SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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MARGARET HEALY, Index No.: 21646/11

plaintiff,

- against –

SLANEY O'HANLON and SUSAN McCARTHY,

defendants,

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PLAINTIFF'S MEMORANDUM OF LAW SUBMITTED IN SUPPORT OF INSTANT MOTION TO QUASH

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Statement of Facts

Please see the original Affidavit of Michael J. Devereaux, Esq., sworn-to the 15th of February, 2012, with attached exhibits, which is incorporated-by-reference as though actually and fully repeated herein at length word-for-word.

Summary of Argument

Defendants' pattern of lawlessness and gross disrespect for the Court and applicable law continues with the defendants having covertly served a subpoena on a non-party without any of the prerequisite notices of any kind whatsoever, including, most importantly, Judiciary Law §753(A)(5) notice. Defendants may have served other entities with subpoenas without any such notice to plaintiff which should also all be quashed.

Defendants' disrespect for this Court and well-established applicable law is deliberate, willful and malicious requiring quashing of the 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.

Point 1

THE NON-PARTY SUBPOENAED ENTITY, NOT DEFENDANTS, NOTIFIED PLAINTIFF THAT HE WAS SERVED WITH WHAT WAS PURPORTEDLY AN UNENFORCEABLE "JUDICIAL SUBPOENA" REQUESTING PRIVILEGED, IMMUNIZED INFORMATION

Unbeknownst to plaintiff, defendants covertly served a "Judicial" subpoena on a non-party entity demanding that the non-party comply on the pain of punishment of contempt if he did not appear. The non-party Jerome A. Scharoff, Esq., notified plaintiff, that the defendants served him with a document entitled "Judicial Subpoena," although not signed by the Court. The purported "Judicial Subpoena,' is plainly defective and unenforceable because, among other

things, it failed to comply with Judicial Law §753(A)(5). The defendants' "Judicial Subpoena," also requests palpably improper privileged, immunized information because he is adversary counsel. There is plainly no information he can provide that is not privileged and immunized. It is plainly irrelevant to this hearing and palpably improper.

By letter, dated February 2nd, the defendants were notified that we were made aware that defendants had served a "Judicial Subpoena," that plainly was not a "Judicial Subpoena," and that defendants had served it without any notice to defendants, and failed to comply with applicable law and to account for the subpoena. However, defendants improperly refused to withdraw it.

Point 2

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

Where discovery is conducted against a non-party, adverse parties must be afforded notice (*Matter of Beiney*, 129 AD2d 126, 131-132, 517 NYS2d 474, 477-478 [1st Dept 1987]) (attorneys 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)).

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 an unenforceable subpoena misrepresenting it as "Judicial" subpoena issued by the**

Court (emphasis added). Thus defendants and defendants' attorneys should, at minimum, be held in contempt, and sanctioned.

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).

Point 3

ELEMENTAL FAIRNESS REQUIRES SUPRESSION, PRECLUSION, AND PROTECTIVE ORDER

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]; *Andrusziewicz v. Atlas,* 13 AD3d 325, 788 NYS2d 395 [2d Dept 2004]).

The defendants and their attorneys, however, covertly issued "Judicial" subpoenas misrepresenting them as issued by this Court to obtain the plaintiff's confidential information, including the plaintiff's confidential records of and relating to plaintiffs.

Obtaining confidential information, including confidential documents 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]).

In *Beiney*, the attorney violated the applicable law requiring notice of a subpoenaed non-party deposition to be provided (*Id.*) As a result, the information, including documents obtained from the non-party were suppressed and, among other dire results, the firm disqualified (*Id.*)

Similarly, at bar, the defendants and the defendants' attorneys, just as the attorneys in *Beiney*, violated the applicable law, including Juciciary Law §753 (A)(5); CPLR 2303, et. seq., to obtain non-party confidential information (*Beiney*, 129 AD2d at 126, 517 NYS2d at 474).

The circumstances at bar evidence that the plaintiffs' misconduct was and continues to be deliberate, willful, contumacious and severe, and calculated to manipulate and contrive the circumstances to covertly allow them to obtain plaintiffs' confidential information and confidential documents without plaintiffs' presence and participation. The defendants' misconduct is thus obviously deliberate, willful, 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 Dept 1997]) (suppression due to improperly noticed deposition); *Amado v. Estrich,* 182 AD2d 1109, 583 NYS2d 85 [4h Dept 1992]) (suppression due to construably deceptive conduct); *Brussels Leasing Ltd Partnership v. Henne,* 174 Misc2d 535, 664 NYS2d 905 [Supreme Court, Queens County 1997] (sanctions imposed for using subpoenas without notice)).

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 subpoenas, mis-representing them as "Judicial" Subpoenas, issued by this Court, to force a non-party to comply on the pain of punishment of contempt is deliberately, willful egregious misconduct further exacerbated by the repeated refusal to reveal any and all subpoenas so covertly issued.

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

Conclusion

For the compelling reasons herein stated, the Court is, respectfully, requested to grant the motion, together with such other and further relief as is just and proper in the circumstances.

Dated: February 15, 2012
New York, New York

Michael J. Devereaux, Esq.
DEVEREAUX, BAUMGARTEN
Attorneys for Plaintiff
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New York NY 10006

To: Stanley Alter, Esq.
ALTER & ALTER LLP
Attorney for Defendants, SLANEY O'HANLON and SUSAN McCARTHY
300 East 42nd Street, 10th Floor
New York, New York 10017
(212) 867-7777

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

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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

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