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CASE NUMBER: 2020-CV-000442
PII COMPLIANT



Court: Shawnee County District Court
Case Number: 2020-CV-000442
Case Title: Dale Svacina - Individually and Derivatively obo
Jr vs. Kimberly Koehler - Representative Capacity
and Individually, et al.
Type: Memorandum Decision And Order On Robert Brown's
Motion To Quash Subpoena

SO ORDERED.

A handwritten signature in cursive script that reads "M.E. Christopher".

/s/ Honorable Mary E Christopher, District Judge

**IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION EIGHT**

DALE SVACINA, JR., individually and derivatively on
behalf of 4R CONSTRUCTION COMPANY, LLC and
HUNDRED-PROOF PROPERTY MANAGEMENT, LLC,

Plaintiffs/Counterclaim Defendants,

vs.

KIMBERLY KOEHLER, in her representative capacity
and individually, 4R CONSTRUCTION COMPANY, LLC
and HUNDRED-PROOF PROPERTY MANAGEMENT,
LLC,

Defendants/Counterclaim Plaintiffs.

2020-CV-442

MEMORANDUM DECISION AND ORDER
ON ROBERT BROWN’S MOTION TO QUASH SUBPOENA

This matter is now before the Court on non-party Robert Brown’s *Motion to Quash Subpoena*, filed June 8, 2023, the defendant’s *Response* and Brown’s *Reply*.

Mr. Brown is self-represented. The Defendants are represented by their counsel Paul Snyder. Plaintiffs are represented by their counsel David Cooper and Blake Porter, however plaintiffs have chosen not to respond to the motion. The Court finds oral argument would not aid the Court materially under Kansas Supreme Court Rule 133(c)(1). There are no appearances before the Court.

The Court has reviewed the motion, response, and all supporting briefs of the parties. After careful consideration and being fully apprised on the premises, the Court finds as follows:

I. OVERVIEW

Plaintiff Dale Svacina filed this litigation, which includes 12 separate counts. He seeks an order declaring him part-owner of 4R and Hundred-Proof or, in the alternative, back wages. Svacina alleges a verbal agreement between himself, Koehler, and another individual, Kirk Revelle, dealt with the parties' intention to split the annual net profits. The defendants filed several counterclaims against Svacina, including assault, battery, and replevin.

II. FACTS

1. Mr. Brown was subpoenaed by defendants to provide trial testimony. The subpoena was served on June 6, 2023 at 6:27 p.m. and was accompanied by a draft for \$20.00. (See Ex. A, Motion to Quash.)

2. The subpoena commands Mr. Brown to appear in the Shawnee County District Courthouse to testify at a trial in this action on Wednesday, June 14, 2023, at 9:00 a.m. (See Ex. A, Motion to Quash.)

3. Counsel for the defendants prepared a cover letter that was served on Mr. Brown along with the subpoena. In the cover letter counsel states: "I am happy to make this appearance as convenient as possible for you, so please call me at XXX-XXX-XXXX and I will be happy to discuss any arrangements that are possible under the circumstances. I will also be happy to share with you the subject matter of the questions I intend to ask you at trial so there are no surprises." (See Ex. A, p. 2, Motion to Quash.)

4. Counsel for defendants additionally maintains he "offered to have Brown sign an affidavit in lieu of testifying live in person, if counsel for [p]laintiff would be amenable to that." (See *Resp. to Motion.*)

III. ANALYSIS

Mr. Brown asks that this Court quash the trial subpoena pursuant to K.S.A. 60-245(c)(1); 60-245(c)(3)(A)(i); and 60-245(c)(3)(A)(iv). Alternatively, he asks that the defendants, as the subpoenaing party, be required to show a substantial need for his testimony; compensate him at the rate of \$85.00 per day; and compensate him for the costs of retaining representation including preparation time with counsel of his choosing.

Mr. Brown voices a general objection to the scope of the subpoena, arguing since he was subpoenaed to testify about “Bob Brown” the subpoena is all encompassing and no subject of his entire life is off the table. Brown states it leaves him without a way to prepare for trial. Brown argues defendants use of subpoena power is in an overbroad attempt to supplement discovery after discovery has closed.

Brown’s argument appears to refer to a document that is not the subpoena itself, but rather the cover page issued by the Clerk’s Office. (See Ex. A, p. 1.) The actual subpoena document states Brown “*must appear in the district court at the time, date, and place set forth below to testify at a trial in this action.*” (See Ex. A, p. 2.) This is standard language contained in subpoenas issued by the Clerk of the Court. Thus, the Court concludes Brown’s argument has no merit.

A. **K.S.A. 60-246(c)(1) Protecting Person Subject to Subpoena, Avoiding Undue Burden**

Under K.S.A. 60-245(c)(1), “[a] party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction, which may include lost earnings and reasonable attorney’s fees, on a party or attorney who fails to comply.”

Mr. Brown does not describe the precise nature of the undue burden attendance at trial will create. His motion does not provide the Court anything that would assist it in identifying a hardship setting him apart from other witnesses who may have been subpoenaed to appear at trial.

Counsel for the defendants provided a letter in which he offers to discuss any arrangements for Mr. Brown's trial appearance, and to discuss the questions that he intends to ask. In addition, counsel for defendants maintains he "offered to have Brown sign an affidavit in lieu of testifying live in person." Under these circumstances, this Court does not find adequate grounds to quash the subpoena under K.S.A. 60-245(c)(1).

B. K.S.A. 60-246(c)(3) Quashing or Modifying a Subpoena

Mr. Brown also asks that this Court quash the trial subpoena pursuant to K.S.A. 60-245(c)(3)(A)(i), and 60-245(c)(3)(A)(iv). Those subsections of the statute state as follows:

(3) *Quashing or modifying a subpoena.*

(A) *When required.* On timely motion, the issuing court must quash or modify a subpoena that:

- (i) Fails to allow a reasonable time to comply;
- (ii) requires a resident of this state who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed or regularly transacts business in person or requires a nonresident who is neither a party nor a party's officer to travel more than 100 miles from where the nonresident was served with the subpoena, is employed or regularly transacts business in person, except that, subject to paragraph (3)(B)(iii), the person may be commanded to travel to the place of trial;
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

K.S.A. 60-245(c)(3)(A).

In his motion, Mr. Brown argues the subpoena should be quashed under K.S.A. 60-245(c)(3)(A)(i) because it fails to allow a reasonable time to comply. Brown objects to the 8 days'

time between the date the subpoena was served on him and the date he is commanded to appear and testify, arguing that period is insufficient for him to meet with an attorney and prepare for his testimony. However, Brown is self-represented and there are no express statements or statements from which the Court might infer that Brown is making arrangements to meet with or retain counsel in regard to this matter. Even if he were to retain counsel, Brown is not being called as an expert witness. Eight days is sufficient time to arrange a meeting with counsel to prepare for a general trial appearance. Under these circumstances, this Court does not find adequate grounds to quash the subpoena for failure to allow adequate time to comply under K.S.A. 60-245 c)(3)(A)(i).

Brown also argues the subpoena should be quashed under K.S.A. 60-245(c)(3)(A)(iv) because it subjects him to undue burden. Counsel for defendants states when he contacted Mr. Brown by phone on June 8, 2023, Mr. Brown confirmed that plaintiff Dale Svacina, Jr. had worked for Mr. Brown and his companies very recently, and that the statements in Brown's motion regarding how Brown had had no contact with plaintiff were as of August 2020, when this lawsuit was filed. Counsel for defendants additionally maintains he "offered to have Brown sign an affidavit in lieu of testifying live in person, but Brown refused this offer."

After careful review of Brown's motion and reply, it appears Brown himself may be responsible for a good deal of the burden of which he complains. Counsel for defendants has taken "reasonable steps to avoid imposing undue burden" by offering to have Brown sign an affidavit in lieu of testifying live in person. In short, this Court does not find sufficient grounds to quash the subpoena for undue burden under K.S.A. 60-245(c)(3)(A)(iv).

C. Brown's Alternative Requests for Compensation

Alternatively, Mr. Brown asks that the defendants, as the subpoenaing party, be required to show a substantial need for his testimony; compensate him at the rate of \$85.00 per day; and compensate him for the costs of retaining representation including preparation time with counsel of his choosing. The relevant statute states:

(C) *Specifying conditions as an alternative.* In the circumstances described in subsection (c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions as the serving party:

- (i) Shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

K.S.A. 60-245(c)(3)(C).

This Court declines to authorize a payment of \$85.00 per day to Brown, as \$20.00 per day is the rate at which all witnesses are compensated. Notably, however, K.S.A. 60-245(b) requires “the fees for one day’s attendance *and the mileage allowed by law.*” K.S.A. 60-245(b) (emphasis added). It appears Brown has not yet been fully compensated for his round-trip mileage from Overland Park, Kansas. This is a required statutory fee and, therefore, counsel for defendants must pay Brown statutory mileage fees.

IV. CONCLUSION

The Court understands the inconvenience of a court appearance, but service as a trial witness is part of the duties of a citizen of this State and country. The Court reminds Mr. Brown that there are penalties for failing to obey a subpoena. “The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena.” K.S.A. 60-245(e).

The Court encourages the witness, Mr. Brown to contact counsel for the defendants as is outlined in counsel's cover letter. Counsel for defendants' duty to take reasonable steps to avoid imposing undue burden or expense continues throughout trial. Counsel for defendants may also wish to contact the Court and consider a virtual appearance by the witness, via Zoom, if that is possible.

V. ORDERS

For all the reasons stated above, Robert Brown's *Motion to Quash Subpoena*, filed June 8, 2023, is denied. Should Mr. Brown attend the trial in person, K.S.A. 60-245(b) requires the defendants to pay him "the fees for one day's attendance and the mileage allowed by law."

This Memorandum Decision and Order shall constitute the Court's entry of judgment when filed with the Clerk of this Court. No further journal entry is required.

This Order is effective on the date and time shown on the electronic file stamp.

IT IS SO ORDERED.

**HON. MARY E. CHRISTOPHER
DISTRICT COURT JUDGE**

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above document was filed electronically on the date stamped on the order, providing notice to counsel of record in this matter.

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In addition, the foregoing was emailed to the following:

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_____/s/ Vicky Haynes
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