

Matter of Overstock.com v Morgan Stanley & Co.

2012 NY Slip Op 33297(U)

January 13, 2012

Sup Ct, NY County

Docket Number: 111926/2010

Judge: Paul G. Feinman

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NEW YORK — NEW YORK COUNTY

Index Number : 111926/2010 ↙

OVERSTOCK.COM INC HON. PAUL G. FENMAN
vs. *ice*

HAZAN, STEVEN MOSES

SEQUENCE NUMBER : 001

COMPEL

PART 12

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

FEET OF IS DENIED IN ACCORDANCE WITH THE ANNEXED DECISION/ORDER AND JUDGMENT.

Dated: 1/13/2012 _____ *[Signature]* _____
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 12

-----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; HUGH D.
BARRON, an individual; DAVID TRENT, an individual;
and MARK MONTAG, an individual,
Petitioners,

Index Number: 111926/2010
Motion Seq. No.: 001

DECISION AND ORDER

for an order for the issuance of a subpoena for the
deposition and production of documents by:
STEVEN M. HAZAN,

Respondent,

for use in an action pending in the State of California
entitled

OVERSTOCK.COM, A DELAWARE CORPORATION;
KENNETH CARPENTER, an individual; OLIVIER
CHENG, an individual; MARY HELBURN, an individual;
HUGH D. BARRON, an individual; DAVID TRENT,
an individual; and MARK MONTAG, an individual,

Plaintiffs,

-against-

MORGAN STANLEY & CO., INCORPORATED, THE
GOLDMAN SACHS GROUP, INC., BEAR STEARNS
SECURITIES CORP., BANC OF AMERICA
SECURITIES LLC, THE BANK OF NEW YORK,
CITIGROUP, INC., CREDIT SUISSE (USA) INC.,
DEUTSCHE BANK SECURITIES, INC., UBS
SECURITIES LLC, GOLDMAN SACHS & CO.,
GOLDMAN SACHS EXECUTION AND CLEARING,
L.P., CITIGROUP GLOBAL MARKETS, INC.,
CREDIT SUISSE SECURITIES (USA) LLC,
MERRILL LYNCH PROFESSIONAL CLEARING
CORPORATION and DOES 1 THROUGH 100,

Defendants.

-----X
For the petitioners:
Gibbons P.C.
By: Kevin G. Walsh, Esq.
One Pennsylvania Plaza, 37th fl.
New York, NY 10019-3701
(212) 613-2000

For respondent:
Bachner & Associates, PC
By: Scott J. Splittgerber, Esq.
26 Broadway, ste. 2310
New York, NY 10004
(212) 344-7778

Papers considered in connection with this motion and cross motion:

	Document Numbers
Amended notice of motion, Walsh affirm. and annexed exhibits A-J	1 - 2
Amended cross motion, memo. of law, Splittgerber affirm., and annexed exhibits A - C	3 - 5
Reply memo. of law in further support	6
In camera submission - Documents 1 - 3	7
Oral argument transcript	8

PAUL G. FEINMAN, J.:

Petitioner, Overstock.com, Inc., moves pursuant to CPLR 3102 (e) and 3124 to compel non-party witness Steven M. Hazan to continue to be deposed and answer all of Overstock's questions, including but not limited to areas in which he has already provided sworn deposition testimony, and for costs and fees, including attorneys' fees, associated with this motion. Hazan opposes and cross moves for costs and attorney's fees pursuant to 22 NYCRR 130-1.1. For the reasons provided below, the motion is granted in part and denied in part, and the cross motion is denied in its entirety.

Background

Petitioners are the plaintiff in a civil litigation pending in the Superior Court of California, County of San Francisco, captioned as *Overstock.com, Inc. v Morgan Stanley & Co., Inc., et. al.*, case no. CGC-07-460147 ("the California action"). In that case, petitioners filed a complaint alleging numerous defendants engaged in a manipulative trading scheme involving Overstock securities. In short, petitioners allege that the defendants and other non-parties (including respondent Hazan) engaged in the practice of "naked short selling" and that it caused tortious injury to petitioners.

On March 22, 2006, Hazan testified before the American Stock Exchange (AMEX), a subsidiary of the former National Association of Securities Dealers (NASD), a self-regulatory organization for member broker-dealers. During his testimony, Hazan testified extensively about

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his trading practices with regards to Overstock.com's stock without asserting his Fifth Amendment privilege against self-incrimination. A copy of the transcript has been submitted to the court in camera for review in connection with the instant motion.

Subsequently, the Superior Court of California authorized a commission to take Hazan's deposition outside of California. A justice of this court then granted a "superseding order for issuance of a subpoena for deposition and the production of documents" pursuant to CPLR 3102 (e), and Hazan was served with a subpoena around September 13, 2010. A similar commission and order for a subpoena was issued for Hazan Capital Management, LLC (Hazan Capital). Petitioners' counsel and the attorney for both Hazan and Hazan Capital, then communicated regarding Hazan's deposition and the documents to be produced in response to the subpoena duces tecum that were served on Hazan and Hazan Capital. According to petitioners' attorney, Hazan's attorney informed him that his client would be invoking the Fifth Amendment privilege throughout his prospective deposition, and letters were exchanged between the attorneys on this issue.

On April 4, 2011, Hazan appeared for his deposition. Hazan answered three questions about whether any of the defendants in the California action contributed to the payment of his attorney's fees at the start of his deposition. However, after that, for the next 100 pages of testimony in the deposition transcript, Hazan answers "I take the Fifth" to every question posed to him, even when, on the face of the question, the privilege would not seem to the court to be implied (Nazan trans., Apr. 4). For example, "I take the Fifth" was Hazan's response to the question of whether Michael F. Bachner, Esq., was the attorney representing him at the deposition (*id.* at 11). He gave the same answer when portions of his deposition testimony in the NASD/AMEX investigation were read into the record and he was asked whether it was his

testimony. Hazan also gave this answer when asked whether he had been notified by federal or state criminal investigators if he was the target of any pending investigation into his trading activities from 2004 to 2007 (*id.* at 13). There was no discussion on the record at the deposition where Hazan explained the basis for his invocation of the Fifth Amendment privilege.

Analysis

The Fifth Amendment provides that no person “shall be compelled in any criminal case to be a witness against himself” (US Const, 5th Amend). The Amendment privileges an individual not to answer official questions put to him or her in any proceeding, civil or criminal, formal or informal, where the answers might incriminate him or her in future criminal proceedings (*Lefkowitz v Turley*, 414 US 70, 77 [1973]). The “mere assertion of the privilege, however, by the one whose testimony is sought, based on his reasonable belief, is not enough” (*United States v Edgerton*, 734 F2d 913, 919 [2d Cir 1984]). The court is required to determine, “in view of the implications of the question, in the setting in which it is asked, whether the incriminating nature of the answer is evident” (*id.* at 919; quoting *In re Grand Jury Subpoena of Flanagan*, 691 F2d 116, 120 [2d Cir 1982]). If the court determines that the incriminatory nature is not readily apparent, the witness has the burden to explain how his or her answer will be incriminatory (*id.*; citing *United States v Rylander*, 460 US 752, 759 [1983]).

As mentioned above, Hazan’s response to nearly every question at his April 4, 2011 deposition was “I take the Fifth.” This answer was repeated even where the questions were designed to determine whether Hazan had a reasonable belief that his answers could incriminate him. The same answer was given when Hazan was asked administrative questions such as whether Michael Bachner, his attorney, was representing him at the deposition that day. Such a blanket refusal to answer questions based upon the Fifth Amendment privilege against self-

incrimination “cannot be sustained absent unique circumstances [as] ... the privilege may only be asserted where there is reasonable cause to apprehend danger from a direct answer” (*Matter of Astor*, 62 AD3d 867, 869 [2d Dept 2009]; quoting *Chase Manhattan Bank, Natl. Assn v Federal Chandros*, 148 AD2d 567, 568 [2d Dept 1989]).

In opposition to petitioners’ motion, Hazan argues that the risk of self-incrimination is self-evident from petitioners’ questioning at the deposition. He further contends that it is self-evident from petitioners’ papers submitted in support of the instant motion and describing the subject matter as concerning allegations of manipulative trading activity and schemes involving Overstock.com’s securities, an alleged “massive, illegal stock market manipulation scheme” and “RICO violations” (Doc. 13, Hazan memo. of law at 4). Hazan’s attorney at that deposition, Michael F. Bachner, Esq., submits an affirmation stating that he “advised counsel for plaintiffs during a break that Hazan was asserting his Fifth Amendment right because [he] had been contacted by the United States Attorney’s Office [USAO] for the Southern District of New York, and advised that Mr. Hazan was a subject of a criminal investigation” (Doc. 12, Bachner affirm. at ¶ 6). Although he also claims that it was during the course of the Securities and Exchange Commission’s (SEC) investigation into Regulation SHO that Hazan was contacted with this information, Bachner does not indicate when exactly this communication took place, whether he subsequently heard anything further from the unnamed individual at the USAO, or whether this criminal investigation had anything to do with Hazan’s trading in Overstock.com’s shares or any other matter testified to by Hazan before AMEX/NASD in 2006. Bachner also states that he was counsel for Hazan when he testified before AMEX/NASD in 2006, and that prior to that deposition, he was told by Cameron Funkhouser, an AMEX representative, that he was not aware of any criminal investigations concerning the matters at issue in the AMEX investigation at that

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time. Thus, piecing together Bachner's statements, Hazan was not aware of any criminal investigation at the time of 2006 deposition, and thus did not invoke his Fifth Amendment privilege, but he subsequently learned of a criminal investigation at some point between his March 2006 deposition and April 2011 deposition. The court notes, however, that this information comes from an affirmation of Hazan's former attorney, and is almost entirely based upon hearsay statements made to Bachner by unnamed individuals. Absent additional details, the court is unable to determine the reasonableness of any belief at the time of the April 2011 deposition that Hazan was under investigation or likely to come under investigation.

In reply, petitioners argue that, to the extent the above allegations could expose Hazan to criminal liability, the statute of limitations would already have run because the trading activity described in Hazan's AMEX/NASD deposition occurred no later than March of 2006, when that deposition took place. At oral argument, petitioners' attorney emphasized that there is a five-year statute of limitations for federal criminal purposes which would have run as it pertains to any of the trading activity described by Hazan in his AMEX/NASD testimony (Oral arg. trans. at 8). Petitioners also note the lack of details found in Bachner's affirmation regarding when it was that he was contacted by the USAO.

Unless expressly provided by law, under Title 18, Chapter 213, Section 3282, a criminal indictment must be found or an information instituted within 5 years after any non-capital federal offense has been committed. Presumably, any criminal charges that could be brought by the USAO would be covered by this statute of limitations, and Hazan has not pointed out his potential liability under any other statute with a longer limitations period. Because the trading activity described previously by Hazan in his deposition before the AMEX/NASD had to have occurred prior to March of 2006 when that deposition took place, to the extent any of his trading activity

constituted criminal conduct, the USAO would have had until no later than March of 2011 to bring formal charges against Hazan before the statute of limitations ran out. At this time, there are no pending charges or grand jury proceedings and none have been brought against Hazan related to the trading activity at issue. Even if there was a statute with a longer limitations period and the USAO had commenced a criminal investigation at some point after Hazan gave his AMEX/NASD deposition, as Bachner suggests in his affirmation, the fact that the USAO has not brought charges more than 5 years after the conduct at issue suggests that there is no intent to do so.

In light of the above, contrary to Hazan's contention, it is not readily apparent that Hazan would potentially incriminate himself by answering the questions posed to him at his court-ordered deposition in April 2011. Thus, the burden is placed upon Hazan to explain how his answers to each specific question will be incriminatory. Upon review of the parties' papers submitted in connection with this motion, the court holds that Hazan has not met his burden with respect to each question posed to him at his April 2011 deposition where he invoked the Fifth Amendment. Although a blanket assertion of the Fifth Amendment privilege is improper, it would also be improper to direct Hazan to provide answers to every question asked of him at the April 2011 based only upon the record before the court at this time.

Accordingly, petitioners' motion is granted solely to the extent that Hazan is required to appear for an additional deposition and must provide full answers to any questions not reasonably protected by any colorable claim of privilege. When a privilege is invoked, Hazan must be prepared to offer a sufficient explanation for its assertion on a question-by-question basis. Petitioners' request for costs and fees is also denied.

Hazan's cross motion for sanctions and costs is denied as the record does not demonstrate that petitioners' counsel has engaged in the type of frivolous conduct necessary to warrant such punishment.

Finally, a request was made at oral argument that the record on this motion be sealed. In particular, in support of this motion, petitioners had submitted three documents for in camera consideration: (1) a stipulated protective order regarding confidential information; (2) Hazan's March 2006 deposition transcript; and (3) Hazan's April 2011 deposition transcript. Pursuant to section 216.1 (a) of the Uniform Rules for Trial courts, the court may not enter an order sealing the court records except upon a written finding of good cause. "A finding of good cause presupposed that public access to the documents at issue will likely result in harm to a compelling interest of the movant" (*Mosallem v Berenson*, 76 AD3d 345, 349 [1st Dept 2010]). "Confidentiality is clearly the exception, not the rule ... and the party seeking to seal court records has the burden to demonstrate compelling circumstances to justify restricting public access" (*id.*).

The parties have not meet their burden of demonstrating compelling circumstances that would outweigh the public's interest in open court proceedings. The public interest in openness is particularly important in matters of public concern such as those involved in the subject transcripts, as they pertain to allegedly manipulative trading schemes in publicly-traded securities. The fact that the documents are marked "highly confidential" by the parties pursuant to their stipulated protective order in the California action "is not controlling on the court's determination whether there is good cause to seal the record" (*Mosallem*, 76 AD3d at 350). No affidavits of any individuals purporting to have any personal knowledge of the documents' contents have been submitted in support of this application. Thus, there "is no evidence in the

record as to why the documents are so confidential or sensitive that public access to them should be restricted" (*id.*). Accordingly, the parties' application to seal the record is denied.

Accordingly, it is

ORDERED that petitioners' motion to compel the deposition testimony of Steven M. Hazan is granted to the extent provided herein and otherwise denied, and such deposition shall be held at a time and place mutually agreeable to the parties but no later than March 5, 2012; and it is further

ORDERED that the cross motion of Steven M. Hazan is denied in its entirety; and it is further

ORDERED that the application to seal the record pursuant to 22 NYCRR 216.1 (a) is denied, and the parties are directed to upload to the NYSECF system all papers submitted for the court's consideration on this motion and cross motion and, when appropriate, may designate documents as "secured" on the NYSECF system.

This constitutes the decision and order of the court.

Dated: January 13, 2012
New York, New York



J.S.C.