

Martin v Daily News LP
2012 NY Slip Op 30731(U)
March 21, 2012
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**

PRESENT: MARTIN SHULMAN
J.S.C.
Justice

PART 1

Index Number : 100053/2008
MARTIN, LARRY D.
VS.
DAILY NEWS L.P.
SEQUENCE NUMBER : 008
COMPEL

INDEX NO. 100053/08
MOTION DATE _____
MOTION SEQ. NO. 008

The following papers, numbered 1 to _____, were read on this motion to compel

Notice of Motion/Order to Show Cause — Affidavits — Exhibits A-G

No(s) 1, 2

Answering Affidavits — Exhibits A-B

No(s) 3

Replying Affidavits — Exhibits H-I

No(s) 4

Notice of Cross-Motion - Aff. - Exhibits 1-11

No. 5

Upon the foregoing papers, it is ordered that this motion is

Answering Aff. to Cross-motion - Exhibit A

No. 6

Upon the foregoing papers, this motion and cross-motion are decided in accordance with the attached decision and orders.

FILED

MAR 26 2012

**NEW YORK
COUNTY CLERK'S OFFICE**

Dated: March 21, 2012


MARTIN SHULMAN
J.S.C.

1. CHECK ONE: ☐ CASE DISPOSED ☒ NON FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

-----X
LARRY D. MARTIN,

Plaintiff,

Index No: 100053/08

-against-

Decision & Order

DAILY NEWS LP, et al,

Defendants.
-----X

FILED

MAR 26 2012

HON. MARTIN SHULMAN, J.S.C.:

NEW YORK
COUNTY CLERK'S OFFICE

Motion sequences 8 and 9 are consolidated for disposition. In motion sequence 8, plaintiff moves and defendants cross-move to compel responses to outstanding discovery demands. In motion sequence 9, defendant Daily News, LP ("DNLP") moves to "quash" plaintiff's attempt to depose its general counsel, Anne B. Carroll, Esq. ("Carroll"), who has also appeared as DNLP's counsel herein, and its employee, Scott Cohen ("Cohen").¹

Defendants' Motion for a Protective Order

This court first addresses motion sequence 9 seeking a protective order prohibiting plaintiff from deposing Carroll and Cohen with respect to their roles in having the February 2007 article at issue in this defamation action restored to DNLP's website. As more fully set forth in this court's decision and order dated February 10, 2012 in the recently dismissed companion action also entitled *Martin v Daily News LP, et al.* (NY County Index No. 103129/11) ("Martin II"), the subject article first appeared on the

¹ As plaintiff's counsel notes in opposition, the proposed witnesses were not subpoenaed so the motion more accurately seeks a protective order prohibiting plaintiff from proceeding with Carroll and Cohen's noticed depositions.

DNLP website in February 2007. Thereafter, due to technical changes made to the website, the article became unavailable online. Carroll realized the article was no longer available on the DNLP website in or about March 2010 and instructed DNLP's technical staff² to restore it. In dismissing *Martin II*, this court rejected plaintiff's claim that this restoration constituted a republication triggering anew the statute of limitations for an additional defamation cause of action.

DNLP argues, and this court agrees, that the dismissal of *Martin II* renders plaintiff's deposition notices moot. Plaintiff argues that *Martin II*'s dismissal will not render his discovery demands moot because the purported republication is relevant in this action to "the issue of constitutional malice, that is a reckless disregard for truth or falsity in publication . . ." *Schwab Aff. in Opp.* at ¶3.

This court sees no relevancy in DNLP's 2010 restoration of the article to its website *vis a vis* defendants' intent at the time of the original 2007 publication. Plaintiff simply fails to connect the dots to adequately explain how restoring the article to DNLP's website might establish malicious intent at the time of its original publication three (3) years earlier. Indeed, this court previously found post-publication communications were irrelevant as not probative of defendants' knowledge and intentions at the time of publication. See *Martin v Daily News, L.P.*, 2010 WL 1821988.

In light of the foregoing finding of irrelevancy, it is unnecessary to address DNLP's remaining arguments including, but not limited to, the propriety (or lack thereof)

² Cohen is DNLP's senior managing editor of digital media. Plaintiff's counsel contends that Carroll directed e-mails to Cohen regarding restoring the article and that he is DNLP employee Ethan Sacks' "boss". *Schwab Opp. Aff.* at ¶10. Sacks restored the article to the website and plaintiff has already deposed him on this subject.

of deposing a party's counsel, and plaintiff's claim that DNLP waived the attorney-client privilege by providing limited post-publication discovery. Nonetheless, the court is compelled to note that this sought after discovery appears to be cumulative of previous discovery and depositions already taken. Plaintiff previously deposed several DNLP employees and there is no indication that the witnesses DNLP previously produced lacked sufficient knowledge about this subject matter.

Finally, the deposition notices also seek the production of overbroad (all documents reviewed in preparation for the proposed deposition) and/or irrelevant documentation (Carroll and Cohen's job descriptions and/or employment records). For the foregoing reasons, motion sequence 9 is granted in its entirety and defendants are granted a protective order striking plaintiff's improper deposition notices.

Plaintiff's Motion to Compel

Turning to motion sequence 8, plaintiff moves to compel defendants to respond to his Additional Further Supplemental Interrogatories and Requests for Production served on March 22, 2011 ("plaintiff's demands"). Defendants responded to plaintiff's demands by serving responses and objections dated May 13, 2011 (Exh. A to Motion). Plaintiff's motion argues that defendants' responses and/or objections to the following interrogatories are improper: 13(a), 16(a), 16(c), 16(e), 16(f), 16(g), 16(h), 21, 21(c) and 21(d).³

³ Plaintiff argues for the first time in his reply papers that defendants' response to interrogatory 14 is deficient. As this demand is closely related to interrogatory 13(a), the court's analysis will include demand 14.

At the outset, plaintiff's motion is denied as to interrogatories 16(a), 16(c), 16(e), 16(f), 16(g) and 16(h), all of which pertain to the subject article's purported republication. These demands are stricken as irrelevant for the same reasons previously stated.

As to plaintiff's remaining interrogatories, interrogatory 13(a) asks why defendants did not use the following search terms in its computer search for e-mails related to the subject of this action for the period January 1, 2007 to January 2, 2008: "Errol Louis", "Jerome Karp", "Martin Riskin", "Theodore (Ted) Singer" and "Robert Tembeckjian". Interrogatory 14 demands that defendants identify and produce any documents the foregoing search terms might have yielded. This court agrees that the search terms defendants used, which include several forms of plaintiff's name, "Ravi Batra", the "Commission on Judicial Conduct" and phrases from the titles of the subject article, were sufficient to generate e-mails relevant to this action. However, the proposed search terms plaintiff requests are either too broad⁴ or pertain to individuals who are peripheral to the subject article. Thus, plaintiff's motion is denied as to interrogatories 13(a) and 14 and the demands are stricken.

Interrogatory 21(a) through (c) seeks further information as a result of defendants' production of certain February 8, 2007 e-mails between defendant Louis and Robert Tembeckjian ("Tembeckjian"). Specifically, these interrogatories request details pertaining to any other e-mails or other communications between Louis and

⁴ For example, a search of DNLP's computers for the name "Errol Louis", one of DNLP's regular columnists, would potentially yield thousands of e-mails unrelated to the subject article.

Tembeckjian regarding the subject article or plaintiff. While not irrelevant, these demands are duplicative inasmuch as Louls' deposition testimony and a previously submitted affidavit from Tembeckjian corroborate that they never discussed plaintiff and had limited communications regarding the subject article. Accordingly, plaintiff's motion is denied and interrogatories 21(a), (b) and (c) are stricken.

Plaintiff's motion is similarly denied as to interrogatory 21(d), which requests the production of DNLP's hard drive from the computer used to identify the e-mails between Louis and Tembeckjian. Plaintiff fails to make a sufficient showing for such extraordinary relief, which would allow plaintiff access to unrelated and/or privileged materials. Plaintiff's motion is therefore denied and Interrogatory 21(d) is stricken.

Defendants' Cross-Motion

Defendants cross-move in motion sequence 8 to compel plaintiff to respond to Defendants' Second Interrogatories and Document Requests dated June 16, 2011 ("defendants' demands", at Exh. A to Cross-Motion). Plaintiff objected to defendants' demands in their entirety on various grounds. For each interrogatory in defendants' demands, defendants also request corresponding documentation.

Defendants' cross-motion is granted as to interrogatories 1 and 2 and corresponding document demands 1 and 2, which seek the names of plaintiff's trial witnesses and the subject of their testimony. Plaintiff's claim that no legal authority supports these requests does not render them improper. Plaintiff is directed to respond to these requests on or before April 30, 2012.

With respect to Interrogatory 3 seeking discovery of expert witnesses, the court declines to exalt form over substance as plaintiff urges by requiring defendants to serve

a separate demand for expert witnesses rather than seeking this information via interrogatories. Nonetheless, the demand is too broad and must be narrowed to limit the information sought to reflect CPLR §3101(d)(1)'s requirements. This portion of the cross-motion is granted to the extent that plaintiff is directed to respond to Interrogatory 3 as so limited; however, at this time, defendants' cross-motion is denied with respect to corresponding document demands 3 and 4 requesting expert reports and communications between plaintiff, his counsel and/or anyone acting on his behalf and the experts so identified. These document requests can be reconsidered in the event that plaintiff's expert disclosure is insufficient. Accordingly, plaintiff shall respond to interrogatory 3 on or before April 30, 2012 and to the extent that he may be unable to do so at that time, shall supplement this response as soon as practicable, subject to CPLR §3101(d)(1)'s provisions regarding sufficient notice to opposing counsel.

Defendants' cross-motion is denied as to interrogatories 4 and 11, both of which seek information probative of plaintiff's general reputation and any alleged harm the subject article may have caused thereto. Notwithstanding defendants' claim that these demands merely ask plaintiff to supplement his prior discovery responses aimed at identifying individuals with whom plaintiff has discussed the subject matter of the complaint in this action, in this action alleging defamation *per se*, injury to plaintiff's reputation is presumed. *Ideal Publ. Corp. v. Creative Features, Inc.*, 59 AD2d 862 (1st Dept. 1977). As such, inquiry into plaintiff's reputation is irrelevant. It follows that corresponding document demands 5, 7 and 11 must also be stricken.

Interrogatories 5 through 9 ask plaintiff to identify all searches he has conducted or that were conducted on his behalf using various search terms such as:

the title and subtitle of the subject article (5); "Ravi Batra"; (6); "Errol Louis" and "Daily News Columnist" (7); various forms of plaintiff's name (8); and names of various individuals involved in the Riskin litigation (9). Corresponding document demand 6 seeks documents produced by the foregoing searches. Related document demand 10 requests documents pertaining to any requests made by or on behalf of plaintiff to preserve documentation relevant to this action, the subject article and/or the Riskin litigation ("litigation holds").

It appears from various non-party depositions that plaintiff did not instruct court personnel to maintain documents on court computers pertaining to this action. As a result, many electronic files were automatically deleted. Despite plaintiff's claim that no responsive documents exist,⁵ defendants insist that plaintiff respond to these demands and in the event the requested documents do not exist, furnish an affidavit so stating and indicating the efforts made to search for responsive documents.

This court agrees that plaintiff should be compelled to respond to interrogatories 5 through 8 and related document demands 6 and 10. Interrogatory 9 concerns the peripheral subject matter of the Riskin litigation and interrogatory 10 is overbroad as discussed below. Accordingly, the cross-motion is granted to the extent that plaintiff shall respond to interrogatories 5 through 8 and the corresponding document demands on or before April 30, 2012 and interrogatories 9 and 10 and their related document demands are stricken.

⁵ Defendants indicate that a search of their computers uncovered an e-mail from plaintiff to defendant Louis which plaintiff did not produce because it had been automatically deleted from court computers.

With respect to interrogatories 12 and 13 and document demands 8 and 9, which seek information and documents regarding requests for plaintiff to recuse himself and any occasions when plaintiff has recused himself, the cross-motion is denied and these demands are stricken as overbroad and irrelevant. Defendants seek such information and documents from 1991 to date, making the demand unduly burdensome. Further, plaintiff's conduct in declining to recuse himself is only relevant as to the recusal request made in *Riskin v. Belinda*.

This court sees no probative value in plaintiff's recusal history for the approximately 20 year period he has been on the bench. Contrary to defendants' arguments, plaintiff's subjective views as to when recusal is warranted bear no relation to his claim that it was substantially false for defendant Louis to conclude he had a conflict of interest when he denied the recusal request in *Riskin v. Belinda*.

Finally, the cross-motion is denied as to interrogatory 10 (identify searches conducted to respond to defendants' present and prior demands) and document demand 12 (documents relied upon in responding to defendants' demands), which are stricken as too vague, general and overbroad. For all of the foregoing reasons, it is hereby

ORDERED that defendants' motion for a protective order (sequence 9) is granted in its entirety; and it is further

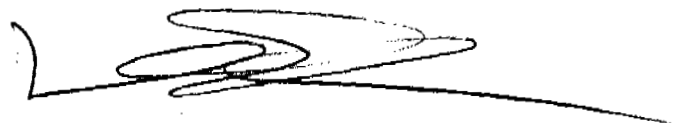
ORDERED that plaintiff's motion (sequence 8) is denied in its entirety; and it is further

ORDERED that DNLP's cross-motion (sequence 8) is granted in part and denied in part as set forth herein, and plaintiff is directed to respond to the demands previously specified on or before April 30, 2012.

Counsel for the parties are directed to appear for a status conference on May 8, 2012 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 same have been provided to counsel for the parties.

Dated: New York, New York
March 21, 2012



HON. MARTIN SHULMAN, J.S.C.

FILED

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