

<b>Rubin v Sabharwal</b>
2020 NY Slip Op 30250(U)
January 31, 2020
Supreme Court, New York County
Docket Number: 650839/2017
Judge: Gerald Lebovits
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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: HON. GERALD LEOVITS PART IAS MOTION 7EFM

Justice

-----X

SHELLEY RUBIN,

Plaintiff,

- v -

NISHA SABHARWAL, MOHIT SABHARWAL, VASTRA  
INC., OM VASTRA LLC, OM VASTRA MIAMI LLC,

Defendants.

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INDEX NO. 650839/2017  
MOTION DATE 11/20/2019  
MOTION SEQ. NO. 003

DECISION + ORDER ON  
MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 75, 76, 77, 78, 79, 80, 81, 82, 83

were read on this motion to QUASH SUBPOENA

*The Law Offices of Neal Brickman, P.C.*, New York, NY (Ethan Y. Leonard of counsel), for plaintiff.

*Certilman Balin Adler & Hyman LLP*, East Meadow, NY (John H. Gionis and Nicole L. Milone of counsel), for defendants.

Gerald Lebovits, J.:

This is another discovery motion in plaintiff's breach-of-contract and unjust-enrichment action against defendants arising from the purchase of millions of dollars of jewelry at allegedly inflated prices.<sup>1</sup> (*See Rubin v Sabharwal*, Index No. 650839/2017, 2018 NY Slip Op 30293 [U] [Sup Ct, NY County Feb. 20, 2018].)

On this motion, plaintiff seeks to block a testimonial and document subpoena directed not to her but to her husband, non-party Donald Rubin. Plaintiff moves to quash under CPLR 2304 or, in the alternative, for a protective order under CPLR 3103. Plaintiff's motion papers include an argument that Donald Rubin should not be required to appear for a deposition on (unspecified) medical grounds. Plaintiff previously sought permission from this court to file a sealed reply in support of the motion to quash that would elaborate on those grounds. (*See* NYSCEF No. 76, at 2-3, 7-9.) Defendants strenuously opposed plaintiff's request to file her reply papers under seal. (*See* NYSCEF No. 81, at 3-8.)

<sup>1</sup> For this court's decision on the parties' prior motion and cross-motion to compel, see *Rubin v Sabharwal* (Index No. 650839/2017, 2019 NY Slip Op 33503 [U] [Sup Ct, NY County Nov. 25, 2019]).

To resolve the parties' disagreement, this court issued an interim order, denying plaintiff leave to file a sealed reply in support of the motion to quash, but permitting plaintiff to "submit for this court's in camera review the records or physician's affidavit about her husband's medical condition that she believes to be relevant to the motion to quash," simultaneous with the filing of plaintiff's reply papers. (NYSCEF No. 82, at 1-2.) Plaintiff then filed public reply papers and provided an affidavit from Donald Rubin's treating physician for this court to review in camera. This court has carefully considered both the parties' legal and factual submissions in their publicly filed papers and the factual information provided in the physician's affidavit submitted by plaintiff in camera.

## Discussion

### I. The Branch of Plaintiff's Motion Challenging Defendants' Deposition Subpoena

Defendants argue first that this court should deny plaintiff's motion to quash the testimonial subpoena directed to Donald Rubin—and therefore compel him to appear for a deposition—because plaintiff lacks standing to move to quash on behalf of her husband. (*See* NYSCEF No. 81, at 10-11.)

Defendants are correct that plaintiff faces a significant standing problem in seeking on Donald Rubin's behalf to block his deposition. Nonetheless, in the particular circumstances presented here, this court declines to permit Mr. Rubin to be deposed. This court, upon reviewing the affidavit submitted in camera by Donald Rubin's treating physician, has concluded that requiring Mr. Rubin to appear for a deposition would be inappropriate. And this court "may at any time on its own initiative" enter "a protective order denying . . . the use of any disclosure advice," where doing so will "prevent unreasonable annoyance . . . embarrassment, disadvantage, or other prejudice to any person. (CPLR 3103 [a].) Even if one were to assume that plaintiff lacks standing to obtain a protective order blocking Mr. Rubin's deposition, the court determines that it should enter that protective order itself *sua sponte*. Defendants' effort to obtain Mr. Rubin's deposition testimony by subpoena ad testificandum is denied.

Defendants are correct, though, that they should be provided a copy of the affidavit that this court reviewed in camera and took into account in ruling on defendants' deposition subpoena. (*See* NYSCEF No. 81, at 9.) This court therefore directs the parties promptly to confer in good faith about an agreement for maintaining the confidentiality of this particular document.

If the parties are able to reach agreement on the terms of a confidentiality order, they shall execute that order and submit it to this court to be so-ordered (notifying the court of that submission by telephone); and within seven days of the court so-ordering the agreement, plaintiff shall provide defendants with the physician's affidavit that she previously submitted to this court in camera. Should the parties be unable to agree on the terms of a confidentiality order, plaintiff and defendants shall each e-file proposed orders for this court's consideration, notifying the court by telephone when they have done so. In that circumstance, the court will consider the parties' proposals and enter an appropriate order, with plaintiff to provide defendants with the physician's affidavit within seven days from the order's entry.

## II. The Branch of Plaintiff's Motion Challenging Defendants' Document Subpoena

### A. Whether Plaintiff Has Standing to Seek a Protective Order

In addition to seeking Donald Rubin's testimony, defendants also served him with a document subpoena comprising five document demands. These demands seek (i) communications between Mr. Rubin and plaintiff relating to the jewelry purchased from defendants; (ii) appraisal reports, drafts, and related documents regarding the jewelry; (iii) diaries, notes, calendars, and similar documents relating to the jewelry and its purchase by plaintiff; (iv) documentary proof of payments made to defendants to purchase the jewelry; and (v) communications between Mr. Rubin and defendants relating to the jewelry. (*See* NYSCEF No. 77, at 6.)

Plaintiff also moves to quash or for a protective order as to these document demands. Defendants again challenge her standing to do so. This court concludes that plaintiff has standing to challenge the bulk of defendants' document demands.

CPLR 3103 provides that a court may enter a protective order on the "motion of any person . . . about whom discovery is sought." (CPLR 3103 [a].) Here, although defendants' document demands are directed to Donald Rubin, Demand Nos. 1-4 each seek materials that likely would have been generated by (or at the request of) plaintiff, or that discuss or describe actions undertaken by the plaintiff. This court concludes, therefore, that plaintiff has standing to seek a protective order as to those four demands because as to them she is a person "about whom discovery is sought."

Demand No. 5, to be sure, is limited to communications between Mr. Rubin and defendants relating to the jewelry at issue, and thus appears not to seek discovery about plaintiff or her actions. Yet given the close temporal and substantive relationship between the documents encompassed by this demand and the materials sought in Nos. 1-4, the court concludes that Demand No. 5 should be treated the same as the other demands. Thus, even assuming that plaintiff lacks standing to seek a protective order with respect to Demand No. 5, the court would deem it appropriate to issue a protective order *sua sponte* as to that demand, *if* plaintiff's papers otherwise establish that a protective order is warranted. Plaintiff's procedural and substantive arguments in favor of issuing a protective order are discussed below.

### B. Whether Defendants' Subpoena Sufficiently Stated the Reasons Defendants Seek Disclosure from Donald Rubin

Plaintiff argues that this court should quash the subpoena or grant a protective order because defendants' own interrogatory responses disprove the subpoena's stated rationale for seeking documents from Mr. Rubin. (*See* NYSCEF No. 76, at 3, 4-6; NYSCEF No. 83, at 2-4.) This court agrees that defendants' interrogatory responses tend to undercut that rationale. The court concludes, however, that this shortcoming is not a basis to quash or grant a protective order in this case.

CPLR 3101 provides that a party may obtain discovery from certain nonparties only upon giving “notice stating the circumstances or reasons such disclosure is sought or required.” (CPLR 3101 [a] [4].) Here, defendants’ document subpoena provides the requisite notice in two forms. First, the subpoena attaches a copy of plaintiff’s complaint in the action (*see* NYSCEF No. 77, at 1, 8-31)—a typical means of providing the necessary background context for the document requests in the subpoena (*see Kapon v Koch*, 23 NY3d 32, 39 & n 3 [2014]). Second, the subpoena states that defendants are seeking the subpoenaed documents as material and necessary to the defense of the action, “in particular, due to [Mr. Rubin’s] presence at most of the transactions at issue in this litigation . . . and [Mr. Rubin’s] knowledge of the statements and representations made by Defendants in connection with those transactions.” (NYSCEF No. 77, at 1.)

Defendants’ response to plaintiff’s Interrogatory No. 11, however, stated that “[d]efendants do not recall any individuals present during discussions between Nisha Sabharwal and Shelley Rubin [plaintiff] concerning the subject jewelry and stones.” (NYSCEF No. 56, at 9.) And defendants’ response to plaintiff’s Interrogatory No. 18 was that the only representations concerning the jewelry sold by defendants to plaintiff were “those described in the invoices that were given to plaintiff” and attached to the response. (*Id.* at 14.) These responses do not wholly contradict the subpoena’s statements about the reasons why documents in Mr. Rubin’s possession are material and necessary—but they at least create substantial tension with those statements.<sup>2</sup>

Nonetheless, this seeming contradiction between responses and subpoena does not warrant this court quashing the subpoena or granting a protective order. As its language reflects, CPLR 3101 (a) (4) is intended only as a notice provision. It imposes a “minimal” burden on the issuing party (*see Bianchi v Galster Mgmt. Corp.*, 131 AD3d 558, 559 [2d Dept 2015])—*i.e.*, provide a little bit of information about the circumstances under which documents are sought so that the receiving party, who may be a complete stranger to the litigation, has “an opportunity to decide how to respond” and has enough information to move to quash or for a protective order if he so chooses (*Velez v Hunts Point Multi-Serv. Ctr., Inc.*, 29 AD3d 104, 109-110 [1st Dept 2006]; *accord Matter of Kapon*, 23 NY3d at 39). And although this brief explanation should ordinarily appear on the face of the subpoena itself, in some cases the issuing party may supply an explanation after the fact in opposing a receiving party’s motion to quash. (*See Velez*, 29 AD3d at 110-112.)

The question whether the issuing party has provided the notice required by CPLR 3101 (a) (4) is also prior to, and distinct from, the question whether the receiving party has shown that the subpoena was plainly brought for improper reasons or seeks plainly irrelevant information. (*See Matter of Kapon*, 23 NY3d at 38, 39.) A challenge to a subpoena on those grounds must be

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<sup>2</sup> To be sure, defendants’ interrogatory responses also raised specific objections to both Interrogatory No. 11 and No. 18. (*See* NYSCEF No. 56, at 9, 14.) But defendants do not argue here that the presence of those objections is sufficient to remedy any potential inconsistency between the substance of the interrogatory responses and the statements in defendants’ later document subpoena.

evaluated based on the context in which the subpoena was issued and the particular discovery that the subpoena seeks—not on the subpoena’s (brief) explanation under CPLR 3101 (a) (4) for why it was issued.

Here, given that Mr. Rubin is married to the plaintiff and aware of plaintiff’s prior interactions with defendants (especially defendant Sabharwal), it is clear that Mr. Rubin (or those acting on his behalf) had sufficient knowledge of “the circumstances or reasons why the requested disclosure was sought or required” (*Matter of Kapon*, 23 NY3d at 39), and a full “opportunity to decide how to respond” (*Velez*, 29 AD3d at 110). Thus, the apparent inconsistency between defendants’ CPLR 3101 (a) (4) subpoena notice and their prior interrogatory responses, though regrettable, did not prejudice Mr. Rubin or plaintiff. The court concludes that granting a protective order solely based on shortcomings of the CPLR 3101 notice, without regard to the substantive sufficiency or propriety of the subpoena’s contents, would exalt form over substance.

### C. Whether this Court Should Issue a Protective Order

On the merits, plaintiff argues that the subpoena should be quashed (or a protective order entered), because it plainly lacks a legitimate purpose on multiple grounds. This court does not agree that the subpoena should be quashed. The court grants plaintiff’s request for a protective order in part—but only in part.

Plaintiff contends generally that—as represented in her interrogatory responses—Mr. Rubin lacked any personal or first-hand knowledge of any relevant facts or circumstances, and indeed that defendants “specifically acted in such a manner to keep Mr. Rubin” from acquiring such knowledge. (NYSCEF No. 76, at 3; *see id.* at 5-6.) Plaintiff fails, however, to identify any authority standing for the proposition that defendants are required to take plaintiff’s word on Mr. Rubin’s knowledge or ignorance without pursuing written discovery from Mr. Rubin himself. That Mr. Rubin apparently was not in the room for interactions between plaintiff and defendant Sabharwal, and that Sabharwal did not make representations to Mr. Rubin about the jewelry (*see id.* at 5-6) does not, without more, necessarily demonstrate that Mr. Rubin lacks any relevant documents.<sup>3</sup>

Plaintiff also challenges each of the five particular document demands made in defendants’ subpoena, arguing in essence that defendants already have obtained any relevant and responsive materials that might be in Mr. Rubin’s possession, such that this additional document subpoena is merely harassing.

**Demand No. 1** seeks communications between plaintiff and Mr. Rubin relating to the jewelry. Such materials are plainly relevant to the action because they would go to plaintiff’s understanding as to the nature of the jewelry that she was purchasing from Sabharwal and the

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<sup>3</sup> This court also agrees with defendants that the excerpted emails between plaintiff and Sabharwal that mention Mr. Rubin suggest that he may be in possession of relevant materials relating to the parties’ transactions. (*See* NYSCEF No. 81, at 12-14, and documents referenced therein.)

circumstances under which they were purchased, which bears on plaintiff's cause of action for equitable rescission of the sales contract. (*See Rubin*, 2019 NY Slip Op 33503 [U], at \*2, \*4.) Plaintiff argues that (i) plaintiff has already provided documents responsive to this demand, and (ii) such materials would be privileged in any event under CPLR 4502, which shields spousal communications. (*See* NYSCEF No. 76, at 6; NYSCEF No. 83, at 5-7, 10.) But plaintiff has not necessarily provided all responsive documents. The prior request to which plaintiff responded was limited to seeking all *email* communications between plaintiff and other parties relating to the jewelry (*see* NYSCEF No. 76, at 6), whereas subpoena Demand No. 1 seeks all communications between plaintiff and Mr. Rubin in any form that relate to the jewelry (*see* NYSCEF No. 77, at 6).

With respect to the issue of privilege, as plaintiff herself acknowledges (NYSCEF No. 83, at 6), whether a party invoking spousal privilege has met each of the privilege's requirements is necessarily a fact-specific inquiry (*see Matter of Vanderbilt*, 57 NY2d 66, 73-75 [1982]). Plaintiff has not provided sufficient information about non-email communications (if any) between she and her husband to demonstrate that those communications are shielded by spousal privilege. The branch of plaintiff's motion seeking a protective order as to this demand is granted only to the extent that the obligation of Mr. Rubin (or his representatives) is limited to searching for and providing responsive communications that were made in a form other than email. If any non-email communications exist that Mr. Rubin (or his representatives) believes to be privileged, he must provide a privilege log.

**Demand No. 2** seeks appraisal reports, drafts, and other similar documents (including appraisal-related communications) regarding the jewelry. These documents are relevant largely for the same reasons as in Demand No. 1 above. Plaintiff contends, though, that "all such documents are in [defendants'] possession already." (NYSCEF No. 83, at 10.) The record reflects that plaintiff previously provided defendants with extensive appraisal-related material and information in response to numerous document requests. (*See* NYSCEF No. 88, at 3, 5-7, 8-11, 14 [discovery responses].) Defendants identify no basis to believe that *other*, unproduced appraisal materials exist, much less that such materials would be in the possession of Mr. Rubin but not plaintiff. The branch of plaintiff's motion seeking a protective order as to this demand is granted.

**Demand No. 3** seeks diaries, notes, calendars, and other documents relating to the jewelry and transactions at issue, which materials are relevant for the same reasons as above. Plaintiff contends that defendants know "from Plaintiff's discovery responses—and from [defendants'] own machinations in ensuring that Plaintiff shared with no one the extent of her purchases from Defendants—that no such documents exist." (NYSCEF No. 83, at 10.) But plaintiffs do not identify any particular discovery response(s) that might support this contention. Nor has this court's own review of plaintiff's interrogatory and document responses identified information supporting this contention. The branch of plaintiff's motion seeking a protective order as to this demand is denied.

**Demand No. 4** seeks various documents establishing proof of the payments that plaintiff made to defendants for the jewelry. But plaintiff previously provided various proofs of payment in response to several document requests. (*See* NYSCEF No. 88, at 5-6, 7, 8-9, 11-12.)

Defendants have indicated that they are not aware of any unpaid jewelry invoices. (See Rubin, 2019 NY Slip Op 33503 [U], at \*7.) And defendants have identified no basis to believe that any additional responsive documents would be in the possession of Mr. Rubin but not plaintiff. The branch of plaintiff's motion seeking a protective order as to this demand is granted.

**Demand No. 5** seeks communications between or among Mr. Rubin and defendants. Presumably, though, defendants themselves would be in possession of all such communications (if any exist), such that there would be no need for Mr. Rubin to have to search for and produce them. Certainly defendants do not identify or describe any communications between them and Mr. Rubin that defendants need yet do not already have. The branch of plaintiff's motion seeking a protective order as to this demand is granted.

Accordingly, it is hereby

ORDERED that the branch of plaintiff's motion seeking a protective order regarding defendants' deposition subpoena directed to nonparty Donald Rubin is granted; and it is further

ORDERED that the parties shall promptly submit an executed confidentiality order as to the affidavit of Donald Rubin's physician (or each party's proposed order) to the court for the court's consideration as set forth in Point I, above; and it is further

ORDERED that plaintiff shall provide a copy of the physician's affidavit to defendants within seven days of the entry by this court of a confidentiality order regarding that affidavit; and it is further

ORDERED that the branch of plaintiff's motion seeking to quash defendants' document subpoena directed to nonparty Donald Rubin is denied; and it is further

ORDERED that the branch of plaintiff's motion seeking a protective order regarding the document subpoena is granted as to Demand Nos. 2, 4, and 5; is granted in part as to Demand No. 1 to the extent described in Section II.C above, and is denied as to Demand No. 3; and it is further

ORDERED that plaintiff's counsel shall, on Donald Rubin's behalf, provide defendants with any documents responsive to Demand Nos. 1 and 3 within 45 days, and shall within that time provide defendants with a privilege log to support any refusal by Donald Rubin to provide responsive documents on the ground of spousal privilege.

1/31/2020

DATE

  
GERALD LEBOVITS, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE