SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID B. COHEN** **PART 58**

Justice

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PAUL EVANS,

Plaintiff,

- v -

MALCOLM A. PUNTER, AARIAN PUNTER, RUCKER PARK PREP FOUNDATION, and HARLEM CONGREGATIONS FOR COMMUNITY IMPROVEMENT, INC.,

Defendants.

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INDEX NO. 154101/2020

MOTION SEQ. NO. 009

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 009) 168, 169, 170, 171, 174, 175, 176, 179

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

In this defamation and libel action, nonparty Office of the New York State Attorney General (OAG) moves, pursuant to CPLR 2304, 3101(a), and 3103, for an order quashing plaintiff's subpoena and preventing plaintiff from seeking additional information from OAG. Plaintiff opposes the motion.

Factual and Procedural Background

Plaintiff commenced this action in June 2020 after defendants sent several allegedly defamatory communications to his employer, the New York City Department of Parks & Recreation (Parks Department), following an incident at a local public park (NYSCEF Doc No. 1). He alleged that such communications caused him to be subjected to internal disciplinary proceedings and denied an internal promotion (Doc No. 1). During discovery, plaintiff sought to serve a subpoena duces tecum upon Letitia James, the Attorney General for the State of New York,

for "all records, notes, emails, and other documents either sent to, authored by, or CCd, to Adrienne Felton, concerning [plaintiff]," and all records between OAG and defendants, the Parks Department, and other various individuals (Seq. 007) (NYSCEF Doc No. 124, 171), which OAG opposed. Shortly before oral argument on the motion to serve the subpoena, OAG voluntarily provided all external communications between itself and defendants, although it still opposed the issuance of the subpoena. The subpoena was subsequently so-ordered on May 9, 2023 (Doc No. 161).

OAG now moves to quash the subpoena (Doc No. 168), which plaintiff opposes (Doc No. 174). In support of their motion, OAG submits a privilege log identifying 59 internal communications between OAG employees purportedly protected by either the attorney-client privilege, work product doctrine, deliberative process privilege, or a combination thereof (Doc No. 170).

Legal Analysis and Conclusions

OAG contends that the subpoena was defective because it failed to provide notice of the circumstances under which the subpoena was sought; the information sought by plaintiff is irrelevant because OAG's internal communications do not help establish whether defendants defamed plaintiff; and the internal communications are protected by attorney-client privilege, work product doctrine, and deliberative process privilege.

Plaintiff argues, among other things, that OAG waived any claim of privilege because its privilege log was incomplete and Felton sat for a deposition regarding her work at OAG. He also maintains that the privileges asserted by OAG are inapplicable.

Sufficient Notice Pursuant to CPLR 3101(a)(4)

OAG's contention that the subpoena was defective because it lacked the requisite notice of circumstances is unavailing. "[A]lthough the better practice, indeed the mandatory requirement of CPLR 3101(a)(4), is to include the requisite notice on the face of the subpoena or in a notice accompanying it" (*Velez v Hunts Point Multi-Serv. Ctr., Inc.*, 29 AD3d 104, 111 [1st Dept 2006]), the statutory requirement can be met so long as the party being subpoenaed has "sufficient information to challenge the subpoena[] on a motion to quash" (*Matter of Kapon v Koch*, 23 NY3d 32, 39 [2014] [explaining that legislature intended notice requirement to allow for subpoena to be challenged effectively]).

Sufficient notice may also be provided through motion papers in opposition to a motion to quash (*see id.* [finding sufficient CPLR 3101(a)(4) notice because subpoenaing party included purpose of investigation in its papers opposing motion to quash]). Not only did plaintiff identify the circumstances for the subpoena in opposition to OAG's motion to quash, it also fully detailed the need for the information sought in support of its prior motion for a so-ordered subpoena. Therefore, plaintiff provided the requisite notice.

Relevancy

"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" (*Anheuser-Busch, Inc. v Abrams*, 71 NY2d 327, 331-332 [1988] [internal quotation marks, brackets, and citations omitted]), and OAG, as the party seeking to quash the subpoena, bears the burden of making that showing (*see e.g. Wells Fargo Bank N.A. v Andalex Aviation II, LLC*, 173 AD3d 418, 419 [1st Dept 2019] [affirming denial of motion

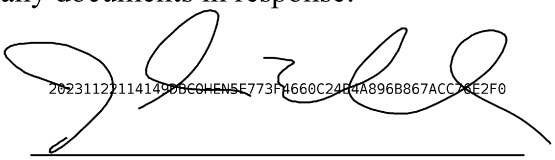
because "movant failed to carry her prima facie burden of showing that the discovery spought was irrelevant"]).

Here, OAG has demonstrated that the information sought is utterly irrelevant. In his complaint, plaintiff alleged that defendants defamed him by sending letters to his employer and other third parties. "To prove a claim for defamation, a plaintiff must show: (1) a false statement that is (2) published to a third party (3) without privilege or authorization, and that (4) causes harm, unless the statement is one of the types of publications actionable regardless of harm" (*Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 34 [1st Dept 2014] [citations omitted]; *accord 3P-733, LLC v Davis*, 187 AD3d 626, 628 [1st Dept 2020]). Internal communications amongst OAG employees are irrelevant to defendants' allegedly defamatory conduct. Any alleged defamation would only occur in external communications made by defendants to OAG, which OAG already provided to plaintiff prior to the issuance of the subpoena. Therefore, OAG's motion to quash is granted (*see Brook v Peconic Bay Med. Ctr.*, 162 AD3d 503, 504 [1st Dept 2018] [affirming motion court's quashing of subpoena against nonparty because defendant medical center's treatment of other doctors suspected of malpractice not relevant to plaintiff's claims regarding his discipline, as plaintiff was never disciplined for malpractice]; *Lupe Dev. Partners, LLC v Pacific Flats I, LLC*, 118 AD3d 645, 645 [1st Dept 2014] [affirming motion court's quashing of subpoena seeking information about nonparty's assets because the assets were not relevant to plaintiff's claims in the underlying action], *lv dismissed* 24 NY3d 998 [2014]).

The parties remaining contentions regarding privilege and waiver are either without merit or do not need to be addressed given the findings set forth above (*see Brook*, 162 AD3d at 504 ["Because we find that the documents sought by the subpoena are not relevant, we need not reach the issue of whether they may properly be withheld as privileged or confidential"]).

Accordingly, it is hereby:

ORDERED that the motion of nonparty Office of the New York State Attorney General to quash a subpoena returnable in this court, served upon it on May 9, 2023, is granted, the subpoena is quashed, and the subpoenaed party need not produce any documents in response.



11/22/2023
DATE

DAVID B. COHEN, J.S.C.

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