

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DARRELL L. GAVRIN
Justice

IA PART 27

ZULEIKA PAIR,

Index No. 702475/2012

Plaintiff,

Motion

Dates December 11, 2014
& January 7, 2015

- against-

Motion

CAPRICE THOMPSON, JUANITA PAIR,
ANNA L. BROWN,

Cal. Nos. 120 & 117

Defendants.

Motion

Seq. Nos. 7 & 9

The following papers numbered 1 to 12 read on this order to show cause by defendant, Caprice Thompson ("Thompson"), pursuant to CPLR 2308 (a), to hold non-party witness, David Bababekov, in contempt, and motion by plaintiff, seeking an order deeming service complete, and quashing defendants' subpoena.

Papers
Numbered

Table with 2 columns: Document Description and Page Numbers. Includes entries like 'Order to Show Cause - Affirmation - Exhibits' (1-3), 'Notice of Motion - Affirmation - Exhibits' (4-6), etc.

FILED
APR -9 2015
COUNTY CLERK
QUEENS COUNTY

Upon the foregoing papers, it is ordered that the order to show cause and motion are determined as follows:

Plaintiff seeks to recover for personal injuries sustained as a passenger in a motor vehicle collision that occurred on November 19, 2011. Plaintiff contends that, for purposes of litigation preparation, counsel retained the services of David Bababekov, a consultant who attends the independent medical examinations of plaintiffs for observation. Relying on attorney-client privilege, plaintiff asserts that Bababekov's services qualify "as adjunct to the lawyer's strategic thought processes, thus qualifying for complete exemption from disclosure" (Santariga v McCann, 161 AD2d 320, 321 [1st Dept 1990] [internal quotation marks and citation omitted]; see Oakwood Realty Corp. v HRH Constr. Corp., 51 AD3d 747, 749 [2d Dept 2008])."

“Although attorney-client communications shared with a third-party generally are not privileged, “an exception exists for ‘one serving as an agent of either attorney or client’ ” (*Robert V. Straus Prods. v Pollard*, 289 AD2d 130 [1<sup>st</sup> Dept 2001], quoting *People v Osorio*, 75 NY2d 80, 84 [1989]).” (*Gama Aviation Inc. v Sandton Capital Partners, L.P.*, 99 AD3d 423 [1<sup>st</sup> Dept 2012]). However, plaintiff also reserves the right to call Bababekov as a non-party witness, at trial.

This court directed that personal service be made upon non-party Bababekov. Defendant admits that she was unable to make such service, without delineating what due diligence, if any, efforts were conducted to serve the non-party witness in compliance with the order to show cause directives. Furthermore, defendant failed to provide to this court “special circumstances” requiring the subpoenaed testimony of Bababekov (*see, In re Cavallo*, 66 AD3d 675 [2d Dept 2009]; *Tannenbaum v Tenenbaum*, 8 AD3d 360 [2d Dept 2004]). “The existence of such special circumstances is not established merely upon a showing that the information sought is relevant. Rather, special circumstances are shown by establishing that the information sought cannot be obtained through other sources” (*Tannenbaum v Tenenbaum, supra*). In the case at bar, movant has not set forth any evidence that would indicate that she cannot obtain the requested evidence from her own independent medical examiners (*see In re Cavallo, supra*). If the party issuing the subpoena has failed to show that the evidence sought cannot be obtained from sources other than the third party, then disclosure will not be granted (*see Tannenbaum v Tenenbaum, supra*.)

Accordingly, that branch of plaintiff’s application seeking to quash defendant’s subpoena is granted. Defendant’s application is therefore denied as moot.

That branch of plaintiff’s application requesting an order confirming that service of the summons and complaint is valid, is denied as moot, having pursuant to the December 20, 2013 court order. Plaintiff’s request for sanctions is denied.

Dated: March 31, 2015

  
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DARRELL L. GAVRIN, J.S.C.

**FILED**

APR -9 2015

COUNTY CLERK  
QUEENS COUNTY