

**Napoli v Bern**

2023 NY Slip Op 33981(U)

November 6, 2023

Supreme Court, New York County

Docket Number: Index No. 161423/2015

Judge: Dakota D. Ramseur

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embarrassment, disadvantage, or other prejudice to any person or the courts” (*id.*). The burden of proving the need for a protective order to preclude discovery is on the moving party (*Liberty Petroleum Realty, LLC v Gulf Oil, L.P.*, 164 AD3d 401, 403 [1st Dept 2018]).

The March 17 order states, in relevant part, as follows:

“[n]on-party Paul Napoli shall appear for a second day of deposition. The parties and non-party shall meet and confer to determine the date of the deposition within five (5) days, and the deposition shall take place within thirty (30) days thereafter”

(NYSCEF doc. no. 1592).

The Court denies the branch of Napoli’s motion for a protective order limiting his continued deposition testimony to a maximum of three additional hours and that the deposition be held on a virtual basis. Napoli fails to present any objective proof that he is unable to travel due to health reasons. Napoli already appeared for a deposition but does not indicate why this is the first time he argues that he is unable to travel due to his health. Notably, during Napoli’s initial deposition, the parties and all counsel complied with appropriate COVID protocols, including remaining masked when not speaking. Napoli’s argument that he should not be required to appear at his deposition in-person would impact him financially as he would have to take time away from his law practice in Puerto Rico is also without merit and not supported by objective proof or law. Additionally, the Court previously directed Napoli to appear for an in-person deposition, which he did. Thus, there is no basis to find that Napoli’s deposition should not take place in person.

The Court further holds that Napoli’s continued deposition is vital to defendants’ affirmative defense of truth. To this end, the Court’s October 26, 2022 decision and order stated, in relevant part, as follows:

“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 true or substantial truth is an absolute defense.”])”

(NYSCEF doc. no. 1546 at 5]).

In sum, Napoli did not meet its burden demonstrating that an additional day for an in-person deposition is improper. There is good cause for Napoli's deposition to continue for a second day, namely, at least one counsel has not asked Napoli any questions due to time constraints and the relevance of Napoli's testimony to the defenses in this action. The Court additionally notes that there is no basis to find that the deposition will go on longer than needed. Thus, Napoli's second day of deposition, a total of seven hours and inclusive of the balance of the time remaining from the first deposition, is directed to take place.

Napoli makes an assortment of additional arguments, including that: he was not properly served with the June 22, 2022 subpoena; he should not be forced to bear a disproportional burden of cost stemming from the deposition; the June 27, 2022 subpoena should not be used as a tool of harassment; and that the June 27, 2022 subpoena is fishing expedition and the information sought therein is irrelevant to the claims or defenses. All of these arguments were addressed and found to be without merit in the October 26, 2023 decision and order.

The Court further holds that Napoli failed to establish the need for a special referee to oversee Napoli's continued deposition. "CPLR 3104 provides for the appointment of a referee to supervise all or part of disclosure proceedings upon motion or on the court's initiative. The decision to appoint a referee is a matter within the discretion of the trial court and is especially appropriate where, as here, a party appearing pro se is hostile or otherwise frustrates discovery" (*Kogan v Royal Indem. Co.*, 179 AD2d 399, 399 [1st Dept 1992]). The Court finds no need for a special referee at this juncture. A review of the disposition transcript does not reveal that the deposing counsel was so hostile to warrant the appointment of a special referee. Moreover, the parties were directed to conduct depositions in the courthouse for the specific reason that the parties contact the Court in the event an issue arose during the deposition. Accordingly, Napoli's request that the Court appoint a special referee is denied.

Accordingly, it is hereby


ORDERED that non-party Paul Napoli's motion is denied; and it is further

ORDERED that non-party Paul Napoli's deposition shall take place within 45 days; and it is further

ORDERED that defendant Marc Jay Bern shall serve a copy of this decision and order upon all parties, with notice of entry, within ten (10) days of entry.

This constitutes the decision and order of the Court.

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**DAKOTA D. RAMSEUR, J.S.C.**

11/6/2023  
DATE

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	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	