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

PRESENT: KIBBIE F. PAYNE PART 4
Justice

In the Matter of the Application of Michael F. Sheehan, etc.,

INDEX NO. 103654/08

MOTION DATE 4-23-08

MOTION SEQ. NO. 001

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

This application is disposed as indicated.

Dated: May 9, 2008

J.S.C.

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

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 4

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In the Matter of:
The Application of Michael F. Sheehan, M.D., for an Order Pursuant to CPLR 328 and 3101(e) for the Issuance of a Deposition Subpoena Upon Mr. John Schwartz as a Non-Party Witness New York Under an Order Granting a Motion to Appoint Commissioners Issued in an Action Entitled *Scott Sweet* v. *Michael F. Sheehnan, M.D.*, Case No.:03-5936, now Pending in the Circuit Court of the Thirteenth Judicial Circuit, In and For Hillsborough County, State of Florida, Civil Division.

DECISION/ORDER

Index No. 103654/08

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KIBBIE F. PAYNE, J.:

Non-party John Schwartz ("Schwartz"), a professional journalist employed by the New York Times, moves to quash a deposition subpoena in the matter of *Scott Sweet v. Michael F. Sheehan, M.D.*, Case No. 03-5936, a medical malpractice action pending in the state of Florida.

Scott Sweet ("Sweet"), the plaintiff in the underlying medical malpractice action, alleges that he suffered a brain injury which, *inter alia*, interferes with his ability to speak and that the alleged injury was caused by Dr. Michael F. Sheehan's ("Sheehan") malpractice. It is undisputed that, subsequent to Sweet's alleged injury, Schwartz interviewed Sweet, by telephone, for an article on initial public offerings that Schwartz was writing for the New York Times. Sheehan alleges that after the interview, in August, 2007, Schwartz told

Sheehan's counsel that during the telephone interview, Sweet spoke clearly without any speech impediment. Sheehan now seeks Schwartz's deposition testimony as to whether Sweet spoke with a speech impediment during the interview.

Schwartz moves to quash the subpoena based on the Federal and State Constitutions and the N.Y. Civil Rights Law 70-h(c), otherwise known as the "Shield Law"[1] which grants a non-party professional journalist a qualified privilege from disclosing non-confidential information obtained during the newsgathering process. Schwartz claims that Sheehan has failed to demonstrate, as is required under the Shield law, that the testimony Sheehan seeks from him is highly material and not available through any

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[1] N.Y. Civil Rights Law 79-h(c) states in relevant part:

> No professional journalist . . . shall be adjudged in contempt by any court in connection with any civil or criminal proceeding . . . for refusing or failing to disclose any unpublished news obtained or prepared by the journalist . . . where such news was not obtained or received in confidence, unless the party seeking such news has made a clear and specific showing that the news: (i) is highly material and relevant; (ii) critical or necessary to the maintenance of a party's claim . . . and (iii) is not obtainable from any alternative source.

Florida's Shield Law, Fla. Stat. 90.5015(2)(b), though not at issue here, is consonant with the New York Shield Law, and also requires the party seeking to overcome the privilege to show that the information being sought is not obtainable through any other source.

other source (*O'Neill v. Oakgrove Construction, Inc.*, 71 NY2d 521, 526 [1988])[2].

In opposition to the motion to quash the subpoena, Sheehan argues that the information being sought is critical to Sheehan's ability to defend against the damages that Sweet alleges he has suffered as a result of the alleged malpractice because Schwartz, as a reporter is in a unique position to testify regarding his observations of Sweet's ability to speak and function in his profession. Sheehan also claims that because the Florida court has permitted Sweet, in response to a discovery demand, to redact the names and email addresses of individuals who were subscribers to Sweet's website, that the information being sought from Schwartz cannot be obtained from an alternative source.

It is well settled that under the New York Shield Law, the reporter's privilege extends to confidential and non-confidential materials. (*O'Neill v. Oakgrove Constr., Inc.*, 71 NY2d at 524; *Matter of Consumers Union*, 495 F Supp 582, 586 [SD NY 1988];

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[2] In *O'Neill, supra*, 71 N.Y.2d at 527, the Court of Appeals stated:

> The privilege bars coerced disclosure of resource materials, . . . which are obtained in the course of newsgathering or newspreparing activities, unless the moving litigant satisfies a tripartite test. . . . Under the tripartite test, discovery may be ordered only if the litigant demonstrates clearly and specifically, that the items sought are (1) highly material, (2) critical to the litigant's claim, and (3) not otherwise available.

Guice-Mills v. Forbes, 12 Misc3d 852, 854 [Sup Ct NY County 2006])

In *O'Neill*, the Court of Appeals expanded the scope of a professional journalist's protection to provide a qualified privilege for non-confidential information collected in the course of newsgathering. The *O'Neill* court articulated its rationale for requiring the party seeking the information to demonstrate relevance, need and unavailability of other sources in order to obtain release of the information:

> The ability of the press freely to collect and edit news, unhampered by repeated demands for its resource material, requires more protection than that afforded by the disclosure statute (CPLR 3101). The autonomy of the press would be jeopardized if resort to its resource materials, by litigants seeking to use the newsgathering efforts of journalists for their private purposes, were routinely permitted . . . . Moreover, because journalists typically gather information about accidents, crimes and other matters of special interest that often give rise to litigation, attempts to obtain evidence by subjecting the press to discovery as a nonparty would be widespread if not restricted.
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> *O'Neill v. Oakgrove Constr., Inc.*, 71 NY2d at 526

In this case, it is undisputed that Sheehan is seeking non-confidential information that Schwartz collected during the course of newsgathering and that he must therefore satisfy the three part test articulated in Section 79-h(c) of the New York Civil Rights Law.

Here, Sweet has failed to demonstrate that the information

that he seeks from Schwartz is not obtainable from an alternative source. (N.Y. Civil Rights Law 79-h [c])[3]. The mere fact that the Florida court has ordered redaction of the last names and email addresses of Sweet's website subscribers, is insufficient to demonstrate that there are no other sources, e.g., friends, neighbors, other business associates and/or family members-that can testify as to Sweet's speech patterns before and after the alleged injury. Sheehan has not detailed the efforts he has made to obtain the information from other sources, i.e. he has not submitted evidence that he subpoenaed Sheehan's telephone records to discover who else Sheehan may have spoken to during the critical period and he has not submitted evidence that Sheehan sought to depose other individuals who were unavailable. (See, *Flynn v. NYP Holdings, Inc.*, 235 AD2d 907, 909 [3d Dept 1997] [denying discovery of journalist's notes and materials when plaintiff did not detail efforts he made to obtain requested information from alternative sources]; *see also, Emerson v. Port*, 303 AD2d 229, [1st Dept 2003])

Additionally, Sheehan has failed to demonstrate, as he must, that other available sources of information have been exhausted. (*In re Application of Behar*, 779 F Supp 273, 276 [SD NY 1991]; *Matter of CBS Inc.*, 232 AD2d 291, [1st Dept 1996])

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[3] There is no dispute that New York Law applies to this controversy, but the choice of law is immaterial since Florida's Shield Law is parallel to New York's.

Accordingly, Sheehan has not satisfied the third prong of the test articulated in the Shield Law.

Sheehan has also failed to make a clear and specific showing that Schwartz's testimony regarding Sweet's speech patterns is critical and necessary. "The test is not merely that the material be helpful or probative, but whether or not the defense of the action may be presented without it." (*In re Subpoena Duces Tecum to ABC*, 189 Misc2d 805, 808 [Sup Ct NY County 2001])

Sheehan has not submitted any evidence that Schwartz's testimony goes to the heart of Sweet's claim. Sheehan has failed to make a showing that Sweet is claiming that he is unable to conduct his business because he has suffered a speech impediment as a result of the alleged malpractice. Indeed, the complaint in the underlying malpractice action merely states that plaintiff suffered, *inter alia*, bodily injury, disability and aggravation of a previously existing condition. Moreover, if such testimony is necessary, there are alternative ways for Sheehan to put in proof regarding Sweet's speech patterns. The availability of expert witnesses and/or other individuals who have had an opportunity to observe Sweet's speech patterns defeat Sheehan's claim that Schwartz's testimony is critical and necessary. Here, Sheehan cannot show, as he must, that the defense "virtually rises or falls with the admission or exclusion of the proffered evidence." (*Matter of the Application to Quash Subpoena to Natl.*

Broadcasting Co., 79 F3d 346, 351[2d Cir 1996]; *see also, Flynn v. NYP Holdings*, 235 AD2d at 908) Therefore, Sheehan has not satisfied the second prong of the test articulated in the Shield Law.

Accordingly, it is ORDERED that non-party Jonathan Schwartz's motion to quash the subpoena is granted.

This decision constitutes the order of the court.

Dated: May 9, 2008

ENTER:

KIBBIE F. PAYNE
J.S.C.