

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
MARGARET HEALY,

Index No.: 21646/11

plaintiff,

AFFIDAVIT IN
SUPPORT

- against -

SLANEY O'HANLON and SUSAN McCARTHY,

defendants,

-----X

STATE OF NEW YORK)
) ss.:
COUNTY OF KINGS)

Michael J. Devereaux, hereby duly sworn, deposes and says under the penalties of perjury as follows:

1. The undersigned attorney is a member of the firm Devereaux, Baumgarten, with offices at 39 Broadway, Suite 910, New York, New York 10006, attorneys for the Plaintiff Margaret Healy and, as such, is familiar with the pleadings and prior proceedings heretofore had herein based on a series of the files maintained by our offices.

2. This affidavit is, respectfully, submitted in support of the relief requested in the instant motion to quash.

3. Defendants' pattern of lawlessness and gross disrespect for the Court and applicable law continues with the defendants having covertly served what was entitled and purported to be a "Judicial Subpoena," against a non-party that was not, however, neither a "Judicial" subpoena nor even issued by the Court. It was served on a non-party, without any of the prerequisite notices of any kind whatsoever, including, Judicial Law §753(A)(5), which makes it unenforceable. Defendants' disrespect for this Court and well-established applicable law is deliberate, willful and malicious requiring quashing of the so-called "Judicial Subpoena,"

contempt, sanctions, including attorneys' fees and costs, preclusion, suppression, an order of protection, together with such other and further relief just and proper in the circumstances.

4. Unbeknownst to plaintiff, defendants served what they misrepresented to be a "Judicial Subpoena," on a non-party, demanding that the non-party comply on the pain of punishment of contempt. Although defendants were required to notify plaintiff, defendants never did. Instead the non-party entity notified plaintiff. Although defendants were required to serve their subpoena with statutorily mandated notice pursuant to Judicial Law §753(A)(5), defendants failed to do so rendering it unenforceable. A copy of defendants' fatally defective and improper "Judicial Subpoena," is attached as Exhibit 1.

5. By letter, dated February 2nd, we notified defendants that we were made aware that defendants had served a fatally defective subpoena entitled "Judicial Subpoena," and to withdraw same. A true and accurate copy of the written request is attached as Exhibit 2.

6. The defendants, however, refused to withdraw their fatally defective subpoena, by letter received February 13th, a copy which is attached as Exhibit 3.

**DEFENDANTS AND THEIR ATTORNEYS WILLFULLY
AND MALICIOUSLY COVERTLY ISSUED AN
UNENFORCEABLE SUBPOENA MISREPRESENTING IT
AS A "JUDICIAL SUBPOENA"**

7. Where a non-party is subpoenaed, adverse parties must be afforded notice (Matter of *Beiney*, 129 AD2d 126, 131-132, 517 NYS2d 474, 477-478 [1st Dept 1987]) (attorney held in contempt, sanctioned, disqualified and records suppressed). In *Beiney*, the attorney covertly issued attorneys' subpoenas in violation of applicable law (*Id.*, 129 AD2d at 132-133, 517 NYS2d at 478, citing to *Siegel, Prac Commentaries, McKinney's Cons. Laws of N.Y.*, Book 7B, CPLR 3102 [C3102:2], 3111 [C3111:1], 3120 [C3120:12], at 262, 409, 522; see also *3A Weinstein-Korn-Miller, NY Civ. Prac.* ¶[3120.08]).

8. Here defendants not only failed to provide any notice, thus doing exactly what the attorneys in *Beiney* were guilty of, that is, the covert use of attorney-issued subpoenas, they did much worse than the *Beiney* attorneys. At bar, the defendants and their attorneys **covertly issued a subpoena misrepresenting it as “Judicial” subpoena issued by the Court although it was not a “Judicial Subpoena” issued by the Court** (emphasis added). Thus defendants and defendants’ attorneys should, at minimum, be held in contempt, and sanctioned.

9. The facts and circumstances, at bar, evidence, beyond any reasonable doubt and to a reasonable certainty, that the defendants and their counsel deliberately, willfully and maliciously failed to abide by the well-known and well-settled CPLR notice provisions as part of a “deliberate and thoroughly unprincipled effort to obtain a litigational advantage by whatever means seemed useful, including deceit.” (*Beiney*, 129 AD2d at 136, 517 NYS2d at 480).

**ELEMENTAL FAIRNESS REQUIRES SUPPRESSION,
PRECLUSION, AND PROTECTIVE ORDER**

10. The Court has held that “[a]s a matter of elemental fairness, all parties to an action have the right to appear at and participate in all pre-trial and trial stages of an action...” *Mollerson v. City of New York*, 178 Misc.2d 803, 807, 680 NYS2d 800, 803 (Supreme Court, New York County 1998). The Appellate Division held that a party has a constitutional right to be present at all stages. *Lunney v. Graham*, 91 AD2d 592, 593, 457 NYS2d 282 (1st Dept 1982); *Andruszewicz v. Atlas*, 13 AD3d 325, 788 NYS2d 395 (2d Dep’t 2004).

11. The defendants and their attorneys, however, covertly issued a “Judicial” subpoena misrepresenting it as issued by this Court to obtain ostensibly confidential and privileged information, of and relating to plaintiff.

12. Obtaining privileged, confidential information, in violation of the CPLR and applicable caselaw requires suppression and preclusion, and other relief, including attorneys' fees, costs and sanctions (Matter of *Beiney*, 129 AD2d 126, 517 NYS2d 474 [1st Dept 1987]).

13. In *Beiney*, the attorney violated the applicable law requiring notice (*Id.*) As a result, the information obtained from the non-party were suppressed and, among other dire results, the firm disqualified (*Id.*)

14. Similarly, at bar, the defendants and their attorneys, just as the attorneys in *Beiney*, violated the applicable law, including CPLR 2303, et. seq., to obtain non-party privileged confidential information, including confidential documents (*Beiney*, 129 AD2d at 126, 517 NYS2d at 474).

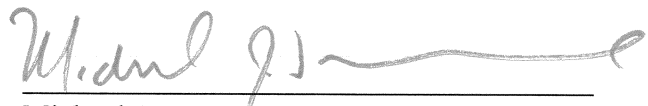
15. The circumstances at bar evidence that the plaintiffs' misconduct was and continues to be contumacious and severe, and calculated to manipulate and contrive the circumstances to covertly allow them to obtain plaintiff's confidential information and confidential documents without our presence and participation. The defendants' misconduct is thus obviously contumacious and severe (*Beiney*; *Cippitelli v. Town of Niskayuna*, 203 AD2d 632, 610 NYS2d 622 (3d Dept 1994) (suppression required due to violation of court order which is equivalent to violating CPLR); *Darius v. Darius*, 245 AD2d 663, 665 NYS2d 447 (3d Dep't 1997) (suppression due to improperly noticed deposition); *Amado v. Estrich*, 182 AD2d 1109, 583 NYS2d 85 (4h Dep't 1992) (suppression due to construably deceptive conduct); *Brussels Leasing Ltd Partnership v. Henne*, 174 Misc2d 535, 664 NYS2d 905 [Supreme Court, Queens County 1997] (sanction imposed for using subpoenas without notice)).

16. Precluding defendants from introducing evidence in their favor at trial and/or on summary judgment is, at minimum, an appropriate sanction in light of the drastic sanction of

dismissal of a plaintiff's complaint based on similar, certainly no more egregious misconduct than that by defendants at bar, in *Lipin v. Bender*, 193 AD2d 424, 597 NYS2d 340[1st Dept 1993] (drastic sanction of dismissal warranted for surreptitious removal and use of confidential documents). Plaintiffs' credit card records are, per se, confidential records. Defendants' covert use of a subpoena, misrepresenting it as "Judicial Subpoena," issued by this Court, to force a non-party to comply on the pain of punishment of contempt is deliberately, willful egregious misconduct.

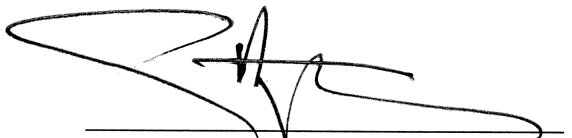
17. The relief sought herein has not been made to this and/or any other Court.

WHEREFORE, the Court is respectfully requested to grant the herein requested relief, together with such other and further relief as is just and proper in the circumstances.

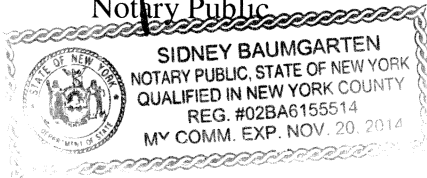


Michael J. Devereaux, Esq.
DEVEREAUX, BAUMGARTEN
Attorney for Plaintiff, MARGARET
HEALY
39 Broadway, Suite 910
New York NY 10006

Sworn to before me this
15th day of February, 2012



Notary Public



SIDNEY BAUMGARTEN
NOTARY PUBLIC, STATE OF NEW YORK
QUALIFIED IN NEW YORK COUNTY
REG. #02BA6155514
MY COMM. EXP. NOV. 20, 2014

Exhibit 1

Subpoena / Healy 10177

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----x
MARGARET HEALY

Index No. 21646/11

Plaintiff,

-against-

SLANEY O'HANLON and SUSAN McCARTHY,

JUDICIAL SUBPOENA

Defendant.
-----x

THE PEOPLE OF THE STATE OF NEW YORK

TO: Jerome A. Scharoff, Esq.
100 Garden City Plaza, Suite 205
Garden City, NY 11530

WE COMMAND YOU, that all business and excuses being laid aside, you and each of you appear and attend before Hon. Yvonne Lewis at the Courthouse located at Civic Center, Brooklyn, New York, Pt. 32. On the 22nd day of February, 2012, at 10 o'clock in the forenoon, and at any recessed and adjourned date to give testimony in this action on the part of the defendants.

Failure to comply with this subpoena is punishable as a contempt of Court and shall make you liable to the person on whose behalf this subpoena was issued for a penalty not to exceed fifty dollars and all damages sustained by reason of your failure to comply.

WITNESS, Honorable Yvonne Lewis one of the Justices of said Court, at the Civic Center, Brooklyn, New York on the 27th day of January, 2012.



ALTER & ALTER
Attorneys for Plaintiffs
300 East 42nd Street
New York, New York 10017
(212) 867-7777

Exhibit 2

DEVEREAUX, BAUMGARTEN

39 BROADWAY, SUITE 910
NEW YORK, NEW YORK 10006
(212) 785-5959 / Fax No. (212) 785-4487
www.devlegal.com

Michael J. Devereaux
Sidney Baumgarten

Thomas J. Chaves *

Comptroller
Catherine Martino

Office Manager
Jonathan Paladini

*Admitted in NY, NJ

February 2, 2012

URGENT

By Mail

Stanley Alter, Esq.
ALTER & ALTER LLP
300 East 42nd Street, 10th Floor
New York, New York 10017

Re: Margaret Healy v Slaney O'Hanlon et al.
Supreme Court, Kings County, Index No. 21646/11

Dear Mr. Alter:

Your "Judicial Subpoena," dated January 27, 2012, against the non-party attorney Jerome A. Scharoff, Esq., is fatally defective and, accordingly, must be withdrawn. It is also defective in that it seeks irrelevant and, in any event, privileged, immunized and/or confidential information, including documents.

It plainly fails to comply with the CPLR and applicable caselaw, including, but not limited to, CPLR 3101 (a)(4). It is also not a "Judicial Subpoena," issued by the Court, although it is improperly misrepresented to be one issued with the power of, and by the Court. It is also not made on behalf of "The People of the State of New York," although again it is misrepresented to be one so made. The CPLR and applicable caselaw is very precise and lucid with respect to what pre-trial subpoenas need to contain, the notice to be served regarding same, where and when it is to be returnable, Simply none of these CPLR provisions were complied with even in the slightest.

Please notify the undersigned, in writing, that it is withdrawn and that the non-party has been notified that it is withdrawn. If you refuse to withdraw same, please notify the undersigned immediately.

Stanley Alter, Esq.
February 2, 2012
Page 2

Thank you for your kind attention and cooperation.

Truly yours,

Michael J. Devereaux, Esq.
DEVEREAUX BAUMGARTEN

MJD/jp

cc: Jerome A. Scharoff, Esq. (via fax)

Exhibit 3

ALTER & ALTER
COUNSELORS AT LAW
300 EAST 42 STREET
TENTH FLOOR
NEW YORK, NEW YORK 10017
212-867-7777

STANLEY ALTER
STEPHANIE S. ALTER
IVAN S. ALTER

FEB 13 2012

(M)

Healy
1/10/12

February 9, 2012

Michael J. Devereaux, Esq.
Devereaux, Baumgarten
39 Broadway, Suite 910
New York, NY 10006

Re: Margaret Healy v. Staney O'Hanlon et al
Index No. 2164 6/11

Dear Mr. Devereaux:

In response to your letter dated February 7, 2012 regarding the Subpoena served upon Jerome Scharoff for his appearance on February 22, 2012, the Subpoena will not be withdrawn. The Subpoena served upon Mr. Scharoff, was and is a valid Subpoena, and I respectfully submit that your attempt to establish otherwise has absolutely no basis in fact or law.

I expect that Mr. Scharoff will attend as he is required to do so.

Very truly yours,


Stanley Alter

Cc: Jerome Scharoff

2/13/12

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JONATHAN PALADINI, being duly sworn, deposes and says: Deponent is not a party to the action, is over 18 years of age and resides in Kings County, New York.

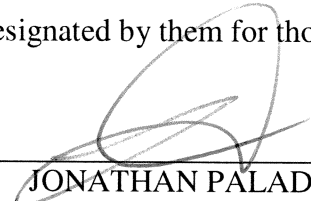
On February 15, 2012, deponent served the within

- **AFFIDAVIT IN SUPPORT with EXHIBITS 1 – 3**

Upon:

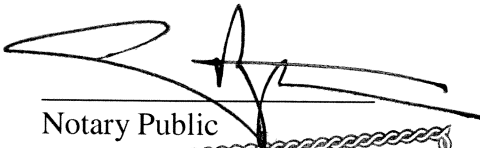
Stanley Alter, Esq.
ALTER & ALTER LLP
300 East 42nd Street, 10th Floor
New York, New York, 10017

by depositing true copies in a post-paid wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York, properly addressed to each of said attorney(s) at the above address designated by them for those purposes.



JONATHAN PALADINI

Sworn to before me this
15rd day of February 2012



Notary Public

