

**Brummer v Wey**

2019 NY Slip Op 32352(U)

July 31, 2019

Supreme Court, New York County

Docket Number: 153583/2015

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 46

CHRISTOPHER BRUMMER,

Index No. 153583/2015

Plaintiff

- against -

DECISION AND ORDER

BENJAMIN WEY, FNL MEDIA LLC, and NYG  
CAPITAL LLC d/b/a NEW YORK GLOBAL  
GROUP,

Defendants

APPEARANCES:

For Plaintiff

Nicole Gueron Esq. and Ashleigh Hunt Esq.  
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For Defendants Wey and NYG Capital LLC

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LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Defendants Wey and NYG Capital LLC move to compel plaintiff to produce his unredacted Scope of Work and correspondence dated April 1, 2016, from Momentum Factor, LLC, for his "custom Reputation Defense Program," Aff. of Jonathan D. Lupkin Ex. 4, at 2; C.P.L.R. § 3124, or to preclude plaintiff from claiming damages for payments to Momentum Factor for its services. C.P.L.R. § 3126(2). In producing the documents in a redacted form, plaintiff does not rely on any privilege or protection against disclosure, but instead claims that, if defendants learn

his customized reputation defense program, they will devise means to combat and overcome it and thus protract and enhance the defamation about which he sues. Plaintiff points to defendants' use of search engine optimization, which features defamatory statements and depictions most prominently when anyone searches for information about plaintiff on the internet.

At his deposition, plaintiff testified that, because of defendants' defamatory statements about him on the internet, he hired Momentum Factor, an online reputation defense service, and paid it \$4,170 per month for five months, a total of \$20,850, to mitigate the damage defendants caused to his reputation and to prevent further harm from defendants' defamatory statements. Defendants maintain that they need Momentum Factor's Scope of Work to determine whether plaintiff's payments for its services were in fact designed to mitigate the past and future effects of the alleged defamation. Plaintiff's very complaints that the defamatory attacks allegedly launched by defendants still appear most prominently in his Google Image results, however, indicate that Momentum Factor's reputation defense has been ineffective.

## II. CONFIDENTIALITY

Defendants agree that plaintiff may designate the Momentum Factor documents confidential under the stipulated confidentiality order in this action. Plaintiff also consents to allowing defendants' attorneys, but not defendants, to review, but not to copy, the unredacted documents. The remaining question, then, is whether any part of the documents is a trade

secret or other proprietary or competitively sensitive business information, the use of which by defendants would be detrimental to Momentum Factor's or plaintiff's business. E.J. Brooks Co. v. Cambridge Sec. Seals, 31 N.Y.3d 441, 453 (2018); Ashland Mgt. v. Janien, 82 N.Y.2d 395, 407 (1993); Second Source Funding, LLC v. Yellowstone Capital, LLC, 144 A.D.3d 445, 446 (1st Dep't 2016); Schroeder v. Pinterest Inc., 133 A.D.3d 12, 27 (1st Dep't 2015).

Defendants question whether any information that Momentum Factor shares with its client may be considered confidential. A trade secret or comparable proprietary or competitively sensitive business information that is to be protected from dissemination or use by defendants must, above all, be secret, Ashland Mgt. v. Janien, 82 N.Y.2d at 407; Second Source Funding, LLC v. Yellowstone Capital, LLC, 144 A.D.3d at 446; Schroeder v. Pinterest Inc., 133 A.D.3d at 28-29; Susan D. Fine Enters., LLC v. Steele, 66 A.D.3d 613, 614 (1st Dep't 2009), but plaintiff may be within the circle to whom the secret is known, as long as Momentum Factor and he have taken measures to guard the secrecy of the information. Ashland Mgt. v. Janien, 82 N.Y.2d at 407; Schroeder v. Pinterest Inc., 133 A.D.3d at 27-28.

Plaintiff has consented to the court's in camera review of the Momentum Factor documents. That review reveals nothing in the Momentum Factor Reputation Defense prepared for plaintiff and created by Momentum Factor indicating any part of the Management Team biographies, References from other businesses, Scope of Services, Pricing, or Services Agreement is to be kept

confidential. Plaintiff presents no other evidence of measures taken to guard the secrecy of the information. Ashland Mgt. v. Janien, 82 N.Y.2d at 407; Schroeder v. Cohen, 169 A.D.3d 412, 413 (1st Dep't 2019); Schroeder v. Pinterest Inc., 133 A.D.3d at 29; 1 Model Mgt., LLC v. Kavoussi, 82 A.D.3d 502, 503 (1st Dep't 2011).

### III. MATERIALITY AND NECESSITY

On the other hand, nothing that plaintiff has redacted will assist defendants toward their purpose for reviewing the documents: to ascertain whether Momentum Factor's services were designed to mitigate the effect of the defamatory statements alleged in the amended complaint or even whether its services were related to those statements. The scope of services described well might apply to any Momentum Factor client.

Thus the documents themselves will not assist defendants in ascertaining whether plaintiff's claimed payments to Momentum Factor are expenses incurred due to defendants' alleged defamatory statements. The description of strategies and techniques to repair and protect a client's, any client's, not specifically plaintiff's online reputation may be necessary, however, for defendants' meaningful examination of a Momentum Factor witness. To ascertain from a Momentum Factor witness what is unascertainable from its documents, whether its strategies and techniques were targeted to mitigating the effects of defendants' alleged defamatory statements on plaintiff's online reputation, defendants may need to know what those strategies and techniques

were, even if they were implemented for other clients as well. To determine whom to depose or call as a witness at trial, defendants may need to know who created and prepared the Momentum Factor Reputation Defense for plaintiff and who among the Management Team was involved.

Consequently, if defendants intend to depose a Momentum Factor witness, or if any party intends to call a Momentum Factor witness at trial, defendants may be entitled to the Momentum Factor documents' identification and biographies of Momentum Factor's personnel, complete Scope of Services, and complete Reputation Defense Program Setup and Monthly Service, unredacted. Until defendants demonstrate such an intent, however, the documents' contents that plaintiff has withheld are immaterial and unnecessary to defendants' current inquiry.

#### IV. CONCLUSION

For the reasons explained above, the court denies the motion by defendants Wey and NYG Capital LLC to compel plaintiff to produce an unredacted copy of Exhibit 4 to the Lupkin Affirmation in support of the motion. C.P.L.R. § 3124. Given the denial of defendants' motion, the court denies plaintiff's cross-motion insofar as it seeks to produce the unredacted copy to defendants' attorneys, but not defendants, to review, but not to copy, as moot. The parties' stipulation dated June 27, 2019, resolves the remainder of plaintiff's cross-motion.

DATED: July 31, 2019



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LUCY BILLINGS, J.S.C.