

Matter of Pakter v New York City Dept .of Educ.

2010 NY Slip Op 32451(U)

August 20, 2010

Supreme Court, New York County

Docket Number: 107024/10

Judge: Cynthia S. Kern

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

CYNTHIA S. KERN

PRESENT: _____ J.S.C. Justice

PART 52

DAVID PAXTER

INDEX NO. 107024/10

MOTION DATE _____

NYC DEPT. OF EDUCATION)
ET AL.

MOTION SEQ. NO. 1

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 the attached decision.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1412).

Dated: 8/20/10

CYNTHIA S. KERN 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):

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

-----X

In the Matter of the Application for an Order Pursuant to
Section 3102(c) of the Civil Practice Law and Rules to
Compel Disclosure

DAVID PAKTER,

Petitioner,

Index No. 107024/10

-against-

JUDGMENT/ORDER

NEW YORK CITY DEPARTMENT OF EDUCATION,
NEW YORK POST, NYP HOLDINGS, INC.,

Respondents.

-----X

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Cross-Motion and Affidavits Annexed.....	_____
Answering Affidavits to Cross-Motion.....	_____
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

In this special proceeding, petitioner seeks an order permitting pre-action discovery pursuant to C.P.L.R. §3102(c). The petition is granted in part and denied in part for the reasons set forth below.

Petitioner is a school teacher employed by the New York City Department of Education (DOE). In 2006, petitioner was charged by the DOE with misconduct and removed from his

classroom teaching duties. Petitioner was subsequently assigned to one of the DOE's reassignment centers, also known as the "rubber rooms." On March 21, 2010, the New York Post (the "Post") published an article titled "Bored of Ed. in Rubber Rooms." A sidebar to this article featuring "notable rubber room residents" included petitioner and stated that petitioner was charged with sexual misconduct (the "statement"). It is undisputed that petitioner was not charged with sexual misconduct and the Post subsequently ran a retraction in this regard.

Petitioner believes that he has been defamed and intends to bring a lawsuit against the person or persons who provided the Post with the inaccurate information that petitioner had been charged with sexual misconduct. The Post and the DOE (collectively "respondents") have refused to provide petitioner with the identity of the source of this statement. Petitioner seeks an order pursuant to C.P.L.R. § 3102(c) (1) compelling respondents through depositions, interrogatories and production of documents to disclose the name or names of the person or persons involved with providing the information and documentation that petitioner was charged with sexual misconduct, (2) directing respondents to preserve evidence related to the publication of the statement, including reporters' notes, emails, and electronically stored information and (3) directing respondents to produce the evidence related to the publication of the statement, including reporters' notes, emails, and electronically stored information.

C.P.L.R. § 3012 (c) allows pre-action disclosure – with a court order – to seek additional information necessary to frame a complaint or to identify the proper defendant with respect to a known cause of action. However, when a party seeks pre-action disclosure for these purposes, "courts traditionally require a strong showing that a cause of action exists." *Cohen v. Google Inc.*, 887 N.Y.S.2d 424, 426-427 (Sup.Ct. N.Y. Co. 2009) (internal citations omitted). "As a

general rule, the adequacy of the merit rests within the sound discretion of the court.” *Peters v. Sotheby's Inc.*, 34 A.D.3d 29, 34 (1st Dept 2006).

Petitioner is entitled to pre-action disclosure of information as to the identity of the source or sources who provided the Post with the statement at issue as petitioner has made a strong showing that a cause of action exists in this matter. “The elements of a cause of action for defamation are a false statement, published without privilege or authorization to a third-party, constituting fault as judged by, at a minimum, a negligence standard, and, it must either cause special harm or constitute defamation *per se*.” *Cohen v. Google, Inc.* 887 N.Y.S.2d 424, 427 (Sup. Ct. N.Y. Co. 2009). Imputations of serious sexual misconduct constitute defamation *per se*. *Rejent v. Liberation Publications, Inc.*, 197 A.D.2d 240 (1st Dept 1994). Here, petitioner has demonstrated that a valid cause of action exists in this matter as the Post published a false statement without privilege in a major newspaper that petitioner was charged with sexual misconduct.

Moreover, pre-action discovery is permitted in cases, such as here, where petitioner who has a valid claim for defamation needs to identify the unnamed source or sources who provided defamatory information to a newspaper in order to bring an action against them. For example, in *Application of Dack*, 421 N.Y.S. 2d 775 (Sup.Ct. Monroe Co. 1979), a newspaper quoted unidentified sources who claimed that a police officer shot an assailant who was already down. The police officer sought pre-action disclosure of the identity of the sources in order to bring a defamation action against them. In granting pre-action discovery, the *Dack* court stated, “[w]hat petitioner does not know is the identity of the witnesses quoted in the newspaper article. Thus,

while petitioner has fairly indicated a good cause of action, he needs discovery to identify potential parties. Under such circumstances, petitioner is entitled to discover the identities of those persons under C.P.L.R. 3102 (subd. (c)).” *Dack*, 421 N.Y.S. 2d at 799. In the present case, petitioner, like in *Dack*, has a valid defamation claim and needs to discover the identity of the person or persons who provided the Post with the false statement in order to bring a claim against them.

The Post attempts to distinguish the instant action from *Dack* by emphasizing that the unnamed sources in that action were “quoted” in the newspaper. This distinction does not make a difference. The *Dack* court’s decision did not hinge on the fact that the sources were “quoted.” Rather, the analysis was dependent on the fact that the identities of the sources – against whom that petitioner had a valid claim – were unknown to petitioner. Accordingly, the Post is ordered to answer interrogatories – limited to the issue of the name(s) and identit(ies) of the source or sources who provided the Post with the statement that petitioner was charged with sexual misconduct by the DOE – as reported in “Bored of Ed. in Rubber Rooms,” published in the Post on March 21, 2010.

However, the court denies petitioner’s request for an order directing respondents to produce documents, reporter’s notes, emails, and electronically stored information related to the statement at issue as this request is overly broad and not necessary for petitioner to frame his complaint and may be produced in the due course of discovery. The court directs respondents to preserve the same in anticipation of petitioner’s filing a complaint in this matter.

Accordingly, the court hereby orders the Post to answer interrogatories limited to the issue of the name(s) and identit(ies) of the source or sources who provided the Post with the statement that petitioner was charged with sexual misconduct as reported in the article and sidebar to the article entitled "Bored of Ed. in Rubber Rooms," published in the Post on March 21, 2010 and orders the Post and the DOE to preserve any documents, reporter's notes, emails, and electronically stored information related to the statement at issue. This constitutes the ORDER and JUDGMENT of the court.

Dated: 8/20/10

Enter: _____ *PK*

J.S.C.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).