People for the Ethical Treatment of Animals v PetSmart LLC
2022 NY Slip Op 32040(U)
June 29, 2022
Supreme Court, New York County
Docket Number: Index No. 154009/2022
Judge: Arlene Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE BLUTH** **PART** **14**

Justice

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PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS,

Petitioner,

- v -

PETSMART LLC, JUSTINE GLASSMOYER

Respondent.

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INDEX NO. 154009/2022

MOTION DATE 6/28/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 39, 40, 43

were read on this motion to/for QUASH SUBPOENA, FIX CONDITIONS.

The petition to quash subpoenas served on petitioner's non-party vendors is granted.

Background

This proceeding arises out of a related Florida litigation. Petitioner admits that it conducted a nationwide investigation into respondent PetSmart LLC's ("PetSmart") treatment of animals at PetSmart stores. One particular investigation involved a PetSmart store in Brandon, Florida where one of PETA's undercover investigators (Ms. Jordan) documented purported misconduct by PetSmart employees. Petitioner contends that the nationwide inquiry resulted in three convictions for animal cruelty in Tennessee.

In response to petitioner's investigations, PetSmart commenced a lawsuit in Florida alleging that Ms. Jordan unlawfully recorded conversations with a PetSmart employee (respondent Glassmoyer) and a breach of contract claim relating to Ms. Jordan's employment as a PetSmart employee. Petitioner explains that Florida law provides a civil cause of action for

recording another individual without their consent or knowledge. However, petitioner emphasizes that the person who was recorded must demonstrate that they had a subjective expectation of privacy and that society recognizes that expectation as reasonable. Petitioner acknowledges that Ms. Jordan recorded Ms. Glassmoyer without her knowledge or consent and that the recording devices were concealed. It claims that the only issue for this cause of action concerns the reasonable expectation of privacy element.

Petitioner details how the parties have battled over various discovery issues in the Florida litigation, including discovery about the recording devices themselves. Petitioner argues that the judge in Florida limited discovery about the recording devices to three categories: 1) a third-party expert inspection of the two recording devices, 2) a description of how PETA tracked, monitored, and identified the two devices and 3) a description of any repairs, complaints, criticisms or malfunctions regarding the two devices.

Petitioner contends that it has provided all the discovery requested by respondent in the Florida case in accordance with the Florida judge's rulings. It insists it has produced interrogatory responses that describes every repair and alleged malfunction that occurred with devices and emails that those were the repairs made to the devices, including emails with the non-party vendors.

Petitioner argues that it has made the recording devices available for inspection by PetSmart for more than a year but that PetSmart has not made any effort to inspect the devices. Petitioner contends that the subject subpoenas are simply and end-run around the Florida judge's rulings limiting discovery relating to the recording devices. It maintains that PetSmart's efforts to find out about the individuals involved with the devices were rebuffed by the Florida court. Petitioner theorizes that these subpoenas are merely part of an effort to harass its vendors and has

no relation to relevant evidence in the Florida case. It claims that PetSmart is trying to gather information so it can try to thwart future investigations into PetSmart's practices.

In opposition, PetSmart argues that it simply wants to find out more information about the recording devices. It observes that discovery in the Florida litigation revealed that sometimes the recording devices malfunctioned and that it wants to hold a deposition with petitioner's vendors to learn more about how they work. PetSmart explains that the devices are "bespoke," meaning that they are not commercially available for everyday consumers and were customized for petitioner's use.

It characterizes the subject requests for information as limited in scope and observes it is willing to work with petitioner to keep the information confidential. At oral argument,[1] PetSmart insisted that it is willing to keep the depositions classified as "Attorneys' Eyes Only" and let the Florida court make future rulings about how the deposition might be used in that litigation. PetSmart also argues that petitioner lacks standing to bring the instant proceeding and that it has already agreed to limit the information sought in the subpoenas.

PetSmart claims that information sought in the subpoenas is highly relevant to the unlawful recording claims because petitioner already agreed to have the vendors submit declarations related to the recording devices at issue and because the vendors serviced the recording devices. PetSmart argues that a deposition of the vendors would only cover information that the Florida court has already deemed to be discoverable information.

In reply, petitioner stresses that it conceded in the Florida litigation that the devices were concealed and the recordings happened without the knowledge of the person being recorded. It questions what relevance PetSmart's focus on these devices has with respect to that case given

[1] The Court observes that both of the attorneys who argued the petition were extremely well prepared and talented orators. This Court appreciates that the partners, while there if needed, allowed the associates to take the lead.

what it has admitted. Petitioner argues that PetSmart's expert should simply look at the recording devices, which petitioner has made available.

Discussion

"The words "material and necessary" as used in section 3101 must "be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. Section 3101(a)(4) imposes no requirement that the subpoenaing party demonstrate that it cannot obtain the requested disclosure from any other source. Thus, so long as the disclosure sought is relevant to the prosecution or defense of an action, it must be provided by the nonparty" (*Matter of Kapon v Koch*, 23 NY3d 32, 38, 988 NYS2d 559 [2014] [internal quotations and citation omitted]).

"An application to quash a subpoena should be granted only where the futility of the process to uncover anything legitimate is inevitable or obvious ... or where the information sought is utterly irrelevant to any proper inquiry. It is the one moving to vacate the subpoena who has the burden of establishing that the subpoena should be vacated under such circumstances" (*id*. at 38-39 [internal quotations and citations omitted]).

The Court grants the petition and quashes the subpoenas. As an initial matter, the Court finds that petitioner has standing to bring this case because it has an interest in keeping the information at issue confidential and in maintaining its relationships with its vendors. And a party may seek to quash a subpoena on behalf of a non-party (*see Capacity Group of NY, LLC v Duni*, 186 AD3d 1482, 131 NYS3d 373 [2d Dept 2020] [granting defendants' motion to quash subpoenas served by plaintiff on nonparties]). Of course, it would make little sense if a party had to solely rely on a non-party to fight a subpoena that could reveal potentially confidential information.

Turning to the merits, the Court finds that the information sought is utterly irrelevant. As petitioner points out, it has already admitted that Ms. Jordan surreptitiously recorded PetSmart employees without their knowledge or consent. Florida law "prohibits the recording of oral communications without a person's consent or knowledge and the disclosing of such recordings" (*State v Caraballo*, 198 So 3d 819, 820 [Fla Dist Ct App 2016]). In other words, petitioner has already admitted to the elements of an unlawful recording claim that would justify additional discovery about the recording devices.

This is not a situation, for example, where petitioner denies it made any recordings and PetSmart wants to depose these vendors about whether they sold or repaired recording devices for petitioner. The only remaining issue with respect to the unlawful recording cause of action is whether there was a reasonable expectation of privacy. Petitioner argues that there was none because the recordings were made in a publicly accessible part of PetSmart's store while PetSmart disagrees with that asserted fact. But that dispute has nothing to do with the vendors as there is no allegation the vendors did the recording for petitioner. The issue is whether Ms. Glassmoyer had a subjective expectation of privacy and whether that expectation (if she had one) was reasonable. That issue does not compel the Court to order discovery on the non-party vendors.

Plus, petitioner maintains (and PetSmart does not deny) that it has provided copies of those recordings to PetSmart in the Florida litigation. Petitioner also claims that it provided all information about repairs, the devices' memory storage capabilities and about the external storage of the recordings to PetSmart. The Court does not see what relevant information a deposition of the vendors would provide on this record. At best, it would yield cumulative information that PetSmart already possesses. And at worst, it confirms petitioner's fears that this

is simply an attempt at an end-run around discovery rulings in the Florida case or, even worse, an effort to harass petitioner's vendors.

To the extent that PetSmart claims it wants to do this deposition so that its expert can have a better grasp of what devices he or she is to inspect, the Court finds that is not a legitimate reason to make these vendors sit for a deposition under these circumstances. At oral argument, PetSmart intimated that it did not want to burden petitioner with multiple inspections of the devices. But sometimes experts may need to look at items on multiple occasions—setting up another inspection of recording devices does not present an insurmountable burden. Moreover, PetSmart has had ample opportunity to review these devices but has decided, for whatever reason, not to do the inspection yet. It may be that the inspection justifies additional discovery, including the deposition of these vendors, but nothing submitted in this proceeding suggests the subpoenas are likely to reveal relevant and material information.

Because the Court finds that the subpoenas are not likely to find any relevant information, it makes no finding about whether New York's Shield Law applies.

Accordingly, it is hereby

ORDERED that the petition to quash the subpoenas served by respondents on two of petitioner's vendors is granted and the Clerk is directed to enter judgment accordingly along with costs and disbursements upon presentation of proper papers therefor.

6/29/2022		ARLENE BLUTH, J.S.C.
DATE		

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