

**Martin v Daily News, L.P.**

2010 NY Slip Op 31039(U)

April 23, 2010

Supreme Court, New York County

Docket Number: 100053/08

Judge: Martin Shulman

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

MARTIN SHULMAN

J.S.C.

PART 1

Index Number : 100053/2008

MARTIN, LARRY D.

vs

DAILY NEWS L.P.

Sequence Number : 003

QUASH SUBPOENA, FIX CONDITIONS

INDEX NO. 100053/08

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

MOTION SEQ. NO. 003

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

The following papers, numbered 1 to 4 were read on this motion to/for quash subpoena

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ... 1-3

Answering Affidavits — Exhibits \_\_\_\_\_

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

PAPERS NUMBERED

1  
2, 3  
4

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

**FILED**

APR 29 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: April 23, 2010

J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

REFERENCE

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

*E*  
*9.29.10*

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 1

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LARRY D. MARTIN,  
Plaintiff,

Index No.: 100053/08

-against-

DECISION/ORDER

DAILY NEWS, L.P., ERROL LOUIS and  
RAVI BATRA,

Defendants.

**FILED**

APR 29 2010

COUNTY OF NEW YORK  
CLERK OF THE COURT

-----X  
**Martin Shulman, J.**

In this defamation action, non-party Ravi Batra ("movant" or "Batra")<sup>1</sup> moves to quash a subpoena duces tecum (the "subpoena" at Exh. 2 to Motion) plaintiff Larry D. Martin ("Justice Martin" or "plaintiff") served upon him and for a protective order with respect thereto. The subpoena requests the following documents from Batra:

All documents, including all letters, memoranda, emails or notes, relating to or constituting any communications between Ravi Batra, on the one hand, and Errol Louis or any other reporter or employee of the Daily News, on the other, from the period July 1, 2006 through January 1, 2010, relating to or concerning (i) the administration or conduct of the Courts of the State of New York or any proceedings conducted therein or any persons (including Judges or Justices) employed by or working in the Courts of the State of New York; (ii) any articles published by Errol Louis; (iii) the pendency of this Action or the claims asserted by the plaintiff in this Action.

In support of his motion, movant contends that: 1) as the dismissal order notes, he is not mentioned in the Second Article; 2) he played no role in the Second Article's

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<sup>1</sup> Batra was formerly named as a defendant in this action. This court granted his pre-answer motion to dismiss in its entirety by decision and order dated July 14, 2009 (the "dismissal order" at Exh. 1 to Motion). The salient facts of this action are summarized in the dismissal order, which also granted co-defendants Daily News, L.P.'s and Errol Louis' simultaneous pre-answer motion to dismiss to the extent of dismissing all but the first cause of action for defamation *per se*, solely as it relates to Louis' article the Daily News published on February 8, 2007 (the "Second Article"). The defined terms in the dismissal order are used herein.

publication; 3) the subpoena is overbroad in that it seeks irrelevant documents unrelated to the Second Article for a four year period; and 4) plaintiff does not demonstrate special circumstances for obtaining discovery from a non-party, such as unavailability from other sources such as the parties hereto.

Substantially agreeing that the subpoena is overbroad, co-defendants Daily News and Louis primarily support Batra's motion in part, but oppose it "to the extent it seeks communications between Batra and Louis related to the specific subject matter of the columns in suit, and the claims in this case to the extent those communications predate the [Second Article] in issue or discuss the [Second Article]." See Daily News/Louis Memorandum of Law at p. 2 (bracketed matter added).

In opposition, Justice Martin argues: 1) Batra failed to comply with 22 NYCRR 202.7, requiring a good faith attempt to resolve this discovery dispute prior to bringing a motion; 2) the complaint in this action alleges that Batra was the source of Louis' articles and blog postings; 3) the subpoena seeks relevant documents which would provide factual support for the Second Article's alleged defamatory statements, plaintiff's claim that the statements were made with constitutional malice and any potential defense of justification and/or good faith; 4) special circumstances exist since the remaining defendants have failed to produce the requested documents; and 5) the four year time period is not overbroad since it seeks communications from only one year before the Second Article was published to date.

Movant replies that: 1) 22 NYCRR 202.7 is inapplicable to subpoenas served on non-parties; 2) plaintiff failed to timely serve his opposition to the motion; 3) plaintiff claims in his opposition that he only seeks materials which were the source of Louis's

claims in the Second Article, yet the subpoena itself seeks far more; and 3) the "source materials" Justice Martin seeks consist of pleadings and other documents which are matters of public record.

### DISCUSSION

The court first addresses plaintiff's and Batra's procedural arguments. At the outset, the court declines to disregard plaintiff's opposition as untimely served as movant urges in his reply papers. In its discretion, the court excuses plaintiff's *de minimis* delay in serving his opposition two days late. If prejudiced by the delay and unable to prepare his reply, Batra was not without remedy in that he could have requested, and likely obtained, a short adjournment. He does not allege any specific prejudice and this motion was submitted on its original return date without any adjournments.

Turning to 22 NYCRR 202.7's advance conferral requirements, it is undisputed that Batra failed to contact Justice Martin's counsel to voice his objections to the subpoena prior to bringing this motion. As such, the motion contains no affirmation of good faith pursuant to 22 NYCRR 202.7. While this court feels in this case that the better and more efficient course of action would have been for Batra, as an attorney himself, to contact plaintiff's counsel to discuss the subpoena before bringing this motion, nonetheless, the court agrees with his interpretation of 22 NYCRR 202.7(a) as being inapplicable to a non-party who moves to quash a subpoena served upon him or her. 22 NYCRR 202.7 provides in relevant part that:

. . . no motion shall be filed with the court unless there have been served and filed with the motion papers . . . (2) with respect to a motion relating to disclosure or to a bill of particulars, an affirmation that **counsel has**

**conferred with counsel for the opposing party** in a good faith effort to resolve the issues raised by the motion. (Emphasis added)

The rule's reference to conferring with opposing counsel assumes an adversarial context and supports Batra's interpretation, as a subpoenaed non-party is not in an adversarial relationship with the subpoena's issuer.<sup>2</sup>

Finally, CPLR §2304 is in accord with this interpretation in that it requires a prior request to withdraw or modify a subpoena only where a subpoena is "not returnable in a court".<sup>3</sup> As the instant subpoena is returnable in the context of this court action, CPLR §2304 does not require that a request to withdraw or modify be made prior to moving to quash.

Turning to the merits and substance of the subpoena itself, as stated in *Velez v. Hunts Point Multi-Service Ctr., Inc.*, 29 A.D.3d 104, 112 (1<sup>st</sup> Dept. 2006):

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 (*see Matter of Terry D.*, 81 N.Y.2d 1042, 1044, 601 N.Y.S.2d 452, 619 N.E.2d 389 [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 (*see New Hampshire Ins. Co. v. Varda, Inc.*, 261 A.D.2d 135, 687 N.Y.S.2d 261 [1999]; *Matter of Reuters Ltd. v. Dow Jones Telerate*, 231 A.D.2d 337, 341, 662 N.Y.S.2d 450 [1997]).  
"Moreover, the burden of establishing that the requested documents and

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<sup>2</sup> This is not inconsistent with case law finding that 22 NYCRR 202.7's requirements apply where a party to the litigation, rather than a non-party, moves to quash an opposing party's subpoena to a non-party. *See, e.g., Fanelli v Fanelli*, 296 A.D.2d 373 (2<sup>nd</sup> Dept. 2002); *In re Estate of Offman*, N.Y.L.J. 10/2/07, p. 39, col. 1 (Surr. Ct., Westchester Cty.).

<sup>3</sup> This language is interpreted as referring to subpoenas not issued in the context of a pending court action or proceeding. *See Brooks v. City of New York*, 178 Misc.2d 104, 105 (Sup. Ct. NY Cty. 1998).

records are utterly irrelevant is on the person being subpoenaed" (*Gertz v. Richards*, 233 A.D.2d 366, 650 N.Y.S.2d 584 [1996]).

Here, the court agrees that plaintiff's subpoena is overbroad and seeks irrelevant documents.

As previously stated, Justice Martin's sole remaining cause of action alleges defamation *per se* in connection with the Second Article<sup>4</sup> written by Louis and published by the Daily News. The subpoena, however, does not limit its request to communications concerning the Second Article. Nor does plaintiff's opposition address all of the demands made in the subpoena. Rather, plaintiff only defends the subpoena's request for "documents relating to [Batra's] communications with Mr. Louis with respect to the [Second] Article and the subject matter of the [Second] Article". Blander Opp. Aff. at ¶7. Justice Martin offers no explanation as to how the following might provide factual support for the Second Article's alleged defamatory statements, plaintiff's claim of malice and any potential defense of justification and/or good faith: communications between Batra and other Daily News reporters and employees; communications between Batra and Louis related to any articles written by Louis; and communications concerning this action. This court cannot discern any relevance to the

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<sup>4</sup> The Second Article is entitled "Weed Out Bad Judges" and bears the subtitle "More Resources Will Help Nail Corrupt Jurists". Briefly, it concerns the New York Commission on Judicial Conduct's (the "Commission") regulatory role and lack of adequate staff and funding. Louis opines in the Second Article that there would be fewer court scandals if the Commission had more resources and goes on to discuss Justice Martin's actions as presiding jurist in the Belinda Action. This court's dismissal order held that as a whole, the average reader might conclude from the Second Article that plaintiff is corrupt and that the Commission is investigating his role in the Belinda Action.

foregoing demanded documents and the subpoena must therefore be quashed with respect to these requests and a protective order issued.

Batra's motion is denied to the extent that the subpoena seeks communications between Batra and Lewis relevant to the Second Article and its subject matter. Finally, the court agrees with Batra that communications between Louis and Batra after the Second Article's publication are not relevant. At issue is the knowledge Louis possessed and his intentions at the time the Second Article was published. Subsequent communications are not probative of such issues. Accordingly, the documents to be produced are limited to those from the period July 1, 2006 through February 8, 2007.

The court has considered the movant's and plaintiff's remaining arguments and finds them lacking in merit. For all of the foregoing reasons it is hereby

ORDERED that non-party Ravi Batra's motion to quash and for a protective order is granted in part and denied in part to the extent that Batra shall comply with the subpoena's demands for communications between Batra and Louis for the period July 1, 2006 through February 8, 2007 relating to the Second Article and its subject matter.

Counsel for plaintiff and defendants are directed to appear for a status conference on May 18, 2010 at 9:30 a.m. at **60 Centre Street, Room 325, New York, New York.**

This constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to counsel for the parties and movant.

Dated: New York, New York  
April 23, 2010

**FILED**

APR 29 2010

NEW YORK  
COUNTY CLERK OFFICE

  
HON. MARTIN SHULMAN, J.S.C.