

Smartmatic USA Corp. v Fox Corp.

2023 NY Slip Op 30886(U)

March 24, 2023

Supreme Court, New York County

Docket Number: Index No. 151136/2021

Judge: David B. Cohen

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID B. COHEN PART 58

Justice

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SMARTMATIC USA CORP., SMARTMATIC
INTERNATIONAL HOLDING B.V., SGO CORPORATION
LIMITED,

Plaintiffs,

- v -

FOX CORPORATION, FOX NEWS NETWORK LLC, LOU
DOBBS, MARIA BARTIROMO, JEANINE PIRRO,
RUDOLPH GIULIANI, SIDNEY POWELL

Defendant.

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INDEX NO. 151136/2021

MOTION DATE 03/09/2023

MOTION SEQ. NO. 018

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 018) 1149, 1182, 1183, 1184, 1185, 1186, 1187, 1188, 1189, 1190, 1191, 1192

were read on this motion to/for MODIFY ORDER/JUDGMENT.

Plaintiffs move pursuant to CPLR 3104(d) for an order modifying an order issued by Judicial Hearing Officer (JHO) Alan C. Marin, which required plaintiffs to provide defendants with any Litigation Finance Agreements (“LFAs”).

JHO Marin was assigned to this action to act as referee for discovery purposes. The volume of documents and the quantity of discovery issues addressed by JHO Marin have been extensive. This motion involves one of the few issues addressed by JHO Marin that the parties have sought to challenge.

JHO Marin, in his December 21, 2022 order, granted the Fox defendants’ motion to compel plaintiffs to produce “all agreements under which a person or entity has agreed to fund its litigation expenses and costs in this action,” commonly referred to as LFAs (NYSCEF 1186). While the written December 21st Order does not provide the basis for JHO Marin’s ruling, JHO Marin explained his ruling on the record as contained in the transcript of oral argument. Implicit

in his ruling is the determination that an LFA could lead to information relevant to plaintiffs' motive to bring this action, which goes to an element of defendants' anti-Slapp counterclaim (NYSCEF 1187).

I. CONTENTIONS

Plaintiffs argue that discovery of LFAs is prohibited under New York law, unless the LFA is relevant to a claim or defense, and that the party seeking it in discovery must provide a concrete, nonspeculative basis to establish its relevancy in the action. Plaintiffs maintain that defendants have no basis for requesting any LFAs from it as nothing produced in discovery thus far suggests that an LFA exists here. Plaintiffs also deny that any LFA is relevant to a claim or defense in this action. Plaintiffs thus argue that JHO Marin abused his discretion as his ruling is contrary to New York law (NYSCEF 1182).

Defendants assert that as they have interposed an anti-SLAPP counterclaim against plaintiffs, the existence of an LFA between plaintiffs and a non-party is relevant as they are entitled to know the non-party's identity in order to potentially sue them in this action and/or to obtain evidence related to plaintiffs' motivation to sue defendants for defamation.

II. APPLICABLE LAW

Pursuant to CPLR 3104(d), any party may seek review of an order made by a referee or JHO, and the standard of review of such an order is whether it was clearly erroneous or contrary to law (4 NY Prac, Com. Litig. in New York State Courts 38:20 [5th ed], *citing CIT Project Fin. v Credit Suisse First Boston LLC*, 7 Misc 3d 1002[A] [Sup Ct, New York County 2005]).

In New York, applicable caselaw provides that LFAs are generally not discoverable, unless shown to be material and necessary to a party's claim or defense (*see Worldview Enter. Holdings, Inc. v Woodrow*, 204 AD3d 629, 630 [1st Dept 2022] [affirming denial of motion to

compel discovery from plaintiffs as defendant did not explain how discovery about litigation financing “would support or undermine any particular claim or defense”]; *Rodriguez v Rosen & Gordon, LLC*, 2022 WL 635416 [Sup Ct, New York County 2022] [denying LFA request as not necessary and material]; *Garcia v City of New York*, 2022 WL 4790488 [Sup Ct, New York County 2022] [same]; *Coronado v Veolia N. Am. Inc. & Subsidiaries*, 2021 WL 1374261 [Sup Ct, New York County 2021] [request for LFA information denied as it was not the subject of the plaintiffs’ claim for damages, nor was it a collateral source]; *Quan v Peghe Deli Inc.*, 2019 WL 3974786 [Sup Ct, Queens County 2019] [denying request for LFA information]; *Cabrera v 1279 Morris LLC*, 2012 WL 5418611 [Sup Ct, Bronx County 2013] [denying request for LFA as a fishing expedition as the information was not material or necessary to the action and also observing that there was no appellate authority requiring the production of an LFA]; *cf. Manrique v Delgado, D.M.D.*, 2019 WL 13043577 [Sup Ct, New York County 2019] [granting without explanation unopposed motion to compel litigation funding information after plaintiffs admitted having obtained loan]; *see also* 48 NY Prac. Com. Litig. in New York State Courts § 77:37 [5th ed 2022] [“[T]here is currently no law in New York, and no standing order or rule in the New York State courts or the federal courts sitting in New York requiring the disclosure of a funder’s relationship with a party.”)].

Federal courts have been guided by the same principle that LFA discovery is only permitted upon a showing that is it material and necessary to a claim or defense (*see Benitez v Lopez*, 2019 WL 1578167 [Dist Ct, ED NY 2019] [motion to compel LFA documents denied upon a finding that, despite the defendants’ contentions, the information was irrelevant to plaintiffs’ credibility]; *MacKenzie Architects, P.C. v VLG Real Estate Developers, LLC*, 2017 WL 4898743 [Dist Ct, ND NY 2017] [denying request for litigation funding information as

plaintiffs' motive for litigation irrelevant]; *Kaplan v S.A.C. Cap. Advisors, L.P.*, 2015 WL 5730101 [Dist Ct, SD NY 2015] [finding litigation funding information not relevant to any party's claim or defense]), and is only permitted where there has been an articulated showing of materiality (*see e.g. In re Gawker Media LLC, et al.*, 2017 WL 2804870 [Bankr Ct, SD NY 2017] [permitting discovery of litigation funding agreements based on specific Bankruptcy Court rule allowing bankruptcy administrator or trustee to pursue claims against non-parties in order to recoup money for bankruptcy estate]; *Nunes v Lizza*, 2021 WL 7186264 [Dist Ct, ND Iowa 2021] [permitting LFA discovery where plaintiffs were close family members of prominent United States Congressman, who had history of litigation against media defendants and had filed his own lawsuit based on same allegedly defamatory story published by defendants, as it was undisputed that nonparty was financing lawsuit and issue was relevant to whether plaintiffs had to prove defendants acted with actual malice and/or whether plaintiffs were still real "parties-in-interest"]).

The inquiry of whether material is relevant or may lead to relevant evidence is broadly defined, and the test is "one for usefulness and reason," which "embodies the policy determination that liberal discovery encourages fair and effective resolution of disputes on the merits, minimizing the possibility for ambush and unfair surprise" (*Spectrum Sys. Intl. Corp. v Chem. Bank*, 78 NY2d 371, 376 [1991]).

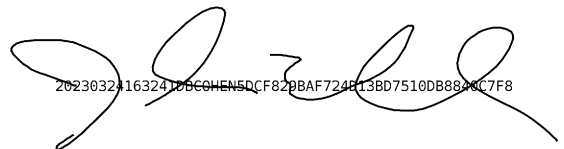
Here, defendants contend, and plaintiffs do not dispute, that the issue of their motivation to sue defendants is an element of defendants' anti-SLAPP counterclaim. Information about the source, amount, and terms of any litigation funding may be relevant, or lead to evidence relevant, to plaintiffs' motive for this litigation. Since information contained in the LFA may lead to

relevant evidence as to plaintiffs’ motivation, the information may be material and necessary to defendants’ counterclaim and is thus discoverable.

While plaintiffs correctly set forth New York law on the discoverability of LFAs, they cite no caselaw that prohibits LFA disclosure when a party’s motivation is an element of a claim or defense (*compare MacKenzie Architects, P.C.*, 2017 WL 4898743 [denying request for litigation funding information as plaintiffs’ motive for litigation irrelevant]). Plaintiffs thus fail to establish that JHO Marin’s order was clearly erroneous or contrary to law.¹

Accordingly, it is hereby

ORDERED, that plaintiffs’ motion to modify is denied.



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3/24/2023
DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE:

¹ Although there is authority in other jurisdictions for the proposition that certain information about an LFA must be disclosed but that the entire agreement need not be produced except in special circumstances (*see* 48 NY Prac. Com. Litig. in New York State Courts § 77:37 [5th ed 2022]), plaintiffs did not raise this issue before either JHO Marin or this Court.