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

PRESENT: HON. PAUL WOOTEN Justice PART 7

In the Matter of the
Application of TYLER HODSON,

Petitioner,

- against-

AL ROKER ENTERTAINMENT, INC.,

Respondent.

INDEX NO. 116662/09

MOTION DATE

MOTION SEQ. NO. 002

The following papers, numbered 1 to 5 were read on this motion by the respondent to quash a subpoena duces tecum.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	1,2
Answering Affidavits — Exhibits (Memo)	3,4
Replying Affidavits (Reply Memo)	5

Cross-Motion: ☐ Yes ☒ No

Respondent Al Roker Entertainment, Inc. ("Respondent") seeks an order quashing a subpoena duces tecum (the Subpoena) served on it by petitioner, Tyler Hodson ("Petitioner"). The subpoena seeks the complete video and audio recordings ("the Outtakes") in the possession of the respondent regarding any incidents filmed by respondent involving the petitioner or his residence.

Underlying Facts and Procedural History

Respondent is the producer of a documentary television series broadcast on the Spike TV cable channel entitled "DEA" ("the Show"), which focuses on the activities of the United States Drug Enforcement Agency ("DEA") (Stracher affirmation, ¶ 3). The Show follows DEA agents in their enforcement activities and, on January 29, 2009, respondent filmed DEA agents in Jersey City, New Jersey during their surveillance of petitioner's home, during the search of

his home by the agents and his arrest for drug possession when six pounds of marijuana was discovered (*id.*, ¶ 4). Respondent further states that it returned to petitioner's home on March 9, 2009 and shot additional footage "in and around" the area (*id.*, ¶ 5). It further contends that petitioner gave "express written consent" to the filming (*id.*, ¶ 5), but has not annexed a copy of this document.

Petitioner is currently facing trial in New Jersey Superior Court, Indictment Number 09-04-854-1 ("the Criminal Case"). Apparently due to the pendency of the Criminal Case, petitioner has submitted solely the affirmation of his counsel, rather than an affidavit by a party with personal knowledge of the facts. This affirmation claims that "the video is essential to his defense" in the Criminal Case (D'Elia affirmation, ¶¶ 6, 12), stating that the Outtakes show that he "was wrongfully arrested and that there was no proper basis to search" his house (*id.*, ¶ 6). Petitioner's attorney states that there was no consent to the search on January 29, 2009, or to the filming by respondent (*id.*, ¶¶ 7-8) or to the purported return into petitioner's home on March 9, 2009 (*id.*, ¶ 9). However, petitioner's attorney bases his affirmation on "meeting and talking with [petitioner] and witnesses" (*id.*, ¶ 1). He, therefore, seeks to present facts without evidentiary support or personal knowledge.

On December 23, 2009, petitioner brought an application to obtain a deposition pursuant to CPLR 3102 (e), based upon an order dated November 10, 2009 ("the Criminal Case Order") issued in the Criminal Case. The Criminal Case Order allowed subpoenas duces tecum for the production of film footage and audio recordings in the possession of respondent. It indicated that the prosecutor had no objection to production of the Outtakes.

This Court, by order dated June 30, 2010, directed production of the Outtakes into court for an in-camera inspection. After review of the Outtakes, they were returned to respondent. On September 10, 2010, respondent produced a four-minute excerpt to petitioner (Stracher affirmation, ¶ 6). However, the parties were unable to resolve the matter, since petitioner seeks

the balance of the Outtakes and, accordingly, respondent brought this motion to quash the Subpoena.

CPLR 3102 (e)

CPLR 3102 (e) permits a party from another jurisdiction to utilize New York State's courts to obtain discovery for use in an action pending in that jurisdiction (*Matter of Ayliffe & Cos.*, 166 AD2d 223 [1st Dept 1990], *lv denied* 76 NY2d 714 [1990]). The New York court is not bound by the determination of the court in the other jurisdiction, but retains its authority to quash a subpoena based upon, among other grounds, a legislatively enacted privilege such as Civil Rights Law § 79-h (the Shield Law) (*Matter of Pennzoil Co.*, 108 AD2d 666 [1st Dept 1985]), attorney-client privilege *(Matter of Kirkland & Ellis v Chadbourne & Parke*, 176 Misc 2d 73, 77 [Sup Ct, N. Y. County 1998]) and that the matter sought is not critical or necessary in the underlying action (*Matter of Brown & Williamson Tobacco Corp. v Wigand*, 228 AD2d 187 [1st Dept 1996]).

While the Criminal Case Order states that the prosecutor had no objection to production of the Outtakes, it does not reflect respondent's participation and, consequently, respondent is not precluded from litigating in this court its rights in this matter. As applied in this case, the Criminal Court Order is, therefore, not determinative that petitioner is entitled to the Outtakes. Rather, this Court must determine, on its own, whether petitioner has established his entitlement to the Outtakes and whether the Shield Law provides respondent a legitimate basis to withhold them.

The Shield Law

Generally, requests for discovery, even against a nonparty, are based upon the need for full disclosure of evidence and material related to the issues involved in the controversy, but where the nonparty is engaged in news gathering or reporting and the materials sought are

recordings made in the course of these endeavors, the test is different, since the burden would tend to negatively impact on a free press (*O'Neill v Oakgrove Constr.*, 71 NY2d 521, 526 [1988]). There is a qualified reporters' privilege against the production of these material unless a moving litigant satisfies a "more demanding" three-part test of showing "clearly and specifically, that the items sought are (1) highly material, (2) critical to the litigant's claim, and (3) not otherwise available" (*id.* at 527). To show that the information sought is critical or necessary, "a petitioner cannot merely show that it would be useful, but rather that [his] defense could not be presented without it" (*Matter of Perito v Finklestein*, 51 AD3d 674, 675 [2d Dept 2008]).

Additionally, to show that the relevant information is unavailable elsewhere, a party must present evidence of "investigative effort to obtain [the] evidence" from other sources (*Matter of CBS Inc. (Vacco)*, 232 AD2d 291, 292 [1st Dept 1996]).

Analysis

Applying the above mentioned principles to this case, petitioner has failed to make the requisite showing. He has failed to present any evidentiary showing, either from his own affidavit or the affidavits of any party with personal knowledge of the facts. Relying solely upon his attorney's affirmation, he has not proffered any evidence as to the Outtakes's contents, let alone clearly and specifically that they reveal highly material facts critical to his defense in the Criminal Case, that his defense cannot be presented without the Outtakes, that he has sought to obtain the information another way and how he has been unable to do so (*O'Neill*, 71 NY2d at 527; *CBS*, 232 AD2d at 292). Consequently, respondent's motion to quash the Subpoena must be granted.

Conclusion

For these reasons and upon the foregoing papers it is,

ORDERED that respondent's motion to quash the subpoena duces tecum is granted, it is further,

ORDERED that the parties are directed to appear for a status conference on August 10, 2011 at 11:00 a.m. in Part 7, Room 341, 60 Centre Street.

This constitutes the Decision and Order of this Court.

Dated: 6-9-11 **Enter:**

PAUL WOOTEN J.S.C.

Check one: ☐ **FINAL DISPOSITION** ▩ **NON-FINAL DISPOSITION**
Check if appropriate: : ☐ **DO NOT POST** ☐ **REFERENCE**