[* 1]

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

PRESENT: EDWARD H. LEHNER PART 19

Index Number : 100155/2007

LIPMAN, AMY

VS

IONESCU, GAIL

Sequence Number : 003

COMPEL DISCLOSURE

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

g 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

Upon the foregoing papers, it is ordered that this motion

motion is decided in accordance with accompanying memorandum decision

FILED
JAN 09 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: JAN 06 2009

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 19

----------x

AMY LIPMAN,

Plaintiff,

Index No.
100155/07

-against-

GAIL IONESCU,

Defendant.

EDWARD H. LEHNER, J.:

Plaintiff Amy Lipman, moves, pursuant to CPLR 3124 and 3214(b), to compel defendant Gail Ionescu to respond to plaintiff's discovery requests. Plaintiff contends that the requests include responses to interrogatories, a document demand, and the completion of defendant's deposition. Defendant cross-moves, pursuant to CPLR 3103, for an order denying, limiting, conditioning or regulating the disclosure sought by plaintiff, contending that plaintiff's discovery requests are overbroad and unreasonable, amount to a fishing expedition and violate the privacy rights of certain third parties.

FACTUAL ALLEGATIONS

From 1994 until November 27, 2006, plaintiff was employed at Poppyseed Pre-Nursery School (Poppyseed), a private pre-nursery program in Manhattan. While employed at Poppyseed, plaintiff's duties included leading classes for toddlers and their caregivers, creating curricula in various subjects, training and supervising junior teachers and assistants, maintaining supplies and ensuring positive interactions

among children and adults.

On November 27, 2006, defendant, the sole-proprietor of Poppyseed, informed plaintiff via phone that her employment was terminated. Defendant did not give plaintiff any prior notice or an explanation concerning her decision. Plaintiff maintains that she was shocked by her termination, because during her tenure at Poppyseed, defendant never gave her any indication that she was inadequately performing her job.

Just before and soon after defendant terminated plaintiff's employment, plaintiff alleges that defendant spoke to some, if not all, of the parents of the students in her class, and informed them that plaintiff would no longer be employed as a teacher at Poppyseed. Plaintiff contends that she only knows the names of two of the parents to whom defendant spoke. Although defendant did not provide her with a contact list of the parents of the children in her classes, plaintiff previously had the phone number of one parent, Maura Sheridan (Ms. Sheridan), due to Ms. Sheridan's children being in the same class as plaintiff's son. Plaintiff states that Ms. Sheridan was the only parent from plaintiff's class whom her counsel has been able to depose. According to her deposition, Ms. Sheridan testified that defendant contacted her by phone in November of 2006 and stated that plaintiff "was terminated effective immediately and . . . would not [be at school] the following day for class" and that whatever led to the termination "was egregious enough that she cannot come back to

work tomorrow" (Ms. Sheridan's EBT, at 13-14).[1]

Plaintiff maintains that she also spoke about her termination to Melena Bellafonte (Ms. Bellafonte), another parent of a child in her class. Plaintiff alleges that upon randomly meeting Ms. Bellafonte, she confirmed to plaintiff that defendant also contacted her and made similar statements regarding her termination. Plaintiff's counsel maintains that although it attempted to contact Ms. Bellafonte for a deposition, she could not be located.

On January 4, 2007, plaintiff filed a complaint alleging a cause of action for defamation and slander per se. Defendant filed a motion to dismiss the complaint for failure to state a cause of action for slander per se, for failure to allege that the purported defamatory statements were anything other than non-actionable statements of opinion, and for failure to properly plead special damages. The motion to dismiss the complaint was granted by this court on July 24, 2007. On March 27, 2008, the First Department reversed the Supreme Court's decision and held (49 AD3d 458):

> [t]he motion court erred when it viewed defendant's statements as merely an unfavorable assessment of plaintiff's work performance. In the context of informing parents of two- and three-year-olds that the children's teacher has been terminated, defendant's statements were reasonably susceptible to a defamatory meaning and slanderous per se because they directly implied that plaintiff had done something so egregious that it made her unfit to practice her profession even one more day.

---

[1] Although footnote one of the affidavit in opposition to defendant's cross motion includes direct quotations from the EBT of Ms. Sheridan, the EBT transcript is not attached to this motion.

DISCUSSION

CPLR 3101 (a) requires the full disclosure of all information that is material and necessary to the defense or prosecution of an action. "The words, 'material and necessary' are, in our view, to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason." *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 (1968).

Defendant raises several objections to plaintiff's interrogatories. Plaintiff's first interrogatory requests the identification of the parents of each child who attended plaintiff's classes in the fall of 2006. Defendant contends that plaintiff's requests constitute a "fishing expedition" and "violate the parent's right to expected privacy, and would obviously have a disruptive effect on the running of defendant's school." (Morris Affirm., ¶¶ 9, 13).

However, such names are relevant to plaintiff's claims of defamation. As aforesaid, the First Department has ruled that the allegations about defendant's telephone conversation with one parent were "reasonably susceptible to a defamatory meaning and slanderous per se because they directly implied that plaintiff had done something so egregious that it made her unfit to practice her profession even one more day." Plaintiff alleges at least one other parent was contacted by the defendant,

and it is likely that others were also informed why their child's teacher would not be present at the school. Thus, plaintiff is entitled to the information in defendant's possession to discover if other similar or even more defamatory statements about her were made.

While counsel for defendant argues that the parents have an expected privacy interest and that the names of the parents are privileged and confidential, he fails to support this argument with any case law in which a privately-run facility's contact list was deemed to be privileged information. Furthermore, the burden of establishing that the documents sought are covered by a certain privilege rests on the party asserting the privilege. *See Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 377 (1991); *New York State Elec. & Gas Corp. v Lexington Ins. Co.*, 160 AD2d 261, 262 (1st Dept 1990). Here, defendant fails to assert anything more than a boilerplate claim that a privilege may exist. As the statements made by defendant to the parents of the children in plaintiff's classes are the basis for plaintiff's slander claim, the list of who defendant spoke to is a relevant piece of discovery. Also, any claims that the disclosure of the contact information for parents of a class from 2006 would have a disruptive effect on the present operation of the school is based solely on the speculation of defendant's counsel.

Defendant contends that interrogatories two through five request information beyond the scope of the alleged slander and that the wording of each demand which

states "identify each conversation or communication" is vague and will be duplicative, as plaintiff's counsel will be able to question the defendant at her deposition regarding any conversations which took place. Defendant also argues that interrogatory six regarding the reason for plaintiff's termination would be more appropriately asked at the defendant's deposition.

The First Department has held that "interrogatories are appropriate and useful in enabling the seeking party to obtain lists and other detailed information to set the stage for meaningful depositions." *L.K. Comstock & Co. v City of New York*, 80 AD2d 805, 807 (1st Dept 1981), citing *Commissioners of State Ins. Fund v News World Communications*, 74 AD2d 765 (1st Dept 1980); *Clifton Steel Corp. v County of Monroe Pub. Works Dept.*, 74 AD2d 715 (4th Dept 1980). Although defendant maintains that some of the interrogatories may be better answered at a deposition, "[t]he CPLR does not set forth any order of priority as to the use of the various disclosure devices. A party is generally free to choose both the discovery devices it wishes to use and the order in which to use them." *Edwards-Pitt v Doe*, 294 AD2d 395, 396 (2d Dept 2002).

While defendant maintains that the wording of the interrogatories are vague in that they request that defendant "identify each conversation or communication," the requests are not unclear and specify the conversations and communications for which plaintiff requests information. Plaintiff specifically requests that defendant identify

each conversation that defendant had with the parents concerning plaintiff's termination from Poppyseed or any issues concerning such termination, identify persons except those already identified with whom defendant had any conversations or communications concerning plaintiff's termination or issues concerning such termination, and identify the conversations and communications, and identify any documents concerning any of the conversations or communications identified in response to the interrogatories. These conversations and communications are relevant to this lawsuit as they will assist specifically in the disclosure of facts and information relating to plaintiff's termination or the allegedly slanderous comments made to the parents. *See Allen v Crowell-Collier Publ. Co.*, 21 NY2d at 406 (holding that facts must be disclosed "which will assist preparation for trial by sharpening the issues and reducing delay and prolixity").

In regards to plaintiff's First Request for Production dated February 22, 2007, defendant agrees to comply with paragraph two which requests that defendant search for and exchange documents reflecting the compensation earned by plaintiff. Defendant also agrees to comply with paragraph six which requests that defendant provide all documents concerning plaintiff's performance as a teacher.

Paragraph one of the document request seeks all of the documents concerning the terms and conditions of plaintiff's employment with defendant. Despite defendant's objection, as plaintiff was terminated and not provided with any notice

as to the reasons for her termination, such documents are relevant.

As to paragraph three, plaintiff seeks all documents concerning her termination which are in defendant's possession. Defendant contends that this information "could very well contain privileged information." (Morris Affirm., ¶ 10). Although defendant speculates that a privilege may exist, because the burden of establishing that the documents sought are covered by a privilege rests on the party asserting the privilege, defendant's argument regarding a potential privilege fails as it is an unsupported speculation. *See Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d at 377.

Paragraph four requests the disclosure of all documents concerning any conversations or communications between plaintiff and any other person regarding plaintiff's termination. As plaintiff is unaware of the reason as to why she was fired and unclear as to what allegations defendant made to the parents or others about her work performance, such documents are relevant to this litigation.

In paragraph five, plaintiff requests all documents which concern her unemployment benefits. The documents concerning unemployment compensation may contain information relevant to the reasons for plaintiff's termination, and thus defendant must produce such documents.

Plaintiff also requests that all insurance policies be exchanged that were issued to defendant or Poppyseed under which defendant made a claim concerning this

lawsuit. However, since defendant's counsel states in his affirmation that he is not representing defendant under the terms of any insurance contract, plaintiff's request is denied as moot.

Defendant is therefore compelled to answer plaintiff's interrogatories and document requests, with the exception of paragraph seven of the document request. Plaintiff shall serve its responses and exchange documents within thirty days of service of a copy of this order. To the extent that depositions have not taken place, both plaintiff and defendant's depositions are ordered to take place within 60 days of service of a copy of this order. However, defendant contends that plaintiff was noticed for a deposition before plaintiff noticed defendant, and thus she has the priority to depose plaintiff first. As there does not appear to be any objections in plaintiff's papers to this argument, plaintiff shall be deposed first.

CONCLUSION and ORDER

Accordingly, it is ORDERED that the motion to compel is granted to the following extent; it is

ORDERED that defendant must respond to interrogatories one through six within 30 days of service of a copy of this order; and it is further

ORDERED that the defendant must exchange the documents discussed in paragraphs one through six of the document request within 30 days of service of a copy of this order; and it is further

ORDERED that the document request for all insurance policies (paragraph seven) is denied as moot; and it is further

ORDERED that the depositions of plaintiff and defendant will take place within 60 days of service of a copy of this order; and it is further

ORDERED that defendant's cross motion is denied; and it is further

ORDERED that a compliance conference will be held on April 1, 2009 at 9:30 a.m. in room 252, 60 Centre Street, New York, New York, at which time both counsel for plaintiff and defendant will update the court on the exchange of discovery; and it is further

ORDERED that the note of issue must be filed on or before May 15, 2009.

Dated: January 6, 2009

ENTER:

J.S.C.