SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. FRANK P. NERVO** **PART** **04**

Justice

----------X

ROBERT MALTA

Plaintiff,

- v -

MARY EVANCHO,

Defendant.

----------X

INDEX NO. 154409/2021

MOTION DATE 05/30/2023

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 18, 19, 20, 21, 22, 23, 24, 25, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45

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

Plaintiff moves by order to show cause to quash subpoenas issued by defendant seeking, inter alia, information related to PPP loans[1] received by a non-party business solely owned by plaintiff. Defendant opposes contending, inter alia, that the information sought by subpoena is necessary as plaintiff has not provided evidence of claimed business losses, and such loses, if any, have been mitigated by PPP loan funds.

A party seeking discovery from a nonparty must state the "circumstances or reasons" underlying the subpoena, on its face, and the party seeking to quash the subpoena must establish the material sought is "utterly irrelevant" or "the

[1] Paycheck Protection Program (PPP) established by the CARES Act as a result of the COVID-19 pandemic.

futility of the process to uncover anything legitimate is inevitable or obvious" (*Kapon v. Koch*, 23 NY3d 32 [2014]). Should the party opposing the subpoena make such a showing, the burden shifts to the subpoenaing party to establish the material sought is "material and necessary" to the action (*id.* at 34). CPLR § 2304 requires a motion to quash a subpoena be made "promptly," thus making the issue of timeliness *sui generis*. However, where a motion to quash is made returnable after the return date of the subpoena, the motion risks futility if the subpoena is obeyed (*Brunswick Hospital Center, Inc. v., Hynes*, 52 NY2d 333, 339, "a motion to quash or vacate no longer is available"; *see also Santangello v. People*, 38 NY2d 536, 539 "motion to quash ... should be made prior to the return date").

The instant motion is, perhaps, instructive on the importance of bringing an application to quash a subpoena quickly and, furthermore, ensuring such application complies with the dictates of Uniform Rule § 202.7-f.[2] The instant subpoenas were issued, according to movant, on May 16, 2023, and required compliance within 20 days. Thus, compliance with the instant subpoenas was due on or before June 6, 2023. This application to quash was filed in the ex-parte office on Friday, May 26, 2023, and was not processed and presented to

[2] A scrivener's error on the signed order to show cause listed "202.2-f" rather than "202.7-f". § 202.7-f refers to temporary restraining orders. § 202.2-f does not exist.

this Court until Tuesday, May 30, 2023. Given that movant failed to comply with Uniform Rule § 202.7-f, requiring advance notice to adverse parties of an application for a stay or temporary restraining order, the Court could not issue the stay sought in this motion. Accordingly, the instant motion, returnable after the compliance deadline contemplated by the subpoena, has likely been rendered moot, and denial upon such grounds is proper.

Assuming, *arguendo*, that the motion is not moot, and turning to the merits of movant's motion, denial is nevertheless warranted. It is well-established that subpoena served upon a non-party must provide the reasons or circumstances for service of same upon the non-party (CPLR § 3101[a][4]; *Kapon v. Koch*, 23 NY3d 32 [2014]). "The subpoenaing party must include that information in the notice in the first instance, lest it be subject to a challenge for facial insufficiency" (*Kapon v. Koch*, 23 NY3d at 39). However, the party seeking to quash a subpoena nevertheless retains the burden of establishing a subpoena's facial insufficiency or other basis to quash the subpoena (*id.*, *infra*).

Here, the Court notes that movant has failed to annex complete copies of the subpoenas at issue, instead providing only the first page (NYSCEF Doc. Nos. 20 and 21). Indeed, the signature page of each subpoena is missing. This is

fatal to movant's motion, as it is beyond cavil that the Court cannot possibly pass judgment upon that which has not been fully submitted to the Court. Stated differently, and as held by the Court of Appeals, "the subpoenaing party's notice obligation was never intended by the legislature to shift the burden of proof on a motion to quash from a nonparty to the subpoenaing party" (*Kapon v. Koch*, 23 NY3d at 39). Thus, plaintiff having failed to provide complete copies of the subpoenas has failed to meet their burden establishing that the subpoenas at issue are facially defective, and the motion must be denied.[3]

Notwithstanding any claims of facial deficiency, the disclosure sought in the instant subpoenas is material and necessary to the damages as alleged by plaintiff, and consequently necessary to the defense of same. As relevant here, plaintiff's lawsuit alleges defamation by defendant and concomitant losses suffered by the non-party business owned by plaintiff as a result of the alleged defamation. Information related to the receipt, and any subsequent forgiveness, of PPP loans is material and necessary to the proof and accounting of damages, if any, resulting from the defamation alleged by plaintiff.

[3] Defendant's submission of subpoenas does not serve to meet plaintiff's prima facie burden (NYSCEF Doc. Nos. 41 and 42).

In *Pedraza v. New York City Transit Authority*, the Appellate Division, First Department determined that this Court has a duty to raise potential defenses on behalf of a defendant, notwithstanding that the defendant has not pled or proceeded on same (203 AD3d 95 [1st Dept 2022] at footnote 1, reversing and remanding for new trial on defendant's unpled qualified immunity defense raised for the first time on eve of trial).

Here, under the dictates of *Pedraza*, this Court notes that defendant has alleged, in essence, that plaintiff has brought the instant defamation action, among others, in bad faith and sought to predicate settlement of this defamation action and other pending litigation upon defendant surrendering her apartment in plaintiff's building (NYSCEF Doc. No. 34 at ¶ 19 -20). These allegations by defendant may support claims for tenant harassment under the Housing Maintenance Code (*see generally*, New York City Administrative Code, § 27-2001; *see e.g.* New York City Administrative Code § 27-2004[48][d]). Likewise, given the public nature of the alleged statements made by defendant in forming a block association (NYSCEF Doc. No. 34 at ¶ 10), defendant's allegations may further support claims under the 2020 amendment to the anti-strategic lawsuit against public participation (anti-SLAPP) law (Civil Rights Law § 76-a).

Accordingly, it is

ORDERED that the motion is denied.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

6/22/2023
DATE

HON. FRANK P. NERVO J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE