

O'Reilly v Klar

2018 NY Slip Op 33510(U)

June 21, 2018

Supreme Court, Nassau County

Docket Number: 608441/16

Judge: Jeffrey S. Brown

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT: HON. JEFFREY S. BROWN
JUSTICE

-----X TRIAL/IAS PART 12
WILLIAM J. O'REILLY, Plaintiff(s), INDEX # 608441/16
Motion Seq. 8
Motion Date 4.6.18
Submit Date 5.21.18
-against-
MICHAEL N. KLAR, Defendant(s).
-----X

Table with 2 columns: The following papers were read on this motion: and Efile Docs Numbered. Rows include Notice of Motion, Answering Affidavit, and Reply Affidavit.

Defendant Michael N. Klar moves by notice of motion pursuant to CPLR 3124 for an order compelling plaintiff to produce all documents sought by Klar's first document demand dated October 13, 2017 or, alternatively, compelling plaintiff to produce for an in camera review documents withheld from disclosure by his November 15, 2017 responses and objections.

Familiarity with the law and reasoning set forth in the court's April 28, 2017 and April 10, 2018 orders is presumed. Further, the court adds that "[w]hen 'an inspection, copying, testing or photographing' of an item or items is sought, CPLR 3120(2) . . . requires that the seeking party set forth 'by individual item or by category, and . . . describe each item and category with reasonable particularity.' (Siegel & Connors, New York Practice, 6th ed., 682-683 [2018] [emphasis added] ["Even under this new permission to demand by category, however, a demand may still be vacated in its entirety if it is found 'unduly burdensome.'"]). Where demands are "palpably improper in that they are overbroad, lack specificity, or seek irrelevant or confidential information, the appropriate remedy is to vacate the entire demand rather than to prune it" (Ural v. Encompass Ins. Co. of Am., 97 A.D.3d 562, 566 [2d Dept 2012][citation omitted]; see also Stepping Stones Assocs., LP v. Scialdone, 148 A.D.3d 855 [2d Dept 2017]; Gilman & Ciocia, Inc. v. Walsh, 45 A.D.3d 531 [2d Dept 2007]).

Plaintiff's November 15, 2017 responses to defendant's discovery demands set forth 11 general objections followed by specific objections to each of the 50 categories of documents for which defendant sought disclosure. The court notes that although many of the plaintiff's objections invoke Domestic Relations Law § 235, plaintiff acknowledges that the operative question is whether there is a sufficient nexus between the sealed matrimonial documents and the instant dispute to justify disclosure here. (*See Hovagim v. Marchand's School of Dance, Inc.*, 225 A.D.2d 522 [2d Dept 1996]; *see also Solomon v. Meyer*, 103 AD3d 1025 [3d Dept 2013]). Each demand is addressed below.

Document Demand No. 1

Document Demand No. 1 seeks: "The original, or, if not available, a true copy of the Pre-Nuptial Agreement by and between Plaintiff O'Reilly and McPhilmy, and any drafts and/or amendments thereto."

In response, "Plaintiff objects to this Demand on the grounds that it does not seek disclosure of documents that are material and necessary to the prosecution or defense of any of the issues at issue in this matter. Additionally, by requesting 'any drafts,' this Demand calls for the production of attorney-client protected information and/or attorney work product."

Defendant contends that the O'Reilly-McPhilmy pre-nuptial agreement is directly relevant to the issues of inducement as well as plaintiff's alleged damages in this action. In particular, defendant contends that the plaintiff's obligations under the pre-nuptial agreement reflect an independent reason for plaintiff to enter into the subsequent separation agreement. Counsel for the plaintiff acknowledges that during a brief meet and confer held on these issues, plaintiff agreed to produce an executed copy of the pre-nuptial agreement entered into between O'Reilly and McPhilmy. Finding that this document is relevant to the instant proceeding, plaintiff is directed to turn it over.

With respect to drafts of the agreement, the court finds the same are relevant to the defense in this action to the extent that they reflect negotiations and the spouses' respective positions concerning distribution of assets. Accordingly, to the extent that they are in the possession, custody or control of the plaintiff and not subject to attorney-client privilege, such drafts must be produced.

Document Demand No. 2

Document Demand No. 2 seeks: "A copy of each Brief, Reply Brief, Motion, or other submission made by Plaintiff O'Reilly and filed with the Appellate Division, Second Department and/or the New York State Court of Appeals in connection with the Divorce Proceeding. . . , including all such documents in relation to Appellate Division Docket Number. . . , and any subsequent filings in connection with any other additional appeals to either such Court by Plaintiff O'Reilly."

In response, "Plaintiff objects to this Demand on the grounds that it does not seek disclosure of documents that are material and necessary to the prosecution or defense of any of the issues at issue in this matter. Plaintiff objects to this Demand as it seeks confidential divorce proceeding materials protected from public disclosure pursuant to DRL § 235 and 22 NYCRR § 202.5(e). Plaintiff further objects to this Demand on the grounds as overbroad and unduly burdensome to the extent it seeks documents that are readily or more easily accessible to Defendant from Defendant's own files."

Documents falling within this demand are material and necessary in the instant action as the chronology of events and contentions of the parties in the underlying custody proceedings are relevant to plaintiff's ability to maintain fraud claims here. Accordingly, to the extent that they are in the possession, custody or control of the plaintiff, responsive documents must be produced.

Document Demand No. 3

Document Demand No. 3 seeks: "A copy of the Record on Appeal filed by Plaintiff O'Reilly and/or McPhilly in connection with the Appeal(s) to the Appellate Division, Second Department referred to at 2 above."

In response, "Plaintiff incorporates by reference his Response to Demand No. 2 as if fully stated herein."

As above, documents falling within this demand are material and necessary in the instant action as the chronology of events and contentions of the parties in the underlying custody proceedings are relevant to plaintiff's ability to maintain fraud claims here. Accordingly, to the extent that they are in the possession, custody or control of the plaintiff, responsive documents must be produced.

Document Demand No. 4

Document Demand No. 4 seeks: "A copy of each and every transcript of hearing and/or other proceeding conducted before the Supreme Court, Nassau County in relation to the Order to Show Cause and/or any other application or proceeding under Nassau County Index No. . . ."

In response, "Plaintiff objects to this Demand on the grounds that it does not seek disclosure of documents that are material and necessary to the prosecution or defense of any of the issues at issue in this matter. Plaintiff further objects to this Demand as it seeks confidential divorce proceeding materials protected from public disclosure pursuant to DRL § 235 and 22 NYCRR § 202.5(e). Plaintiff further objects to this Demand on the grounds as overbroad and unduly burdensome to the extent it seeks documents that are readily or more easily accessible to Defendant from Defendant's own files."

As above, documents concerning the Order to Show Cause are material and necessary in the instant action as the chronology of events and contentions of the parties in the underlying custody proceedings are relevant to plaintiff's ability to maintain fraud claims here. However, the request for "any other application or proceeding" in the underlying matrimonial action are overly broad. Accordingly, the plaintiff's objections to the demand are sustained.

Document Demand No. 5

Document Demand No. 5 seeks: "For the period October 2009 to the present, a copy of each and every email and/or communication received by Plaintiff O'Reilly from attorney(s): (a) Nancy Gianakos, Esq.; (b) Thomas O. Rice, Esq.; (c) Timothy M. Tippins, Esq.; (d) Fredric S. Newman, Esq. and which email or other communication Plaintiff O'Reilly forwarded and/or otherwise transmitted via email, or otherwise, to McPhilmy."

In response, "Plaintiff objects to this Demand on the grounds that it is overbroad, and not specific as to content or subject matter to the extent that it seeks the production of 'all emails and/or other communications' sent between Plaintiff and his attorneys in which he forwarded an email from McPhilmy. Plaintiff further objects to this Demand on the grounds that it calls for the production of attorney-client communications, as to which there has been no waiver, and as to which no valid exception exists."

This demand is improper as it seeks disclosure of information that is not relevant to any issue in the instant action. Rather, it seeks to "fish out" disclosures that might support a further argument of waiver of the attorney-client privilege. As determined in the court's April 10, 2018 decision and order, only a limited waiver on issues relevant to this action has been established. The objection is sustained.

Document Demand No. 6

Document Demand No. 6 seeks: "A copy of each and every document concerning, and which supports, Plaintiff O'Reilly's claim that McPhilmy knowingly made 'false misrepresentations' and material omissions of existing fact for the sole purpose of inducing Plaintiff O'Reilly to agree to a consensual divorce."

In response, "Plaintiff objects to this Demand on the grounds as overbroad and unduly burdensome to the extent that it seeks documents that are readily or more easily accessible to Defendant from Defendant's own files."

This demand seeks documents directly relevant to plaintiff's contentions in this action. Accordingly, to the extent that such documents are in the possession, custody or control of the plaintiff and not subject to attorney-client privilege, they must be produced.

Document Demand No. 7

Document Demand No. 7 seeks: "A copy of each and every document concerning, and which supports, Plaintiff O'Reilly's claim that McPhilty knowingly made 'false misrepresentations' and material omissions of existing fact for the sole purpose of obtaining money and real property."

In response, "Plaintiff incorporates by reference his Response to Demand No. 6 as if fully stated herein."

As above, this demand seeks documents directly relevant to plaintiff's contentions in this action. Accordingly, to the extent that such documents are in the possession, custody or control of the plaintiff and not subject to attorney-client privilege, they must be produced.

Document Demand No. 8

Document Demand No. 8 seeks: "A copy of each and every document concerning, and which supports, Plaintiff O'Reilly's claim that Defendant Klar 'aided and abetted' McPhilty in 'knowingly making false misrepresentations and material omissions of existing fact' to induce Plaintiff O'Reilly to agree to a consensual divorce and/or to allow McPhilty to obtain money and real property."

In response, "Plaintiff incorporates by reference his Response to Demand No. 6 as if fully stated herein."

Again, this demand seeks documents directly relevant to plaintiff's contentions in this action. Accordingly, to the extent that such documents are in the possession, custody or control of the plaintiff and not subject to attorney-client privilege, they must be produced.

Document Demand No. 9

Document Demand No. 9 seeks: "For the period October 1, 2009 to the date of Plaintiff's O'Reilly's filing of his Cross-Motion in 2011, a copy of all communications between Plaintiff O'Reilly and: (a) Nancy Gianakos, Esq.; (b) Thomas O. Rice, Esq.; (c) Timothy M. Tippins, Esq.; and (d) Fredric S. Newman, Esq. made in connection with the Separation Agreement and/or the Divorce Proceeding . . . regarding McPhilty's making 'false misrepresentations and material omissions of existing fact' and/or Plaintiff O'Reilly having been fraudulently induced to enter into the Separation Agreement and/or to agree to a consensual divorce."

In response, "Plaintiff objects to this Demand on the grounds that it calls for the production of attorney-client communications, as to which there has been no waiver, and as to which no valid exception exists."

For the reasons set forth in the court's April 10, 2018 decision and order, this demand seeks documents that are privileged and the objection is sustained.

Document Demand No. 10

Document Demand No. 10 seeks: "For the period October 1, 2009 to October 2011 (the date of the Order to Show Cause), a copy of all communications between Plaintiff O'Reilly and: (a) Nancy Gianakos, Esq.; (b) Thomas O. Rice, Esq.; (c) Timothy M. Tippins, Esq.; and (d) Fredric S. Newman, Esq. concerning Defendant Klar's having 'aided and abetted' McPhilly 'in making false misrepresentations and material omissions of existing fact' and/or Plaintiff O'Reilly having been fraudulently induced to enter into the Separation Agreement and/or to agree to a consensual divorce."

In response, "Plaintiff objects to this Demand on the grounds that it calls for the production of attorney-client communications, as to which there has been no waiver, and as to which no valid exception exists."

For the reasons set forth in the court's April 10, 2018 decision and order, this demand seeks documents that are privileged and the objection is sustained.

Document Demand No. 11

Document Demand No. 11 seeks: "For the period October 1, 2009 to April 2, 2010, a copy of all communications between Plaintiff O'Reilly and: (a) Nancy Gianakos, Esq.; (b) Thomas O. Rice, Esq.; (c) Timothy M. Tippins, Esq.; and (d) Fredric S. Newman, Esq. concerning the terms of and/or negotiation of the Separation Agreement."

In response, "Plaintiff objects to this Demand on the grounds that it calls for the production of attorney-client communications, as to which there has been no waiver, and as to which no valid exception exists."

Ultimately, due to the nature of the claims in this action, plaintiff by necessity may need to reveal communications with his attorneys whereby representations made by defendant Klar regarding custody and parenting time were transmitted. (*Ambac Assur. Corp. v. DLJ Mtge. Capital, Inc.*, 92 A.D.3d 451 [1st Dept 2012]). However, no such revelation has occurred and, as written, this document demand goes well beyond representations concerning custody and parenting time. Accordingly, the objection is sustained.

Document Demand No. 12

Document Demand No. 12 seeks: "For the period of October 1, 2009 to December 31, 2012, a copy of all communications between Plaintiff O'Reilly and: (a) Nancy Gianakos, Esq.; (b) Thomas O. Rice, Esq.; (c) Timothy M. Tippins, Esq.; and (d) Fredric S. Newman, Esq. concerning the conduct and/or actions of Defendant Klar and/or concerning Defendant Klar's representation of McPhilmy."

In response, "Plaintiff objects to this Demand on the grounds that it calls for the production of attorney-client communications, as to which there has been no waiver, and as to which no valid exception exists."

For the reasons set forth in the court's April 10, 2018 decision and order, this demand seeks documents that are privileged and the objection is sustained.

Document Demand No. 13

Document Demand No. 13 seeks: "For the period of October 1, 2009 to December 31, 2012, a copy of all communications between Plaintiff O'Reilly and: (a) Nancy Gianakos, Esq.; (b) Thomas O. Rice, Esq.; (c) Timothy M. Tippins, Esq.; and (d) Fredric S. Newman, Esq. and/or among the attorneys stated at (a) to (d) herein, concerning legal or other proceedings contemplated to be taken by them, or any of them, on behalf of Plaintiff O'Reilly as against Defendant Klar."

In response, "Plaintiff objects to this Demand on the grounds that it calls for the production of attorney-client communications."

For the reasons set forth in the court's April 10, 2018 decision and order, this demand seeks documents that are privileged and the objection is sustained.

Document Demand No. 14

Document Demand No. 14 seeks: "For the period October 1, 2009 to December 31, 2012, a copy of all communications, including letters and emails, written and sent by Fredric S. Newman, Esq. to Defendant Klar."

In response, "Plaintiff objects to this Demand on the ground that it does not seek disclosure of documents that are material and necessary to the prosecution or defense of any of the matters at issue in this matter. Plaintiff objects to this Demand as it seeks confidential divorce proceeding materials protected from public disclosure pursuant to DRL § 235 and 22 NYCRR § 202.5(e). Plaintiff further objects to this Demand on the grounds that it calls for the production of attorney-client communications and/or attorney work-product, as to which there has been no waiver, and as to which no valid exception exists. Plaintiff further objects to this

Demand on the grounds as overbroad and unduly burdensome to the extent that it seeks documents that are readily or more easily accessible to Defendant from Defendant's own files."

On its face, this demand does not request materials protected by the attorney-client privilege. Further, the defendant has raised valid reasoning for requesting such documents as relevant to his defense in this action. Accordingly, to the extent that they are in the possession, custody or control of the plaintiff, such documents must be produced.

Document Demand No. 15

Document Demand No. 15 seeks: "For the period October 1, 2009 to December 31, 2012, a copy of all communications between Fredric S. Newman, Esq. and Plaintiff O'Reilly, or any other person, concerning the communications, including letters and emails, written and/or proposed to be written by Fredric S. Newman, Esq. to Defendant Klar."

In response, "Plaintiff objects to this Demand on the ground that it does not seek disclosure of documents that are material and necessary to the prosecution or defense of any of the issues at issue in this matter. Plaintiff objects to this Demand on the grounds that it calls for the production of attorney-client communications and/or attorney work-product, as to which there has been no waiver, and as to which no valid exception exists."

For the reasons set forth in the court's April 10, 2018 decision and order, this demand seeks documents that are privileged and the objection is sustained.

Document Demand No. 16

Document Demand No. 16 seeks: "A copy of each and every document concerning and/or supporting the claim that Defendant Klar committed a fraud on the Court."

In response, "Plaintiff objects to this Demand as improper in that it seeks confidential and protected information as to Plaintiff's strategy in this Action. Plaintiff further objects to this Demand as it seeks confidential divorce proceeding materials protected from public disclosure pursuant to DRL § 235 and 22 NYCRR § 202.5(e). Plaintiff further objects to this Demand on the grounds as overbroad and unduly burdensome to the extent that it seeks documents that are readily or more easily accessible to Defendant from Defendant's own files."

This demand seeks documents directly relevant to plaintiff's contentions in this action. Accordingly, to the extent that such documents are in the possession, custody or control of the plaintiff and not subject to attorney-client privilege, they must be produced.

Document Demand No. 17

Document Demand No. 17 seeks: “For the period October 1, 2009 to the date of the Divorce Judgment, a copy of all communications by and between Plaintiff O’Reilly and: (a) Nancy Gianakos, Esq.; (b) Thomas O. Rice, Esq.; (c) Timothy M. Tippins, Esq.; and (d) Fredric S. Newman, Esq. concerning the terms of the Separation Agreement with respect to joint custody and decision making, including without limitation, concerning the terms of the Separation Agreement as to the modification of the joint custody and decision making provisions therein.”

In response, “Plaintiff further objects to this Demand on the grounds that it calls for the production of attorney-client communications and/or attorney work-product, as to which there has been no waiver, and as to which no valid exception exists.”

As noted, due to the nature of the claims in this action, plaintiff by necessity may need to reveal communications with his attorneys whereby representations made by defendant Klar regarding custody and parenting time were transmitted. (*Ambac Assur. Corp.*, 92 A.D.3d 451). However, no such revelation has occurred and, as written, this document demand goes well beyond representations concerning custody and parenting time. Accordingly, the objection is sustained.

Document Demand No. 18

Document Demand No. 18 seeks: “For the period of October 1, 2009 to the date of the Order to Show Cause, a copy of each letter authored by Defendant Klar, and in the possession of Plaintiff O’Reilly and/or: (a) Nancy Gianakos, Esq.; (b) Thomas O. Rice, Esq.; (c) Timothy M. Tippins, Esq.; and (d) Fredric S. Newman, Esq. concerning McPhilmly’s assertion that Plaintiff O’Reilly had violated one (1) or more terms of the Separation Agreement.”

In response, “Plaintiff objects to this Demand on the ground that it does not seek disclosure of documents that are material and necessary to the prosecution or defense of any of the issues at issue in this matter. Plaintiff also objects to this Demand as improper, burdensome, and oppressive as it seeks the production of documents outside the care [of] Plaintiff’s control. Plaintiff objects to this Demand as it seeks confidential divorce proceeding materials protected from public disclosure pursuant to DRL § 235 and 22 NYCRR § 202.5(e). Plaintiff further objects to this Demand on the grounds as overbroad and unduly burdensome to the extent that it seeks documents that are readily or more easily accessible to Defendant from Defendant’s own files.”

Plaintiff cannot be charged with production of documents that are not in his possession, custody or control. With respect to documents falling within this demand and within the plaintiff’s possession, such documents are clearly relevant to the defense of this action. Accordingly, to the extent that they are in plaintiff’s possession, custody or control, plaintiff is directed to produce documents responsive to this request.

Document Demand No. 19

Document Demand No. 19 seeks: "For the period October 1, 2009 to the date of the Order to Show Cause, a copy of each communication between Plaintiff O'Reilly and: (a) Nancy Gianakos, Esq.; (b) Thomas O. Rice, Esq.; (c) Timothy M. Tippins, Esq.; and (d) Fredric S. Newman, Esq. concerning the letters authored by Defendant Klar and referred to at Item 18 above."

In response, "Plaintiff objects to this Demand on the grounds that it does not seek disclosure of documents that are material and necessary to the prosecution or defense of any of the issues at issue in this matter. Plaintiff objects to this Demand as it seeks confidential divorce proceeding materials protected from public disclosure pursuant to DRL § 235 and 22 NYCRR § 202.5(e). Plaintiff further objects to this Demand on the grounds that it calls for the production of attorney-client communications and/or attorney work-product, as to which there has been no waiver, and as to which no valid exception exists."

For the reasons set forth in the court's April 10, 2018 decision and order, this demand seeks documents that are privileged and the objection is sustained.

Document Demand No. 20

Document Demand No. 20 seeks: "For the period October 1, 2009 to the date of the Order to Show Cause, a copy of each communication in the possession of Plaintiff O'Reilly and/or: (a) Nancy Gianakos, Esq.; (b) Thomas O. Rice, Esq.; (c) Timothy M. Tippins, Esq.; and (d) Fredric S. Newman, Esq. received by Plaintiff O'Reilly, or any other persons named, from Defendant Klar advising of McPhilmy's intent to modify the Separation Agreement, or any term thereof, including as to joint custody and/or decision making."

In response, "Plaintiff also objects to this Demand as improper, burdensome, and oppressive as it seeks the production of documents outside the care [of] Plaintiff's control. Plaintiff objects to this Demand as it seeks confidential divorce proceeding materials protected from public disclosure pursuant to DRL § 235 AND 22 NYCRR § 202.5(e). Plaintiff further objects to this Demand on the grounds as overbroad and unduly burdensome to the extent that it seeks documents that are readily or more easily accessible to Defendant from Defendant's own files."

Plaintiff cannot be charged with production of documents that are not in his possession, custody or control. With respect to documents falling within this demand and within the plaintiff's possession, such documents are clearly relevant to the defense of this action. Accordingly, to the extent that they are in plaintiff's possession, custody or control, plaintiff is directed to produce documents responsive to this request.

Document Demand No. 21

Document Demand No. 21 seeks: “For the period October 1, 2009 to the conclusion of all proceedings and appeals in the Divorce Proceeding . . . all communications between Plaintiff O’Reilly and (a) Nancy Gianakos, Esq.; (b) Thomas O. Rice, Esq.; (c) Timothy M. Tippins, Esq.; and (d) Fredric S. Newman, Esq. concerning Plaintiff O’Reilly seeking to vacate and set aside the Separation Agreement as a consequence of fraud in the inducement or on any other basis.”

In response, “Plaintiff objects to this Demand on the ground that it does not seek disclosure of documents that are material and necessary to the prosecution or defense of any of the issues at issue in this matter. Plaintiff objects to this Demand as it seeks confidential divorce proceeding materials protected from public disclosure pursuant to DRL § 235 and 22 NYCRR § 202.5(e). Plaintiff further objects to this Demand on the grounds that it calls for the production of attorney-client communications and/or attorney work-product, as to which there has been no waiver, and as to which no valid exception exists.”

For the reasons set forth in the court’s April 10, 2018 decision and order, this demand seeks documents that are privileged and the objection is sustained.

Document Demand No. 22

Document Demand No. 22 seeks: “For the period October 1, 2009 to the date of the Divorce Judgment, a copy of all communications between Plaintiff O’Reilly and: (a) Nancy Gianakos, Esq.; (b) Thomas O. Rice, Esq.; (c) Timothy M. Tippins, Esq.; and (d) Fredric S. Newman, Esq. concerning Defendant Klar’s submission of a Proposed Judgment of Divorce to the Court, and concerning Plaintiff O’Reilly’s submission of a Counter-Proposed Judgment of Divorce to the Court.”

In response, “Plaintiff objects to this Demand on the ground that it does not seek disclosure of documents that are material and necessary to the prosecution or defense of any of the issues at issue in this matter. Plaintiff objects to this Demand as it seeks confidential divorce proceeding materials protected from public disclosure pursuant to DRL § 235 and 22 NYCRR § 202.5(e). Plaintiff further objects to this Demand on the grounds that it calls for the production of attorney-client communications and/or attorney work-product, as to which there has been no waiver, and as to which no valid exception exists.”

For the reasons set forth in the court’s April 10, 2018 decision and order, this demand seeks documents that are privileged and the objection is sustained.

Document Demand No. 23

Document Demand No. 23 seeks: "A copy of all documents submitted by Plaintiff O'Reilly to the Supreme Court, Nassau County in connection with his submission of a Counter-Proposed Judgment of Divorce."

In response, "Plaintiff objects to this Demand as it seeks confidential divorce proceeding materials protected from public disclosure pursuant to DRL § 235 and 22 NYCRR § 202.5(e). Plaintiff further objects to this Demand on the grounds as overbroad and unduly burdensome to the extent it seeks documents that are readily or more easily accessible to Defendant from Defendant's own files."

Documents falling within this demand are material and necessary in the instant action as the chronology of events and contentions of the parties in the underlying custody proceedings are relevant to plaintiff's ability to maintain fraud claims here. Accordingly, to the extent that they are in the possession, custody or control of the plaintiff, responsive documents must be produced.

Document Demand No. 24

Document Demand No. 24 seeks: "A copy of all documents submitted/filed with the Supreme Court, Nassau County by Plaintiff O'Reilly and/or McPhilmy in connection with the O'Reilly-McPhilmy Action, including all pleadings, motions, affidavits, exhibits, filings, document discovery and orders/judgments of the Court."

In response, "Plaintiff objects to this Demand on the ground that it does not seek disclosure of documents that are material and necessary to the prosecution or defense of any of the issues at issue in this matter. Plaintiff further objects to this Demand as it seeks documents subject to a sealing order of the Supreme Court of the State of New York, Nassau County."

The O'Reilly-McPhilmy matter before Justice Mahon is sealed. For the reasons set forth in the court's April 28, 2017 decision and order, this court is without the authority to alter the sealing order in that action. Defendant's reply brief indicates that his entitlement to documents sought by this demand has been resolved by a separate, sealed order, presumably issued by Justice Mahon. Thus, no ruling is required.

Document Demand No. 25

Document Demand No. 25 seeks: "A copy of all documents concerning the alleged payment made to McPhilmy in July 2010 as alleged at Paragraph 17 of the Complaint."

In response, "Subject to and without waiver of the foregoing General Objections, Plaintiff will produce documents demonstrating the payments made by O'Reilly to McPhilmy in 2010."

As the plaintiff has agreed to produce responsive documents, such production is hereby directed to the extent that it has not already been made.

Document Demand No. 26

Document Demand No. 26 seeks: "A copy of all documents concerning McPhilty's alleged 'receipt of substantial funds paid to her by Plaintiff' as alleged in Paragraph 18 of the Complaint."

In response, "Subject to and without waiver of the foregoing General Objections, Plaintiff will produce documents demonstrating the payments made by O'Reilly to McPhilty in 2010."

As the plaintiff has agreed to produce responsive documents, such production is hereby directed to the extent that it has not already been made.

Document Demand No. 27

Document Demand No. 27 seeks: "A copy of all documents concerning the alleged 'campaign' by McPhilty 'to vitiate Plaintiff O'Reilly's agreed parental rights and to undermine him as the children's father and otherwise violate her obligation' as alleged at Paragraph 18 of the Complaint."

In response, "Plaintiff objects to this Demand on the ground that it does not seek disclosure of documents that are material and necessary to the prosecution or defense of any of the issues at issue in this matter. Plaintiff objects to this Demand as it seeks confidential divorce proceeding materials protected from public disclosure pursuant to DRL § 235 and 22 NYCRR § 202.5(e). Plaintiff further objects to this Demand on the grounds as overbroad and unduly burdensome to the extent it seeks documents that are readily or more easily accessible to Defendant from Defendant's own files"

This demand seeks documents directly relevant to plaintiff's contentions in this action. Accordingly, to the extent that such documents are in the possession, custody or control of the plaintiff and not subject to attorney-client privilege, they must be produced.

Document Demand No. 28

Document Demand No. 28 seeks: "A copy of all documents concerning, and which support the claim that McPhilty was 'aided and abetted by Defendant in the campaign' as alleged at Paragraph 18 of the Complaint."

In response, "Plaintiff objects to this Demand as it seeks confidential divorce proceeding materials protected from public disclosure pursuant to DRL § 235 and 22 NYCRR § 202.5(e). Plaintiff further objects to this Demand on the grounds as overbroad and unduly burdensome to

the extent it seeks documents that are readily or more easily accessible to Defendant from Defendant's own files."

This demand seeks documents directly relevant to plaintiff's contentions in this action. Accordingly, to the extent that such documents are in the possession, custody or control of the plaintiff and not subject to attorney-client privilege, they must be produced.

Document Demand No. 29

Document Demand No. 29 seeks: "A copy of all communications between Plaintiff O'Reilly and: (a) Nancy Gianakos, Esq.; (b) Thomas O. Rice, Esq.; (c) Timothy M. Tippins, Esq.; and (d) Fredric S. Newman, Esq. concerning Plaintiff O'Reilly's request that the Court incorporate the entirety of the Separation Agreement into the Divorce Judgment."

In response, "Plaintiff objects to this Demand on the grounds that it does not seek disclosure of documents that are material and necessary to the prosecution or defense of any of the issues at issue in this matter. Plaintiff objects to this Demand as it seeks confidential divorce proceeding materials protected from public disclosure pursuant to DRL § 235 and 22 NYCRR § 202.5(e). Plaintiff further objects to this Demand on the grounds that it calls for the production of attorney-client communications and/or attorney work-product, as to which there has been no waiver, and as to which no valid exception exists."

As noted above, ultimately, due to the nature of the claims in this action, plaintiff by necessity may need to reveal communications with his attorneys whereby representations made by defendant Klar regarding custody and parenting time were transmitted. (*Ambac Assur. Corp.*, 92 A.D.3d 451). However, no such revelation has occurred and, as written, this document demand goes well beyond representations concerning custody and parenting time. Accordingly, the objection is sustained.

Document Demand No. 30

Document Demand No. 30 seeks: "A copy of all documents concerning and/or which support the claim that Defendant Klar fraudulently submitted the Separation Agreement to the Court for incorporation into the Judgment of Divorce."

In response, "Plaintiff objects to this Demand as it seeks confidential divorce proceeding materials protected from public disclosure pursuant to DRL § 235 and 22 NYCRR § 202.5(e). Plaintiff further objects to this Demand on the grounds as overbroad and unduly burdensome to the extent it seeks documents that are readily or more easily accessible to Defendant from Defendant's own files."

This demand seeks documents directly relevant to plaintiff's contentions in this action. Accordingly, to the extent that such documents are in the possession, custody or control of the plaintiff and not subject to attorney-client privilege, they must be produced.

Document Demand No. 31

Document Demand No. 31 seeks: "A copy of all documents that Defendant Klar submitted to the Court in connection with the Proposed Judgment of Divorce, including as alleged at Paragraph 20 of the Complaint, any document by which it is alleged that Defendant Klar 'reaffirmed' McPhilmy's express representations concerning co-parenting and undertaking to foster a relationship of love, affection and respect between Plaintiff O'Reilly and his children."

In response, "Plaintiff objects to this Demand as it seeks confidential divorce proceeding materials protected from public disclosure pursuant to DRL § 235 and 22 NYCRR § 202.5(e). Plaintiff further objects to this Demand on the grounds as overbroad and unduly burdensome to the extent it seeks documents that are readily or more easily accessible to Defendant from Defendant's own files."

Documents falling within this demand are material and necessary in the instant action as the chronology of events and contentions of the parties in the underlying custody proceedings are relevant to plaintiff's ability to maintain fraud claims here. Accordingly, to the extent that they are in the possession, custody or control of the plaintiff, responsive documents must be produced.

Document Demand No. 32

Document Demand No. 32 seeks: "A copy of each document concerning the allegations of Paragraph 21 of the Complaint."

In response, "Plaintiff objects to this Demand as it seeks confidential divorce proceeding materials protected from public disclosure pursuant to DRL § 235 and 22 NYCRR § 202.5(e). Plaintiff further objects to this Demand on the grounds as overbroad and unduly burdensome to the extent it seeks documents that are readily or more easily accessible to Defendant from Defendant's own files."

Paragraph 21 of the complaint asserts, "upon information and belief, as early as August 9, 2011 (well before the Divorce Judgment), Defendant began work to prepare a challenge to material provisions of the expected Divorce Judgment."

This demand seeks documents directly relevant to plaintiff's contentions in this action. Accordingly, to the extent that such documents are in the possession, custody or control of the plaintiff and not subject to attorney-client privilege, they must be produced.

Document Demand No. 33

Document Demand No. 33 seeks: "A copy of each document concerning Defendant Klar's preparation of the Order to Show Cause to modify the Divorce Judgment, and/or which support the claim that the preparation and/or submission of such Order to Show Cause was violative of any provision of the Separation Agreement, or contrary to any Court rule, or contrary to any representation by McPhilmly and/or Klar, concerning their right to submit such Order to Show Cause."

In response, "Plaintiff objects to this Demand on the grounds that it is vague to the extent that Klar asks for documents concerning allegations not made by Plaintiff. Plaintiff further objects to this Demand as it seeks confidential divorce proceeding materials protected from public disclosure pursuant to DRL § 235 and 22 NYCRR § 202.5(e). Plaintiff further objects to this Demand on the grounds as overbroad and unduly burdensome to the extent it seeks documents that are readily or more easily accessible to Defendant from Defendant's own files."

Although stated in conjoined subparts, documents falling within this demand are material and necessary in the instant action as the chronology of events and contentions of the parties in the underlying custody proceedings are relevant to plaintiff's ability to maintain fraud claims here. Accordingly, to the extent that they are in the possession, custody or control of the plaintiff and not subject to the attorney-client privilege, responsive documents must be produced.

Document Demand No. 34

Document Demand No. 34 seeks: "A copy of each document concerning Plaintiff O'Reilly's transfer of property and further payment as alleged at Paragraph 26 of the Complaint."

In response, "Plaintiff will produce documents demonstrating the payment made by O'Reilly to McPhilmly as alleged at Paragraph 34 of the Complaint."

Presumably, plaintiff's agreement to produce documents demonstrating payments made to his former wife as required by the Separation Agreement extends equally to the transfer of any property as alleged in Paragraph 26 of the complaint. The response's reference to paragraph 34 appears to be a typographical error. Accordingly, to the extent that such documents are in the possession, custody or control of the plaintiff and not subject to attorney-client privilege, they must be produced.

Document Demand No. 35

Document Demand No. 35 seeks: "A copy of each document concerning, and which supports the claim as set forth in Paragraph 29 of the Complaint."

In response, "Plaintiff objects to this Demand as it seeks confidential divorce proceeding materials protected from public disclosure pursuant to DRL § 235 and 22 NYCRR § 202.5(e). Plaintiff further objects to this Demand on the grounds as overbroad and unduly burdensome to the extent it seeks documents that are readily or more easily accessible to Defendant from Defendant's own files."

Paragraph 29 of the complaint alleges, on information and belief, that "[d]efendant aided and abetted those misrepresentations intentionally and knowing that they were false, with the express intention of inducing Plaintiff to enter into the Separation Agreement, and later, to agree to convert the Separation Agreement into a consensual Divorce Judgment, all so that his client, Ms. McPhilly, could obtain a consensual divorce and substantial financial benefits and real property."

This demand seeks documents directly relevant to plaintiff's contentions in this action. Accordingly, to the extent that such documents are in the possession, custody or control of the plaintiff and not subject to attorney-client privilege, they must be produced.

Document Demand No. 36

Document Demand No. 36 seeks: "A copy of all communications between Plaintiff O'Reilly and: (a) Nancy Gianakos, Esq.; (b) Thomas O. Rice, Esq.; (c) Timothy M. Tippins, Esq.; and (d) Fredric S. Newman, Esq. concerning Plaintiff O'Reilly's claim that Plaintiff O'Reilly entered into the Separation Agreement 'in large part to protect his children and secure for them the peace and happiness they had previously enjoyed during the early years of marriage.'"

In response, "Plaintiff objects to this Demand on the ground that it does not seek disclosure of documents that are material and necessary to the prosecution or defense of any of the issues at issue in this matter. Plaintiff objects to this Demand as it seeks confidential divorce proceeding materials protected from public disclosure pursuant to DRL § 235 and 22 NYCRR § 202.5(e). Plaintiff further objects to this Demand on the grounds that it calls for the production of attorney-client communications and/or attorney work-product, as to which there has been no waiver, and as to which no valid exception exists."

For the reasons set forth in the court's April 10, 2018 decision and order, this demand seeks documents that are privileged and the objection is sustained.

Document Demand No. 37

Document Demand No. 37 seeks: "In connection with the allegations at Paragraph 30 of the Complaint, and as quoted at Paragraph 36 above, a copy of each and every contract, and/or invoice, received by Plaintiff O'Reilly from any and all security firms, or security personnel, concerning services rendered at Plaintiff O'Reilly's residence during the year 2009, including the

names and addresses of all security personnel residing, either permanently, and/or on a daily basis, at the Plaintiff O'Reilly residence during that period of time."

In response, "Plaintiff objects to this Demand on the ground that it does not seek disclosure of documents that are material and necessary to the prosecution or defense of any of the issues at issue in this matter."

Defendant fails to establish the relevance of the demanded materials to any claim of fraud raised in this action or the defense thereof. Therefore, the objection is sustained.

Document Demand No. 38

Document Demand No. 38 seeks: "A copy of all documents and/or communications concerning and/or which support the claim set forth at Paragraph 33 of the Complaint."

In response, "Plaintiff objects to this Demand as it seeks confidential divorce proceeding materials protected from public disclosure pursuant to DRL § 235 and 22 NYCRR § 202.5(e). Plaintiff further objects to this Demand on the grounds as overbroad and unduly burdensome to the extent it seeks documents that are readily or more easily accessible to Defendant from Defendant's own files."

Paragraph 33 of the complaint asserts that "[d]efendant aided and abetted the false representations, which were made knowingly, or with a willful, wanton, and reckless disregard for the truth, and were intended to deceive and defraud Plaintiff into entering into a Separation Agreement and ultimately the Divorce."

This demand seeks documents directly relevant to plaintiff's contentions in this action. Accordingly, to the extent that such documents are in the possession, custody or control of the plaintiff and not subject to attorney-client privilege, they must be produced.

Document Demand No. 39

Document Demand No. 39 seeks: "A copy of all documents and/or communications concerning and/or which support the claim of damages and/or substantial legal costs as alleged at Paragraph 34 of the Complaint."

In response, "Plaintiff will produce non-privileged documents demonstrating the damages he suffered as a result of Klar's actions."

As the plaintiff has agreed to produce responsive documents, such production is hereby directed to the extent that it has not already been made.

Document Demand No. 40

Document Demand No. 40 seeks: "A copy of each and every invoice received by Plaintiff O'Reilly in connection with the legal services and costs he allegedly incurred in enforcing his rights under the Separation Agreement and the Divorce Judgment as alleged at Paragraph 34 of the Complaint."

In response, "Plaintiff incorporates by reference his Response to Demand No. 39 as if fully stated herein."

As the plaintiff has agreed to produce responsive documents, such production is hereby directed to the extent that it has not already been made.

Document Demand No. 41

Document Demand No. 41 seeks: "A copy of each and every retainer agreement by and between Plaintiff O'Reilly and the following: (a) Nancy Gianakos, Esq.; (b) Thomas O. Rice, Esq.; (c) Timothy M. Tippins, Esq.; and (d) Fredric S. Newman, Esq. concerning the negotiation of the Separation Agreement and all services rendered in connection with the Divorce Proceeding."

In response, "Plaintiff objects to this Demand on the ground that it does not seek disclosure of documents that are material and necessary to the prosecution or defense of any of the issues at issue in this matter. Plaintiff objects to this Demand as it seeks confidential divorce proceeding materials protected from public disclosure pursuant to DRL § 235 and 22 NYCRR § 202.5(e). Plaintiff further objects to this Demand on the grounds that it calls for the production of attorney-client communications and/or attorney work-product, as to which there has been no waiver, and as to which no valid exception exists."

These documents are relevant to the plaintiff's claims of damages in this action. 22 NYCRR 1400.3, effective prior to the date the underlying matrimonial action was instituted, requires written retainer agreements to be filed with the court along with the statement of net worth. Accordingly, to the extent that these documents are in the plaintiff's possession, custody or control and were filed with the court in the matrimonial action, they must be produced.

Document Demand No. 42

Document Demand No. 42 seeks: "A copy of each and every document concerning and/or which supports the claim as set forth at Paragraph 36 of the Complaint."

In response, "Plaintiff objects to this Demand as it seeks confidential divorce proceeding materials protected from public disclosure pursuant to DRL § 235 and 22 NYCRR § 202.5(e). Plaintiff further objects to this Demand on the grounds as overbroad and unduly burdensome to

the extent it seeks documents that are readily or more easily accessible to Defendant from Defendant's own files."

Paragraph 36 of the complaint alleges that "[d]efendant committed a fraud on the court when he submitted the Separation Agreement to the court for incorporation into the Divorce Judgment."

This demand appears to duplicate document demand number 16. Nonetheless, it seeks documents directly relevant to plaintiff's contentions in this action. Accordingly, to the extent that such documents are in the possession, custody or control of the plaintiff and not subject to attorney-client privilege, they must be produced.

Document Demand No. 43

Document Demand No. 43 seeks: "A copy of each and every document concerning the allegations at Paragraph 40 of the Complaint."

In response, "Plaintiff objects to this Demand as it seeks confidential divorce proceeding materials protected from public disclosure pursuant to DRL § 235 and 22 NYCRR § 202.5(e).

Plaintiff further objects to this Demand on the grounds as overbroad and unduly burdensome to the extent it seeks documents that are readily or more easily accessible to Defendant from Defendant's own files."

Paragraph 40 of the complaint states that "[d]efendant's misrepresentations interfered with the judicial system's ability to impartially adjudicate the matter by improperly influencing the trier and by unfairly hampering the presentation of Plaintiff's claims and has caused Plaintiff to suffer damages, including the substantial legal costs he has incurred in enforcing his rights under the Separation Agreement and the Divorce Judgment."

Paragraph 40 of the complaint is a summary asserted in conclusory terms and indicating that plaintiff has sustained damages. As this paragraph makes no real assertion of fact, and the plaintiff has already agreed to produce documents in support of his damages claims, the court finds the demand vague and overly broad and, thus, sustains the objection thereto.

Document Demand No. 44

Document Demand No. 44 seeks: "For the period from the date of Plaintiff O'Reilly's marriage to McPhilly to the date of the Divorce Judgment, a copy of each and every employment or other agreement between Plaintiff O'Reilly and News Corp.; Fox News; Henry Holt & Co.; and/or other person or entity from whom Plaintiff O'Reilly received any compensation for services or products rendered during the course of the marriage."

In response, "Plaintiff objects to this Demand on the ground that it does not seek disclosure of documents that are material and necessary to the prosecution or defense of any of the issues at issue in this matter. Plaintiff objects to this Demand as it seeks confidential and proprietary business information."

Defendant fails to establish the relevance of the demanded materials to any claim of fraud raised in this action or the defense thereof. In particular, the relevance of these materials to a damages calculation is attenuated and defendant has sought materials that will directly bear on these issues through other demands. Therefore, the objection is sustained.

Document Demand No. 45

Document Demand No. 45 seeks: "Copies of all appraisals, contracts of sale, and closing statements in connection with any and all real property acquired and/or transferred by Plaintiff O'Reilly between the date of his marriage to McPhilmly and the date of the Divorce Judgment."

In response, "Plaintiff objects to this Demand on the ground that it does not seek disclosure of documents that are material and necessary to the prosecution or defense of any of the issues at issue in this matter."

Defendant fails to establish the relevance of the demanded materials to any claim of fraud raised in this action or the defense thereof. In particular, the relevance of these materials to a damages calculation is attenuated and defendant has sought materials that will directly bear on these issues through other demands. Therefore, the objection is sustained.

Document Demand No. 46

Document Demand No. 46 seeks: "A copy of any complaints, petitions or other proceedings commenced by or on behalf of Plaintiff O'Reilly by which he sought to enforce the terms of the Separation Agreement and/or the Divorce Judgment and/or sought to vacate and set aside the Separation Agreement, or any provision thereof, and/or the Divorce Judgment."

In response, "Plaintiff objects to this Demand as it seeks confidential divorce proceeding materials protected from public disclosure pursuant to DRL § 235 and 22 NYCRR § 202.5(e). Plaintiff further objects to this Demand on the grounds as overbroad and unduly burdensome to the extent it seeks documents that are readily or more easily accessible to Defendant from Defendant's own files."

Documents falling within this demand are material and necessary in the instant action as they bear on the plaintiff's ratification of the Separation Agreement or substantiate his claims of fraud in this action. Accordingly, to the extent that they are in the plaintiff's possession, custody or control and not subject to the attorney-client privilege, responsive documents must be produced.

Document Demand No. 47

Document Demand No. 47 seeks: "A copy of each and every document that Plaintiff O'Reilly intends to use during the course of this case and/or at trial to establish that Defendant Klar knew or any fraud allegedly committed by McPhilty, and/or did any act to 'aid and abet' any such fraud."

In response, "Plaintiff objects to this Demand on the grounds that it does not request documents which are the proper subject of a demand under the CPLR and it improperly seeks confidential and protected information as to Plaintiff's strategy."

Defendant fails to establish the propriety of such a demand. Therefore, the objection is sustained.

Document Demand No. 48

Document Demand No. 48 seeks: "A copy of each and every financial statement and tax return prepared for and/or filed by Plaintiff O'Reilly from the date of his marriage to McPhilty to the date of the Divorce Judgment."

In response, "Plaintiff objects to this Demand on the ground that it does not seek disclosure of documents that are material and necessary to the prosecution or defense of any of the issues at issue in this matter. Plaintiff further objects to this Demand on the grounds Plaintiff has failed to demonstrate that the disclosure of tax returns and financial information is indispensable to this litigation and unavailable from other sources."

In accordance with the court's April 10, 2018 decision and order, the plaintiff is directed to produce documents in his possession, custody or control constituting financial statements prepared on his behalf from April 2, 2007 to September 1, 2011.

Document Demand No. 49

Document Demand No. 49 seeks: "A copy of each communication between Plaintiff O'Reilly and: (a) Nancy Gianakos, Esq.; (b) Thomas O. Rice, Esq.; (c) Timothy M. Tippins, Esq.; and (d) Fredric S. Newman, Esq. concerning an application by Plaintiff O'Reilly to seek to vacate and set aside the Separation Agreement and/or the Divorce Judgment, and/or to seek to enforce the Separation Agreement and/or Divorce Judgment."

In response, "Plaintiff objects to this Demand on the ground that it does not seek disclosure of documents that are material and necessary to the prosecution or defense of any of the issues at issue in this matter. Plaintiff objects to this Demand as it seeks confidential divorce proceeding materials protected from public disclosure pursuant to DRL § 235 and 22 NYCRR § 202.5(e). Plaintiff further objects to this Demand on the grounds that it calls for the production

of attorney-client communications and/or attorney work-product, as to which there has been no waiver, and as to which no valid exception exists.”

For the reasons set forth in the court’s April 10, 2018 decision and order, this demand seeks documents that are privileged and the objection is sustained.

Document Demand No. 50

Document Demand No. 50 seeks: “For the period commencing with the date of the Divorce Judgment to December 31, 2012, a copy of each communication between Plaintiff O’Reilly and: (a) Nancy Gianakos, Esq.; (b) Thomas O. Rice, Esq.; (c) Timothy M. Tippins, Esq.; and (d) Fredric S. Newman, Esq. concerning Defendant Klar’s submission of the Divorce Judgment and the assertion that such submission violated any court rule, ethical standard, and/or constituted any fraud on Plaintiff O’Reilly or the Court.”

In response, “Plaintiff objects to this Demand on the grounds that it does not seek disclosure of documents that are material and necessary to the prosecution or defense of any of the issues at issue in this matter. Plaintiff further objects to this Demand on the grounds that it calls for the production of attorney-client communications and/or attorney work-product, as to which there has been no waiver, and as to which no valid exception exists.”

For the reasons set forth in the court’s April 10, 2018 decision and order, this demand seeks documents that are privileged and the objection is sustained.

For the foregoing reasons, it is hereby

ORDERED, that the defendant’s motion to compel discovery is **denied** in part and **granted** in part as herein provided; and it is further

ORDERED, that the plaintiff shall produce documents within his possession, custody or control and according to the directives outlined herein; and it is further

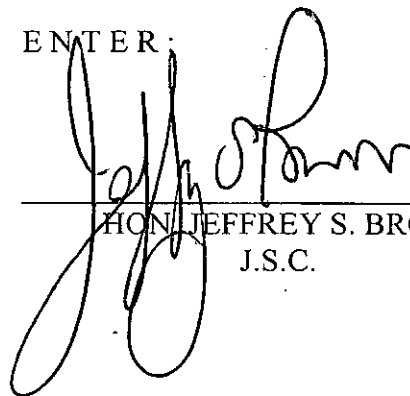
ORDERED, that the compliance conference scheduled for June 29, 2018 is adjourned to July 31, 2018 to allow plaintiff time to comply with this decision and order; and it is further

ORDERED, that the clerk in the E-Filing department is directed to forward all unredacted papers submitted by the parties in hard copy on this motion to the Nassau County Clerk to be maintained **under seal** pursuant to DRL § 235.

This constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
June 21, 2018

ENTER:



HON. JEFFREY S. BROWN
J.S.C.

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JUN 21 2018
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COUNTY CLERK'S OFFICE