

Verdi v Dinowitz

2018 NY Slip Op 30463(U)

March 19, 2018

Supreme Court, New York County

Docket Number: 158747/2016

Judge: Arlene P. Bluth

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 32

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MANUELE VERDI, individually and in his official capacity
as the Assistant Principal of Public School 24 ("P.S. 24"), a
public school under the auspices of the New York City
Department of Education,

Plaintiff,

Index No. 158747/2016
Motion Seq: 002

-against-

JEFFREY DINOWITZ, both individually and in his official
capacities as Assembly Member of the 81st Assembly District,

Defendant.

DECISION & ORDER
ARLENE P. BLUTH, JSC

-----X
The motion to quash the subpoena issued to Council Member Andrew Cohen is denied
and the cross-motion is granted only to the extent that it seeks to compel the production of Mr.
Cohen. Plaintiff's request for sanctions and costs is denied.

Background

This case arises out of an overcrowding crisis at PS 24 in the Riverdale section of the
Bronx. This crisis began after the school lost the lease for an annex in a nearby co-op building in
2015, which forced the school to find space for the students whose classrooms were located in
that annex. Unsurprisingly, the community expressed outrage and looked for people to blame.
The school administrators at PS 24, including plaintiff (the assistant principal), were singled out
as responsible for losing the lease.

Plaintiff insists that defendant blamed plaintiff for losing the lease for PS 24's annex despite the fact that defendant knew that plaintiff was not responsible for obtaining or renewing leases. Plaintiff also contends that one of defendant's staff members was improperly involved in the kindergarten registration process as part of defendant's purported racially-motivated scheme to bar low-income minority students from the school.

Plaintiff served a subpoena ad testificandum on non-party witness Andrew Cohen, a New York City Council member whose district encompasses PS 24. Cohen moves to quash this subpoena on the ground that he is a high-ranking official and because plaintiff has not shown that he is unable to gather the evidence he seeks from other sources.

In opposition,¹ plaintiff claims that Cohen has material information about this lawsuit. Plaintiff maintains that Cohen attended various meetings at which defamatory statements were made by defendant, Cohen has knowledge about various phone conversations he had with defendant, and Cohen wrote an op-ed about the issue.

Discussion

CPLR 3101 provides that "There shall be full disclosure of all mater material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by . . . (4) any other person, upon notice stating the circumstances or reasons such disclosure is sought or required."

¹Although Cohen claims that plaintiff's opposition (and cross-motion) was filed late, the Court will decide the instant motion and cross-motion on the merits.

“The words material and necessary as used in section 3101 must be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. Section 3101(a)(4) imposes no requirement that the subpoenaing party demonstrate that it cannot obtain the requested disclosure from any other source. Thus, so long as the disclosure sought is relevant to the prosecution or defense of an action, it must be provided by the nonparty” (*Kapon v Koch*, 23 NY3d 32, 38, 988 NYS2d 559 [2014] [internal quotations and citations omitted]).

Here, Cohen (a non-party) claims that as a high-ranking government official he can only be deposed if he has unique information not available from other sources. He cites to a Second Circuit case, *Lederman v New York City Dep. of Parks & Recreation* (731 F3d 199 [2d Cir 2013]), in which that federal court granted a protective order barring the deposition of Mayor Bloomberg. The Court observed that many federal courts have held that “a high-ranking government official should not— absent exceptional circumstances— be deposed or called to testify regarding the reasons for taking official actions” (*id.* at 203).

That case does not establish that Cohen’s motion should be granted. Here, the information sought from Cohen does not deal with the reasons taken for official actions. Unlike in *Lederman*, where plaintiffs sought the deposition of Mayor Bloomberg in connection with a lawsuit about new regulations that limited the number of art vendors, the issues in this action concern a community crisis. The record before this Court does not indicate that Cohen took any official action as part of his role as a City Council member— for instance, there is no mention of legislation introduced by Cohen or debates held before a City Council committee.

Cohen also cites to a Court of Claims case, *Torres v City of New York* (39 Misc3d 558, 959 NYS2d 859 [Ct Cl 2013]), where the Court quashed a subpoena seeking the deposition of the Police Commissioner on the ground that plaintiffs “failed to show that Commissioner Kelly possesses relevant and material information that could not be obtained from any other source.” The Court added that “Contrary to Plaintiffs’ assertion, the mere fact that Commissioner Kelly made statements to the media regarding the subject incident does not demonstrate his personal or unique first-hand knowledge as to the circumstances involved in this case” (*id.* at 566) This case is also distinguishable from the instant circumstances—Cohen allegedly has personal knowledge regarding what defendant knew about plaintiff’s role in losing the annex lease.

At oral argument, Cohen submitted a transcript from a federal case (*Winfield v City of New York*, Docket #15cv5236) in which a federal magistrate judge quashed subpoenas seeking depositions of city council members (*see* Document 187-1, filed 09/28/2017). However, that decision is not persuasive because the Magistrate Judge found that “plaintiffs have not explained what first hand knowledge these counsel [sic] members possess that is relevant to the claims in this case” (*id.* at 8-9). Here, plaintiff has made that showing. Moreover, the issue in *Winfield* dealt with an affordable housing policy that was implemented and enforced by the mayor rather than a law passed by the City Council (*id.*).

This Court was unable to find, and the parties did not cite, a case where a New York court has held that a New York City Council member is entitled to the protections referred to in *Lederman*. However, the Court observes that at least one Court has held that a mayor and city council members (in White Plains) should testify in an administrative hearing about matters in which they have personal knowledge (*see Del Vecchio v White Plains Unit, Westchester County*

Chapter, Civil Serv. Empl. Assn. Inc., Local 860, 64 AD2d 975, 408 NYS2d 802 [2d Dept 1978] [reversing a Supreme Court decision that quashed subpoenas compelling the attendance of the mayor and city council members at an administrative hearing to testify about a letter they sent to city employees concerning collective bargaining negotiations]].

Under the circumstances, the Court need not decide whether a City Council member is a high-ranking official subject to a broad protection from deposition subpoenas because the Court finds that Cohen has unique information about defendant's knowledge concerning who was responsible for losing the annex.

Cohen published an op-ed in the *Riverdale Press* in which he claimed that "In the fall of 2014, Assemblyman Jeffrey Dinowitz and I learned that negotiations regarding the P.S. 24 annex lease renewal . . . between the Whitehall and the School Construction Authority (SCA) were breaking down. We relayed this information to then-principal Donna Connelly, to Assistant Principal Manny Verdi and to some of the officers of the Parent Association (PA). Principal Connelly told us that lease renewals are not under a principal's purview and that it is the job of the SCA to negotiate the lease. The PA officers supported that position. The Assemblyman and I were concerned and reached out to the SCA. We were then asked by the SCA to not interfere because they were concerned that our involvement would undermine the negotiating position" (NYSCEF Doc. No. 77).

This article demonstrates that Cohen could potentially have information material and necessary to plaintiff's prosecution of his case. Plaintiff's theory is that defendant blamed plaintiff for the loss of the annex lease despite the fact that he knew plaintiff was not responsible for renewing the lease. This op-ed suggests that Cohen was in communication with defendant

about the annex lease renewal— that is relevant to plaintiff's claims and it is unlikely to be obtained through other sources. The Court agrees with Cohen that plaintiff could have sought to depose other attendees at the public meetings where defendant allegedly defamed plaintiff. But Cohen 's involvement was not limited to merely showing up for community events. Cohen's deposition may reveal that he has limited insight into defendant's knowledge about the lease renewal, but this op-ed is enough to merit a deposition especially given this state's liberal disclosure precedent.

Legislative Privilege

Cohen also claims that he would be protected from answering certain deposition questions pursuant to the legislative privilege. That does not justify quashing the subpoena. If Cohen feels that he need not answer certain questions, then his attorney can raise objections. But that does not mean that Cohen can avoid a deposition (*see* 58A NY Jur 2d Evidence and Witnesses § 752 ["A witness subject to a subpoena ad testificandum cannot generally raise an issue of privilege until the witness has actually appeared and been questioned"]).

And the Court questions the applicability of a legislative privilege to discussions about the renewal of the annex lease. Contract negotiations between the School Construction Authority and a co-op are clearly not part of a City Council member's *legislative* function. While the Court is sensitive to the fact that the public may expect a local legislator to have an opinion (and likely speak out) about an overcrowding crisis, the Court is unwilling to find that any action taken by a City Council member that he or she claims is part of his or her "legislative duties" is off-limits

for a deposition. The fact is that Cohen had no official role in the lease discussions and was not performing a legislative function.

Plaintiff's Cross-Motion

Plaintiff moves to compel the deposition of Cohen and for sanctions. The Court grants the branch of the cross-motion to compel the deposition for the reasons stated above but denies the portions of the cross-motion seeking sanctions and costs.

Despite plaintiff's efforts to characterize Cohen's motion as frivolous, the fact that Cohen has a different view about his role in the instant action does not make his motion to quash sanctionable. The Court observes that Cohen is a not a party to this case and submitted a good faith basis regarding why he need not appear for a deposition. Plaintiff's bizarre reading of Cohen's motion appears to suggest that because Cohen objects to the subpoena, it must be "phony" and "frivolous."

And there is substantial case law supporting Cohen's position that high-ranking governmental officials cannot be deposed unless they possess personal knowledge that cannot be obtained through other means. Otherwise, officials would spend the vast majority of their time in public service in depositions. Although the Court did not opine on whether Cohen's role as a City Council member entitles him to that type of broad protection, his arguments in favor of quashing the subpoena are not baseless. It is a reasonable and logical position to suggest that City Council members need not be deposed unless they have unique knowledge about an issue that cannot be obtained through other witnesses.

Summary

Although the Court finds that plaintiff is entitled to a deposition of Cohen, that deposition need not be scheduled until after a decision is rendered in defendant's appeal of this Court's decision granting, in part, defendant's motion to dismiss (*see* NYSCEF Doc. No. 55). If the First Department decides to dismiss plaintiff's entire case, then, obviously, no deposition of Cohen will be necessary. Because that argument will be held soon, there is no reason to immediately hold Cohen's deposition. The Court also observes that the preliminary conference scheduled for March 13, 2018 was adjourned because the parties could not reach an agreement about anything. Therefore, because discovery in this case is still in its infancy, there is no need to hold a non-party deposition before paper discovery or the parties' depositions are completed.

Accordingly, it is hereby


ORDERED that the motion to quash plaintiff's subpoena is denied; and it is further

ORDERED that plaintiff's cross-motion to compel the deposition of non-party Andrew Cohen is granted only to the extent that plaintiff is entitled to a deposition, which shall be scheduled after the First Department renders a decision on defendant's appeal, and denied as to the remaining branches of plaintiff's cross-motion.

This is the Decision and Order of the Court.

The parties are directed to appear for the already-scheduled conference on June 12, 2018. The parties shall work together to complete a preliminary conference order at the next conference. If the parties are unable to do so, the Court will pick dates for the parties.

Dated: March 19, 2018
New York, New York



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