

**Al Fayed v Barak**

2006 NY Slip Op 30106(U)

September 19, 2006

Supreme Court, New York County

Docket Number: 0060135/2006

Judge: Walter B. Tolub

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: WALTER B. TOLUB  
*Justice*

PART 15

MOHAMED AL FAYED

INDEX NO. 601354/06

MOTION DATE \_\_\_\_\_

- v -

MOTION SEQ. NO. 004

DAPHNE BARAK

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**FILED**  
SEP 22 2006  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 9/18/06

WALTER B. TOLUB J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 15

-----x  
MOHAMED AL FAYED

Plaintiff,

Index No. 601354/06  
Mtn Seq. 004, 005

-against-

DAPHNE BARAK

Defendants.  
-----x

WALTER B. TOLUB, J.:

Motion sequence 004 and 005 are consolidated for disposition and resolved in the accompanying memorandum decision. For the following reasons, both motion sequences are granted in part, and denied in part.

Facts

The instant motions arise in connection with a series of subpoenas duces tecum served upon defendant Daphne Barak, and nonparties Solow Management Corporation ("Solow Management"), Chris Pemchuck ("Pemchuck") and Yahoo! Inc., ("Yahoo!"). Plaintiff Mohammed Al Fayed seeks, by way of these subpoenas, documents which he believes will establish Ms. Barak's presence in New York during the time that the summons and complaint were served in this action. Plaintiff additionally believes that the documents sought in the subpoenas will establish that defendant

intentionally evaded service of the summons and complaint, and attempted to avoid service of the default judgment against her, which was signed by this court on June 9, 2006. By motion sequence 004, nonparty Solow Management Corporation ("Solow Management") seeks to quash the subpoena duces tecum served upon it by plaintiff. Similarly, by motion sequence 005, defendant moves to quash the subpoenas served by plaintiff upon nonparties Solow Management, Yahoo!, Inc., and Chris Pemchuck. Nonparty Solow Management is the manager of the building in which defendant resides. Nonparty Chris Pemchuck is the doorman claimed by plaintiff's process server to have received the summons and complaint intended for defendant, and nonparty Yahoo!, Inc., is an Internet website and search engine which is claimed to have published a news site reporting on news stories written by defendant.

#### Discussion

"In determining whether to quash a subpoena duces tecum, a court must determine, among other things, whether the documents sought by the subpoena were relevant to the investigation" (N. v. Novello, 13 AD3d 631,632 [2<sup>nd</sup> Dept 2004]). If the documents sought are deemed irrelevant, the motion should not, and will not, be granted (see, Velez v. Hunts Point Multi Service Center, Inc., 29 AD3d 104 [1<sup>st</sup> Dept 2006]; New Hampshire Insurance Co. v.

Varda, Inc., 261 AD2d 125 [1<sup>st</sup> Dept 1999]). Whether or not the requested documents and records are utterly irrelevant is a burden that lies on the person or entity being subpoenaed (Gertz v. Richards, 233 AD2d 366 [1<sup>st</sup> Dept 1996]).

This court, in its August 28, 2006 decision, determined that the only issues presently under consideration in the instant case are (1) whether or not defendant received timely delivery of the summons and had adequate time to respond pursuant to CPLR 317 (See generally Barr, Altman, Lipshie and Gerstman, New York Civil Practice Before Trial 39:340 [James Publishing 2006]); and (2) whether plaintiff's attempts at service were intentionally evaded. These issues, and only these issues are the subject of the hearing scheduled for tomorrow, September 19, 2006, after which this court will determine whether defendant will be allowed to proceed with her asserted defense to this action.

Plaintiff's subpoenas however, although claimed newly tailored to the impending hearing, in fact go beyond the scope of relevance for the purpose of this court's immediate needs. This is especially true with respect to the subpoena served on defendant which seeks, among other things, telephone records (Barak Subpoena, Paragraph 2), financial records (Barak Subpoena, Paragraphs 4 and 5), cable television bills (Barak Subpoena, Paragraph 3), documents pertaining to the interview conducted with plaintiff (Barak Subpoena, Paragraphs 8, 10 and 11), and

information about Internet sites that defendant operates or contributes to on a regular basis (Barak Subpoena, Paragraph 9). Inasmuch as none of this information is relevant to the hearing scheduled for tomorrow, these particular demands contained within the subpoena duces tecum served upon Daphne Barak are quashed. Similarly, inasmuch as the portion of the subpoena served upon Ms. Barak seeking passports and visas valid in February, 2006 predates service of the summons and complaint, that demand (Barak Subpoena, Paragraph 1) is also quashed as it is irrelevant. Equally irrelevant to the inquiry at hand is all of the information sought from nonparty Yahoo!. As such, that subpoena is quashed in its entirety.

However, contrary to the arguments made by both defendant and nonparty Solow Management, the remaining subpoenas served upon nonparties Solow Management and Chris Pemchuck are largely, if not entirely, relevant. Therefore, the court denies the motion to quash the subpoena duces tecum served upon nonparty Chris Pemchuck, and quashes the following portions of the subpoena duces tecum served upon nonparty Solow Management as either overbroad (see, Local 237 International Brotherhood of Teamsters, Welfare Fund v. Trans World Life Insurance Co., 88 AD2d 509 [1<sup>st</sup> Dept 1982]) or irrelevant:

The portion of the first paragraph of the subpoena seeking video recordings of the floor of the Building on which Ms. Barak's

apartment is located is quashed.

The portion of the fourth paragraph of the subpoena seeking documents evidencing, reflecting or relating to the receipt, delivery, attempted delivery or handling of any mail or packages is limited solely to those items sent to Ms. Barak. The remainder of the information sought in this request is quashed. The portion of the fifth paragraph of the subpoena seeking documents evidencing, reflecting or relating to any doorman, concierge, or other employee communications concerning or relating any persons staying in the apartment in issue is limited solely to communications concerning Daphne Barak. The remainder of the information sought by this request is quashed.


The portion of the sixth paragraph of the subpoena seeking documents evidencing reflecting or relating to any service performed for or requested by any persons staying in the apartment, the request is limited to only those services performed for or requested by Ms. Barak. The remainder of the information sought by this request is quashed.

The remaining portions of the subpoena served upon nonparty Solow Management are to be responded to forthwith.

Counsel for the parties are directed to appear for tomorrow's hearing on this matter with all of their necessary witnesses and subpoena responses in accordance with this court's decision.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 9/19/06

  
\_\_\_\_\_  
HON. WALTER B. TOLUB, J.S.C.

**FILED**  
SEP 22 2006  
COUNTY CLERK'S OFFICE  
NEW YORK