

Napoli v Bern

2022 NY Slip Op 33697(U)

October 26, 2022

Supreme Court, New York County

Docket Number: Index No. 161423/2015

Judge: Dakota D. Ramseur

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAKOTA D. RAMSEUR PART 34M

Justice

INDEX NO. 161423/2015

MARIE KAISER NAPOLI,

Plaintiff,

MOTION DATE 08/03/2022, 08/24/2022

- v -

MOTION SEQ. NO. 046 047

MARC JAY BERN, CLIFFORD S ROBERTS, THE PARKSIDE GROUP, LLC, BRIAN BRICK,

Defendants.

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 046) 1494, 1495, 1496, 1497, 1507, 1508, 1509, 1510, 1511, 1512, 1513, 1514

were read on this motion to/for DISCOVERY

The following e-filed documents, listed by NYSCEF document number (Motion 047) 1498, 1499, 1500, 1501, 1502, 1503, 1504, 1505, 1506, 1519, 1520, 1521, 1522, 1523, 1524, 1525, 1526, 1527, 1528, 1529, 1530, 1531, 1532, 1533, 1534, 1535, 1536, 1537, 1538

were read on this motion to/for ORDER OF PROTECTION

Plaintiff, Marie Kaiser Napoli (plaintiff), commenced this action seeking damages for, among other claims, defamation, defamation per se, and breach of fiduciary duty, stemming from the alleged publication of a sham draft complaint in another action entitled Vanessa Dennis v Marie Napoli, et al., New York County index no. 153857/2014 (Dennis v Napoli). In motion sequence 046, plaintiff now moves pursuant to CPLR 3124 to compel the continued deposition of non-party Clifford James, Esq. (James). In motion sequence 047, non-party, Paul J. Napoli, now moves pursuant to CPLR § 3103(a) for a protective against the June 23, 2022 subpoena ad testificandum and duces tecum (the subpoena) issued by defendants, Marc Jay Bern (Bern), Clifford S. Robert, The Parkside Group, LLC, and Brian Brick (collectively, defendants) against Paul Napoli, and pursuant to CPLR § 2304 to quash the subpoena. Defendants now cross-move pursuant to 22 NYCRR § 130-1.1 for sanctions against Paul Napoli stemming from the costs incurred by defendants associated with opposing the motion to quash and for a protective order. The motions and cross-motion are opposed. For the following reasons' plaintiff's motion to compel is granted, Paul Napoli's motion for a protective order and to quash the subpoena is granted in part, and defendants' cross-motion for sanctions is denied.

This action stems from the claim that defendant Bern and his agents filed the so-called "sham" draft complaint by Vanessa Dennis (Dennis) in Dennis v Napoli as an attachment to an affidavit from Bern on a public docket, and then disseminated that sham complaint to the New

York Post on around November 5, 2014.¹ The third amended verified complaint (complaint) alleges that the sham complaint contains defamatory statements and that defendants conspired to defame plaintiff by filing certain papers in a separate legal action commenced by Paul Napoli against Bern.

DISCUSSION

Motion to compel a continued deposition

In support of her motion to compel the continuing deposition of James, plaintiff argues that James was both obstructive and violated the rules of conduct at his deposition. Specifically, plaintiff argues that James refused to answer questions about how he searched for the documents he produced in response to his subpoena in this case. Plaintiff further argues that counsel for James frequently interjected and coached James. Plaintiff contends that she is entitled to explore the nature of the draft complaint and what evidence James has that the allegations made therein were defamatory. As to the claim for a breach of fiduciary duty, plaintiff argues that James' communications with the defendants, which would go towards Bern's legal representation of plaintiff and breach of duty, are relevant and not protected by the attorney client privilege.

In opposition, James argues that the questions asked during his deposition were improper and are designed to prejudice Dennis and James, and the answers seek to breach Dennis's attorney-client privilege. For instance, plaintiff's counsel asked James how many sexual partners Dennis had had as of 2014, which is privileged because he was asking about information James received during his representation of plaintiff. James further argues that plaintiff's line of questioning sought information irrelevant to the instant action. Specifically, plaintiff contends that trial and appellate courts have concluded that neither the draft nor the complaint ultimately filed in *Dennis v Napoli* were a sham.

The parties do not dispute that James was Dennis' counsel at the time the alleged sham complaint was drafted and allegedly had a role in drafting the complaint. James appeared for a non-party deposition on June 28, 2022 based on a subpoena issued by defendants.

CPLR 3101(a) calls for "full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." Evidence is "material" if sought "in good faith for possible use as evidence-in-chief or rebuttal or for cross-examination" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 407 [1968]). Here, plaintiff demonstrates her entitlement to a continued deposition of James, as the information sought from Paul Napoli is relevant to her claims for defamation and breach of fiduciary duty. One of the primary issues of this litigation is the nature of the draft sham complaint. Plaintiff is entitled to explore the nature of the draft sham complaint at a deposition of James, including to determine what evidence James may have as to material or necessary to plaintiff's claims for defamation. As to plaintiff's claim for a breach of fiduciary duty, plaintiff is entitled to question James as to his communications with defendants, to the extent those communications are not protected by the attorney client privilege.

¹ A recitation of the factual and procedural background in this matter can be found in *Napoli v Bern* (60 Misc 3d 1221[A] [Sup Ct., New York County 2018]).

James' argument that another court already determined that the draft complaint itself was not a sham is misplaced. James argues that the decision in a motion to dismiss in another action entitled *Marie Napoli v New York Post, et al.*, New York County index no. 161367/2015, wherein plaintiff herein sought to hold the New York Post, among others, liable for publishing the details contained in the sham draft complaint, already determined the legitimacy of the draft complaint. The court stated that:

“[c]onsidering that this Court (Bransten, J.) ultimately granted large portions of the relief sought in Bern's motion for a preliminary injunction, which was made in the context of Paul Napoli's action against him, it is palpably incredible that his motion papers were a sham brought maliciously and solely for the purpose of defaming plaintiff. Furthermore, plaintiff's argument that Dennis' draft complaint against her, sounding in defamation, was a fabrication is utterly refuted by the allegations in plaintiff's own complaint. Most notably, plaintiff admits to having “wr[itten] a . . . letter to [Dennis' current boss's wife] warning her of [Dennis'] behavior.”

(*Napoli v New York Post*, 2016 NY Slip Op. 32268[U] [Trial Order], **11-12, [Sup Ct, New York County 2016]).

However, the above determination has no bearing on the merits of plaintiff's claims in the instant action. In denying the motion to dismiss plaintiff's claims for defamation and defamation per se in this action, the court stated that, “[J]ustice Freed's comments relating to the purported sham complaint were dicta and were not critical to the ruling. Therefore, it has no collateral estoppel effect” (*Napoli v Bern*, 60 Misc 3d 1221[A] [Sup Ct, New York County 2018], *affd sub nom Napoli v New York Post*, 175 AD3d 433 [1st Dept 2019]). Indeed, “[t]he question of whether the document was relevant to [] Bern's order to show case was not before the Court in *New York Post*, and therefore plaintiff did not have a full, fair opportunity to litigate it” (*id.* [emphasis in original]).

As to the assertion of the attorney-client privilege, James' opposition “withdraws his objections to some questions . . . subject to plaintiff acknowledging that no response could ever constitute a waiver of Dennis' privileges” (NYSCEF doc. no. 1512 at 8). However, James does not indicate which objections it withdraws, and importantly, the papers submitted on the instant motion reveal a discrepancy between the number of objections at James' deposition marked for rulings by James and plaintiff. Accordingly, the court requires that the parties appear for a conference to determine the scope of James' continued deposition.

Motion to Quash and protective order

“Pursuant to CPLR 3103(a), the Supreme Court may issue a protective order striking a notice for discovery and inspection that is palpably improper” (*Lombardi v Lombardi*, 190 AD3d 964, 966 [2d Dept 2021]). A party or nonparty moving to quash a subpoena has the initial burden of establishing either that the requested disclosure “[w]here the futility of the process to uncover anything legitimate is inevitable or obvious . . . or where the information sought is utterly

irrelevant to any inquiry” (*Kapon v Koch*, 23 NY3d 32, 38 [2014] [internal quotation marks and citations omitted]). “Should the [movant] meet this burden, the subpoenaing party must then establish that the discovery sought is material and necessary to the prosecution or defense of [the] action” (*id.*).

The subpoena seeks, among other things, the production of documents and testimony concerning Dennis, a former employee of Napoli Bern. Bern represented Paul Napoli against Dennis with regard to the precise events at issue in the Subpoena.

In support of his motion, Paul Napoli argues that the document requests contained in the subpoena are not relevant to this action. He further argues that the demands are overly broad in time and scope and are unrelated to plaintiff’s remaining claims concerning defamation and breach of fiduciary duty. Paul Napoli further contends that a protective order is necessary here because the subpoena seeks information protected by the attorney-client privilege and defendant Bern’s fiduciary obligations to Paul Napoli, as Bern personally represented Paul Napoli in connection with Dennis’ threatened litigations.

Here, defendants correctly argue that Paul Napoli’s motion for a protective order and to squash the subpoena based on the purported attorney-client privilege is premature, and instead should be raised at the time of his deposition (*see Wells Fargo Bank, N.A. v Confino*, 175 AD3d 533, 535 [2d Dept 2019] [the non-party “failed to demonstrate that the subpoena, insofar as it sought his testimony, should be quashed on the basis of the attorney-client privilege. Such privilege could be invoked only when (the non-party) appears for the deposition and is asked questions that seek privileged information”]; *Ocean-Clear, Inc. v Contl Cas. Co.*, 94 AD2d 717, 718–719 2d Dept 1983] [“While such testimony may be subject to the attorney-client privilege (and the attorneys may not even have personal knowledge of the events), a witness subject to a subpoena ad testificandum cannot raise an issue of privilege until he has actually appeared and been questioned”]).

Moreover, Paul Napoli does not raise any specific privilege issue implicated by the subpoena. Paul Napoli, as the proponent of the privilege, bears the burden of establishing that the information sought is immune from disclosure, which he has failed to do (*see Stafford v A&E Real Estate Holdings*, 192 AD3d 648 [1st Dept 2021]). To the extent Paul Napoli opposes specific demands, Paul Napoli shall comply with CPLR 3122(b).

Paul Napoli’s argument that the subpoena should be quashed because defendants failed to tender travel expenses is without merit. While Paul Napoli may be a resident of Puerto Rico, he was served with the subpoena in New York City. Pursuant to CPLR 8001(a), “[a]ny person whose attendance is compelled by a subpoena . . . shall receive for each day’s attendance fifteen dollars for attendance fees and twenty-three cents as travel expenses for each mile to the place of attendance from the place where he or she was served, and return. There shall be no mileage fee for travel wholly within a city.” Thus, since Paul Napoli was served in New York City, defendants were not required to render travel expenses associated with travel from Puerto Rico.

Paul Napoli’s additional argument that service of the subpoena was improper because defendants failed to provide a complete copy of the subpoena is also without merit. A simple

review of the subpoena reveals that the pages of the subpoena are not in numerical order but are clearly complete. Moreover, a copy of the subpoena attached to Paul Napoli's moving papers clearly reveals that the subpoena served upon Paul Napoli was complete, albeit allegedly not in sequential order.

Paul Napoli also argues that demands 4 to 12 and 14 to 15 in the subpoena seek documents irrelevant to the action, as they seek numerous requests for documents and communications concerning various women unrelated to the action. Not so. The third amended verified complaint (complaint) alleges that “[d]efendants have caused to be published over and over that Marie’s husband (Paul Napoli) was a philanderer with a cheating history” and that “[t]his is false and derogatory to the state of [her] marriage and therefore to [her]” (complaint ¶ 96). Here, Paul Napoli has information concerning, among others, the factual allegations describing plaintiff’s conduct within the draft complaint—which form the basis for plaintiff’s defamation claims; and whether Bern represented plaintiff in the Dennis action. Moreover, the value of Paul Napoli as a witness herein is further exemplified by the fact that plaintiff named Paul Napoli as a witness. As the documents and communications between Paul Napoli and the various women may be relevant to defendants’ affirmative defense of truth to plaintiff’s claims in their respective answers, those requests are not irrelevant to this action (*Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 34 [1st Dept 2014] [“Because the falsity of the statement is an element of the defamation claim, the statement’s truth or substantial truth is an absolute defense”]).

As for the time scope of the subpoena, Paul Napoli correctly argues that the subpoena, which seeks documents and communications from January 1, 2008 to the present is overbroad, as it would include communications unrelated to this action. It is unclear what relevancy documents and communications from beyond the filing of the instant action. Further, documents and communications from 2008 appear arbitrary and unmoored to any allegation contained in the complaint. Defendants fail to address the broad time frame in their opposition papers. Accordingly, the time scope of the subpoena is amended from the date of commencement of Dennis’ employment, on or about February 1, 2011 through the commencement of this action on November 5, 2015.

Paul Napoli next argues that the subpoena demands are overbroad, in that the subpoena demands “all documents and communications.” A review of the subpoena reveals that the demands seek a specific type of documents and communications, including e-mails, text messages, audio recordings, telephone call logs and video messages, and are not overly broad (*see Engel v Hagedorn*, 170 AD2d 301, 301 [1st Dept 1991]). While some of the discovery seeks “all documents,” these requests are limited to specific subjects and are thus not overly broad.

As to Paul Napoli’s argument that the subpoena should be quashed on the basis that defendants served it in bad faith to harass Paul Napoli and his family, he fails to address the fact that plaintiff made him a witness by affirmatively pleading details concerning state of their marriage and by disclosing Paul Napoli on her trial witness list (*see Mano Enterprises, Inc. v Metropolitan Life Ins. Co.*, 2017 NY Slip Op 31175[U] [Trial Order] [Sup Ct, New York County 2017] [“Plaintiff cannot have it both ways – (the non-party witness’) testimony cannot be ‘material and necessary’ only when it suits plaintiff’s needs to oppose a motion to stay, and not

'material and necessary' when sought when defendant seeks such testimony and documentation"). In any event, as discussed above, the subpoena seeks documents relevant to this action, and the requirement that Paul Napoli be deposed and produce documents herein is not harassment.

Next, Paul Napoli argues that the demands numbered 3, 6, 8, 11, and 12 improperly seek communications protected by the spousal privilege between him and plaintiff. Whether a communication is protected by the spousal privilege should be raised at the deposition (*see Liberty Mut. Ins. Co. v Engels*, 244 NYS2d 983, 985 [Sup Ct, Kings County 1963], *aff'd* 250 NYS2d 851 [2d Dept 1964] ["The courts have consistently held that the proper time to assert the claim of privilege and seek its protection is by an objection upon the examination before trial or on the trial of the action"] [*Kovacs v Metropolitan Life Ins. Co.*, 17 NYS2d 906, 907 [App Term 1st Dept 1940] ["If any (spousal) privilege exists and is claimed, appropriate protection may be afforded by rulings during the examination before trial"]).

As to the demands, the complaint does not contain allegations wherein plaintiff place her communications with Paul Napoli concerning the other various women, other than Dennis, at issue. Thus, those demands seeking documents and communications between Paul Napoli and plaintiff concerning the other women, other than Dennis, are stricken from the subpoena. The Court notes that demand number 11, which seeks documents and communications between Paul Napoli and Linda DePietto does not also seek records from plaintiff, and thus the Court denies to strike paragraph 11.

Finally, Paul Napoli argues that he and Bern entered into a "Mutual Non-Interference Agreement" on September 3, 2021, wherein they agreed, as relevant herein, that they "[s]hall not, directly or indirectly, at any time, act in a manner intended to harass, annoy or alarm another Party or such Party's family members" (NYSCEF doc. no. 1504 at ¶ 3). As discussed above, the subpoena seeks documents relevant to this action, and the requirement that Paul Napoli be deposed and produce documents herein is not harassment. Second, defendants correctly argue that the forum selection paragraph of the agreement directs all disputes arising out of the agreement to a referee, and thus, in this instance, this court is not the appropriate forum to resolve disputes concerning the agreement (*id.* at ¶ 9).

Sanctions

22 NYCRR 130-1.1(a) allows for "costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct." Section 130-1.1(c) defines conduct as frivolous if, "it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law," is undertaken to delay or prolong the litigation, or it asserts material factual statements that are false. While some of Paul Napoli's arguments were unsuccessful, in light of the above determination, Paul Napoli's motion was not "so egregious as to constitute 'frivolous conduct' within the meaning of 22 NYCRR 130-1.1" (*Carson v Hutch Metro Ctr., LLC*, 110 AD3d 468, 469 [1st Dept 2013]). Accordingly, the branch of defendants' cross-motion seeking attorney's fees is denied.

Accordingly, it is hereby

ORDERED that the plaintiff's motion to compel the continued deposition of non-party witness Clifford James, Esq. is granted; and it is further

ORDERED that non-party Paul Napoli's motion for a protective order and to quash the subpoena is granted to the extent that the time scope of the subpoena is modified to February 1, 2011 through November 5, 2015, and demands 6, 8, 12 are stricken. Paul Napoli shall respond to the subpoena within thirty (30) days; and it is further

ORDERED that defendants' cross-motion for attorneys' fees is denied; and it is further

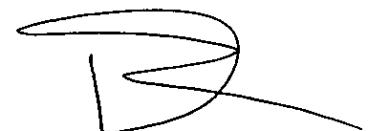
ORDERED that the parties shall appear for a conference on November 29, 2022 at 11:00 a.m.; and it is further

ORDERED that defendants shall serve a copy of this decision and order upon all parties and the non-party witnesses within ten (10) days.

This constitutes the decision and order of the Court.

10/26/2022

DATE



DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					<input type="checkbox"/>
					REFERENCE