

Matter of Walker v Brian

2023 NY Slip Op 32972(U)

August 25, 2023

Supreme Court, New York County

Docket Number: Index No. 155841/2023

Judge: John J. Kelley

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY PART 56M

Justice

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In the Matter of

DOUGLAS S. WALKER, DIANA BRIAN, NATALIE H. DENT,
CHRISTOPHER C. BRIAN, ALEXANDRA M. BRIAN, EARL
W. BRIAN, III, JENNIFER BRIAN, DAVID SCHMICKEL, and
WILLIAM J. HOWARD, all derivatively on behalf of
the Diana and Earl W. Brian, Jr. Family Trust,

Petitioners,

- v -

EARL W. BRIAN, III,

Respondent.

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INDEX NO. 155841/2023

MOTION DATE 08/02/2023

MOTION SEQ. NO. 001

**DECISION, ORDER, and
JUDGMENT**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12

were read on this motion to/for MISC. SPECIAL PROCEEDINGS/COMPEL COMPLIANCE WITH SUBPOENA.

The petitioners seek relief pursuant to CPLR 2308, 3124 and 3125 to compel the respondent, Earl W. Brian, III, to comply with a subpoena duces tecum and ad testificandum served upon him on March 17, 2023, and for an award of attorneys' fees, disbursements, and costs incurred in commencing and litigating this proceeding. The respondent did not oppose the petition. The petition is granted to the extent that the respondent is directed to appear in person at the offices of the petitioners' attorneys on September 21, 2023, at 10:00 a.m., or at any adjourned date agreed upon by the parties, to give testimony and produce all of the documents demanded in the subpoena, and the petitioners are awarded the sums of \$50 as a penalty and \$50 for actual costs incurred. The petition is otherwise denied.

In or about 2022, the petitioners had commenced an action in the Circuit Court, Talbot County, Maryland, entitled *Douglas S. Walker, et al. v Mary B. Burgoyne, M.D.*, Case No. C-20-

CV-22-000047. The Maryland action involves claims that Mary B. Burgoyne, M.D., received and is in possession of assets that rightfully belong to the Diana and Earl W. Brian, Jr. Family Trust, an irrevocable trust organized under the laws of Delaware and located in Talbot County, Maryland. On February 23, 2023, the clerk of Circuit Court, Talbot County, issued a subpoena duces tecum for deposition and documents pursuant to the Maryland Uniform Interstate Discovery and Deposition Act (UIDDA) (Md. Code Ann., Cts. & Jud. Proc. §§ 9-401-9-407) that directed the respondent herein to appear for a deposition and produce certain documents at the offices of the petitioners' attorneys in New York. The petitioners filed the Maryland subpoena with the New York County Clerk, who thereupon issued an equivalent New York subpoena on March 9, 2023 pursuant to the New York UIDDA (CPLR 3119), directing the respondent to appear at the offices of the petitioners' attorneys on March 29, 2023. The petitioners served the respondent with the subpoena on March 17, 2023. The parties adjourned the respondents' deposition and document production until April 21, 2023. When he did not appear on that date, the petitioners commenced the instant proceeding. The respondent, although served with the notice of petition, petition, and supporting papers, did not oppose the petition.

The court notes that a showing of "special circumstances" is not required before a party may obtain discovery from a nonparty by means of a subpoena. Nor must a party seeking disclosure from a nonparty establish that the evidence sought cannot be obtained from sources other than the nonparty. CPLR 3101(a)(4) provides that, with respect to nonparties, "there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof . . . upon notice stating the circumstances or reasons such disclosure is sought or required." As the Court of Appeals has clearly explained,

"[t]he 'circumstances or reasons' language replaced former CPLR 3101(a)(4)'s 'adequate special circumstances' requirement. It is noteworthy, however, that the appellate departments, even before the 1984 amendment, liberally interpreted the 'special circumstances' requirement as favoring disclosure so long as the party seeking it met the low threshold of demonstrating a need for the disclosure in order to prepare for trial. . . We conclude that the 'material and necessary' standard adopted by the First and Fourth Departments is the appropriate one

and is in keeping with this state's policy of liberal discovery. The words 'material and necessary' as used in section 3101 must be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. Section 3101(a)(4) imposes no requirement that the subpoenaing party demonstrate that it cannot obtain the requested disclosure from any other source. Thus, so long as the disclosure sought is relevant to the prosecution or defense of an action, it must be provided by the nonparty"

(*Matter of Kapon v Koch*, 23 NY3d 32, 37, 38 [2014] [citation and some internal quotation marks omitted]). The petitioners have shown that the respondent has information or is in possession of documents relevant to their claims in the Maryland action, inasmuch as he possesses or has information as to the whereabouts of assets that allegedly belong to the subject trust. Hence, they have adequately stated the circumstances and reasons justifying their need for the issuance and enforcement of the subject subpoena.

The definition of a "judicial subpoena" includes subpoenas that are made returnable before the court (see *Irizarry v New York City Police Dept.*, 260 AD2d 269, 271 [1st Dept 1999]; *Matter of Cambridge Packing Co, Inc. v LaJaunie*, 2019 NY Slip Op 30689[U], *3, 2019 NY Misc LEXIS 1210, *3-4 [Sup Ct, N.Y. County, Mar. 18, 2019] [Kelley, J.]; *4720 15th Ave., LLC v Jacobson*, 2017 NY Slip Op 30318[U], *3-4, 2017 NY Misc LEXIS 615, *4 [Sup Ct, N.Y County, Feb. 17, 2017]; *Lyon Financial Services v Pinto Trading Co.*, 2009 NY Slip Op 51783[U], *2-3, 24 Misc 3d 1237[A], 2009 NY Misc LEXIS 2164, *5-6 [Sup Ct., Kings County, Aug. 17, 2009]). Although the subject subpoena was not made returnable in court, it nonetheless must be characterized as a judicial subpoena, inasmuch as (a) the subpoena was issued by the Clerk of the court, (b) the definition of the term "judicial subpoena" also "embraces subpoenas issued by an officer of the court (such as an attorney) at any stage of a judicial proceeding, regardless of whether the subpoena was specifically returnable in court" (*Cadlerock Joint Venture, L.P. v Patterson*, 199 AD3d 557, 558 [1st Dept 2021]; see *Douglas Elliman, LLC v TWP Real Estate, LLC*, 189 AD3d 614, 614 [1st Dept 2020]; see also *Matter of Ling v Sans Souci Owners Corp.*, 187 AD3d 755 [2d Dept 2020]), and (c) a "[f]ailure to comply with a subpoena issued by a

judge, clerk or officer of the court shall be punishable as a contempt of court” (*Matter of Bobby D. Assoc. v Park*, 97 AD3d 815, 816 [2d Dept 2012], quoting CPLR 2308[a] [emphasis added]).

CPLR 2308(b)(1) permits a party to move to compel compliance with a subpoena. Although, by its terms, CPLR 2308(b)(1) applies only to nonjudicial subpoenas, and thus need not be invoked prior to seeking a contempt ruling against a person who has failed to comply with a judicial subpoena (see *Cadlerock Joint Venture, L.P. v Patterson*, 199 AD3d at 558; *Douglas Elliman, LLC v TWP Real Estate, LLC*, 189 AD3d at 614; cf. *Reuters, Ltd. v Dow Jones Telerate, Inc.*, 231 AD2d 337, 341 [1st Dept 1997] [applying CPLR 2308(b)(1) to enforcement of nonjudicial subpoena]; *Dias v Consolidated Edison Co. of New York, Inc.*, 116 AD2d 453, 454 [1st Dept 1986] [same]), there is nothing prohibiting the petitioners from seeking an order of compliance prior to seeking a judgment of contempt (see *Matter of Cambridge Packing Co, Inc. v LaJaunie*, 2019 NY Slip Op 30689[U], *3, 2019 NY Misc LEXIS 1210, *3-4 [Sup Ct, N.Y. County, Mar. 18, 2019] [Kelley, J.]; *4720 15th Ave., LLC v Jacobson*, 2017 NY Slip Op 30318[U], *3-4, 2017 NY Misc LEXIS 615, *4 [Sup Ct, N.Y. County, Feb. 17, 2017]; *Lyon Financial Services v Pinto Trading Co.*, 2009 NY Slip Op 51783[U], *2-3, 24 Misc 3d 1237[A], 2009 NY Misc LEXIS 2164, *5-6 [Sup Ct., Kings County, Aug. 17, 2009]).

Where a petitioner in a proceeding pursuant to CPLR 2308 has been damaged by the respondent’s failure to comply with a duly issued and served subpoena, the respondent may be held liable for those damages, but those damages do not necessarily include attorneys’ fees and disbursements that the petitioner incurred in litigating the proceeding (see *Gyeltsen v Vogel & Rosenberg*, 75 Misc 3d 1211[A], 2022 NY Slip Op 50467[U], *1-2, 2022 NY Misc LEXIS 2440, *11-12 [Sup Ct, N.Y. County, Jun. 1, 2022]). Hence, the court denies the petitioner’s application for an award of attorneys’ fees and disbursements, but awards them the maximum allowable sum of \$50 in actual costs that they incurred in litigating this proceeding and a \$50 penalty, as permitted by CPLR 2308 (see *id.*)

Accordingly, it is

ADJUDGED that the petition is granted, without opposition, to the extent that the respondent is directed to comply with the subpoena served upon him on March 17, 2023 and the petitioners are awarded a penalty and the maximum allowable costs that they actually incurred in litigating the proceeding, and the petition is otherwise denied and the proceeding is otherwise dismissed; and it is,

ORDERED that, on September 21, 2023, at 10:00 a.m., or at any adjourned date agreed upon by the parties, the respondent is directed to appear in person at the offices of the petitioners' attorneys, to give testimony concerning issues in the action entitled *Douglas S. Walker, et al. v. Mary B. Burgoyne, M.D.*, Case No. C-20-CV-22-000047, pending in the Circuit Court, Talbot County, Maryland, and to produce all of the documents demanded in the subpoena served upon him on March 17, 2023; and it is further,

ORDERED that the Clerk of the court shall enter a money judgment in favor of the petitioners and against the respondent in the principal sum of \$100, consisting of the statutory \$50 penalty imposed by CPLR 2308 and the \$50 allowable maximum in actual costs that the petitioners incurred in litigating the proceeding, as permitted by CPLR 2308.

This constitutes the Decision, Order, and Judgment of the court.

JOHN J. KELLEY, J.S.C.

8/25/2023

DATE

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