

At an IAS Term, Part Comm-2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 5th day of February, 2007.

P R E S E N T:

HON. CAROLYN E. DEMAREST,

Justice.

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PROGRESSIVE NORTHEASTERN INSURANCE COMPANY,

Plaintiff,

- against -

Index No. 27202/06

GERMAN LAUFER, ET ANO.,

Defendants.

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The following papers numbered 1 to 4 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1-2 _____
Opposing Affidavits (Affirmations) _____	3 _____
Reply Affidavits (Affirmations) _____	4 _____
_____ Affidavit (Affirmation) _____	_____
Other Papers _____	_____

Upon the foregoing papers in this action by plaintiff Progressive Northeastern Insurance Company (plaintiff) alleging a fraudulent scheme on the part of defendants Milan Medical, P.C. (Milan) and German Laufer (Laufer) (collectively, defendants) involving payment of no-fault insurance benefits for medical services, defendants move, pursuant to

CPLR 2304 and 3103, for an order quashing a subpoena duces tecum, dated October 5, 2006, issued by plaintiff to HSBC Bank.

Milan was incorporated in New York State on August 24, 2000 as a domestic professional corporation which provides medical services. Laufer is licensed to practice as a physician in New York, and is the sole shareholder and owner of Milan. Non-physicians are legally prohibited from sharing ownership in a professional medical services corporation, such as Milan (*see* Business Corporation Law §§ 1507, 1508; *State Farm Mut. Auto. Ins. Co. v Mallela*, 4 NY3d 313, 320 [2005]). In addition, a provider of health care services is not eligible for reimbursement, pursuant to Insurance Law § 5102 (a) (1), of no-fault benefits, which include payment for medical services to persons injured in automobile accidents, “if the provider fails to meet any applicable New York State or local licensing requirement” (11 NYCRR 65-3.16 [a] [12]; *see also* *State Farm Mut. Auto. Ins. Co.*, 4 NY3d at 322).

On September 11, 2006, plaintiff filed this action against defendants. Plaintiff alleges that Milan, with the complicity of Laufer, operates in violation of New York State laws. Specifically, plaintiff asserts that Milan was incorporated as part of a fraudulent scheme in which non-professionals illegally operate and profit from professional medical service corporations by billing insurance companies, such as it, with no-fault endorsements. Plaintiff also asserts that the profits of Milan are actually funneled to three management companies, i.e., Mara Services, Inc. (Mara), Mirka United, Inc. (Mirka), and Graham Management Group, Inc. (Graham), which, it claims, are owned by three convicted felons, i.e., Jacob

Kagan, Margarita Khalavsky, and Robert Khalavsky. Plaintiff claims that since Milan's incorporation, Milan paid \$5 million to Mara, Mirka, and Graham. Plaintiff further claims that Jacob Kagan operates and controls every aspect of Milan, other than the treatment of patients.

Plaintiff served a notice of non-party deposition, dated October 5, 2006, on HSBC Bank, scheduling its deposition "concerning all of the relevant facts and circumstances in connection with the issues in plaintiff's complaint concerning Milan." The notice required the person to be examined from HSBC Bank to produce documents in accordance with an enclosed subpoena duces tecum. The subpoena duces tecum, also dated October 5, 2006, served upon HSBC Bank, demanded that HSBC Bank produce "[a]ll HSBC bank records in the name of Milan . . . for account number 995730083."

Defendants, in their instant motion, seek to quash the subpoena duces tecum served on HSBC Bank. They assert that the subpoena duces tecum fails to contain a "notice stating the circumstances or reasons such disclosure is sought or required" as mandated by CPLR 3101 (a) (4). They argue that due to this omission of the requisite notice, the subpoena duces tecum is facially defective and must be quashed. It has been specifically held, however, that "although the better practice, indeed the mandatory requirement of CPLR 3101 (a) (4), is to include the requisite notice on the face of the subpoena or in a notice accompanying it," a motion to quash a subpoena duces tecum should nevertheless be denied where the papers in opposition to the motion articulate the need for the discovery sought, such discovery is not

unduly burdensome to the custodian of the document, and there is an absence of any apparent prejudice to the non-party served (*Velez v Hunts Point Multi-Serv. Ctr.*, 29 AD3d 104, 111 [2006]; see also *Matter of State of N.Y. - Off. of Mental Retardation & Dev. Disabilities v Mastracci*, 77 AD2d 473, 475 [1980]; *Paterson v Niagara County Legislature, Comm. on Investigations of Legislature of County of Niagara*, 59 AD2d 1062, 1062 [1977]; *Matter of Stevens Imports v Lack*, 52 AD2d 928, 928 [1976], *aff'd* 41 NY2d 939 [1977]; *Matter of New York State Bd. of Elections*, 49 AD2d 806, 806 [1975]; *Buckingham Badler Assocs. v Best Equities, LLC*, 12 Misc 3d 1161 [A], *6, 2006 NY Slip Op 50987 [U] [2006]; *Matter of Syracuse Coop. Milk Distributors' Bargaining Agency v Attorney-General of State of N.Y.*, 13 Misc 2d 26, 27 [1958]).

Plaintiff's opposition papers articulate the need for the discovery sought. Plaintiff asserts that it has unsuccessfully requested Milan's financial records a number of times over the course of the last 10 months by correspondence with Milan's counsel. It has also deposed Laufer, but at his deposition, Laufer could not recall the amount of money Milan is supposed to pay Mara each month, or whether Milan ever paid any money to Mirka, Graham, or Jacob Kagan. Plaintiff asserts that it needs to review Milan's bank records in order to determine whether Milan's profits are being funneled to non-licensed individuals, such as Jacob Kagan, through payments to management companies.

"It is well settled that 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*, 29 AD3d at 112; *see also Matter of Terry D.*, 81 NY2d 1042, 1044 [1993]). “It is equally well settled that a motion to quash a subpoena duces tecum should be granted only where the materials sought are utterly irrelevant to any proper inquiry” (*Velez*, 29 AD3d at 112; *see also New Hampshire Ins. Co. v Varda, Inc.*, 261 AD2d 135, 135 [1999]; *Matter of Reuters Ltd. v Dow Jones Telerate*, 231 AD2d 337, 341 [1997]; *General Elec. Co. v Rabin*, 184 AD2d 391, 392 [1992]). “Moreover, the burden of establishing that the requested documents and records are utterly irrelevant is on the person being subpoenaed” (*Gertz v Richards*, 233 AD2d 366, 366 [1996]; *see also Velez*, 29 AD3d at 112).

Here, defendants contend that since a greater fraudulent scheme involving other non-licensed individuals and other clinics is involved, HSBC Bank’s documents have no relevance. Such contention is devoid of merit. As discussed above, plaintiff specifically claims that Milan is part of, and intricately involved in this fraudulent scheme, and that it needs the bank records in order to show Milan’s involvement based upon its payments to these non-licensed individuals and management companies. Thus, defendants have failed to meet their burden of demonstrating that the requested bank documents are “utterly irrelevant to any proper inquiry” (*New Hampshire Ins. Co.*, 261 AD2d at 135, quoting *Ayubo v Eastern Kodak Co.*, 158 AD2d 641, 642 [1990]; *see also Velez*, 29 AD3d at 113; *Buckingham Badler Assocs.*, 12 Misc 3d at *6). Rather, plaintiff has demonstrated that such bank records are material and necessary to its claim of alleged fraudulent activities and

payments, and to the facts at issue in this lawsuit. Consequently, the bank records have been shown to be relevant to the prosecution of plaintiff's action (*see Lexington Acupuncture, P.C. v State Farm Ins. Co.*, 12 Misc 3d 90, 92-93 [2006]; *Continental Med. Acupuncture Servs., P.C. v Travelers Ins. Co.*, 13 Misc 3d 132 [A], *1, 2006 NY Slip Op 51890 [U] [2006]).

The production of the bank records also will not constitute an undue burden on HSBC Bank. The bank records are not voluminous, but only specify one account number, which HSBC Bank has in its custody and can readily produce.

With respect to the issue of prejudice to HSBC Bank, it is noted that the purpose of the notice requirement "is presumably to afford a nonparty who has no idea of the parties' dispute or a party affected by such request an opportunity to decide how to respond." Defendants argue that without the requisite notice, HSBC Bank cannot possibly know how to respond and that it is, therefore, necessary that they act in its place and stead to object to the subpoena duces tecum.

Defendants' argument is rejected. The notice of deposition, served along with the subpoena duces tecum (as discussed above), stated that disclosure was being sought in connection with the issues in plaintiff's complaint concerning Milan. Moreover, the subpoena duces tecum seeks to compel the production of documents that pertain solely to Milan, not to HSBC Bank, who is merely the custodian of its bank records (*see Buckingham Badler Assocs.*, 12 Misc 3d at *6). Thus, there is no apparent prejudice to HSBC Bank,

which does not object to complying with the subpoena duces tecum (*see Velez*, 29 AD3d at 111-112).

Defendants, in their motion papers, also request a protective order in accordance with CPLR 3103. Pursuant to CPLR 3103 (a), a protective order may be granted “to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person.” Defendants contend that they need a protective order because the subpoena duces tecum constitutes an attempt to harass them. In view of the relevancy of the requested bank records, defendants have not established that plaintiff has sought such records to harass them. Therefore, based upon plaintiff’s legitimate need for these documents, a protective order is not warranted.

Accordingly, defendants’ motion for an order quashing the October 5, 2006 subpoena duces tecum issued by plaintiff to HSBC Bank is denied. HSBC Bank is directed to comply with the subpoena duces tecum within 20 days of service upon it of a copy of this decision and order, with notice of entry.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.