| **Walt Disney Co. v Peerenboom** |
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| 2019 NY Slip Op 30181(U) |
| January 17, 2019 |
| Supreme Court, New York County |
| Docket Number: 151788/2018 |
| Judge: Nancy M. Bannon |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42
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THE WALT DISNEY COMPANY,

Petitioner

Index No. 151788/2018

v

DECISION AND ORDER

HAROLD PEERENBOOM,

Respondent.

MOT SEQ 001

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NANCY M. BANNON, J.:

## I. INTRODUCTION

In this proceeding pursuant to CPLR 3101, the petitioner, The Walt Disney Company (Disney), seeks a protective order quashing in part a subpoena duces tecum and ad testificandum (the subpoena) served on Disney pursuant to CPLR 3119 by counsel for the respondent, Harold Peerenboom. The subpoena is related to a civil action pending in the Circuit Court for Palm Beach County, Florida, which was brought against Isaac Perlmutter, and is captioned Harold Peerenboom v Isaac ("Ike") Perlmutter, et al., Case No. 502013CA15257XXXXMB AI (the Florida Action). Disney further seeks to have its reasonable costs of compliance with the subpoena, to the extent not objected to, defrayed by Peerenboom pursuant to CPLR 3111 and 3122(d). Peerenboom opposes the motion. The motion is granted in part.

## II. BACKGROUND

In the Florida Action, Peerenboom seeks damages for an alleged hate mail campaign carried out by Perlmutter, his wife, and others who aided them. Peerenboom alleges, *inter alia*, that Perlmutter and his wife were responsible for sending anonymous letters accusing Peerenboom of crimes between 2011 and 2015, because they opposed Peerenboom's efforts to put out for public bidding the management of the tennis center at the condominium complex where both Peerenboom and the Perlmutters reside. Perlmutter and his wife asserted counterclaims against Peerenboom involving Peerenboom's alleged illegal collection of their DNA.

Perlmutter is employed by affiliates of Marvel Entertainment, LLC (Marvel), and Marvel's ultimate corporate parent is Disney. After party discovery, Peerenboom issued a subpoena in New York to Marvel, seeking access to certain records, including documents and emails from a former Marvel employee, Joshua Silverman. Silverman, while a Marvel employee, conducted internet research on Peerenboom at Perlmutter's request. Silverman subsequently became an employee of a Disney affiliate in California. Disney does not object to producing non-privileged documents responsive to the first request in the instant subpoena, using agreed-upon search terms, to the extent

such documents are sought from Silverman's sole Disney e-mail account.

In addition to documents from Silverman's Disney e-mail account, the subpoena seeks (1) documents from the email accounts maintained by Disney for Alan Braverman, the Senior Vice President and General Counsel of Disney, and from email accounts maintained by Disney for Damon Nee and Jesse Falcon, each a Director, Product Development Hard Lines, Disney Global Product Development and Creative, Inc.; (2) company policies in effect at any time during the period from 2011 to the present pertaining to the use of company resources for personal purposes or other non-work purposes; (3) documents and communications concerning the employment contracts of Perlmutter, Silverman, Braverman, Nee, Falcon, and a number of other persons during that period; (4) documents and communications concerning complaints or grievances involving the same persons during that period; (5) documents and communications concerning any legal actions or claims related to Disney or Marvel, involving any of those persons during that period; and (6) documents and communications showing the internet usage history of those persons during that period.

Disney objects to the production of the foregoing documents. Because the subpoena seeks disclosure in the County of New York, Disney commenced this proceeding. See CPLR 3119(e). Disney also

objects to the ad testificandum component subpoena, which demands that Disneys "Record's Custodian" appear to give testimony at the offices of Kasowitz Benson Torres LLP in New York, New York, arguing that (1) a records deposition is not necessary, and (2) if such a deposition is necessary, it must be taken in California, where Disney's principal place of business is located. Finally, Disney avers that Peerenboom should bear any costs Disney incurs in responding to the subpoena pursuant to CPLR 3111 and CPLR 3122(d).

III. DISCUSSION

CPLR 3101 provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." "The words 'material and necessary' as used in CPLR 3101(a) are 'to be interpreted liberally to require disclosure . . . of any facts bearing on the controversy' (Allen v Crowell-Collier Pub. Co., 21 NY2d 403, 406 [1968])." Matter of Steam Pipe Explosion at 41st Street and Lexington Avenue, 127 AD3d 554, 555 (1st Dept 2015). However, where the information sought is completely irrelevant to the issues in dispute in the underlying proceeding, there is no basis for directing its disclosure. See 425 Park Ave. Co. v Finance Adm'r of City of N.Y., 69 NY2d 645 (1986). Similarly, "[d]iscovery demands that are overly broad, are lacking in specificity, or seek irrelevant documents are improper." Ferrara

Bros. Bldg. Materials Corp. v FMC Const., LLC, 138 AD3d 685, 685 (1st Dept. 2016); see Perez v Bd. of Educ. of City of New York, 271 AD2d 251 (1st Dept. 2000).

"The person challenging [a nonjudicial] subpoena bears the burden of demonstrating the utter irrelevancy of the demands." Matter of Hyatt v State Franchise Tax Bd., 105 AD3d 186, 201 (2nd Dept. 2013); see Matter of Kapon v Koch, 23 NY3d 32 (2014); Matter of Harris v Seneca Promotions, Inc., 149 AD3d 1508 (4th Dept. 2017). When a nonjudicial subpoena is challenged on the ground of irrelevancy, it becomes "incumbent upon the issuer to come forward with a 'factual basis' which establishes the relevancy of the items sought to the subject matter of the investigation before a witness will be compelled to comply with the subpoena's mandate." Matter of Hyatt v State Franchise Tax Bd., supra at 202 (citing Virag v Hynes, 54 NY2d 437 [1981]).

A. Waiver of Objections

As a preliminary matter, Peerenboom's argument that Disney waived its objections to the subpoena by failing to provide a written response within 20 days is without merit. Peerenboom issued the subpoena pursuant to CPLR 3119, which governs interstate depositions and discovery. As Disney correctly notes, the requirement under CPLR 3122 of providing a written response within 20 days is addressed specifically to CPLR 3120 and 3121 notices or subpoenas. Conversely, CPLR 3119 provides that an

application for a protective order to enforce, quash, or modify a subpoena issued under its authority must comply with the rules or statutes of the state of New York, but does not include a time frame for providing a response to the subpoena.

Moreover, Disney asserts that it made Peerenboom aware of its objections prior to filing this petition during two teleconferences within 10 days of its receipt of the subpoena, and in related e-mail correspondence, through which Disney attempted to resolve its objections to the subpoena and obviate the need for the instant proceeding. Peerenboom does not dispute these assertions. His argument that Disney waived its objections by failing to provide a written response to him within 20 days is unpersuasive under these circumstances.

B. Objections to Information Sought

1. *Request No. 1*

Turning to the merits of the petition, the court agrees that Peerenboom fails to cite any factual basis for seeking information from the Disney e-mail accounts of Nee and Falcon, former Marvel employees who became Disney employees in March 2012. Peerenboom's conclusory assertion, in an unsworn memorandum of law prepared by his counsel, that Nee and Falcon "are believed to have assisted Perlmutter in other previous mailings he sent in the past involving his personal vendettas," is unsupported by any factual statements, identifying, for

example, whose belief this is or what exactly the "other mailings" pertained to. Moreover, Peerenboom does not submit any factual information to support a connection between Nee and Falcon and the actual mailings in the Florida Action.

Peerenboom, alleging that evidence previously produced in connection with Silverman's assistance in Perlmutter's campaign against Peerenboom constitutes "conclusive proof from Marvel about Perlmutter's use of company employees to assist him in such non-work related matters," appears to ask that the court find anyone who worked with Perlmutter while at Marvel obligated to comply with Peerenboom's broad discovery requests, without any other information linking such Marvel employees to Perlmutter's alleged "personal vendettas" or to the Florida Action. Peerenboom's arguments are unpersuasive.

As to Braverman's e-mail account, Peerenboom argues that Braverman is linked to the Florida Action because he received updates as to the status of the Florida Action and Marvel's response to a prior Peerenboom subpoena, in his capacity as general counsel to Disney. Peerenboom further states that discovery from Marvel shows that Marvel's in-house counsel, John Turitzin, was involved in Perlmutter's efforts to spread false information about Peerenboom, and that Turitzin reported on those efforts to Braverman. However, Peerenboom fails to indicate what discovery purportedly revealed this information. Peerenboom states instead that evidence that Marvel produced about Braverman

was designated "confidential" and that this "designation will be challenged at the appropriate time." This material has not been provided to the court. Peerenboom provides no other source for his allegations implicating Braverman.

Under the foregoing circumstances, the court can discern no factual basis for searching the Disney e-mail records of Braverman, Nee, or Falcon, as the information sought is irrelevant to the underlying legal dispute between Peerenboom and Perlmutter, and is unlikely to lead to lead to the discovery of admissible evidence.

2. *Request No. 2*

As to Peerenboom's second request, which is for company policies pertaining to the use of company resources for personal purposes or other non-work purposes, Disney establishes that the request is overbroad and that the information sought is irrelevant. While Peerenboom argues that it needs the policies "to assess any assertion of privilege over the work email," no such assertion has been made at this juncture. Peerenboom offers no other basis for seeking Disney's company policies at this time. In light of the foregoing, Peerenboom is not entitled to the information sought in the second request of the subpoena.

3. *Requests No. 3, 4, and 5*

The third, fourth, and fifth requests, which pertain to the employment contracts of Perlmutter and other individuals, and any complaints, grievances, or legal actions involving them, are

similarly overbroad given the nature of the Florida Action. Peerenboom avers that any prior instances wherein Disney employees used company resources "to further Perlmutter's personal vendettas" is "directly relevant evidence in the Florida Action," and that evidence of past wrongdoing and grievances "goes directly to [the] credibility" of Perlmutter, Braverman, Nee, Falcon, Silverman, and a series of other individuals including Marisol Garcia, Chris Fondocaro, Robert Grosser, John Turitzin, Eli Bard, Glenn Magala, and Richie Waite. Silverman, Garcia, and Grosser, have been deposed in connection with the Florida Action, but Peerenboom does not point to any matter addressed at their depositions that would warrant the discovery Peerenboom presently seeks.

The court notes that neither Disney nor Marvel is a party to the Florida Action. Moreover, as far as the court is aware, Peerenboom has not made any claims against Disney or Marvel. For these reasons, Peerenboom's assertion that the existence of a "pattern of Marvel and Disney employees using company resources to further Perlmutter's personal vendettas" would be directly relevant to the Florida Action, which involves a dispute between only Perlmutter and Peerenboom, is unpersuasive. There is no indication that the disclosure of Disney employment contracts, internal complaints or grievances, or information about unrelated legal actions concerning Perlmutter and other Disney personnel, will produce information relevant to the claims in the Florida

Action.

To the extent that counsel for Peerenboom indicated in a conversation with counsel for Disney that the information Peerenboom is seeking is relevant to hypothetical or potential claims against Disney for "sanctioning harassing behavior" against Peerenboom, Peerenboom is cautioned that it is improper to seek pre-action disclosure irrelevant to the existing action through the issuance of a non-party subpoena pursuant to CPLR 3119. In addition, pre-action disclosure, even if sought through the proper channel, may not be used to determine whether the plaintiff has a cause of action in the first place. See Bishop v Stevenson Commons Assocs., L.P., 74 AD3d 640 (1st Dept. 2010).

4. *Request No. 6*

The sixth request, which essentially seeks disclosure of the internet and e-mail usage history of Perlmutter and other Disney employees over a seven-year period, is plainly overbroad. Peerenboom states, without any further explanation, that this information is needed "to track electronic efforts at anonymity and surreptitious collection of information." Peerenboom suggests that he is entitled to this information because it was revealed in the Florida Action that Perlmutter used company resources "to perpetrate an anonymous mailing." Contrary to Peerenboom's assertion, however, the revelation that Permutter used the Marvel network to send an anonymous email does not render "self-evident" the appropriateness of the disclosure of

seven years of internet and e-mail usage history pertaining not only to Perlmutter but to a number of other Disney employees, many of whom have not been implicated in the underlying Florida Action in any way.

C. Objection to Deposition

Disney objects to the ad testificandum component of the subpoena on the grounds that a records deposition is not necessary and that if it does go forward, it should be required to take place in California, Disney's principal place of business. Disney does not elaborate on its assertion that the deposition is not necessary and cites to a single decision from the Appellate Division, First Department, in support of its objection to the location of the deposition. In that case, the Appellate Division, First Department, held that a motion for a commission pursuant to CPLR 3108 to examine a nonparty witness in California was properly denied because the party seeking the commission failed to demonstrate that a commission was necessary or convenient. See Reyes v Riverside Park Community (Stage I), Inc., 59 AD3d 219 (1st Dept. 2009). It is unclear how these facts are analogous to the facts underlying the instant petition, which seeks to quash a subpoena ad testificandum pursuant to CPLR 3119 demanding that a non-party deposition take place in New York.

Since Disney has not provided a basis for quashing the ad

testificandum component of the subpoena, the branch of its petition seeking that relief is denied. However, as discussed below, it is likely that Peerenboom will bear the costs of production of a Disney witness for deposition, if such deposition does take place.

D. <u>Entitlement to Cost-Shifting</u>

As to that portion of the subpoena that relates to Silverman's emails, which Disney does not object to, Disney seeks costs in connection with the processing and review of Silverman's data in producing its response to Peerenboom. Disney states that it will incur attorneys' fees in its review of potentially responsive documents costing, at an estimated blended associate rate $420 per hour. Disney also states that it may incur data-vendor costs.

Pursuant to CPLR 3111 and 3122(d), the "reasonable production expenses of a non-party witness shall be defrayed by the party seeking discovery." If a court finds that a non-party is required to produce information, including electronically-stored information (ESI), the "court should allocate the costs of this production to [the party seeking the discovery]." <u>Tener v Cremer</u>, 89 AD3d 75, 82 (1st Dept. 2011). The court should consider in that allocation the cost of disruption to the business operations of the nonparty and any delay in making the ESI discovery demand. <u>Id.</u> While specific reference to

attorneys' fees or data-vendor costs is omitted from CPLR 3111 and 3122(d), the court's review of the case law did not reveal any prohibition on the allocation of such fees or costs. Moreover, the Rules of the Commercial Division of the Supreme Court specifically allow for the allocation of such fees and costs "in accordance with Rules 3111 and 3122(d) of the CPLR." 22 NYCRR § 202.70(g), Comm. Div. Rules, Appendix A, Guidelines for Discovery of Electronically Stored Information ("ESI") from Nonparties, V., A & B.

In light of the foregoing, Peerenboom shall be responsible for all reasonable production expenses incurred by Disney in responding to the subpoena, which may include attorneys' fees and/or data-vendor costs. Since the amount sought by Disney is unspecified, however, the court cannot direct its payment at this time. Therefore, the court denies Disney's application for production expenses without prejudice, pending Disney's submission of an itemization of the reasonable expenses it actually incurs.

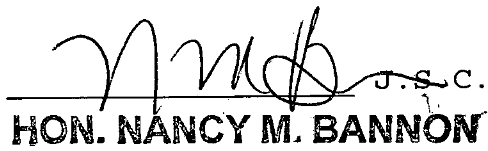
## IV. CONCLUSION

In light of the foregoing, it is

ORDERED that the petition for a protective order quashing in part a subpoena duces tecum and ad testificandum served pursuant to CPLR 3119 is granted to the extent that the subpoena is quashed except with respect to so much of Request No. 1 as

relates to the emails of Joshua Silverman and with respect to the ad testificandum component of the subpoena, and the petitioner's application for reasonable production expenses is denied without prejudice to the petitioner's submission of an itemization of the reasonable expenses the petitioner actually incurs in responding to the subpoena.

This constitutes the Decision and Order of the court.

Dated: January 17, 2019 ENTER:  J.S.C.

HON. NANCY M. BANNON