

People v Richmond Capital Group LLC
2020 NY Slip Op 34189(U)
December 17, 2020
Supreme Court, New York County
Docket Number: 451368/2020
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

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INDEX NO. 451368/2020

PEOPLE OF THE STATE OF NEW YORK, BY LETITIA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK,

MOTION DATE 08/10/2020

MOTION SEQ. NO. 003

Plaintiff,

- v -

RICHMOND CAPITAL GROUP LLC, RAM CAPITAL FUNDING LLC, VICEROY CAPITAL FUNDING INC. ALSO DOING BUSINESS AS VICEROY CAPITAL FUNDING AND VICEROY CAPITAL LLC, ROBERT GIARDINA, JONATHAN BRAUN, TZVI REICH, MICHELLE GREGG,

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 313, 314, 315, 316, 317, 318, 319, 320, 321, 347, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 388, 389, 390, 391, 392, 393, 394, 395

were read on this motion to/for QUASH SUBPOENA, FIX CONDITIONS

Upon the foregoing documents and for the reasons set forth on the record (12-16-2020) and as otherwise set forth below, (i) Respondent Tzvi Reich's motion (seq. no. 003) to quash the subpoena dated June 14, 2019 (the Subpoena) served by the People of the State of New York (the NYAG) or, in the alternative, for a protective order is denied, and (ii) the NYAG's cross motion to compel the testimony of Mr. Reich pursuant to CPLR 2308(b)(1) is granted. Service of the subpoena on Mr. Reich was proper and occurred over one year prior to the Petition (hereinafter defined) being served. On the record before the court, the NYAG did not delay in attempting to depose Mr. Reich as part of their active and continuing investigation. Nor can it be said that they are using Executive Law § 63(12) and this Subpoena as a way of avoiding proper

discovery. Instead, the record reflects gamesmanship by Mr. Reich and his frustration of the NYAG and its powers under Executive Law § 63(12) from deposing him for approximately one year by, among other things, first agreeing to do the deposition and then cancelling it, and then delaying in responding to requests to go forward with the deposition, and ultimately refusing to be deposed. Under the circumstances, his arguments are wholly without merit.

Discussion

On June 14th, 2019, the NYAG issued the Subpoena commanding Mr. Reich to appear to give testimony on July 2, 2019 “in connection with an investigation concerning merchant cash advances provided by Richmond Capital Group, LLC, Viceroy Capital Funding, Ram Capital Funding LLC, or any other matter which the Attorney General deems pertinent thereto” (NYSCEF Doc. No. 316). Mr. Reich never complied with the Subpoena, nor has he previously moved to quash, and he now argues, some 14 months after the Subpoena was first served, that (i) he was never properly served (notwithstanding that he at first agreed to go to the deposition), (ii) the Subpoena is now “stale,” and (iii) that the Subpoena became a nullity upon the filing of the instance proceeding. On the record (12-16-2020) at argument, counsel for Mr. Reich withdrew his objections on the basis of service and staleness, however, as set forth below, these arguments are, in any event, all unavailing.

I. Service

The Subpoena was properly served upon Mr. Reich on June 18, 2019 and again on June 21, 2019, by delivery of papers to a person of suitable age and discretion at Mr. Reich’s place of business (CPLR 308 [2]; Kaplan Aff., NYSCEF Doc. No. 376; Marshall Aff, NYSCEF Doc. No.

380). Building personnel have long been recognized as “person[s] of suitable age and discretion” for purposes of service pursuant to CPLR 308(2) (e.g., *F.I. du Pont Glore Forgan & Co. v Chen*, 41 NY2d 794, 797 [1977]).

The fact that Mr. Reich refused to come down to receive the Subpoena when the NYAG’s office attempted a subsequent delivery does not render service ineffective, it only evidences Mr. Reich’s attempts to evade service (Marshall Aff., NYSCEF Doc. No. 380).

Moreover, counsel for Mr. Reich, Thomas Harvey, acknowledged receipt of the Subpoena in a phone call with the NYAG’s office and Mr. Harvey and the NYAG agreed to an August 8, 2019 date for the deposition (NYSCEF Doc. No. 386, ¶ 6). However, on August 7, 2019, counsel for Mr. Reich advised the NYAG by letter (the **August 7, 2019 Letter**) that his client would not appear and that he would instead seek a protective order (which was ultimately not filed until August of the following year) (NYSCEF Doc. No. 319).

Indisputably, service here was proper. For the avoidance of doubt, to the extent Mr. Reich argues that the suite number was not present or that the address is not his principal place of business, the documents submitted by the NYAG, including among other things, the Affidavit of Christopher Marshall (NYSCEF Doc. No. 380) and its exhibits and the Affidavit of Melissa Kaplan (NYSCEF Doc. No. 376) and its exhibits utterly refute his position.

II. The Subpoena is Not Stale

The passage of time, during which the NYAG's office repeatedly sought to enforce the Subpoena as Mr. Reich sought to evade it, has not caused the Subpoena to grow stale. Mr. Reich offers no legal support in support of this argument and the facts here clearly demonstrate that the NYAG's office was seeking his testimony throughout the course of last year (NYSCEF Doc. No. 386).

III. This Action Has Not Rendered the Subpoena Unenforceable

Executive Law § 63(12) authorizes the NYAG to “take proof” as part of its investigation of repeated or persistent fraud or illegality. The statute, as amended in 1985, includes a non-abatement provision, stating:

Such authorization **shall not abate or terminate by reason of any action or proceeding brought by the attorney general under this section.**

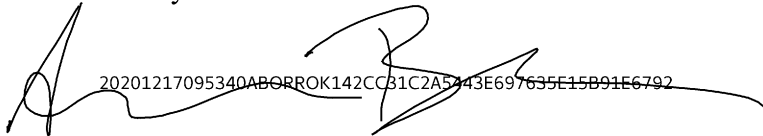
(Exec. L. § 63[12] [emphasis added]).

The plain text of the statute settles the issue. The cases relied upon by Mr. Reich in support of his argument that the Subpoena has been superseded by the instant action do not dictate a different result. *Dellwood Foods Inc. v Abrams* (109 Misc 2d 263, 269 [Sup Ct Bronx Cnty 1981]) and *People v Anaconda Wire & Cable* (45 Misc 2d 151, 152 [Sup Ct NY Cnty 1965]), which discussed a related provision of the Donnelly Act, GBL 343, and not Executive Law § 63(12), involve a factually different scenario where subpoenas were issued *after* a litigation had already begun. Having frustrated the NYAG's from obtaining his testimony, he cannot now credibly argue that the NYAG is using its powers under Executive Law § 63(12) to avoid going through discovery. To the extent that he argues that former New York Attorney General Robert Abrams

wrote a memo prior to, or at the time of, the adoption of Executive Law § 63(12) to the Governor, the concern raised by New York Attorney General Abrams is not reflected in the language of the statute. Finally, his objection to the subpoena based on the fact that his client will not have his attorney present is also without merit as the NYAG indicated on the record (12-16-2020) that there will be no prohibition to the presence of counsel.

Accordingly, it is

ORDERED that the motion to quash is denied and the cross motion to compel is granted, and Mr. Reich is directed to appear for a deposition within 30 days of this decision and order.



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12/17/2020
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: