

**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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CITIFINANCIAL AUTO, LTD.,

Plaintiff,

-against-

**UNIVERSAL AUTO SALES, LLC. d/b/a
UNIVERSAL AUTO WORLD; UNIVERSAL
CAPITAL CORP.; MICHAEL OSHRY;
MARK HARLEY; ROBERT O'HARA;
CHRIST TSIROPOULOS aka CHRIS
TSIROPOULOS,**

Defendants.

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**TRIAL/IAS PART: 22
NASSAU COUNTY**

**Index No: 022457-07
Motion Seq. Nos: 2 & 3**

**Submission Dates:
Motion Seq. No. 2: 6/14/10
Motion Seq. No. 3: 6/8/10**

Papers Read on these Motions:

- Notice of Motion, Affirmation in Support and Exhibits.....x**
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This matter is before the court on the motions by Defendants Attorneys for Universal Auto Sales, LLC d/b/a Universal Auto World ("Universal Auto"), Universal Capital Corp. ("Universal Capital"), and Pamela Geller and David P. Oshry, as co-administrators c.t.a. of the Estate of Michael Oshry (collectively "Oshry Defendants"), filed on May 27, 2010 and June 1, 2010 and submitted on June 14 and June 8, 2010, respectively. These motions seek similar relief, specifically the issuance of two Subpoenas Duces Tecum to the Nassau County Police Department ("NCPD") and Kathleen Rice, Esq., District Attorney of Nassau County ("DA"). For the reasons set forth below, the Court directs that these motions will be the subject of oral argument before the Court on July 2, 2010 at 9:30 a.m.

BACKGROUND

A. Relief Sought

In motion sequence number 2, the Oshry Defendants seek 1) the so-ordering, pursuant to CPLR § 2307, of a subpoena duces tecum directed to the NCPD, to permit inspection and copying by counsel for the Oshry Defendants of the following: a) all documents seized, on or after January 11, 2007, from the offices of Universal Auto at 711 Burnside Avenue, Lawrence, New York 11559 (“Burnside Location”) or any other location, by the NCPD and/or the DA and currently in the possession, custody or control of the NCPD, b) all documents voluntarily turned over by Universal Auto or its representatives, on or after January 11, 2007, to the NCPD and/or the DA, and currently in the possession, custody or control of the NCPD, c) all documents regarding Universal Auto’s used car dealership operated at the Burnside Location, seized by the NCPD and/or the DA from, or voluntarily turned over to the NCPD and/or the DA, by Christ Tsiropoulous a/k/a Chris Tsiropoulos (“Chris”), or his representatives, on or after January 11, 2007, and currently in the possession, custody or control of the NCPD, and d) all documents regarding Universal Auto’s used car dealership operated at the Burnside Location, seized by the NCPD and/or the DA from, or voluntarily turned over to the NCPD and/or the DA, by Mark Harley (“Harley”), or his representatives, on or after January 11, 2007, and currently in the possession, custody or control of the NCPD.

In motion sequence number 3, the Oshry Defendants seek the issuance of so-ordered Subpoenas Duces Tecum directed to the NCPD and DA to produce the following records: 1) any and all documents seized from Universal Auto or voluntarily turned over to Defendants Universal Auto, Universal Capital and Michael Oshry (“Oshry”), and 2) any and all documents that the NCPD and/or DA seized from, or were voluntarily turned over by, Chris and/or Harley to the NCPD and/or DA, regarding Universal Auto and/or the used car dealership operated by Universal Auto on the ground that such records are essential to the response by the Oshry Defendants to the discovery demands made by Plaintiff Citifinancial Auto, Ltd. (“Citifinancial”).

B. The Parties’ History

1. Prior Decision

In the Complaint, Citifinancial alleges that the Defendants, acting jointly and aiding and abetting each other, participated in a scheme to defraud the Plaintiff and other entities. The

parties' history is outlined in detail in a prior decision of the Court dated February 17, 2010 ("Prior Decision") in which the Court reserved decision on the motion by Plaintiff to strike the Verified Answer of Defendant Harley and directed counsel for both parties, on or before March 5, 2010, to provide the Court with a letter outlining the status of the related criminal action involving Defendant Harley. That letter was to include 1) whether the related criminal action has been presented to a Grand Jury; 2) if the matter has been presented to a Grand Jury, whether the Grand Jury issued an Indictment in which Harley is one of the named defendants; 3) if the matter has not been presented to the Grand Jury, the scheduled date of a future Grand Jury presentment; 4) if an Indictment has been issued, the Indictment Number and the charges in the Indictment; 5) whether Harley has pled guilty to any crime or offense in the related criminal action and, if so, the status of the sentencing proceeding; 6) if Harley has not pled guilty, whether any pretrial hearings have been conducted in the related criminal action and, if not, the scheduled date of any such pretrial hearings; and 7) the scheduled trial date of the related criminal action, if known.

In compliance with the Prior Decision, counsel for Plaintiff ("Plaintiff's Counsel") provided the Court with a letter dated March 4, 2010 which advised the Court that 1) Plaintiff's Counsel attempted to ascertain the status of the criminal proceedings against Harley by calling and e-mailing the assigned Assistant District Attorney ("Assigned ADA") but was advised that he was out of the office for several days; 2) Plaintiff's Counsel spoke with a supervisor ("Supervisor") in the DA's Office who said that the Assigned ADA was out of the office and the Supervisor could not provide information regarding the status of the case until the Assigned ADA returned; and 3) Plaintiff's Counsel searched the website ("Website") of the New York State Unified Court System and received information that no cases were found. The letter from Plaintiff's Counsel includes two (2) attachments: 1) the March 3, 2010 automated e-mail response from the Assigned ADA to Plaintiff's Counsel stating that the Assigned ADA would be out of the office until March 8, and 2) a Website printout reflecting that no cases were located for Defendant Harley.

2. The Instant Motions

Counsel for the Oshry Defendants ("Counsel") provides an Affirmation in Support dated May 28, 2010 in which he affirms as follows:

In an effort to respond fully to Plaintiff's discovery requests, and pursuant to the Court's

direction, Counsel served a subpoena (“DA Subpoena”) dated August 26, 2009 on the DA on September 2, 2009. A copy of the DA Subpoena is annexed to Counsel’s Affirmation as Exhibit A. The DA Subpoena demanded production of “[a]ny and all documents that the [DA] seized from or voluntarily turned over by [the Oshry Defendants]; and [a]ny and all documents that the [DA] seized from or voluntarily turned over by [Chris] and [Harley] regarding the Burnside Avenue dealership.

Counsel directed the DA Subpoena to the DA because he was informed that the DA was in possession of numerous files seized from the Burnside Location on or after Jan 11, 2007 in connection with the investigation of certain automobile financing transactions made by Universal Auto. That investigation began when police were called to the Universal Office in connection with a homicide at that location.

After service of the DA Subpoena, Counsel spoke with the Assigned ADA on several occasions “regarding [the DA’s] reluctance to give us access to all of the documents because there was an active homicide investigation” (Counsel’s Aff. at ¶ 4). The Assigned ADA advised Counsel that the DA had lost the DA Subpoena. As directed by the Court at a conference on this matter, Counsel issued a second subpoena dated October 7, 2009 that was served on the DA on October 8, 2009 (“Second DA Subpoena”) (Ex. B to Counsel’s Aff.), together with a Notice of Deposition (Ex. C to Counsel’s Aff.) for the examination of a DA representative with knowledge of the documents in question (“Documents”).

Following service of the Second DA Subpoena, Counsel continued to speak with the Assigned ADA regarding access to the Documents. In February of 2010,¹ the Assigned ADA advised Counsel that the Assigned ADA needed the permission of the NCPD to release certain Documents, and said that some of the Documents seized from Universal Auto were in the possession of the NCPD. In February or March of 2010, the Assigned ADA discussed with Counsel the DA’s reluctance to provide Counsel with access to the seized Documents and suggested that the Assigned ADA could provide a list (“List”), by category, of the Documents and Counsel could specify which categories of Documents he wished to inspect.

Another attorney in Counsel’s law firm spoke with the Assigned ADA in February and March of 2010 regarding whether the Assigned ADA was authorized to release to Counsel the

¹ Although Counsel’s affirmation reflects that these discussions took place in February of 2009, the Court gleans that Counsel meant February of 2010.

proposed List so that Counsel could attempt to identify the Documents he wished to inspect. By e-mail dated March 8, 2010 (Ex. D to Counsel's Aff.), Counsel's colleague advise the Assigned ADA that Counsel was scheduled to attend a pre-trial conference before the Court on March 9, 2010 and still had not been informed whether they would receive the proposed List.

By e-mail dated March 9, 2010 (Ex. E to Counsel's Aff.), the Assigned ADA provided Counsel with the DA's inventory notes ("Inventory") (part of Ex. E to Counsel's Aff.) regarding the items seized from Universal Auto so that Counsel could identify which Documents he wished to inspect. That March 9th e-mail read as follows:

Attached are the requested DA Inventory Notes regarding the materials seized from [Universal Auto] at the time of its closure. These notes are merely a rough accounting as to files taken. The vast majority of the notes were made by members of the [DA's Office] in an effort to track certain files when needed (hence the DA# marking system). It is by no means a complete detailed and itemized accounting of every single record and document seized nor is it an official warrant return[;] it was prepared simply as a rough guide for finding certain evidence seized. That being said, despite its handwritten nature, it does encompass the materials seized to a good general degree.

Due to Counsel's inability to discern from the Inventory which of the categories contained relevant Documents, and in light of the Assigned ADA's statement that the Inventory was not complete, Counsel again requested that he be given access to all of the Documents seized. On April 28, 2010, the Assigned ADA advised Counsel that the Assigned ADA needed to speak with a Deputy County Attorney ("DCA") assigned to the Legal Bureau of the NCPD regarding inspection of the Documents, and the Assigned ADA would then contact Counsel.

On May 17, 2010, the Assigned ADA left Counsel a telephone message advising him that he had spoken to the DCA and that it was her position, on behalf of the NCPD, that 1) the subpoena to the DA was not addressed to the NCPD and, therefore, was not sufficient to prompt her to release Documents in the NCPD's possession relating to an active homicide investigation; and 2) the NCPD would not provide Counsel with access to the Documents without a court-ordered subpoena directed to the NCPD.

On May 19, 2010, Counsel called the DCA and left her a message. On May 21, 2010, Counsel called the DCA and spoke with her. The DCA advised Counsel that 1) the NCPD could not turn over or permit inspection and copying of any Documents without a court-ordered subpoena; 2) the subpoena previously issued by Counsel was directed to the DA, not the NCPD;

3) even after a so-ordered subpoena was issued and served on the NCPD, the NCPD would not permit inspection and copying of all the Documents seized from Universal Auto in light of the open homicide investigation; and 4) the NCPD would likely object to producing Documents that the NCPD deemed related to that investigation.

On May 19, 2010, Counsel spoke again with the Assigned ADA and requested permission to inspect and copy the Universal Auto Documents in the DA's possession. The Assigned ADA advised Counsel that the DA had only one or two boxes ("Boxes") of Documents relating to Universal Auto, many of which were provided by Citifinancial to the DA. Counsel affirms that "virtually all of the documents on the index furnished by the [DA] are actually in the possession of the [NCPD], not the [DA]" (Counsel's May 28th Aff. in Supp. at ¶ 11).

Counsel submits that it is now apparent that the Assigned ADA, with whom Counsel communicated for eight months, had no authority to permit Counsel or the other parties to this litigation to inspect and copy the Documents seized from Universal Auto. When Counsel was unable to schedule an expeditious inspection, he asked the Assigned ADA to have the documents in the Boxes copied without the need for an inspection. The Assigned ADA advised Counsel that he needed to discuss that request with his superior and with counsel for the NCPD because it involved documents related to an active homicide investigation. When Counsel reminded the Assigned ADA that the Documents in question are the business records of his client, Universal Auto, which were seized from its office, the Assigned ADA said that he would discuss this issue with his superiors. Counsel received no subsequent information or direction from the Assigned ADA.

At the Court's direction, Counsel provided the Court with a letter, dated May 21, 2010, outlining the issues attendant to Counsel's efforts to obtain the Documents. In that Letter (Ex. B to Counsel's May 24th Aff. in Support), Counsel outlined his unsuccessful efforts to obtain the Documents. Counsel affirms, in his Affirmation in Support dated May 24, 2010, that the DCA has advised him that the NCPD will not permit inspection or copying of the Documents without a court-ordered subpoena.

C. The Parties' Positions

Counsel submits that, without access to the books and records of Universal Auto, the Oshry Defendants are unable to prepare complete answers to Plaintiffs' Interrogatories or produce all of the documents demanded in Plaintiff's document demands. Counsel affirms that, based on his numerous conversations with the Assigned ADA and DCA as outlined herein, the majority of the Documents removed from Universal Auto's office in January of 2007 are in the possession, custody or control of the NCPD.

Motion Sequence Number 3 includes Affidavits of Service reflecting the service of the motion on the NCPD, the DA, counsel for Plaintiff and counsel for Defendant Harley on May 28, 2010. There has been no opposition or other response submitted to the motion.

Motion Sequence Number 2 includes an Affidavit of Service reflecting the service of the motion on the NCPD, counsel for Plaintiff and counsel for Defendant Harley on May 24, 2010. There has been no opposition or other response submitted to the motion.

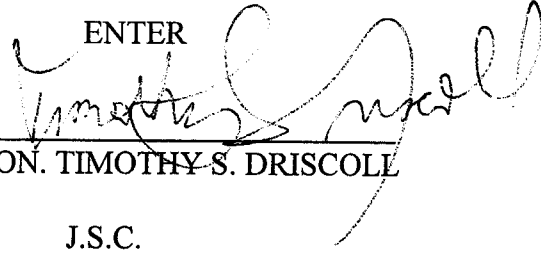
RULING OF THE COURT

CPLR § 2307 provides as follows:

A subpoena duces tecum to be served upon a library, or a department or bureau of a municipal corporation or of the state, or an officer thereof, requiring the production of any books, papers or other things, shall be issued by a justice of the supreme court in the district in which the book, paper or other thing is located or by a judge of the court in which an action for which it is required is triable. Unless the court orders otherwise, a motion for such subpoena shall be made on at least one day's notice to the library, department, bureau or officer having custody of the book, document or other thing and the adverse party. Such subpoena must be served upon such library, or such department or bureau of such municipal corporation or of the state or an officer having custody of the book, document or other thing and the adverse party at least twenty-four hours before the time fixed for the production of such records unless in the case of an emergency the court shall by order dispense with such notice otherwise required. Compliance with a subpoena duces tecum may be made by producing a full-sized legible reproduction of the item or items required to be produced certified as complete and accurate by the person in charge of such library, department or bureau, or a designee of such person, and no personal appearance to certify such item or items shall be required of such person or designee, unless the court shall order otherwise pursuant to subdivision (d) of rule 2214 of this chapter. Where a stipulation would serve the same purpose as production of the book, document or other thing and the subpoena is required because the parties will not stipulate, the judge may impose terms on any party, including the cost of production of the book or document, and require such cost to be paid as an additional fee to the library, department or officer.

The Court directs that these motions will be the subject of oral argument before the Court on July 2, 2010 at 9:30 a.m. All of the parties and entities listed below are directed to appear on that date.

DATED: Mineola, NY
June 15, 2010

ENTER

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ENTERED
JUN 18 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE