Trussell-Slutsky v McIlmurray
2018 NY Slip Op 33496(U)
October 11, 2018
Supreme Court, Rockland County
Docket Number: 31137/2017
Judge: Robert M. Berliner

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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MEREDITH TRUSSELL-SLUTSKY,

Plaintiff,

-against-

CAROL MCILMURRAY, ROCKLANDPOST.COM, MCILMURRAY PUBLISHING HOUSE PRINTING CO., and THE CAROL REPORT,

Defendants.

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DECISION AND ORDER
Index No.: 31137/2017
Order Date: Oct. 11, 2018
Mot. Seq. 1

BERLINER, J.

The following papers were read on this motion by plaintiff pursuant to CPLR 3124 and 3126 to compel defendants to further respond to plaintiff's Notice to Produce dated August 2, 2017:

Notice of Motion, Affirmation in Support, Exhs. A-E
Affirmation in Opposition, McIlmurray Affidavit
Reply Affirmation
Transcript of August 22, 2018
Referee Report (Markus, C.A.R.) dated September 6, 2018

Upon the foregoing papers, the motion is determined as follows:

Pursuant to the Order of Reference of this Court (Berliner, J.) dated August 9, 2018, directing Court Attorney-Referee David Evan Markus to hear and report in this action, such Referee filed with this Court a Referee Report dated September 6, 2018, in relation to the pending motion. Such Referee Report provides in relevant part as follows:

Background

Plaintiff, a public school teacher living and working in Rockland County, New York, commenced this defamation action by Summons and Verified Complaint on March 13, 2017

(NYSCEF Doc. 1), alleging that defendant Carol McIlmurray published libelous statements about plaintiff on the websites rocklandpost.com ("Rockland Post") and/or carolreport.com ("The Carol Report") – websites that plaintiff alleges McIlmurray to own and operate personally or via co-defendant entities. The allegedly defamatory statements include that plaintiff is a "47-year-old hooker ... who daylights as an elementary school teacher at Woodglen Elementary School in New City," which school is part of the Clarkstown Central School District ("CCSD"); that plaintiff is "well-known prostitute," a "hooker" charging for "group sex"; and that plaintiff has been "moonlight[ing] ... as a house call girl to satisfy entire rooms of men and women" including plaintiff's alleged "client," nonparty Dr. Jeffrey Oppenheim, former mayor of the Village of Montebello. The Complaint attaches what plaintiff alleges to be print-outs of these statements, and seeks $15.7 million in compensatory damages, plus punitive damages, on 31 causes of action for defamation per se, intentional infliction of emotional distress and negligent infliction of emotional distress.

Defense counsel entered a Notice of Appearance for all defendants on June 1, 2017 (NYSCEF Doc. 14); interposed an answer for defendant McIlmurray on June 2, 2017 (NYSCEF Doc. 15); and filed an affidavit of service for such answer on June 2, 2017, denominating such filing to be for all defendants (NYSCEF Doc. 16). On or about August 2, 2017, plaintiff served on all defendants a Notice to Produce; all counsel then attended a Preliminary Conference before this Court (Berliner, J.) on September 14, 2017. On September 28, 2017, defendants objected to plaintiff's Notice to Produce on multiple grounds, including the journalist privilege of Civil Rights Law section 79-h to protect defendants' "sources" against disclosure. By Notice of Motion dated November 9, 2017, plaintiff moved to compel defendants to provide full and complete responses to the Notice to Produce; defendants opposed plaintiff's motion.

This Court's Order of Reference dated August 9, 2018 (NYSCEF Doc. 35), directed the undersigned to "hear and report on all pertinent issues" and, pursuant to CPLR 4001 and 4201, "conduct further proceedings in connection therewith, including but not limited to framed issue hearings to resolve factual disputes." Accordingly, the undersigned held a hearing on August 22, 2018, at which all counsel appeared. At such proceeding, all counsel agreed that a framed issue hearing on whether any of defendants qualify as journalists or newscasters under the Shield Law

would adduce no cognizable evidence beyond materials already submitted on the motion (*see* Hearing Tr., at 12-13). Defense counsel also confirmed orally the position that defendants previously took in their discovery response that defendants possess no information responsive to plaintiff's Demands ## 9 (names and addresses of rocklandpost.com board members), 26 (number of subscribers to rocklandpost.com) and 42-45 (addresses of four rocklandpost.com "editors") (*see* Hearing Tr., at 5-6)

On such representations, all counsel agreed that the discovery motion should be deemed submitted for determination based on the papers before the Court (*see* Hearing Tr., at 8-9, 13).

Party Contentions

Plaintiff asserts that defendants are ineligible to invoke the Shield Law privilege because they offer no cognizable record evidence that any of the defendants are paid to report on news for any commercial publication in business for over one year. Plaintiff further argues that even if the Shield Law could apply, at most defendants can claim only a qualified privilege that plaintiff may breach, and sufficiently demonstrates entitlement to breach, upon a "clear and specific showing" that the materials sought are highly material and relevant, critical or necessary to the claim, and not obtainable from any alternative source (Civil Rights Law § 79-h[c]). As to discovery that plaintiff's Notice to Produce seeks, plaintiff asserts that she makes this requisite demonstration as to"news"-gathering materials by showing that such information is not allegedly confidential and that such discovery goes to (1) the truth or falsity of the statements, (2) whether defendants are journalists and/or (3) whether defendants published the materials with malicious intent. Such proof, plaintiff asserts, is vital to the defamation and emotional distress claims, as well as to plaintiff's demand for punitive damages, and by definition not obtainable from other sources. Plaintiff further argues that certain other disclosures to which defendants object on Shield Law grounds outside the Shield Law privilege because defendants published on social media websites, such as Facebook, the allegedly defamatory statements to which such disclosures relate (*see* Civil Rights Law § 79-h[g]).

In opposition, defendants submit an affidavit from Carol McIlmurray attesting, among other things, that she is a "journalist by profession," that she makes her "living" as such, and that

she has "no other source of income" (McIlmurray Aff., at ¶ 4). She attests that she founded rocklandpost.com in April 2016 as an "online news publication" and that she serves as a "writer" and "journalist" for it (*id.*, at ¶ 7). In connection therewith, she avers that she has "researched, gathered, and organized dozens of news articles for publication on [r]ocklandpost.com" (*id.*). On this basis, she argues that she is a "qualified news professional" eligible to invoke the Shield Law privilege against disclosure. Defendants also argue that all of plaintiff's demands concerning Dr. Oppenheim (and presumably thus also nonparty Ann Oppenheim) are irrelevant as a matter of law because Dr. Oppenheim is not a party to this action.

Analysis

It is axiomatic that under CPLR 3101(a)(1), there must be full disclosure of all matters "material and necessary" to the prosecution or defense of an action. The phrase "material and necessary" is interpreted liberally to require disclosure, on request, of any facts bearing on the controversy that will assist preparation for trial by sharpening the issues and reducing delay and prolixity (*see Matter of Kapon*, 23 NY3d 32 [2014], *quoting Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). Trial courts have broad discretion to supervise discovery and enter appropriate remedies under CPLR 3124 and CPLR 3126 to ensure the fair and efficient conduct of discovery (*see Auerbach v Klein*, 30 AD3d 451 [2d Dept 2006]; *Feeley v Midas Properties, Inc.*, 168 AD2d 416 [2d Dept 1990]).

To strike a pleading under CPLR 3126 as a consequence of discovery violations, the proponent of this "drastic" remedy must show that the discovery violations manifest "willful and contumacious" conduct (*Greene v Mullen*, 70 AD3d 996 [2d Dept 2010]; *Maiorino v City of New York*, 39 AD3d 601 [2d Dept 2007]; *Kingsley v Kantor*, 265 AD2d 529 [2d Dept 1999]). A court may infer such willful and contumacious conduct from repeated noncompliance with court orders or failure to comply with court-ordered discovery over an extended period of time coupled with the lack of an adequate excuse for such noncompliance (*see Mei Yan Zhang v Santana*, 52 AD3d 484 [2d Dept 2008]; *Carbajal v Bobo Robo, Inc.*, 38 AD3d 820 [2d Dept 2007]; *Prappas v Papadatos*, 38 AD3d 871 [2d Dept 2007]). Under these circumstances, "[t]he nature and degree of the penalty to be imposed on a motion pursuant to CPLR 3126 is a matter generally left to the

discretion of the Supreme Court" (*Carbajal,* 38 AD3d at 820).

In a defamation action seeking punitive damages, the plaintiff bears the burden to show both the falsity of offending factual assertions (*see Prozeralik v Capitial Cities Comms., Inc.*, 82 NY2d 466, 473 [1993], *citing Immuno AG v Moor-Jankowski*, 77 NY2d 235, 245 [1991], *cert denied* 500 US 954 [1991]), and that the declarant made such assertions with actual malice (*see Freeman v Johnston*, 84 NY2d 52, 56 [1994]; *Mahoney v Adirondack Publ. Co.*, 71 NY2d 31, 39 [1987]). Offending statements must be more than merely "loose, figurative or hyperbolic" (*Kaye v Trump*, 58 AD3d 579, 580 [1st Dept 2009], *lv denied* 13 NY3d 704 [2009]), and cannot be so "vague, subjective [or] lacking in precise meaning" as to be practicably incapable of proof or disproof (*Jacobus v Trump*, 156 AD3d 452 ,452 [1st Dept 2017], *lv denied* 31 NY3d 903 [2018]; *see Gross v New York Times Co.*, 82 NY2d 146 [1993]). It is well-settled that "actual malice" means either knowledge that the offending factual assertions were false or reckless disregard to the truth or falsity of such assertions (*see New York Times Co. v Sullivan*, 376 US 254, 279-280 [1964]; *Freeman*, 84 NY2d at 56-57; *Prozeralik*, 82 NY2d at 474; *see also Lee v Weinstein*, 116 AD2d 700, 701 [2d Dept 1986] [defining "actual malice" as "personal spite, ill will or culpable recklessness or negligence"], *lv denied*, 68 NY2d 601 [1986]; PJI 3:30 [defamatory statement "is made maliciously if it is made with deliberate intent to injure or made out of hatred, ill will, or spite or made with willful, wanton or reckless disregard of another's rights"]). Plaintiff bears the burden to prove such actual malice with "convincing clarity" (*Harte-Hanks Communications v Connaughton*, 491 US 657, 659 [1989]; *Freeman*, 84 NY2d at 57 [collecting cases]), a standard that is synonymous with clear and convincing evidence (*see Anderson v Liberty Lobby*, 477 US 242, 254 [1986]; *Freeman*, 84 NY2d at 57).

Based on the foregoing principles, CPLR 3101(a)(1) entitles a defamation plaintiff seeking punitive damages to obtain discovery of alleged facts materially bearing on (1) proof or disproof of whether the declarant made the alleged factual assertions, (2) the truth or falsity of such assertions, and (3) whether the declarant made such assertions knowing them to be false or with reckless disregard for their truth or falsity. Where a defendant deliberately refuses to provide such discovery, a court properly may impose the consequences that CPLR 3124 and CPLR 3126 authorize: "If the credibility of court orders and the integrity of our judicial system

are to be maintained, a litigant cannot ignore court orders with impunity" (*Kihl v Pfeffer*, 94 NY2d 118, 123 [1999]; *Gibbs v St. Barnabas Hosp.*, 16 NY3d 74 [2010]).

Notwithstanding the foregoing, the New York Shield Law operates as a CPLR 3101(b) privilege against such discovery. The Shield Law protects against contempt penalties – and thus against judicial enforcement of CPLR 3101(a)(1) discovery obligations – professional journalists and newscasters who decline to disclose:

> "any news obtained or received in confidence or the identity of the source of any such news coming into such person's possession in the course of gathering or obtaining news for publication or to be published in a [qualifying print medium] or for broadcast by a [qualifying broadcast medium] ... by which such person is professionally employed or otherwise associated in a news gathering capacity"

(Civil Rights Law § 79-h[b]). Where a person or entity qualified to invoke the Shield Law obtains or receives news items outside the cloak of news-gathering confidentiality, the Shield Law accords not an absolute privilege but rather only a qualified privilege. A party seeking such qualifiedly privileged information can obtain discovery of the same by making:

> "a clear and specific showing that the [demanded information]: (i) is highly material and relevant; (ii) is critical or necessary to the maintenance of a party's claim; [and] (iii) is not obtainable from any alternative source. A court shall order disclosure only of such portion, or portions, of the news sought as to which the above-described showing has been made and shall support such order with clear and specific findings made after a hearing. The provisions of this subdivision shall not affect the availability, under appropriate circumstances, of sanctions under [CPLR 3126]"

(Civil Rights Law § 79-h[c]).

To implement the foregoing privilege scheme, the Shield Law establishes predicates to define a journalist or newscaster eligible to invoke its protections. The Shield Law defines a "newspaper" as a publication printed and distributed at least weekly for at least a year (Civil Rights Law § 79-h[a][1]); a "magazine" as a publication distributed periodically for at least a year with a paid circulation (*id.*, § 79-h[a][2]); a "news agency" as a "commercial organization that collects and supplies news to subscribing newspapers, magazines, periodicals and news

broadcasters" (*id.*, § 79-h[a][3]); and a "wire service" as a "news agency that sends out syndicated news copy by wire to subscribing newspapers, magazines, periodicals or news broadcasters" (*id.*, § 79-h[a][5]). The Shield Law further defines "news" as communications "concerning local, national or worldwide events or other matters of public concern or public interest or affecting the public welfare" (*id.*, § 79-h[a][8]). In light of the foregoing, the Shield Law defines a "professional journalist" as a person who:

> "for gain or livelihood, is engaged in gathering, preparing, collecting, writing, editing [or otherwise disseminating] news intended for a newspaper, magazine, news agency ... or wire service or other professional medium or agency which has as one of its regular functions the processing and researching of news intended for dissemination to the public; such person shall be someone performing said function either as a regular employee or as one otherwise professionally affiliated for gain or livelihood with such medium or communication"

(Civil Rights Law § 79-h[a][6]).

The party invoking privilege against disclosure under CPLR 3101(b) generally, or under the Shield Law particularly, bears the burden to demonstrate such entitlement (*see e.g. WDAI-FM v Proshin*, 42 AD2d 5, 6-7 [3d Dept 1973]; *People v Wolf*, 39 AD2d 864, 864 [1st Dept 1972]). In the instant posture, the foregoing standards require defendants to demonstrate that each is a qualifying "professional journalist" or "news caster," and thus that the media with which they claim association – here, rocklandpost.com, McIlmurray Publishing House Printing Co., and/or The Carol Report – respectively qualify under the Shield Law as a "newspaper," "magazine," "news agency" or "wire service." Defendants also must show that the materials they invoke Shield Law privilege against disclosing qualify as "news" or are associated with the gathering, editing or dissemination of "news." As defendants further claim absolute privilege against such disclosure, defendants additionally must demonstrate that they obtained under "cloak of confidentiality" the information they object to disclosing on that basis.

In applying the Shield Law, courts strictly construe the qualifying conditions for invoking its protections, because the Shield Law operates as an exception to the generally liberal search for truth that is at the heart of CPLR 3101(a) discovery (*see e.g. People v LeGrand*, 67 AD2d 446

[2d Dept 1979]; *see also Von Bulow ex rel. Auersperg v Von Bulow*, 811 F2d 136 [2d Cir 1987], *cert denied sub nom Reynolds v Von Bulow ex rel. Auersperg*, 481 US 1015 [1987]; *In re Grand Jury Subpoena Dated January 4, 1984*, 750 F2d 223, 224 [2d Cir 1984]). Once a party properly invokes the Shield Law, however, courts broadly apply its protections to vindicate the Legislature's policy determination to protect the public interest in a vigorous independent press and the free channels of news communication (*see e.g. Knight-Ridder Broadcasting, Inc. v Greenberg*, 70 NY2d 151, 155 [1987]; *Matter of Beach v Shanley*, 62 NY2d 241, 251 [1984]; *see also Messenger ex rel. Messenger v Gruner + Jahr Printing & Pub.*, 94 NY2d 436, 441-442 [2000] [broad construction of "newsworthiness"]).

1. Defendants' Untimely Objection

As a prefatory matter, defendants failed to object timely to plaintiff's Notice to Produce. CPLR 3122 requires that a party objecting to a discovery demand must interpose such objection within 20 days of service of such demand (*see* CPLR 3122[a][1]). Given Plaintiff's Notice to Produce of August 2, 2017, the Court should deem the demand served as of August 7, 2017, five days later (*see* CPLR 2103[b][2]). Applying the 20-day rule and recognizing that August 27, 2017, was a Sunday, defendants' response was due August 28, 2017 (*see* CPLR 3122[a][1]). Defendants' response, however, is dated September 28, 2017 – 31 days later – and defense counsel's affidavit of service attests to serving such response by mail on September 29, 2017 (NYSCEF Doc. 20). As such, defendants' objections specified in such response, including defendants' invocation of the Shield Law, all are untimely.

While this Court possesses discretion to extend defendants' discovery response time for good cause shown (*see* CPLR 2004), defendants do not seek such an extension. Defendants also fail to acknowledge the tardiness of their discovery response. Accordingly, defendants offer this Court no cognizable basis to extend time.

On the foregoing basis, the Court should reject as untimely all defense objections to plaintiff's Notice to Produce, including objections on grounds of relevance and Shield Law privilege.

2. Relevance of Demanded Discovery Concerning Nonparties

Leaving aside the untimeliness of defendants' objections, the Court should determine that defendants' relevance objections lack substantive merit.

Defendants assert that all of plaintiff's discovery demands seeking disclosure of materials concerning nonparty Dr. Jeffrey Oppenheim or nonparty Ann Oppenheim are not discoverable because they are not parties to this action. The demands subject to this objection are:

Demand #1: "The basis and sources, including full name(s) and addresses of individuals referred to in your Facebook posting, made on February 21, 2017, that 'Neurosurgeon and Former Mayor of Montebello [Oppenheim is or was] living with Known Prostitute' [Trussell-Slutsky]";

Demand #11: "The index number and caption of all actions brought by Carol McIlmurray for medical malpractice and/or sexual harassment against Jeffrey Oppenheim MD";

Demand #27: "State the date of all communications and meetings between Carol McIlmurray and Ann Oppenheim";

Demand #28: "State the location of all meetings had between defendants and Ann Oppenheim";

Demand #29: "Provide copies of all writings, correspondence, and emails in the possession of defendants to or from Ann Oppenheim";

Demand #38: "The names of all patients that Jeffrey Oppenheim 'sexually harassed for nine years' as stated on defendants (*sic*) Facebook page";

Demand #46: "Provide all documents that establish defendants (*sic*) statement that Dr. Oppenheim 'left his wife of 25 years with zero maintenance after raising three children...'";

Demand #47: "Provide the source of defendants (*sic*) statement that Dr. Oppenheim "left his wife of 25 years with zero maintenance after raising three children...'";

Demand #48: "The name of the individual(s) that (*sic*) provided defendant with information that Dr. Oppenheim provided 'zero maintenance' to his wife for 25 years"; and

Demand #49: "The dates that 'Dr. Oppenheim chronically would show his erection to defendant.'"

The entirety of defendants' relevance argument in opposition to enforcing the foregoing demands is that such discovery is not cognizable under CPLR 3101(a) because the Oppenheims are not parties to this action (Defs' Aff in Opposition, at ¶ 4). This argument lacks merit and borders on specious. Defendants offer no authority for the proposition that a party's topical communications with a nonparty necessarily are "beyond the scope" of permissible discovery simply because of such nonparty status. Even granting defendants' tacit premise that discovery demanded of a party about a nonparty constitutes "nonparty discovery" – which it does not – the Court of Appeals has become nearly as liberal with nonparty discovery as with party discovery (*see Matter of Kapon v Koch*, 23 NY3d 32 [2014]).

Rather, liberally construing defendants' objections and motion papers, the argument most fairly attributable to defendants is that discovery concerning any of the Oppenheims is irrelevant to plaintiff's particular allegations that defendants defamed plaintiff. As to Demand #1, even this argument lacks merit because the discovery also concerns plaintiff's alleged conduct in "living with" Dr. Oppenheim and the basis for defendants' statement that plaintiff is a "Known Prostitute" The Complaint explicitly cites that defendants named Jeff Oppenheim as one of plaintiff's "'johns' ... paying for sex as early as 2000" (Complaint, at ¶¶ 166, 191, 216, 241). The appendix to the Complaint attaches alleged publications from defendants stating that Dr. Oppenheim was "living with a Known Prostitute." As such, Demand #1 is relevant to confirm and clarify declarants' statement and its apparent reference to plaintiff, and thus to satisfy the threshold showing that an allegedly defamatory statement is sufficiently clear to be factually refutable (*see e.g. Jacobus v Trump*, 156 AD3d at 452, *lv denied* 31 NY3d 903; *Kaye v Trump*, 58 AD3d at 580, *lv denied* 13 NY3d 704). Moreover, given defendants' alleged statements about the nature of plaintiff's relationship with Dr. Oppenheim, this Court should concur with plaintiff that defendants' alleged statements about Dr. Oppenheim in Demand #1 (*i.e.* that he lived with

plaintiff as a "Known Prostitute") are "inexorably" related to defendants' alleged statements concerning plaintiff. Thus, the Court should find that Demand #1 is relevant to the factual claims in plaintiff's Complaint.

Demands ##11, 27-29 and 46-48 appear to be relevant to show whether defendants had motive to make the alleged statements concerning plaintiff's relationship with Dr. Oppenheim (*see e.g. Harris v Hirsh*, 86 NY2d 207 [1995]), and/or to explicate defendants' basis for making these statements. Either way, such discovery would be relevant to explicate whether defendants made such statements with knowledge of their falsity or with reckless disregard for their truth or falsity. As to Demand ##38 and 49, even if such discovery does not directly relate to defendants' alleged defamation of plaintiff, these demands do appear relevant to whether the communications referenced in such demands evince a pattern of defendants making sexually-related statements about Dr. Oppenheim that defendants either knew to be false or about which defendants acted with reckless disregard for their truth or falsity. To the extent that any such pattern intersects with defendants' statements concerning plaintiff at issue in this action, discovery of any such pattern would be relevant to demonstrate defendants' actual malice. Accordingly, and especially given the liberality of discovery under CPLR 3101(a)(1), the same appear to be discoverable.

For the foregoing reasons, the Court should overrule on substantive grounds defendants' relevance objections concerning plaintiff's discovery Demands ## 1, 11, 27-29, 38 and 46-49.

3. <u>Relevance of Demanded Discovery Concerning Rockland Post Subscribers</u>

Defendants separately object to plaintiff's Demand #25, which seeks "all subscription fees paid to the RocklandPost (*sic*) by subscribers." Defendants object on grounds that such disclosure is "beyond the scope" of pre-trial discovery. Defendants are wrong. Defendants having claimed that they are journalists eligible to invoke the Shield Law privilege against disclosure, plaintiff is entitled to discovery requisite to the factual burden that defendants bear to demonstrate such entitlement. Such discovery includes whether rocklandpost.com qualifies as a "newspaper," "magazine," "news agency" or "wire service" within the meaning of the Shield Law (*see* Civil Rights Law § 79-h[a][1], [2], [3], [5]). As noted above, proof that rocklandpost.com qualifies as a "magazine" requires a showing of a "paid circulation" (*id.*, § 79-

h[a][2]), and a "news agency" and "wire service" both have "subscribing" customers (*id.*, § 79-h[a][3], [5]). As such, plaintiff is entitled to seek discovery of whether rocklandpost.com has a paid circulation or subscribing customers, and Demand #25 is relevant to that proof.

Such discovery is independently relevant to explicate the relationship, if any, between defendant McIlmurray and rocklandpost.com. Paragraph 27 of the Complaint alleges that rocklandpost.com "was and still is the alter ego of defendant, Carol McIlmurray," which allegation defendants denied except to admit that McIlmurray "has published an electronic publication called 'The Rockland Post'" (Answer, at ¶ 7). McIlmurray's sworn affidavit in opposition to this motion also attests that she makes her living as a journalist and has no other source of income; that she founded rocklandpost.com, and that she has continuously served as a news professional on its behalf (*see* McIlmurray Aff., at ¶¶ 4, 5, 7). McIlmurray having placed in controversy her status as a paid journalist on behalf of rocklandpost.com, plaintiff is entitled to discovery of such status. McIlmurray having sworn to the foregoing in submissions before this Court, such discovery also may bear on McIlmurray's credibility before the finder of fact.

For the foregoing reasons, the Court should overrule on substantive grounds defendants' relevance objections concerning plaintiff's discovery Demand #25.

4. <u>Defendants' Invocation of Shield Law</u>

As noted above, defendants each bear the burden of demonstrating that they are eligible to invoke the Shield Law privilege against disclosure of the demanded discovery. Defendants fail to make the requisite factual showing.

As to the co-defendant entities, defendants offer this Court no relevant evidence concerning rocklandpost.com, McIlmurray Publishing House Printing Co. and The Carol Report. For instance, defendants offer no record evidence that such defendants have paid subscribers, or publish regularly, or furnish news as a syndicating business entity. To the extent that defendants claim Shield Law privilege as a "newspaper," defendants fail to show or even minimally assert paid publication for at least a year with at least weekly general circulation (Civil Rights Law § 79-h[a][1]). To the extent that defendants claim such privilege as a "magazine," defendants fail to show or even minimally assert paid circulation of periodic publication for at least a year

(*id.*, § 79-h[a][2]). To the extent that defendants claim such privilege as a "news agency," defendants fail to show or even minimally assert that any organizational defendant is a "commercial organization" (*id.*, § 79-h[a][3]). To the extent that defendants claim such privilege as a "wire service," defendants fail to show or even minimally assert that they send out "syndicated news copy ... to subscribing" news entities (*id.*, § 79-h[a][5]).

Defendants not only failed to make the above showings but also proffered that they cannot give certain discovery plaintiff sought concerning their status as legitimate ongoing business concerns, at least as to defendant rocklandpost.com. For instance, as noted above, defendants proffered that they have no information responsive to plaintiff's Demand #9, which sought the names and addresses of rocklandpost.com board members – suggesting that rocklandpost.com might not have a board. Likewise, defendants proffered that they have no information responsive to Demand #26, which sought the number of rocklandpost.com's subscribers – suggesting that rocklandpost.com has no subscribers. Defendants also asserted that they have no information responsive to Demands ##42-45, which sought the addresses of certain persons denominated as rocklandpost.com "editors."

While defendants' foregoing discovery responses do not necessarily rule out – as a matter of law – that the co-defendant entities might be legitimate business concerns, defendants' written and oral responses offer additional context for defendants' failure, on this motion, to make any reasonable factual showing that they are, in fact, qualifying news entities. Also of note is that when the undersigned pressed defense counsel at the hearing of August 22, 2018, as to whether defendants could offer further facts to make this necessary showing, defense counsel responded in the negative (*see* Hearing Tr., at 5-6). As such, the Court has no record basis to suggest – much less conclude as a matter of law – that any of the co-defendant entities qualify as a "newspaper," "magazine," "news agency" or "wire service" under the Shield Law (*see* Civil Rights Law § 79-h[a][1], [2], [3], [5]).

For her part, personal defendant Carol McIlmurray also fails to show entitlement to claim Shield Law privilege. While her affidavit attests that she "makes [her] living" as a "professional journalist" (McIlmurray Aff., at ¶ 4), her assertion is entirely bald and self-serving. For instance, it is devoid of any representation (much less proof) that she is paid by any co-defendant entity, or

that she is a "regular employee" of, or "otherwise professionally affiliated for gain or livelihood" with, any of them (Civil Rights Law § 79-h[a][6] [defining "professional journalist"]). That McIlmurray attests that she founded rocklandpost.com, and that she "researched, gathered, and organized dozens of news articles for publication on rocklandpost.com" (McIlmurray Aff., at ¶ 7), is facially insufficient for at least two reasons. As noted above, the affidavit does not assert much less show that McIlmurray performed any of such functions as a "regular employee" of, or otherwise "for gain or livelihood" in association with, rocklandpost.com or another qualifying news entity, as Civil Rights Law § 79-h(a)(6) requires. Also as noted above, defendants fail to show that rocklandpost.com and the other organizational defendants are qualifying news entities in professional association with which McIlmurray could invoke the Shield Law privilege (*see e.g. id.*, § 79-h[b] [absolute privilege only for news coming into possession in course of gathering or obtaining news by or for qualifying news entity "by which such person is professionally employed or otherwise associated in a news gathering capacity"]). For each and all of the foregoing reasons, McIlmurray fails to carry her burden to demonstrate that she is a "professional journalist" eligible to invoke Shield Law protection against plaintiff's discovery demands.[1]

For the above reasons, it follows that the defendant entities also are ineligible to claim supervisory or employer privilege under the Shield Law. Had McIlmurray demonstrated that she is a qualifying news professional, then any Shield Law privilege attaching to her could have extends to any "supervisory or employer third person or organization having authority over [her]" upon that factual showing (Civil Rights Law § 79-h[f]). Defendants offer, however, no evidence concerning any "supervisory or employ[ment] ... authority" that any co-defendant entity may

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[1]The record also suggests that McIlmurray's interest in plaintiff might have extended beyond journalism to encompass more direct participation in civic affairs. The appendix to plaintiff's Complaint includes an alleged Facebook chat transcript in which McIlmurray writes, "I would like to know when the PTA meeting for [S]lutsky is, I would like to attend ... I will give testimony, its true" (Complaint, Appx. [NYSCEF Doc. 1, at 75). The Complaint also attaches a Facebook chat screen shot, allegedly dated February 19, 2017, identifying McIlmurray as a "Member of CCSD Parents Concerned for the Future" (*id.*, at 78). (The undersigned infers that "CCSD" refers to Clarkstown Central School District, which includes the elementary school where defendants allegedly stated plaintiff "daylights" as a teacher.) While there is no record evidence that these materials have been authenticated, these materials cannot properly form a cognizable basis for decision. However, it bears noting that the Shield Law seeks to protect journalists legitimately reporting on civic affairs, not active stakeholders engaging in direct public advocacy by self-identifying as members of civic organizations and offering "testimony."

have had over McIlmurray. Indeed, as narrated above, defendants proffered that they have no information responsive to plaintiff's demands for the names and addresses of rocklandpost.com's board members and the addresses of four specified editors.

Even had defendants met their threshold burden to demonstrate that they are journalists under the Shield Law, they also would need to carry their burden to show that they collected or disseminated the demanded discovery as (or in connection with) qualifying "news" or "sources" in their capacity as journalists. They did not carry that burden or, apparently, recognize the need to do so. Rather, defendants' narrow argument – that McIlmurray claims to be a professional journalist, and therefore she and all defendants may decline plaintiff's discovery demands – appears to misperceive fundamentally the Shield Law's thrust and purpose. As the Court of Appeals repeatedly has recognized, the Shield Law accords not blanket protection to journalists as such, but rather limited protection to bona fide news professionals in the course of news-related functions of the press and associated free channels of news communications (*see e.g. Knight-Ridder Broadcasting, Inc.*, 70 NY2d at 155; *Matter of Beach*, 62 NY2d at 251). Thus, the Shield Law absolutely privileges against compulsory disclosure only "news obtained or received *in confidence or the identity of the source of any such news* coming into such person's possession *in the course of gathering or obtaining news* for publication or to be published in a [qualifying news medium]" (Civil Rights Law § 79-h[b] [emphasis added]). "[W]here such news [or source] was not obtained or received in confidence," the Shield Law allows judicial compulsion of disclosure upon a heightened showing of necessity (*id.*, § 79-h[c]).

Thus, McIlmurray's claim to being a "journalist" – even if record evidence validated that claim – would be only the beginning of properly invoking the Shield Law. McIlmurray also would need to proffer that she or someone else associated with the co-defendant entities obtained or received news, or the source of news, "in confidence" and "in the course of gathering or obtaining news" within the meaning of Civil Rights Law section 79-h(b). Defendants having failed to make this proffer much less support it, defendants cannot invoke the Shield Law's absolute protection against compelled disclosure. At the very most, defendants might claim only the qualified privilege specified in Civil Rights Law section 79-h(b). The potential for such qualified privilege then would extend to "unpublished news obtained or prepared by a journalist

or newscaster ... or the source of any such news" (Civil Rights Law § 79-h[c]) – which might countenance McIlmurray's claim that her status accords her protection against disclosure. Even granting this most liberal treatment of McIlmurray's argument, however, such qualified privilege could not apply to Demands ##11 (index numbers and captions of certain court actions), 27-29 (dates and locations of defendant communications with Ann Oppenheim and copies of any communications with her), and 49 ("dates that 'Dr. Oppenheim chronically would show his erection to defendant'"), because there appears to be no reasonable argument that such matters centrally concern unpublished news or the identity of sources.

Rather, defendants – upon a proper showing entirely absent here – conceivably might have been entitled to assert a qualified privilege as to Demands ## 1, 38 and 46-48. But even so, plaintiff still would be able to obtain responses to such demands upon making the three-part heightened showing that Civil Rights Law section 79-h(c) invites. The record amply supports the conclusion that plaintiff made that showing for each of such demands. As noted above, Demand #1 is highly material and relevant to the facts (or lack of facts) of any relationship that defendants claimed between plaintiff and Dr. Oppenheim, and relevant to prove (or disprove) defendants' claim of eyewitness accounts to plaintiff's prostitution. Such proof is critical to test the truth of the declarants' statements, and the Court could conclude that there is no alternative source for the names and contact information of these alleged witnesses. Turning next to Demand #38, the same is highly material and relevant to discerning any pattern of defendant defamation about Dr. Oppenheim, which would be critical to establishing motive as to the declarants' statements concerning plaintiff. Any such motive would be critical to demonstrate actual malice requisite to punitive damages, and such discovery also is unobtainable by any other means. Demands ##46-48 also are highly relevant to any defense pattern of defamation concerning Dr. Oppenheim and thus defense motive concerning defendants' statements about plaintiff in relation to him. Such discovery also appear to be unobtainable by any other means, especially given that court records in matrimonial actions and support determinations – of exactly the kind that defendants allegedly described – are protected against disclosure from the courts (*see* DRL § 235).

Accordingly, even had defendants met their burden to show that they are qualified news professionals under the Shield Law, responses to plaintiff's Demand ## 1, 38 and 46-48 still can

be compelled under the qualified privilege of Civil Rights Law 79-h(c). Based on the foregoing, the Court should conclude that plaintiff carried her burden to show entitlement to such relief notwithstanding the Shield Law, and therefore that relief should be granted.

Ratification of Referee Report

This Court having received no timely opposition to confirming the Referee Report, and upon due deliberation thereon, it is hereby

ORDERED that the Referee Report is confirmed in accordance with CPLR 4403 and Uniform Rule 202.44(b); and it is further

ORDERED that upon such Referee Report, plaintiff's motion to compel discovery is granted; and it is further

ORDERED that not later than 20 days after this Decision and Order, with Notice of Entry, shall be served on defense counsel in accordance herewith:

(1) Defendants shall tender to plaintiff full and complete responses to plaintiff's Notice to Produce, without further objection; provided that for any demand as to which defendants proffer that they lack responsive information, defendants shall provide an affidavit to that effect – and in the case of the entity defendants, such affidavit shall be executed by a person with authority to sign on behalf thereof, and attaching competent proof of such authority – attesting also to the date or dates and parameters of the search for such responsive information; and

(2) Defense counsel shall make a $100.00 payment to plaintiff's counsel for motion costs pursuant to CPLR 8202, and upload to NYSCEF by such date a suitable affirmation of payment; and it is further

ORDERED that if any defendant fails to comply herewith, plaintiff may upload to NYSCEF – not sooner than 25 days and not later than 30 days after this Decision and Order, with Notice of Entry, shall be served on defense counsel in accordance herewith – an attorney affirmation of noncompliance and proposed order striking such defendant's answer, upon which such defendant's answer may be stricken pursuant to CPLR 3126, and judgment shall be entered against such defendant as to liability only; and it is further

ORDERED that unless all defendants sooner have their answers stricken consistent

herewith, all counsel shall appear before Court Attorney Referee David Evan Markus for further proceedings consistent herewith at 2:00 p.m. on Tuesday, November 20, 2018; and it is further

ORDERED that counsel for plaintiff shall serve this Decision and Order, with Notice of Entry, on counsel for defendant by NYSCEF within five days hereof.

The foregoing constitutes the Decision and Order of this Court.

Dated: New City, New York
October 11, 2018

HON. ROBERT BERLINER, J.S.C.

cc: All counsel via NYSCEF