintiff could not have opened her bank account without certain records that defense counsel implies may not exist. In support of such position, defendant Schwartz attests in her affidavit that she believed plaintiff to be proceeding under a false name, and that plaintiff asked to be paid in cash because she didn't have a bank account.

Nonparty Chase Bank has not submitted papers in support or opposition.

Analysis

Before proceeding to the merits, this Court notes that the Underlying Order narrated plaintiff's previous tender of "her 2010 New York marriage certificate designating her married name, which matches plaintiff's name in the caption; banking records reflecting deposits of payments she received from defendants; and responses to defense-propounded interrogatories explicating plaintiff's name and how she opened a bank account." Plaintiff also correctly quoted the Underlying Order for the propositions that, at least for initial discovery purposes, "plaintiff's identity no longer is an issue substantially in dispute," and that defendants' claims that "plaintiff committed identity fraud and submitted fraudulent documents concerning her identity are speculative" for discovery purposes. Defendants did not materially challenge these recitations. For its part, defense counsel correctly notes that the Underlying Order did not categorically bar discovery of plaintiff's financial records, but rather held that the record, as then existing, did not support such discovery and accordingly conditioned such discovery "on good cause shown after party depositions in accordance with the Differentiated Case Management rules of this Court."

Also as a prefatory matter, this Court rejects defendants' assertion that plaintiff failed to seek an amicable resolution of this matter before seeking motion practice. Plaintiff sought and obtained a briefing schedule before the Court Attorney Referee, which accorded this Court an opportunity to attempt resolution of the issue without need of motion practice. To the extent that

the parties have not proceeded amicably, the record does not support defense counsel's assertion that plaintiff's counsel bears sole responsibility for the litigiousness of this action.

Turning to the merits, it is axiomatic that under CPLR 3101(a)(1), there must be full disclosure of all matter "material and necessary" to prosecute or defend an action. The phrase "material and necessary" is interpreted liberally to require disclosure, on request, of any facts bearing on the controversy that will assist preparation for trial by sharpening the issues and reducing delay and prolixity (*see Matter of Kapon*, 23 NY3d at 36, *quoting Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). Trial courts have broad discretion to supervise discovery and enter appropriate remedies to ensure the fair and efficient conduct of discovery (*see Auerbach v Klein*, 30 AD3d 451 [2d Dept 2006]; *Feeley v Midas Properties, Inc.*, 168 AD2d 416 [2d Dept 1990]).

The "material and necessary" standards for party discovery is now prevailing law for nonparty discovery generally and nonparty subpoenas in particular (*see Matter of Kapon*, 23 NY3d at 36). Accordingly, an application to quash a nonparty subpoena –

> "should be granted '[o]nly 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' (*Anheuser-Busch, Inc. v Abrams*, 71 NY2d 327, 331-332 [1988], *citing Matter of Edge Ho Holding Corp.*, 256 NY 374, 382 [1931] *and Matter of La Belle Creole Intl., S.A. v Attorney-General of State of NY*, 10 NY2d 192, 196 [1961], *quoting Matter of Dairymen's League Coop. Assn., Inc. v Murtaugh*, 274 App Div 591, 595 [1948], *affd* 299 NY 634 [1949]). It is the one moving to vacate the subpoena who has the burden of establishing that the subpoena should be vacated under such circumstances (*see Matter of Dairymen's League Coop. Assn.*, 274 App Div at 5950-596; see also *Ledonne v Orsid Realty Corp.*, 83 AD3d 598, 599 [1st Dept 2011])"

(Matter of Kapon, 23 NY3d at 38-39). Accordingly, the burden lies with the party challenging a nonparty subpoena to establish the irrelevance, illegitimacy and/or futility of the nonparty discovery sought by that discovery device. *Matter of Kapon* also recognized that statute still requires a nonparty subpoena's proponent to state therein or by accompanying notice "the circumstances or reasons such disclosure is sought or required" (CPLR 3101[a][4]; *see Matter of Kapon*, at 36). The Court of Appeals narrated that the subpoenaing party's failure to comply with this provision still subjects the subpoena "to a challenge for facial insufficiency" (*id.* at 39, *citing De Stafano v MT Health Clubs*, 220 AD2d 331, 331 [1st Dept 1995]). This requirement does not shift the burden of proving irrelevance, illegitimacy or futility, but rather gives "petitioners sufficient information to challenge the subpoenas on a motion to quash" (*id.*).

Here, plaintiff properly notes that the challenged subpoena is silent as to "circumstances or reasons" for it within the meaning of CPLR 3101(a)(4). Defendants' papers in opposition to the motion do not dispute this assertion, and do not supply any other notice to nonparty Chase Bank that might satisfy this requirement. Thus, the subpoena is technically defective under

Matter of Kapon and *De Stafano*. To be sure, plaintiff does not lack "sufficient information to challenge the subpoena" (*Matter of Kapon*, 23 NY3d at 39). Accordingly, while the Court notes the technical deficiency of the subpoena, the public policy of adjudicating disputes on the merits counsels that this Court will address the motion's merits.

Applying the *Matter of Kapon* test, plaintiff credibly pleades that discovery of her bank account is irrelevant to her causes of action and defendants' affirmative defenses, and that discovery of documents underlying plaintiff's opening of the bank account is illegitimate given the Underlying Order.[3] Plaintiff is correct that, given the Underlying Order, the law of the case is that defendants conceded plaintiff's identity for instant purposes. While defense counsel now submits Schwartz's affidavit attesting that she believes plaintiff to be proceeding under a false name, defendants did not move to renew, reargue, appeal or stay the Underlying Order. Neither do defendants substantially controvert any finding of fact or conclusion of law in the Underlying Order. Accordingly, this Court holds that plaintiff carried her burden to show that discovery of plaintiff's financial information and underlying proof of identity is irrelevant as a matter of law.

In response, defendants' papers offer this Court no substantial rebuttal. As this Court narrated in the Underlying Order and now appears to be so again, defendants offer nothing but conclusory and self-serving surmise that plaintiff proceeded under a false name: defendants' instant papers rehash defendants' arguments on the prior motion. As such, defendants continue what the Underlying Order held to be a fishing expedition. Even if this Court were to conclude that discovery properly lies at this time for more of plaintiff's banking records than she already produced, defendants offer this Court nothing to justify discovery from the bank of the proofs of identity that plaintiff used to open any Chase Bank account under paragraph 2 of the subpoena.

Turning to the financial records themselves sought under paragraph 1 of the subpoena, even applying the liberal "materiality and relevance" standard for CPLR 3101(a)(1) discovery that *Matter of Kapon* extended to nonparty discovery, this Court finds no substantial basis – and defendants justify no new arguments that the Underlying Order didn't already address– to justify the breadth of materials sought. Defendants offer no reasonable basis to seek nine years of plaintiff's Chase Bank accounts, including every monthly account statement including records of all deposits and withdrawals. The mere fact that plaintiff commenced a wage payment claim does not mean that plaintiff thereby placed in controversy the entirety of her financial transactions for the entirety of her employment period much less afterwards to the present time.

As such, defendants failed to carry their burden to show that such discovery is even minimally relevant to this action. Accordingly, the subpoena is at best substantially overbroad, if not altogether irrelevant and illegitimate, and plaintiff is entitled to appropriate relief.[4]

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[3]Defendants' failure to specify the "circumstances or reasons" for the subpoena must limit the precision by which plaintiff should be required to plead and prove the irrelevance, illegitimacy or futility of this discovery. Defendants cannot fail to specify such circumstances or reasons, on the one hand, and then benefit from any resulting vagueness inherent in that technical deficiency, on the other.

[4]This Court disagrees with plaintiff that the Underlying Order's bar of discovery of plaintiff's immigration status necessarily bars all discovery of plaintiff's identity. Even if tax identification and

The relief plaintiff seeks, however, is overbroad. The subpoena should be quashed, but it is premature for this Court to enter relief in relation to discovery of nonparty Village/Town of Mount Kisco, putative custodian of plaintiff's original marriage license and underlying proof of identity. First, even though plaintiff asserts that defendants have threatened to subpoena such documents, there is no record before the Court that defendants sought such discovery. Second, any such nonparty subpoena would need to comply with the CPLR 2307 requirement to obtain this Court's prior approval to obtain discovery from a municipal corporation of this State. While such matter is not yet before the Court, the plain language of this Decision and Order – and the Underlying Order – speak for themselves as to the relevance of such materials, and the parties should conduct themselves accordingly, keeping in mind the provisions of Rule 130-1.1.

As to plaintiff's request to expand the Underlying Order's CPLR 3103(a) limitation on discovery, this determination is a close call but, on balance, this Court declines to further limit defendants at this time. The Underlying Order repeatedly narrated that because defendants appeared to concede plaintiff's identity and failed to lay any substantial foundation for discovery of her bank account, such discovery was denied without prejudice to the same after party depositions. Such remains the law of this case: if deposition testimony reasonably gives rise to a basis to seek such discovery, the same then will be considered on the merits.

As to plaintiff's prayer for costs and Rule 130-1.1 sanctions on this motion, this Court held oral argument on such matter. This Court notes that this motion is the third discovery application before party depositions, that plaintiff substantially prevailed on each such motion, that defendants' subpoena was technically defective, and that defendants' opposition to this motion bordered on frivolous. This Court is especially concerned that defense counsel not only continues to imply that plaintiff's discovery positions are "baseless" (Def Mem of Law, at 14), but also that plaintiff has a "track record of conducting" baseless sanctions motions, based on two federal cases in which plaintiff sought sanctions. Defense counsel's position is ironic: it is defense counsel that wrongly sought to inquire into plaintiff's immigration status, baselessly sought to compel plaintiff's tax records without laying a foundation, served a facially defective nonparty subpoena, regurgitated self-serving arguments that this Court already rejected, and failed to seek any renewal, re-argument, stay or appeal. Accordingly, it is defense counsel who has proceeded unreasonably on this application. Accordingly, defense counsel will make a monetary payment to plaintiff in the amount of $100 for motion fees and another $350 for costs associated with the making of this motion. Defense counsel is admonished accordingly.

The parties are directed to conduct party depositions in accordance with the Compliance Conference Order of this Court (Scheinkman, J.) dated December 8, 2017 (NYSCEF Doc. 71). Pursuant thereto, plaintiff shall be deposed on January 15, 2018, and defendants shall be deposed on January 19, 2018. At such depositions, the restrictions of this Court's Underlying Order will be in full force and effect, and the same will be strictly construed. Accordingly, it is

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passport information are proper means to open a bank account, defendants aver – and this Court has no reason to dispute – that a bank depositor may present other means to open an account. Thus, the record is insufficient to hold, as plaintiff asserts, that defendants deliberately seek to circumvent the Underlying Order by using nonparty discovery to obtain documents relating to plaintiff's immigration status.

ORDERED that plaintiff's motion is granted to the limited extent that the nonparty subpoena on Chase Bank is quashed pursuant to CPLR 2304; and it is further

ORDERED that not later than January 16, 2018, defense counsel will make a monetary payment to plaintiff in the amount of $450, and upload to NYSCEF an affirmation of payment; and it is further

ORDERED that all other relief not specifically granted herein is denied without prejudice; and it is further

ORDERED that consistent with the Compliance Conference Order of this Court (Scheinkman, J.) dated December 8, 2017 (NYSCEF Doc. 71), plaintiff shall be deposed on January 15, 2018, and defendants shall be deposed on January 19, 2018; at which depositions the restrictions of this Court's Underlying Order will be in full force and effect, and the same will be strictly construed; and it is further

ORDERED that counsel for plaintiff will serve this Decision and Order, with Notice of Entry, on defense counsel by NYSCEF and nonparty Chase Bank by U.S. Mail within three days hereof; and it is further

ORDERED that counsel for all parties will appear in the Compliance Part, Room 800 of this Courthouse, at 9:30 a.m. on January 23, 2018.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
January 8, 2018

HON. JOAN B. LEFKOWITZ, J.S.C.

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