Brummer v Wey
2021 NY Slip Op 31665(U)
May 18, 2021
Supreme Court, New York County
Docket Number: 153583/2015
Judge: Richard G. Latin

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. RICHARD G. LATIN** **PART** **IAS MOTION 46**

Justice

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CHRISTOPHER BRUMMER,

Plaintiff,

- v -

BENJAMIN WEY, FNL MEDIA LLC,NYG CAPITAL LLC D/B/A NEW YORK GLOBAL GROUP,

Defendant.

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INDEX NO. 153583/2015

MOTION DATE 02/11/2021

MOTION SEQ. NO. 047

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 047) 1368, 1369, 1370, 1371, 1372, 1373, 1374, 1375, 1376, 1377, 1378, 1379, 1380, 1381, 1382, 1383, 1384, 1385, 1386, 1387, 1388, 1389, 1390, 1391, 1392, 1393, 1394, 1395, 1396, 1397, 1398, 1399, 1400, 1401, 1402, 1403, 1404, 1405, 1406, 1407, 1408, 1409, 1410, 1411, 1412, 1413, 1414, 1415, 1416, 1417

were read on this motion to/for PRECLUDE.

Upon the foregoing documents, it is ordered that plaintiff's motion to enforce the prior conditional preclusion orders from January 2018 and August 2019, to strike the defendants' answers and affirmative defenses, entering default judgment against defendants as to liability, and imposing additional sanctions is determined as follows:

Plaintiff, a professor of law at Georgetown University Law Center and the sole African-American on the National Adjudicatory Council, commenced the instant action alleging, inter alia, that defendants defamed him when they began publishing numerous articles about him after he sat on the panel that upheld a decision by the Financial Industry Regulatory Authority, Inc. that issued lifetime bans against two African-American stockbrokers, non-parties William Scholander and Talman Harris. This 47th motion in this matter is one of many discovery motions that has been made since this matter was commenced on or about April 13, 2015.

With regards to defendants' obligations concerning electronic discovery, initially, by order dated June 6, 2017, Hon. Manuel J. Mendez ordered that within 90 days of the date of the order, an independent forensic computer expert agreed upon by the parties was to conduct a forensic examination of all computer devices used for business purposes by defendant Benjamin Wey, FNL Media LLC, and NYG Capital LLC d/b/a New York Global Group. Thereafter, by order dated August 11, 2017, Kivu Consulting was appointed as forensic examiner and defendants were ordered by August 16, 2017 to identify all computer devices that would be made available for forensic examination and then to make them available to examination. If any of the identified devices were unavailable for examination, defendants were to provide a sworn affidavit stating the reasons, if any, for the unavailability.

Then, by order dated January 8, 2018, Hon. Manuel J. Mendez granted plaintiff's motion in part by compelling defendants' disclosure and production of computer devices including, inter alia, desktop computers, laptops, tablets, smartphones, and plug-in devices that were used in connection with production of TheBlot, unitedpressnews.com, investigativepress.com, or any other websites created by defendants in connection with Benjamin Wey's activities as an investigative journalist or publisher, for a forensic examination. It further stated that if defendants failed to produce the "computer devices" within 60 days of the date of the order, that they shall be precluded from contesting (a) the ownership and structure of defendant Benjamin Wey in TheBlot, FNL Media LLC, and NYG Capital LLC and related websites; (b) defendants' responsibility authoring and publishing online content about the plaintiff' and (c) defendants' state of mind in authoring and publishing the content. Moreover, the order granted plaintiff reasonable attorney's fees and costs for having to make this motion and the contempt motion under sequence #28.

That order finding defendants in civil contempt was ultimately reversed by order of the Appellate Division dated November 15, 2018. The Appellate Division found that the defendants could not be in contempt because the underlying preliminary injunction should have never been granted since the complained of language, while offensive, was not reasonably understood as a call to violence against plaintiff necessitating an injunction. The Court added, however, that even if the subject injunction was unconstitutional, defendants were not free to disobey the order of the issuing court, that was not void on its face, without obtaining judicial relief from the order.

Thereafter, plaintiff made another motion to compel disclosure and Hon. Lucy Billings issued an order dated August 23, 2019. In the decision, Hon. Billings recounted Hon. Mendez's orders from June 6, 2017 and June 8, 2018, and defendant Wey's deposition testimony. Justice Billings recounted that at Wey's deposition, he admitted that while the action was pending, he sent computer devices used for business purposes relating to TheBlot, including writing articles, and NYG Capital LLC to China. The order stated that "Wey did not indicate that he sent these devices to China before Justice Mendez's orders, but, even if he did so before June 6, 2017, he demonstrated that he retained control over these devices of which he had retained possession and custody such that he is capable of regaining possession and custody." Thus, Justice Billings ordered defendants to retrieve and to produce the subject computer devices to Kivu Consulting within 45 days of entry of that order. Consistent with the January 2018 order, defendant would be precluded from contesting ownership of TheBlot, responsibility for the subject articles, and his state of mind in authoring and publishing the information about plaintiff online. Justice Billings also found that defendants did not fully and directly respond to plaintiff's interrogatories so they were ordered to supplement their answers and corresponding document production within 20 days after entry of the order.

Thereafter, defendants produced two Lenovo laptops for forensic analysis on October 16, 2019. On or about June 30, 2020, Kivu Consulting, the court-appointed independent forensic examiner then issued its report. After examination, Kivu Consulting concluded that the hard drivers for the respective laptops were either restored to their December 23, 2012 status or replaced by a clone of a gold image from that approximate date. These reinstallations or restorations from backup would essentially wipe the operating system clean and appeared to be done on June 23, 2019 and August 21, 2019 respectively. The conclusion of the replacement of the hard drive was derived both from Kivu's internal analysis performed and due to the observation that the internal hard drive was missing screws, indicating that they were previously removed for the hard drive to be pulled. Kivu opined that the only observable activity on the computers was System Administrator activity consistent with preparing a computer for reuse. Ultimately, due to the restorations, Kivu was unable to determine if there was any activity on either laptop before June or August of 2019. These observations were consistent with Kivu's earlier review of the one proffered Huawei cell phone that showed no evidence of any emailing, and retrieval of just 6 calls and 16 texts that were deleted.

Moreover, the record is replete with testimony as to devices used by defendants and Wey other than the two proffered Lenovo laptops. Defendant Wey, himself, testified to using multiple devices throughout the years for written communications with Tracy and assisting with virus issues for the subject websites. Additionally, any claim that he did not actively use the websites and social media accounts is belied by the websites' domain hosts' activity records demonstrating activity from Wey's home IP address.

Furthermore, Alex Geana, TheBlot's first editorial director, testified, among other things, that defendant Wey had interacted with TheBlot employees all the time through his email address

Ben@NewYorkGlobalGroup. He also added that all of TheBlot's email exchanges were maintained in a cloud-based server known as G suite that could be accessed remotely. Geana further stated that all of TheBlot's four Mac desktops were purchased and owned by defendant Wey and held at the shared office. Geana was nearly positive that Wey paid for the computers on his personal credit card, much like how he paid for Genea's gym membership. Geana also testified that he was very familiar with many of the "hit pieces," their comments, and the ISP of the comments and knew them to have come from Wey. For those where he was unfamiliar with the ISP, he still believed they came from Wey based on their syntax.

James Baxter, NYGG of New York's executive chairman and FNL's manager also testified that he would regularly communicate with Wey when TheBlot needed money, that Wey purchased the FNL a/k/a TheBlot's computers, and that Wey would attend various meetings and have input on the content of TheBlot. Baxter described FNL as nothing more than a shell holding company for TheBlot. He also stated that he left his NYGG assigned computer at the office when he left in 2016 and that when he spoke with Wey he noticed that he also had a laptop, possibly Mac, at work. James Gross, former employee for TheBlot, also testified that he communicated with Wey at least once by text message after his employment ended. The screen shots of the text conversation show Wey inquiring from Gross how to log into TheBlot's social media accounts and Gross agreeing to help him out in return for Wey sending him his W2 tax form. The truth of the matter asserted in the text is irrelevant to the fact that no device was ever produced for analysis that contains a history of that text.

Pursuant to CPLR 3101, there shall be "full disclosure of all matter material and necessary in the prosecution or defense of an action" (CPLR 3101[a]). If a party refuses to obey an order or willfully fails to disclose information that it should have, the court may issue an appropriate order

(CPLR 3126). Such orders may include deeming any issues related to the sought after information as resolved in accordance with the claims of the moving party, prohibiting the disobedient party from supporting or opposing designated claims or defenses, and/or striking the pleadings of the disobedient party (CPLR 3126[1]-[3]; *see Husovic v Structure Tone, Inc.*, 171 AD3d 559 [1st Dept 2019]).

Spoliation occurs when a party has an obligation to preserve evidence, the evidence was destroyed with a culpable state of mind, and the evidence was relevant to a claim or defense (*Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543 [2015]). The relevance of the evidence is presumed where it was intentionally or willfully destroyed (*id.*, citing *Zubulake v UBS Warburg* LLC, 220 FRD 212 [SD NY 2003]). A court may find that a disobedient party acted willfully based on a continued pattern of noncompliance with court orders and discovery demands (*see generally Jones v Green*, 34 AD3d 260 [1st Dept 2006]; *Suffolk P.E.T. Mgt., LLC v Anand*, 105 AD3d 462 [1st Dept 2013]). Courts maintain broad discretion "to provide proportionate relief to a party deprived of lost or destroyed evidence, including the preclusion of proof favorable to the spoliator to restore balance to the litigation, requiring the spoliator to pay costs to the injury injured party . . . or employing an adverse inference instruction at the trial of the action" (*Pegasus*, 26 NY3d 543, citing *Ortega v City of New York*, 9 NY3d 69, 76 [2007]). An adverse inference charge may be appropriate even where the evidence was only negligently destroyed (*see Pegasus*, 26 NY3d at 554 [citations omitted]).

Pursuant to 22 NYCRR 130-1.1., sanctions are applied to conduct that is continued when its lack of legal or factual basis should have been apparent to counsel or the party (*see Emery v Parker*, 107 AD3d 635 [1st Dept 2013]).

Here, it is evident from the record that defendants have not supplied all of the electronic devices that were used in connection with TheBlot activities. Besides the ample testimony of Geana and Baxter, Wey's own testimony as to a limited relationship with TheBlot is belied by his earlier testimony in the matter of *Bouveng v NYG Capital, et al.* before Hon. Paul G. Gardephe where he stated that he was the publisher for TheBlot, that it was ownedbyFNL Media, and that he would from time to time write for TheBlot both under his own name and a pseudonym.

Moreover, the few electronic devices that were provided were either decoys, never used in connection with TheBlot, or were wiped clear by Wey's friends/business associates in China so that no discoverable information was discernable. The timing for which the subject Lenovo laptops were wiped clean is problematic in that they were not restored to December 2012 status until June and August of 2019. This is long after Hon. Mendez's initial June 6, 2017 order to turnover the work-related computers for forensic examination and the April 13, 2015 commencement of the action that should have put defendants on notice (*see China Dev. Indus. Bank v Morgan Stanley & Co., Inc.*, 183 AD3d 504 [1st Dept 2020]). Any argument that defendant Wey was not in control of the laptops (which he sent away and facilitated their return) and that he did not think he had to preserve them is both in contravention to the law of the case and unavailing (*see generally Glynwill Investments, N.V. v Shearson Lehman Hutton, Inc.*, 216 AD2d 78 [1st Dept 1995]). Thus, the defendants failed to provide a reasonable excuse for their noncompliance.

In light of this matter's tortured discovery history regarding defendants' dilatory practice and noncompliance with discovery obligations and orders, it is inescapable that defendants' conduct was willful. Thus, the conditional event requiring preclusion first ordered in Justice Mendez's January 8, 2018 order and carried into Justice Billing's August 23, 2019 order is triggered and defendants are found to have spoliated evidence.

Further, Wey's supplemental responses to plaintiff's interrogatories aimed at clarifying his relationship with TheBlot and his, or his agents, electronic activity relating to it, were largely unsatisfactory. Though Justice Billings gave defendant a second opportunity to provide full and direct responses in the order dated August 23, 2019, defendant, more often than not, declined to provide additional information. Moreover, when defendant did supplement his response by referring to his deposition testimony, the referenced material often referred to situations where he did not know the subject persons name. Similarly, when he did know the relevant person to provide information, he failed to identify how to contact said individual.

Because the defendants failed to provide all the relevant work-related computers for forensic examination, proffered only two completely refurbished, altered computers, and failed to provide meaningful supplemental responses, their conduct is subject to additional sanctions pursuant to 22 NYCRR 130-1.1 with regard to this motion and the claims that defendants are intentionally preventing discovery (22 NYCRR 130-1.1; *Visual Arts Foundation, Inc. v Egnasko*, 91 AD3d 578 [1st Dept 2012]).

Accordingly, plaintiff's motion is granted to the extent that defendants Benjamin Wey, FNL Media LLC, and NYG Capital LLC d/b/a New York Global Group are precluded from contesting the allegations of the second amended complaint concerning ownership, corporate control, and state of mind; and it is further

ORDERED that defendants' sixth and seventh affirmative defenses concerning their state of mind are stricken; and it is further

ORDERED that the defendants are precluded from offering any evidence as to their intent and an adverse inference is to be given at trial concerning their intent to cause plaintiff intentional emotional and economic harm; and it is further

ORDERED that plaintiff, shall pursuant to the e-filing protocol, serve a copy of this order with notice of entry on the defendants and the special referee clerk located in the General Clerk's Office, who is directed to assign this matter to a special referee for a hearing to determine the amount of reasonable attorney's fees and costs to be awarded to plaintiff for this motion; and it is further

ORDERED that the plaintiff's motion is denied in all other respects.

This constitutes the decision and order of the Court.

5/18/2021
DATE

RICHARD G. LATIN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE