

Brummer v Wey

2019 NY Slip Op 32451(U)

August 9, 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

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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

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APPEARANCES:

For Plaintiff

Nicole Gueron Esq. and Ashleigh Hunt Esq.
Clarick Gueron Reisbaum LLP
220 5th Avenue, New York, NY 10001

For Nonparty Catafago Fini LLP

Tom Fini Esq.
350 5th Avenue, Suite 7710, New York, NY 10118

LUCY BILLINGS, J.S.C.:

Nonparty law firm Catafago Fini LLP moves to quash and for a protective order against plaintiff's subpoena to the firm dated May 17, 2019, insofar as the subpoena seeks the deposition of Tom Fini Esq., defendants' former attorney. C.P.L.R. §§ 2304, 3103(a). Plaintiff cross-moves to compel compliance with the subpoena's demands both for attorney Fini's deposition and for documents. C.P.L.R. § 3124. Plaintiff sought to depose attorney Fini and to obtain documents regarding (1) the firm's dissemination of an affidavit signed by plaintiff in August 2018 and (2) defendant FNL Media LLC's retention of the firm.

I. DISSEMINATION OF PLAINTIFF'S SIGNED AFFIDAVIT

An unsigned copy of an affidavit by plaintiff was filed as an attachment to a stipulated order in this action August 17, 2018, settling the action upon the parties' compliance with the settlement's terms, and providing that Catafago Fini was to hold the signed affidavit in escrow pending defendants' compliance with the settlement's terms. Defendants did not comply with the settlement's terms, so the action resumed, yet the signed version of plaintiff's affidavit was published on the websites where the defamatory statements alleged in the amended complaint were published. Plaintiff's affidavit of course does not include any defamatory statements about him, nor does plaintiff claim it includes any confidential information, as the signed affidavit was to become public if defendants complied with the settlement, and the affidavit's contents already became public August 17, 2019.

Plaintiff does not move for contempt of the August 2018 stipulated order that required Catafago Fini to hold the signed affidavit in escrow. Instead he seeks information about the dissemination of his signed affidavit to show defendants' control over the websites that, three years earlier, published the defamatory statements to which this action pertains. The subpoena thus seeks information about activity 19-20 months after the amended complaint filed January 13, 2017, and therefore unnecessary to plaintiff's prosecution of his action. Liberty Petroleum Realty, LLC v. Gulf Oil, L.P., 164 A.D.3d 401, 405 (1st

Dep't 2018); Equitable Life Assur. Socy. of U.S. v. Rocanova, 207 A.D.2d 294, 296 (1st Dep't 1994).

Had plaintiff gathered no other evidence associating defendants with those websites that published the earlier alleged defamatory statements, defendants' association during August 2018 or afterward might lead to evidence showing their association years earlier, during the period covered by the January 2017 amended complaint. The prior proceedings regarding disclosure in this action, however, demonstrate that plaintiff already has obtained testimony and documents about earlier periods that show defendants' control of the alleged defamatory websites at the relevant time when they published the statements alleged in the January 2017 amended complaint. Because plaintiff already possesses the material information to which defendants' association with those websites during August 2018 or afterward might lead, this later association is immaterial to the claims in the amended complaint and does not assist in the prosecution of plaintiff's action. Liberty Petroleum Realty, LLC v. Gulf Oil, L.P., 164 A.D.3d at 405; DeLeonardis v. Hara, 136 A.D.3d 558, 558 (1st Dep't 2016); Equitable Life Assur. Socy. of U.S. v. Rocanova, 207 A.D.2d at 296; Kripke v. Benedictine Hosp., 222 A.D.2d 764, 765-66 (3d Dep't 1995). See EIFS, Inc. v. Morie Co., 298 A.D.2d 548, 549 (2d Dep't 2002); Pedone v. Schlotman, 249 A.D.2d 526, 526 (2d Dep't 1998). Moreover, even if plaintiff's signed affidavit was disseminated to defendants, enabling them to disseminate it to the websites that published it, such evidence

would demonstrate only that defendants transmitted the documents to the websites, not that defendants control those websites.

II. FNL MEDIA'S RETENTION OF CATAFAGO FINI

When attorney Fini appeared in support of his firm's motion and in opposition to plaintiff's cross-motion, he was sworn and answered all questions by plaintiff's attorney regarding how the firm undertook representation of defendant FNL Media and later attempted to contact it. Plaintiff seeks this information to contact FNL Media himself, to ascertain its relationship to defendants Wey and NYG Capital, and to confront their defense that FNL Media, which has not appeared in the action since Catafago Fini withdrew as FNL Media's attorney, is the culpable party, not Wey or NYG Capital, that published the defamatory statements about plaintiff. Attorney Fini identified a single document related to plaintiff's inquiry, which Catafago Fini subsequently produced to plaintiff. Plaintiff agrees that attorney Fini's testimony and the production of the document resolves plaintiff's cross-motion to compel testimony and documents regarding defendant FNL Media LLC's retention of the firm, rendering moot the firm's motion to quash and for a protective order against the subpoena insofar as it sought that testimony. Saratoga County Chamber of Commerce v. Pataki, 100 N.Y.2d 801, 811 (2003); Santiago v. Berlin, 111 A.D.3d 487, 487 (1st Dep't 2013); Ryan, Inc. v. New York State Dept. of Taxation & Fin., 83 A.D.3d 482, 483 (1st Dep't 2011); Hernandez v. Department of Hous. Preserv. & Dev., 68 A.D.3d 407, 407 (1st


Dep't 2009).

III. DISPOSITION

For the reasons explained above, the court grants Catafago Fini's motion to quash and for a protective order against plaintiff's subpoena for attorney Fini's deposition, C.P.L.R. §§ 2304, 3103(a), and denies plaintiff's cross-motion to compel compliance with the subpoena's demands for the deposition and for documents, C.P.L.R. § 3124, regarding the dissemination of plaintiff's signed affidavit. Compliance with plaintiff's subpoena for this testimony and any related documents will not lead to any information bearing on the claims in this action that plaintiff does not already possess. Kapon v. Koch, 23 N.Y.3d 32, 38 (2014); Liberty Petroleum Realty, LLC v. Gulf Oil, L.P., 164 A.D.3d at 405; DeLeonardis v. Hara, 136 A.D.3d at 558.

The court denies Catafago Fini's motion to quash and for a protective order against plaintiff's subpoena for attorney Fini's deposition, C.P.L.R. §§ 2304, 3103(a), and denies plaintiff's cross-motion to compel compliance with the subpoena's demands for the deposition and for documents, C.P.L.R. § 3124, regarding FNL Media's retention of the firm. Compliance with plaintiff's subpoena for this testimony and any related documents is moot given attorney Fini's testimony on the record July 25, 2019, and subsequent production of the document identified in his testimony.

DATED: August 9, 2019



LUCY BILLINGS, J.S.C.