

**Matter of Overstock.com v Morgan Stanley & Co.,  
Inc.**

2012 NY Slip Op 30036(U)

January 6, 2012

Supreme Court, New York County

Docket Number: 113303/2010

Judge: Saliann Scarpulla

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

PRESENT: SALIANN SCARPULLA

PART 19

*Justice*

Index Number : 113303/2010  
**OVERSTOCK.COM, INC.**  
 vs.  
**YOUNG, TIMOTHY J.**  
 SEQUENCE NUMBER : 001  
 COMPEL DISCLOSURE

INDEX NO. \_\_\_\_\_

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

MOTION SEQ. NO. \_\_\_\_\_

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

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 and cross-motion are decided~~ in accordance with accompanying memorandum decision.

**FILED**

JAN 11 2012

NEW YORK COUNTY CLERK'S OFFICE

Dated: 1/10/12

*Saliann Scarpulla*  
SALIANN SCARPULLA J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 19

-----X

In the Matter of the Application of  
OVERSTOCK.COM, a Delaware Corporation,  
KENNETH CARPENTER, an individual, OLIVIER  
CHENG, an individual, MARY HELBURN, an  
individual, HUGO D. BARRON, an individual,  
DAVID TRENT, an individual, and MARK  
MONTAG, an individual,

Index No.: 113303/10  
Submission Date: 8/03/11

Petitioners,

For an Order for the issuance of a subpoena for the  
deposition and production of documents by  
TIMOTHY J. YOUNG, and BUCKLEY &  
YOUNG, LLC,

Respondents,

For use in an action pending in the State of  
California entitled OVERSTOCK.COM, et al.,  
Plaintiffs,

- against-

MORGAN STANLEY & CO., INC., et al,

Defendants.

-----X

For Petitioners:  
Gibbons, P.C.  
One Pennsylvania Plaza, 37<sup>th</sup> Floor  
New York, NY 10119

For Respondents:  
Proskauer Rose LLP  
Eleven Times Square  
New York, NY 10036

Papers considered in review of this motion to compel deposition testimony:

- Notice of Motion . . . . . 1
- Aff in Support . . . . . 2
- Mem of Law . . . . . 3
- Aff in Opp . . . . . 4
- Mem of Law . . . . . 5
- Reply Aff. . . . . 6
- Mem of Law . . . . . 7

HON. SALIANN SCARPULLA, J.:

**FILED**  
JAN 11 2012  
NEW YORK  
COUNTY CLERK'S OFFICE  
**DECISION AND ORDER**

Petitioner Overstock.com (“Overstock”) is a plaintiff in a California litigation against various entities who are alleged to have engaged in trading activity of Overstock’s securities from 2004 to 2007, in concert with individuals including Timothy J. Young (“Young”), a New York resident. On June 14, 2006, non-party Young was deposed by regulators from the American Stock Exchange (“Amex”) relating to this trading activity.

In connection with the California litigation, Overstock sought to depose Young. The deposition took place on April 5, 2011, at which time Young invoked his Fifth Amendment privilege in response to all questions asked, other than his name and oath. Overstock now moves to compel non-party witness Young to sit for a continued deposition and answer all the questions that were posed to him at the April 5, 2011 deposition, and to complete his December 7, 2010 document production.<sup>1</sup>

Overstock argues that Young has failed to establish a reasonable basis for his assertion of the Fifth Amendment privilege, as he has not demonstrated that a real danger of prosecution exists. Overstock asserts that by refusing to answer any questions at his deposition, he has failed to establish a foundation for his assertion of the Fifth Amendment privilege, and has failed to demonstrate that he has a reasonable cause to

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<sup>1</sup> Overstock’s notice of motion seeks only to compel further deposition of Young. However, Overstock’s memorandum of law in support of the motion asserts that Young “should also be compelled to complete his production of documents that commenced on December 7, 2010.” Overstock makes no further mention of document production in its moving papers until the concluding paragraph, which states “Petitioner Overstock respectfully requests that this Court grants its motion to compel Mr. Young’s deposition testimony and the production of documents from Young & Buckley. . . . Overstock respectfully urges the Court to grant this motion to compel continued deposition testimony and document production from Mr. Young.” In its reply papers, Overstock does not mention the production of documents.

invoke the privilege based on a real danger. In addition, Overstock argues that Young waived his Fifth Amendment privilege by testifying at the Amex deposition on June 14, 2006. Lastly, Overstock asserts that Young impermissibly asserted a blanket refusal to answer questions at the deposition, and Young should be ordered to answer, at a minimum, questions which Overstock contends could not be used against him by the prosecutions of future criminal proceedings.

In support of its motion, Overstock submits an affirmation by its attorney styled “Affirmation of Good Faith in Support of Petitioner’s Motion to Compel Disclosure.” However, the Affirmation fails to indicate any efforts taken by the attorney to confer with opposing counsel in a good faith effort to resolve the discovery disputes since the April 5, 2011 deposition. It merely states, in pertinent part, that counsel for Overstock and counsel for respondents “communicated several times regarding the prospective deposition and documents that were being produced . . . . I understand that [counsel for Overstock and counsel for respondents] engaged in a series of oral communications between December 7, 2010 and April 5, 2011 in which counsel for the witness Mr. Young informed [counsel for Overstock] that Mr. Young would not testify in any respect beyond providing his name and address.”

In opposition, respondents Buckley & Young LLC and Young (collectively “respondents”) assert that the motion is procedurally defective as Overstock failed to comply with the good faith conference requirement of Uniform Rule 202.7. In addition, respondents assert that Overstock fails to mention that Young is the subject of an ongoing

investigation by the Securities and Exchange Commission (“SEC”), which forms the basis of Young’s reasonable fear of prosecution, and of which Overstock was aware. Respondents assert that Young’s testimony at the Amex deposition did not waive his Fifth Amendment rights, and instead assert that Young properly invoked his rights. In addition, respondents assert that they have produced all documents responsive to Overstock’s request, and that costs for this motion should be imposed against Overstock.

In their reply papers, Overstock reiterates that its counsel discussed Young’s anticipated deposition and invocation of his Fifth Amendment privilege many times, and that upon learning of his intention to invoke the his Fifth Amendment privilege, counsel for Overstock informed respondents’ counsel that Overstock would “be forced” to move to compel his testimony. Overstock further asserts that there was a discussion of Young’s anticipated invocation of his Fifth Amendment rights many times between December 2010 and April 2011, and that Young has no real fear of prosecution. Overstock also contends that Young’s document production is “seemingly incomplete,” and that costs should be assessed against Young.

### Discussion

Summary denial of a motion to compel is “mandated when it is made without a proper affirmation of good faith as required by 22 NYCRR 202.7(a).” *Sixty-Six Crosby Assocs. v. Berger & Kramer, L.L.P.*, 256 A.D.2d 26 (1<sup>st</sup> Dep’t 1998). Here, Overstock fails to include a proper good faith affirmation. As discussed above, the “Affirmation of Good Faith” submitted in support of Overstock’s motion to compel fails to detail any

efforts taken by Overstock's counsel to confer with respondents' counsel in a good faith effort to resolve the discovery issues since Young invoked his Fifth Amendment privilege at the April 5, 2011 deposition. Lacking that, the motion to compel must be denied. *See Fulton v. Allstate Ins. Co.*, 14 A.D.3d 380, 382 (1<sup>st</sup> Dep't 2005).

However, even had Overstock included the required affirmation of good faith, its motion to compel still lacks merit. "An individual may invoke the Fifth Amendment to decline to answer a deposition question when the individual has reasonable cause to apprehend that answering the question will provide the government with evidence to fuel a criminal prosecution." *Bleidner v. East 51<sup>st</sup> Street Development Co., LLC*, 30 Misc. 3d 521, 530 (Sup. Ct. N.Y. Co. 2010) (quoting *Lopez v. City of New York*, 2007 U.S. Dist. LEXIS 55545 (E.D.N.Y. 2007)). "The danger of self-incrimination must be real, not remote or speculative." *Bleidner*, 30 Misc. 3d at 351 (quotation omitted). "[T]he witness is the best judge of whether an answer will tend to incriminate him, since he is obviously in possession of more facts than are known to the court or other parties." *David Webb, Inc. v. Rosenstiel*, 66 Misc. 2d 29, 33 (Sup. Ct. N.Y. Co. 1970), *aff'd* 36 A.D.2d 691 (1<sup>st</sup> Dep't 1971). *See also State of New York v. Carey Resources, Inc.*, 97 A.D.2d 508, 509 (2d Dep't 1983) ("[t]he witness is generally the best judge of whether an answer may tend to be incriminating . . .") (citations omitted).

Overstock contends that Young fails to establish that he has reasonable cause to fear danger of prosecution from answering the questions posed at the April 5, 2011 deposition. However, as Young was in receipt of SEC subpoenas to produce documents

and testify, and was aware of an ongoing SEC investigation into the short sale trades at issue in the California litigation, he has reasonable cause to fear danger of prosecution from answering the questions posed.

Overstock alternatively asserts that at a minimum, certain of the questions asked at the deposition could not possibly lead to incriminating information. “Some of the questions [may] seem to be relatively formal and harmless. However, in context, the spectre of incrimination is clear. As noted in *Steinbrecher [v. Wapnick]*, 24 N.Y.2d 354 (1969)], the fact that the witness answered such questions was sought to be relied on as establishing waiver or bad faith. Although the court found there was neither a waiver or bad faith the case teaches that the witness’ judgment must control, unless the plea is clearly without foundation.” *David Webb, Inc.*, 66 Misc. 2d at 33. Here, the trading activity at issue in the California litigation and the SEC investigation into the same trading activity is enough to establish that Young’s invocation of the Fifth Amendment was not without foundation. As such, Young cannot be compelled to answer the deposition questions if he invokes his Fifth Amendment privilege against self-incrimination.

Moreover, Overstock’s assertion that Young waived the privilege by testifying at the Amex deposition also lacks merit. Young contends that due to the rules of the Amex such testimony could not have been a waiver, but the Court need not reach that issue. Even if the Amex testimony were deemed a waiver of the privilege, “[i]t is immaterial that in another proceeding, even though related to the same subject matter, the witness has

either not pleaded the privilege or has answered in such a manner as in that proceeding would amount to a waiver.” *David Webb, Inc. v. Rosenstiel*, 66 Misc. 2d 29, 33 (Sup. Ct. N.Y. Co. 1970), *aff’d* 36 A.D.2d 691 (1<sup>st</sup> Dep’t 1971). *See also Bleidner*, 30 Misc. 3d at 534, n. 3 (citing *U.S. v. James*, 609 F.3d 36 (2d Cir. 1979)) (“a waiver of the privilege in one proceeding does not affect a witness’ rights in another proceeding”). Accordingly, Overstock has not established that Young waived his Fifth Amendment rights.

Lastly, Overstock has failed to argue, much less establish any shortcomings with the respondents’ document production. Overstock simply asserts, without support or any indication of the possible deficiency of the document production, that Young has not produced all responsive documents in his possession. This speculative claim lacks merit.

In accordance with foregoing, it is

ORDERED that the motion by petitioner Overstock.com to compel non-party witness Timothy Young to continue to be deposed by Overstock.com and to produce further documents is denied; and it is further

ORDERED that to the extent this motion to compel respondent Buckley & Young, LLC to produce further documents, it is denied; and it is further

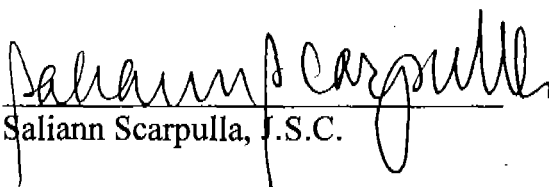
ORDERED that the motion by Overstock.com for costs and fees, including attorneys’ fees, against respondents Timothy J. Young and Buckley & Young, LLC is denied; and it is further

ORDERED that the request by respondents Timothy J. Young and Buckley & Young, LLC for costs and fees, against petitioner Overstock.com, including attorneys' fees is denied.

This constitutes the decision and order of the court.

Dated: New York, New York  
January 6, 2012

ENTER:

  
Saliann Scarpulla, J.S.C.

**FILED**

**JAN 11 2012**

**NEW YORK  
COUNTY CLERK'S OFFICE**