

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

-----X		
RAFAEL KHAVASOV,	:	
	:	Index No. 704413/2015
Plaintiff,	:	
	:	Motion Seq. No. 2
-against-	:	
	:	
MARK SHAKAROV,	:	AFFIRMATION
	:	IN SUPPORT
Defendant.	:	
-----X		

CHARLES A. STEWART, III, an attorney admitted to practice in the State of New York,
affirms under penalty of perjury as follows:

1. I am a member of Stewart Occhipinti, LLP, attorneys for Mark Shakarov, the Defendant in the above captioned action. I respectfully submit this affirmation in support of Defendant's motion for an Order, pursuant to CPLR 2221(d) and/or (e), allowing for reargument and/or renewal of the motion designated "Motion Sequence No. 1," and, upon the granting of same, and upon consideration of the papers previously submitted by the parties in connection with Motion Sequence No. 1, entering an order:

- a) Pursuant to NYCRR 202.21(e), vacating the Notice of Issue and Certificate of Readiness and striking the action from the trial calendar on the ground that discovery has not been completed and this action is not ready for trial; and
- b) Pursuant to CPLR § 3124, compelling Plaintiff RAFAEL KHAVASOV to produce all documents required under the Court's compliance order dated December 16, 2015, including those responsive documents in the possession and control of companies that he owns; and
- c) Pursuant to CPLR § 3124, compelling Non-Party A & R INTERNATIONAL, LLC D/B/A GASTRONOM INTERNATIONAL MARKET to produce all documents responsive to Schedule A attached to the subpoena duces tecum dated December 15, 2016 served upon it by Plaintiff.

PROCEDURAL BACKGROUND OF MOTION SEQUENCE NO. 1

2. On February 3, 2016, Defendant moved by order to show cause for the relief described above. The Hon. Janice A. Taylor executed the Order to Show Cause on February 22, 2016. A true and correct copy of the Order to Show Cause executed by Justice Taylor is attached hereto as Exhibit A.

3. In compliance with the Order to Show Cause, the conformed Order to Show Cause to strike the note of issue and compel discovery and accompanying papers were served by Federal Express on Ray Beckerman, Esq., attorney for Plaintiff Rafael Khavasov and non-party A & R International LLC d/b/a GASTRONOM INTERNATIONAL MARKET (“Gastronom”) by FEDERAL EXPRESS on February 24, 2016, at 10:30 a.m. A true and accurate business record provided by Federal Express to my law firm, demonstrating that a mailing was provided by Stewart Occhipinti, LLP to Federal Express on February 23, 2016 and delivered by Federal Express to Ray Beckerman, Esq., counsel for Plaintiff and non-party Gastronom, on February 24, 2016 is attached hereto as Exhibit B.

4. I personally observed the order to show cause papers, including the conformed Order to Show Cause, being readied by a paralegal on February 23, 2016 for mailing to Plaintiff’s counsel by Federal Express.

5. Unfortunately, the affirmation of service prepared by my office, which I signed, neglected to indicate that service of the Order to Show Cause and accompanying papers had been made upon Plaintiff’s counsel by Federal Express. Instead, it merely stated that it had been caused to be delivered to Plaintiff’s counsel on February 23, 2016.

6. Plaintiff filed opposition papers to Defendant’s motion on March 20, 2016. In these papers, Plaintiff did not argue that Defendant had failed to comply with the Court’s order as

to the manner of service of the Order to Show Cause. Instead, Plaintiff opposed the motion on the merits.

7. The parties appeared before the Hon. Janice A. Taylor on March 22, 2016 to argue the motion. At this hearing, no issue was raised by the Court or the parties regarding the manner of service of the Order to Show Cause, or a failure to comply with the Court's order. If the issue had arisen, counsel for Defendant was prepared to advise the Court that service had been effected in compliance with the Court's Order, i.e., by Federal Express upon Plaintiff's counsel, and records of Federal Express demonstrating such service were electronically available.

8. On April 11, 2016, Plaintiff filed supplemental papers in opposition to the motion. In these supplemental papers, Plaintiff raised no issue regarding Defendant's failure to comply with the Court's order.

9. On July 19, 2016, we received a copy of the Court's decision denying the motion solely on the ground that the affirmation of service filed in the action did not specify the manner of service of the order to show cause papers upon Plaintiff's counsel and, therefore, the Court was unable to determine whether Defendant had complied with its Order. A true and correct copy of the Court's July 19, 2016 Order and Decision is attached hereto as Exhibit C.

10. Defendant has filed an Amended and Corrected Affidavit of Service to reflect the fact that service of the Order to Show Cause and supporting papers complied in all respects with the Court's February 22, 2016 Order to Show Cause. In fact, the Order to Show Cause and accompanying papers were delivered to Plaintiff's counsel on February 24, 2016, five (5) days before the date directed in the Court's order.

11. Attached to this affirmation as Exhibits D-1 to D-22 are true and accurate copies of the papers previously filed by the parties in connection with Defendant's Order to Show Cause

designated as Motion Sequence No. 1. The chart below describes the motion and indicates the Court's docket number of the papers as originally electronically filed.

Documents filed by the Parties: Motion Seq. 1	Docket No.	Stewart Ex.
Proposed Order to Show Cause	16	D-1
Affirmation in Support of Motion	17	D-2
Exhibit A: Summons and Complaint	18	D-3
Exhibit B: Plaintiff Interrogatory Responses	19	D-4
Exhibit C: Answer	20	D-5
Exhibit D: Plaintiff's Deposition	21	D-6
Exhibit E: Supplemental Discovery Requests	22	D-7
Exhibit F: December 4, 2015 Letter	23	D-8
Exhibit G: Compliance Order	24	D-9
Exhibit H: Redacted Production	25	D-10
Exhibit I: Gastronom Subpoena	26	D-11
Exhibit J: Gastronom Objections	27	D-12
Exhibit K: PC Order	28	D-13
Exhibit L: Notice of Issue/Certificate of Readiness	29	D-14
Emergency Affirmation in Support of OSC	30	D-15
Memorandum of Law in Support of Motion	31	D-16
Affidavit in Opposition to Motion	33	D-17
Exhibit A: Pleadings	34	D-18
Exhibit B: Preliminary Conference Order	35	D-19
Exhibit C: Defendant's Second Notice for Discovery, and Plaintiff's Responses	36	D-20

Exhibit D: Compliance Conference Order	37	D-21
Exhibit E: Pay Stubs	38	D-22
Exhibit F: Subpoena and Objections to Subpoena	39	D-23
Supplemental Affidavit in Opposition to Motion	41	D-24
Exhibit A: Pages 39-40 of Deposition Transcript of Rafael Khavasov	42	D-25
Reply Affirmation of Occhipinti	43	D-26
Exhibit A: Pages of Deposition Transcript of Rafael Khavasov	44	D-27
Exhibit B: Plaintiff's responses to supplemental discovery	45	D-28
Exhibit C: Proposed subpoena for Rafael's Deli Corp.	46	D-29
Exhibit D: Photograph of Gastronom	47	D-30
Exhibit E: Photograph of Rafael's Deli	48	D-31
Reply Affirmation of Caminiti	49	D-32
Memorandum of Law in Reply	48	D-33

12. The relief sought by the Defendant's Order to Show Cause (i.e., Motion Sequence No. 1), originally filed on February 3, 2016, is critical and necessary to Defendant's defense of this action. We respectfully submit that the interests of justice are only served if Defendant's motion is fully considered on the merits, particularly where there is no question that Defendant fully complied with the Court's order by delivering the conformed copy of the Order to Show Cause and all accompanying papers to Plaintiff's counsel by Federal Express on February 24, 2016 at 10:30 a.m., as reflected in the Amended and Corrected Affirmation of Service, a true and correct copy of which is attached hereto as Exhibit E.


13. The next pre-trial conference in this matter is scheduled for October 25, 2016.

14. No prior request has been made for the relief sought by the instant application for reargument and/or renewal of Defendant's motion designated "Motion Sequence No. 1."

WHEREFORE, I respectfully request that the Court issue an order pursuant to CPLR 2221 (d) and/or (e) allowing for reargument of Defendant's motion designated "Motion Sequence No. 1", and, upon the granting of same, entering an order:

- a) Pursuant to NYCRR 202.21(e), vacating the Notice of Issue and Certificate of Readiness and striking the action from the trial calendar on the ground that discovery has not been completed and this action is not ready for trial; and
- b) Pursuant to CPLR § 3124, compelling Plaintiff RAFAEL KHAVASOV to produce all documents required under the Court's compliance order dated December 16, 2015, including those responsive documents in the possession and control of companies that he owns; and
- c) Pursuant to CPLR § 3124, compelling Non-Party A & R INTERNATIONAL, LLC D/B/A GASTRONOM INTERNATIONAL MARKET to produce all documents responsive to Schedule A attached to the subpoena duces tecum dated December 15, 2016 served upon it by Plaintiff.

Dated: New York, New York
July 20, 2016



Charles A. Stewart, III