

<b>Fund.com, Inc. v Advisorshares Inv., LLC</b>
2014 NY Slip Op 33022(U)
November 21, 2014
Sup Ct, NY County
Docket Number: 650321/2012
Judge: Melvin L. Schweitzer
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## Discussion

### Motion to Compel

The court is unconvinced that service of the Subpoena was improper, and grants Fund's Motion to Compel.

Mr. Webster's claim that service was improper hinges upon New York's Common Law Doctrine of Legal Immunity from Service (Doctrine). CPLR 2303 and 2308 provide that a subpoena may be served by delivering it within the state to the person to be served. However, under the Doctrine, nonresidents may be protected "from civil process when they voluntarily appear in New York to participate in legal proceedings, either as parties or witnesses." *Weichert v Kimber*, 229 AD2d 998, 999 (4th Dept 1996).

The Doctrine encourages nonresidents to enter New York to participate in legal proceedings without fear that they will be "served with process that would expose that person to new or additional liabilities." *Bartwitz v Hotaling*, 708 NYSd2 590, 591 (Sup Ct Warren Cnty, April 20, 2000). "[T]he privilege of immunity is not a privilege personal to the witness but a privilege belonging to the court." *Bartwitz* at 591. Its purpose is to arm the court with a tool to promote the swift and efficient administration of justice. *Bartwitz* at 591. The Doctrine applies to the service of summonses and complaints, not subpoenas. *Bartwitz* at 591-592.

The Doctrine does not apply when a person is served while attending a legal proceeding in New York, if the service concerns that very case. *See Wehr v Memhard*, 106 AD2d 262, 263 (1st Dept 1984). To qualify for immunity, three requirements must be met: "(1) he or she is in fact a nonresident, (2) whose sole purpose in appearing in New York is to attend the judicial proceedings, and (3) there were no other means of acquiring jurisdiction over his or her person

other than personal service in New York.” *Brause 59 Co. v Bridgemarket Assoc.*, 216 AD2d 200, 201 (1st Dept 1995).

Mr. Webster was served with a subpoena in connection with the very case he was being deposed for. Mr. Webster cites *Weichert v Kimber* as standing for the proposition that nonresidents are immune to “civil process when they voluntarily appear in New York to participate in legal proceedings, either as parties or witnesses.” *Weichert* at 999. In *Weichert*, as the defendant was leaving a courtroom after an action against him was dismissed, he was served with *a summons for another action*. Not only was Mr. Webster served with a subpoena to produce documents, and not with a summons or complaint regarding another action, the documents requested are for the litigation in which he was deposed.

Mr. Webster was not served with a summons or complaint at the EBT but with a subpoena *duces tecum*. When a person is served with a subpoena *ad testificandum*, immunity does not apply because the “subpoena ad testificandum does not, in itself, subject a person to new or additional liabilities – it merely requires them to appear and testify.” *Bratwitz* at 591-592. Just as a subpoena ad testificandum does not expose a person to new or additional liabilities, nor does a subpoena *duces tecum*. It only requires that Mr. Webster produce certain documents.

Mr. Webster can not establish all three requirements necessary to qualify for immunity. Mr. Webster could have been served at his residence in New Jersey, and so fails to meet the third prong, that “there were no other means of acquiring jurisdiction over his or her person other than personal service in New York.” *Brause 59* at 201.

CPLR 3101 (a) (4) requires that “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, by . . . (4)

any other person, upon notice stating the circumstances or reasons such disclosure is sought or required.” CPLR 3101 was amended in 1984 to remove a requirement that a party seeking disclosure from a nonparty had to acquire a court order based on “adequate special circumstances.” While the requirement was still part of the statute, however, “the cases . . . interpreted the statutory requirement most liberally to give effect to the strong policy favoring full disclosure to adequately prepare for trial.” *Slabakis v Drizin*, 107 AD2d 45, 46 (NY App Div 1st Dept 1985). The showing needed to satisfy the “adequate special circumstances requirement” was nominal. *Slabakis v Drizin*, 107 AD2d 45, 46 (1st Dept 1985).

In *Slabakis*, the court found that when the statute was amended there was no legislative intent that the statute be interpreted any less liberally. *Slabakis* at 48. The new language allowed for “the discovery of any person who possesses material and necessary evidence.” *Matter of Kapon v Koch*, 23 NY3d 32, 36 (2014). The amendment assured that nonparties were informed of the reason for the disclosure. *Kapon* at 36. This information is crucial for a nonparty to be able to challenge a subpoena on a motion to quash. *Kapon* at 39. In *Kapon*, the court held that the requirements of CPLR 3101 (a) (4) were met because the subpoena served on the nonparties included the date, time and location of depositions and a copy of the amended complaint for the action. *Kapon* at 39.

The reasoning of *Kapon* applies here. First, Fund included a statement on the face of the subpoena that said the documents Fund required were “relevant and necessary for the Plaintiff to adequately prepare for trial in *the above captioned matter*.” At the time Mr. Webster received the subpoena, he had intimate knowledge of what the matter was about and why the disclosure was sought. Before Mr. Webster was served at the deposition (a) one of the defendants had explicitly asked for Mr. Webster’s support in the dispute, (b) defendants’ counsel took

Mr. Webster out to dinner and discussed the case with him, (c) defendants' counsel deposed him for 4 hours in connection with the case, and (d) Fund provided Mr. Webster's counsel with copies of the pleadings before the deposition. In light of the fact that the requirements of 3101 (a) (4) are interpreted liberally, Fund satisfied the requirements of 3101 (a) (4). Furthermore, Mr. Webster submitted a motion to quash that included an abundance of information about this case.

#### Cross-Motion to Quash

In *Dibenedetto v Zboyan*, the court explained that “whether a discovery demand is appropriate is a matter within the sound discretion of the court, which must balance competing interests.” *Dibenedetto v Zboyan*, 2013 N.Y. Slip Op. 32770(U), at \*2. *Dibenedetto* emphasized the court's discretion in deciding such a matter in light of the burden to the nonparty in complying with a discovery demand. *Dibenedetto* at \*2.

Mr. Webster moves to quash the Subpoena for the following reasons: (a) the desire to avoid legal risk, (b) the desire not to be financially or otherwise unduly burdened, (c) the desire to protect his privacy and intellectual property, and (d) the probability that any documents in Mr. Webster's possession will not be dispositive or lead to the discovery of documents dispositive of the central issue in the case.

With regard to the first reason, a “subpoena ad testificandum does not, in itself, subject a person to new or additional liabilities – it merely requires them to appear and testify.” *Bratwitz* at 591-591. Nor does a subpoena *duces tecum*. It only requires that he submit documents. Mr. Webster will not be financially burdened by this request, since Fund has undertaken to pay expenses associated with extracting the documents. Additionally, Fund committed to take precautions to protect Mr. Webster's privacy. Fund also need not show that the documents it

requests are dispositive or that they will lead to the discovery of documents that are dispositive in the main issue of the litigation. Fund has met its burden of showing that the documents are relevant.

Mr. Webster's motion to quash is denied.

**Conclusion**

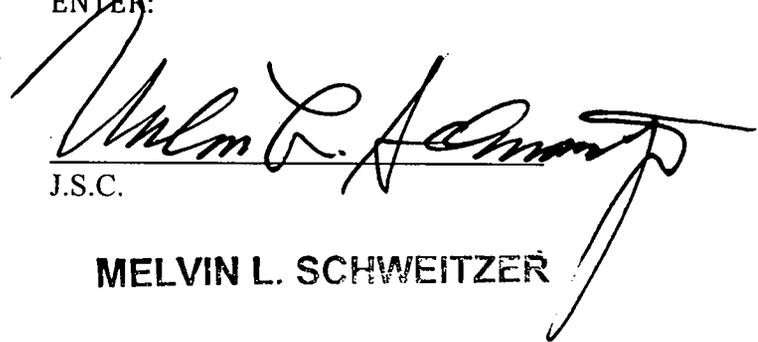
Accordingly, it is

ORDERED that Fund's motion to compel non-party Mr. Webster to comply with the Subpoena is granted; and it is further

ORDERED that Mr. Webster's cross-motion to quash the Subpoena pursuant to CPLR 2304 is denied.

Dated: November 21, 2014

ENTER:



A handwritten signature in black ink, appearing to read 'Melvin L. Schweitzer', is written over a horizontal line. The signature is stylized and extends to the right of the line.

J.S.C.

**MELVIN L. SCHWEITZER**