

Scan

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

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x	TRIAL/IAS PART: 20
MWH GROUP, INC.,	NASSAU COUNTY
Plaintiff,	Index No: 018629-08
-against-	Motion Seq. No: 5
	Submission Date: 11/29/10

SPARTAN RESTAURANT HOLDINGS CORP.,

Defendant.

-----x

The following papers having been read on this motion:

Notice of Motion, Affirmation in Support and Exhibits.....x
Affirmation in Opposition and Exhibits.....x
Affirmation in Opposition.....x
Reply Affirmation in Further Support and Exhibits.....x

This matter is before the Court for decision on the motion filed by Thaler & Gertler, LLP ("T&G"), former attorneys for Defendant Spartan Restaurant Holdings Corp. ("Spartan" or "Defendant")) on November 8, 2010 and submitted on November 29, 2010 to quash a subpoena served on T&G. For the reasons set forth below, the Court denies the motion and directs T&G to comply with the Subpoena on or before February 2, 2011.

BACKGROUND

A. Relief Sought

T&G moves for an Order, pursuant to CPLR §§ 2304 and 3103, quashing the subpoena ("Subpoena") dated October 27, 2010 and served on T&G, or, in the alternative, granting T&G a protective order denying the disclosure sought pursuant to the Subpoena.

Plaintiff MWH Group, LLC and Defendant's current counsel ("Current Counsel")

oppose the motion.

B. The Parties' History

The parties' history is set forth in detail in a prior decision of the Court dated July 1, 2009 ("Prior Decision"), and the Court incorporates that Prior Decision herein by reference. In the Prior Decision, the Court described this action as follows:

MWH and Spartan executed a Consultant and Non-Compete Agreement dated July 13, 2007 ("Agreement"). The Agreement describes MWH as a company that "provides area development rights and services for finding locations for companies through the Nassau and Suffolk communities." The Agreement describes Spartan as a company "engaged primarily in the franchise and restaurant development business for [the restaurant] Au Bon Pain ["ABP"] for the Nassau and Suffolk County territories."

In this action, MWH alleges that Spartan breached the Agreement by terminating MWH, allegedly "for cause" based on conduct that MWH denies. MWH seeks 1) damages in excess of \$5 million, and 2) a judicial declaration that a) Defendant improperly terminated Plaintiff; b) the Agreement remains in full force and effect; and c) Defendant is required to pay Plaintiff money owed pursuant to the Agreement.

In his Affidavit in Support of the instant motion, Richard E. Gertler ("Gertler"), a member of T&G, affirms as follows: T&G appeared on behalf of Defendant and interposed an Answer to the Complaint. Thereafter, T&G moved to be relieved as counsel and Defendant retained its current counsel, the Weinstein Group, who was substituted as counsel for the Defendant.

T&G is currently the plaintiff in a lawsuit against Defendant, its former client, based on non-payment of fees. That matter is titled *Thaler & Gertler, LLP v. Spartan Restaurant Holdings Corp. and Nicholas Rozakis*, Nassau County Index Number 024561-09 ("Fee Action") and was filed on December 2, 2009.

On October 27, 2010, T&G was served with the Subpoena (Ex. C to Gertler Aff. in Supp.). The Subpoena directs T&G to appear and "produce all books, information, records[,] documents and/or things relating to the claims of the Plaintiff and the defenses and counterclaims of the Defendant...includ[ing], but...not limited to, all correspondence, contracts, purchase orders, bills, receipts, agreements, invoices, phone calls, text messages, electronic mail

messages, letters, facsimiles, memorandum, recordings, video, audio, and the like. Attached hereto for response are Exhibit "A", the Plaintiff's First Notice for Discovery and Inspection for Defendant, and Exhibit B, Plaintiff's First Set of Interrogatories to Defendant, which are also included in this document demand." Gertler submits that the Subpoena essentially demands that T&G, a non-party "provide responses to the Plaintiff's Notice for Discovery and Inspection and Interrogatories which were presumably previously served upon the Defendant" (Gertler Aff. at ¶ 6).

In his Affirmation in Opposition, Plaintiff's counsel affirms as follows:

Plaintiff's counsel submit that the Subpoena is not overly broad and unduly burdensome because Exhibit A to the Subpoena ("Subpoena Exhibit A"), which is dated December 3, 2009 and titled "Plaintiffs' First Notice for Discovery and Inspection to Defendant" (hereinafter "Discovery Demand") (Ex. B to Cummings Aff. in Opp.), specifies that the period covered by the demands is from May 2007 to the present. Moreover, the requests for production in the Discovery Demand are more specified and limited, often referring to specific exhibits and drafts of particular agreements. Similarly, Exhibit B to the Subpoena ("Subpoena Exhibit B") (Ex. C to Cummings Aff. in Opp.), which is also dated December 3, 2009 and is titled "Plaintiff's First Set of Interrogatories to Defendant" (hereinafter "Interrogatories"), calls for the production of documents related to the Agreement, as well as the "June 10" and "June 17" letters which are defined in the Interrogatories.

With respect to T&G's assertion that the Subpoena lacks the required notice, Plaintiff's counsel notes that the Subpoena states that it seeks items "related to the claims of the Plaintiff and the defenses and counterclaims of the Defendant."

Current Counsel also submits an Affirmation in Opposition in which she affirms as follows:

There exist special circumstances warranting the issuance and enforcement of the Subpoena, including the fact that the new owners of Spartan do not have the information necessary to comply with Plaintiff's discovery demands because the answers are in the possession of T&G. Current Counsel also notes that Gertler was present during the last court appearance in this action when this issue was discussed with the Court.

Current Counsel also submits that T&G has failed to articulate why the Subpoena is

vague, overbroad and burdensome. Current Counsel estimates that the responsive documents requested are no greater than fifty (50) pages in length, and argues, therefore, that the task of amassing those documents is not a burdensome one for T&G.

With respect to T&G's concerns regarding its retaining lien, Current Counsel affirms that, although Spartan is attempting to resolve its fee dispute with T&G, Spartan disputes T&G's claims in the Fee Action, as well as the adequacy of T&G's representation of Spartan. Accordingly, Current Counsel submits that the Court should refrain from granting a charging lien because such an Order would effectively represent an acknowledgment of the appropriateness of T&G's requested fees. Current Counsel avers, further, that Spartan does not have the financial resources to obtain a bond as a condition to the release of its file by T&G. Finally, if T&G is successful in the Fee Action, it will obtain a judgment against Spartan, rendering the recourse of a retaining lien unnecessary. Current Counsel suggests that T&G may be objecting to the Subpoena in an effort to gain an advantage in the Fee Action.

C. The Parties' Positions

T&G submits that the Court should issue an Order quashing the Subpoena on the grounds that 1) its scope is overly broad and unduly burdensome, particularly because it does not limit the requests to time or subject matter; 2) the Subpoena is defective because it does not contain a notice setting forth the special circumstances or reasons disclosure is sought from T&G; 3) the Subpoena is defective because Plaintiff did not tender the required payment for witness fees; and 4) T&G has a valid retaining lien on its file maintained in connection with this action.

Plaintiff opposes the motion of T&G on the grounds that 1) Subpoena Exhibits A and B clearly attempt to limit the requests to time and subject matter; 2) as this action concerns the facts and circumstances surrounding the Agreement and its alleged breach, relevant contract documents, and documents created contemporaneously with relevant contract documents, are material and necessary to the resolution of this action; 3) the Subpoena provides adequate notice or reason for the requested disclosure; 4) in light of the recent case of *Kooper v. Kooper*, 74 A.D.3d 6 (2d Dept. 2010), Plaintiff is not required to demonstrate special circumstances; 5) at the time the Subpoena was served, T&G had sought to be relieved as counsel and Defendant was without representation, and the Subpoena was an appropriate vehicle to ensure that the requested material was provided to Plaintiff; 6) Plaintiff is prepared to tender the

required witness fee within a reasonable time, as required; 7) with respect to T&G's retaining lien, the Court may fashion an Order that determines the amount of disbursements, if any, that are to be paid before the materials at issue are to be turned over, and directs the manner in which the disputed attorney's fees will be determined and/or secured; and 8) the Fee Action affords T&G the opportunity to obtain a judgment enforceable against the assets of Defendant, its former client.

Current Counsel opposes the motion on several grounds, including the fact that the new owners of Spartan do not have the information necessary to comply with Plaintiff's discovery demands because the answers are in the possession of T&G.

RULING OF THE COURT

CPLR § 3101(a) provides that there shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof. *See Allen v. Cromwell-Collier Pub. Co.*, 21 N.Y.2d 403, 406 (1968); *Spectrum Systems International Corporation v. Chemical Bank*, 78 N.Y.2d 371 (1991); *Quevedo v. Eichner*, 29 A.D.3d 554 (2d Dept. 2006). The Court of Appeals in *Allen, supra*, held that "[t]he words 'material and necessary' are . . . to 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. The test is one of usefulness and reason." *Id.* *See also Andon v. 302-304 Mott Street Assocs.*, 94 N.Y.2d 740, 746 (2000); *Spectrum Systems International Corporation v. Chemical Bank, supra*; *Parise v. Good Samaritan Hosp.*, 36 A.D.3d 678 (2d Dept. 2007). This statute embodies the policy determination that liberal discovery encourages fair and effective resolution of disputes on the merits, minimizing the possibility for ambush and unfair surprise. *Spectrum Systems, supra*, at 376, citing 3A Weinstein-Korn-Miller, N.Y. Civ. Prac. paragraphs 3101.01-3101.03.

CPLR § 3103(a) provides that "a court may make a protective order conditioning or regulating the use of any disclosure device...to prevent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice to any person or the courts." The CPLR also establishes three categories of protected materials, also supported by policy considerations: 1) privileged matter, which is immune from discovery pursuant to § CPLR 3101(b), 2) attorney's work product, which is also immune from discovery pursuant to CPLR § 3101(c), and 3) trial

preparation materials, which are subject to disclosure only on a showing of substantial need and undue hardship in obtaining the substantial equivalent of the materials by other means, pursuant to CPLR § 3101(d)(2). *Spectrum Systems*, 78 N.Y.2d at 376-377. The burden of establishing any right to protection is on the party asserting it, the protection claimed must be narrowly construed and its application must be consistent with the purposes underlying the immunity. *Spectrum Systems* at 377.

The purpose of a subpoena duces tecum is to compel the production of specific documents that are relevant and material to facts at issue in a pending judicial proceeding. *Velez v. Hunts Point Multi-Service Center, Inc.*, 29 A.D.3d 104, 112 (1st Dept. 2006). The court should grant a motion to quash a subpoena duces tecum only when the materials sought are utterly irrelevant to any proper inquiry. *Id.*; *New Hampshire Ins. Co. v. Varda, Inc.*, 261 A.D.2d 135 (1st Dept. 1999); *Matter of Reuters Ltd. v. Dow Jones Telerate*, 231 A.D.2d 337, 341 (1st Dept. 1997). The burden of establishing that the requested documents and records are utterly irrelevant is on the person being subpoenaed. *Gertz v. Richards*, 233 A.D.2d 366 (2d Dept. 1996).

While CPLR § 3120 was amended effective September 1, 2003 to dispense with the requirement of a motion and require only the service of a subpoena duces tecum on a non-party witness for production of documents, the subpoena must specify the time, place and manner of making the inspection, copy, test or photograph, and set forth individually or by category the items to be inspected and describing each item and category with reasonable particularity. *Velez*, 29 A.D.3d at 109. The amendment did not change the requirement of CPLR § 3101(a)(4) that, where disclosure is sought from a nonparty, the nonparty shall be given notice stating the circumstances or reasons such disclosure is sought or required. *Id.* at 111.

In *Kooper v. Kooper*, 74 A.D.3d 6 (2d Dept. 2010), the Second Department discussed the issue of whether it is appropriate to continue to require a showing of special circumstances with respect to nonparty discovery. The Second Department concluded that, in light of its elimination from CPLR § 3101(a)(4), further application of the special circumstances standard is disapproved, except with respect to discovery from expert witnesses, for which applicable statutory language remains (*see* CPLR § 3101(d)(1)(iii)). *Id.* at 16. Thus, on a motion to quash a subpoena duces tecum or for a protective order, in assessing whether the circumstances or

reasons for a particular demand warrant discovery from a nonparty, those circumstances and reasons need not be shown to be "special circumstances." *Id.*

The Court in *Kooper* declined to set forth a comprehensive list of circumstances or reasons that would be deemed sufficient to warrant nonparty discovery in every case, noting that circumstances vary from case to case. 74 A.D.3d at 17. The supervision of discovery, settling of reasonable terms and conditions for disclosure, and determination of whether a particular discovery demand is appropriate are all matters within the discretion of the trial court, which must balance competing interests. *Id.*, citing, *inter alia*, *Wander v. St. John's Univ.*, 67 A.D.3d 904, 905 (2d Dept. 2009).

The Court denies the motion of T&G, and directs T&G to comply with the Subpoena on or before February 2, 2011. The Court notes that the Discovery Request and Interrogatories are dated December 3, 2009 and, therefore, it has been over one (1) year since Plaintiff served those demands on Defendant. Moreover, the documents and information requested in the Discovery Request and Interrogatories, which relate to the Agreement at issue, are relevant and necessary to this action. In addition, Current Counsel affirms that the requested documents and information are within the sole possession of T&G. Finally, the Court declines to impose a charging or retaining lien in the context of this motion, in part because T&G will obtain a judgment against Defendant if it is successful in the Fee Action. The Court also concludes that the notice on the Subpoena is sufficient to advise T&G of the reasons that the disclosure is sought.

All matters not decided herein are hereby denied.

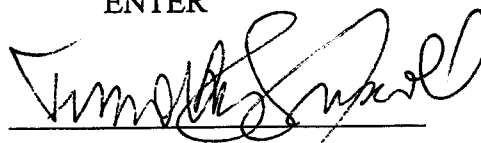
This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a Certification Conference on February 3, 2011 at 9:30 a.m.

DATED: Mineola, NY

January 24, 2011

ENTER



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED
JAN 28 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE