SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART** **61M**

Justice

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HAROLD PEERENBOOM,

Petitioner,

- v –

MARVEL ENTERTAINMENT, LLC,

Respondent.

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INDEX NO. 162152/2015

MOTION DATE 02/21/2024

MOTION SEQ. NO. 001 013

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 10, 11, 12, 13, 14, 15, 24, 25, 77, 121, 260, 261, 262, 263, 264, 265, 266, 268, 284, 285, 286, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 330, 333, 334, 387, 389, 391

were read on this motion to/for ENFORCEMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 013) 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 388, 392

were read on this motion to/for SANCTIONS.

INTRODUCTION

This is a proceeding pursuant to CPLR 3119(e) to enforce a subpoena served upon the respondent, Marvel Entertainment, LLC ("Marvel"), in aid of a civil action commenced by petitioner Harold Peerenboom against Isaac Perlmutter ("Perlmutter") in the Circuit Court of Palm Beach County, Florida (the "Florida Action"). Marvel moves for reimbursement from the petitioner for its reasonable expenses incurred in responding to the subpoena, pursuant to CPLR 3111 and 3122(d) (MOT SEQ 001). Peerenboom opposes the motion and separately moves, pursuant to 22 NYCRR 130-1.1(a), to sanction Marvel and Perlmutter for their purported obstructive and frivolous conduct in response to the subpoena, and spoliation of evidence (MOT SEQ 013). Marvel and Perlmutter both oppose the sanctions motion. Marvel's motion is granted and Peerenboom's motion is denied.

BACKGROUND

Peerenboom commenced the now-concluded Florida Action in October 2013, alleging that Perlmutter defamed him by sending anonymous defamatory mailings to persons living or working at the luxury Palm Beach condominium development where they both own homes. Peerenboom amended his original pleading in the Florida Action four times, expanding his complaint to encompass an alleged defamatory "hate mail" campaign against him, purportedly orchestrated by Perlmutter, that began in June 2011 and lasted until July 2016. Notably, both Peerenboom and Perlmutter are men of advanced age and considerable wealth, and spent several years litigating their dispute which, improbably, included allegations regarding a conspiracy a local tennis pro, anonymous letters containing Hebrew slang and vulgarities and accusations of child molestation and murder, as well as surreptitiously stolen DNA evidence.

Because Perlmutter, as the chairman and former CEO of Marvel, utilized Marvel's e-mail server for his electronic communications, Peerenboom served a subpoena in the Florida Action, addressed to Marvel, a New York based entertainment company, seeking to obtain any communications sent and received by Perlmutter via Marvel's e-mail server that were referable to Peerenboom and relevant to the underlying dispute. Upon receipt of the subpoena in late August 2015, and continuing for approximately two months thereafter, Marvel's attorneys conferred with Peerenboom's counsel concerning the subpoena's scope and the costs of compliance. Marvel took the position that the subpoena was overbroad and that the costs of compliance would be unreasonable and unduly burdensome but offered to undertake the necessary ESI review if Peerenboom advanced the costs of production, including attorney review time and data-vendor costs. Peerenboom refused the request for payment.

In November of 2015, Peerenboom commenced this proceeding to enforce the subpoena pursuant to CPLR 3119[e], which allows a party to serve and enforce a subpoena in New York if it was issued "under authority of a court of record" of another state. Marvel opposed the petition and sought its dismissal based, *inter alia*, on Peerenboom's refusal to reimburse its costs in responding to the subpoena. Following an initial hearing on the petition and Marvel's application for cost-shifting and numerous conferences, the court issued a series of interim orders, dated January 27, 2016, March 9, 2016, and June 2, 2016, which significantly limited the scope of the subpoena, directed Marvel to comply with the subpoena as so limited, and required Peerenboom to deposit a total of $40,000 in escrow to secure payment to Marvel of its costs.

Prior to the dates set forth in the court's interim orders for Marvel's production, Perlmutter filed several motions for protective orders (MOT SEQ 002, 003, 004) to prevent the disclosure of emails that were allegedly protected by various privileges, which were granted in part, as modified by the Appellate Division, First Department. The court also granted a further motion by Perlmutter for a protective order to permit the redaction of information not subject to any privilege but which was irrelevant to the underlying dispute and would be harmful or prejudicial to him in his personal life if revealed (MOT SEQ 006, 008). As required by CPLR 3103, Marvel withheld from its ongoing timely productions the documents subject to Perlmutter's motions until the motions were resolved. Marvel completed its production obligations in July 2018, in full compliance with the subject subpoena, as limited by the court's various interim orders and decisions on Perlmutter's motions for protective orders.

A further motion hearing was scheduled for December 4, 2019, to address Marvel's pending application pursuant to CPLR 3111 and 3122(d) for an order requiring Peerenboom to reimburse its costs in responding to the subpoena (MOT SEQ 001), the sole issue remaining in this proceeding. The hearing was adjourned through January 2021 to consider supplemental papers on Marvel's motion as costs continued to be incurred, Peerenboom's additional motion for sanctions (MOT SEQ 013) and updates on the Florida Action, and to accommodate change of counsel and pandemic related closures. The motions were eventually submitted on papers.

The court considers two decisions issued by the Circuit Court in the Florida Action on September 27, 2021, which granted Perlmutter's motion for summary judgment and dismissed all the causes of action against him in Peerenboom's fifth amended complaint therein. While the Circuit Court found, based on express admissions made at his deposition, that Perlmutter had issued the first mailing targeting Peerenboom in June 2011, it determined that this was an "isolated incident from the now-distant past" and that all the other alleged "hate mail" generated after June 2011 was done by others and there was no evidence whatsoever that Perlmutter had any hand in those subsequent mailings. The Circuit Court further determined that Peerenboom could not maintain any of his claims against Perlmutter based solely on the June 2011 mailing, holding, *inter alia*, that Peerenboom's defamation claims were barred by the applicable two-year statute of limitations under Florida law, and that the evidence concerning the June 2011 mailing failed to satisfy the requirements of his other claims.

DISCUSSION

1. Peerenboom's Sanctions Motion - MOT SEQ 013

Peerenboom seeks an order requiring Marvel and Perlmutter to pay his legal fees in this matter as a sanction for spoliation of evidence, misrepresentations to this court and other obstructive and frivolous conduct in response to the subpoena. The motion is denied.

a. Spoliation

"Under New York law, spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence . . . before the adversary has an opportunity to inspect them" (Kirkland v New York City Housing Auth., 236 AD2d 170, 173 [1st Dept. 1997]), and after being placed on notice that such evidence might be needed for future litigation. See New York City Housing Auth. v Pro Quest Security, Inc., 108 AD3d 471 (1st Dept. 2013); Sloane v Costco Wholesale Corp., 49 AD3d 522 (2nd Dept. 2008). The court has "broad discretion to provide proportionate relief to the party deprived of the lost evidence, such as precluding proof favorable to the spoliator to restore balance to the litigation…or employing an adverse inference instruction at the trial of the action." Ortega v City of New York, 9 NY3d 69, 76 (2007); see CPLR 3126; VOOM HD Holdings LLC v Echostar Satellite LLC, 93 AD3d 33 (1st Dept. 2012); Gogos v Modell's Sporting Goods, Inc., 87 AD3d 248 (1st Dept. 2011); General Security Ins. Co. v Nir, 50 AD3d 489 (1st Dept. 2008).

> "On a motion for spoliation sanctions, the moving party must establish that (1) the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) the records were destroyed with a 'culpable state of mind,' which may include ordinary negligence; and (3) the destroyed evidence was relevant to the moving party's claim or defense. In deciding whether to impose sanctions, courts look to the extent that the spoliation of evidence may prejudice a party, and whether a particular sanction is necessary as a matter of elementary fairness. The burden is on the party requesting sanctions to make the requisite showing."

Duluc v AC & L Food Corp., 119 AD3d 450, 451-452 (1st Dept. 2014) (some internal quotation marks omitted); see VOOM HD Holdings LLC v EchoStar Satellite, LLC, supra.

"The intentional or willful destruction of evidence is sufficient to presume relevance, as is destruction that is the result of gross negligence; when the destruction of evidence is merely negligent, however, relevance must be proven by the party seeking spoliation sanctions." VOOM HD Holdings LLC v EchoStar Satellite, LLC, supra; However, even where relevance is

presumed, that presumption is rebuttable by, for example, "demonstrating that the innocent party had access to the evidence alleged to have been destroyed or that the evidence would not support the innocent party's claims or defenses" such that "there could not have been any prejudice to the innocent party[.]" Id; see Pegasus Aviation I, Inc. v Varig Logistica S.A., 26 NY3d 543 (2015).

It is beyond dispute that the law on spoliation applies to hard drives and electronically stored information (ESI) such as email, the allegations here. See e.g. Rossi v Doka USA, Ltd., 181 AD3d 523, 528 (1st Dept. 2020) (no basis for spoliation sanctions where plaintiff offered only speculation that lost email server still contained emails relevant to its claim at the time it was replaced); Arbor Realty Funding LLC v Herrick Feinstein LLP, 140 AD3d 607 (1st Dept. 2016) (sanction imposed where email and other electrically stored records were destroyed after plaintiff failed to timely institute a litigation hold); Chan v Cheung, 138 AD3 484 (1st Dept. 2016) (sanctions imposed on defendant in defamation action who repeatedly disposed of relevant email that favored plaintiff); VOOM HD Holdings LLC v EchoStar Satellite, LLC, supra (missing emails regarding parties intent to breach warranted sanction); Ahroner v Israel Discount Bank of N.Y., 79 AD3d 481 (1st Dept. 2010) (spoliation sanction of adverse inference appropriate for defendants failure to preserve an employee's hard drive which they controlled after being directed by court).

Peerenboom contends that Perlmutter was aware from the start of the Florida Action that Marvel was in possession of relevant and material information, citing, as an example, emails from the account of Marisol Garcia, Perlmutter's personal assistant at Marvel, showing that Perlmutter had Garcia prepare the June 2011 mailing that was at issue in the Florida Action. Peerenboom further contends that this knowledge should be imputed to Marvel, and that, despite knowing it had information relevant to Peerenboom's claims in the Florida Action, Marvel allowed Garcia's computer, which she had used to prepare the 2011 mailing, to be replaced and disposed of in December 2014. He submits an email from Marvel's counsel herein, dated January 2018, confirming that Garcia's computer was replaced and that Marvel was no longer in possession of the computer and did not, as a matter of course, archive the hard drives of replaced computers.

In opposition to Peerenboom's motion, Marvel contends that it had no obligation to preserve evidence relevant to the Florida Action, to which it is not a party, until August 2015,

when it was served with Peerenboom's subpoena, approximately eight months after the replacement of Garcia's computer. In support of this contention, it cites MetLife Auto & Home v Joe Basil Chevrolet, Inc., 1 NY3d 478 (2004), wherein the Court of Appeals declined to "recognize a cause of action for third-party spoliation of evidence and impairment of a claim or defense as an independent tort" (see id. at 480-81). There, a homeowners' insurance carrier sought to assert a cause of action for spoliation of evidence against a casualty insurance carrier for the latter's failure to preserve a vehicle that caught fire and damaged a home. Notably, the defendant insurer had agreed to preserve the vehicle in response to an oral request for preservation from the plaintiff insurer. Nevertheless, the Court held that the defendant insurer "had no duty to preserve the vehicle" because "no relationship existed between [the plaintiff insurer] and [the defendant insurer] that would give rise to such a duty" and "[the plaintiff insurer] made no effort to preserve the evidence by court order or written agreement" or by "plac[ing] [its preservation] request in writing or volunteer[ing] to cover the costs associated with preservation." Id. at 483-84. Compare Ahroner v Israel Discount Bank of N.Y., supra (adverse inference sanction properly imposed where the defendant was aware of its obligation to preserve a hard drive, and either intentionally erased or failed to preserve it as the result of gross negligence before plaintiff was able to inspect it). Marvel's argument is correct.

As in Metlife Auto, Peerenboom has no relationship of any kind with Marvel and he has not demonstrated that, prior to the service on Marvel of his subpoena in August 2015, he made any effort to preserve electronic evidence in Marvel's possession by court order or written agreement, or by issuing a litigation hold or otherwise requesting preservation of such evidence in writing. Peerenboom attempts to distinguish the MetLife Auto by pointing out that the Florida Action, of which Marvel was aware, was pending for eight months before Garcia's computer was replaced. However, the cases affirming the well-established proposition that a duty to preserve arises from a party's awareness that the information in its possession is relevant to a pending or impending litigation generally concern spoliation by litigants, parties on notice of an anticipated lawsuit in which they are likely to be litigants, or non-parties put on notice by an express court order directing preservation and/or disclosure of the subject evidence. See Arbor Realty Funding LLC v Herrick Feinstein LLP, supra; Chan v Cheung, supra; Ahroner v Israel Discount Bank of N.Y., supra; Kirkland v New York City Hous. Auth., supra at 174. Marvel, once again, was never a party to the Florida Action, nor has Peerenboom demonstrated that there was ever any reasonable basis for Marvel, a New York based entertainment company, to anticipate becoming a party to the Florida Action, which as stated, sought damages for defamation arising

from a personal dispute and events at the Palm Beach condominium where Peerenboom and Perlmutter were neighbors. As such, even assuming Marvel was aware in December 2014 that it possessed evidence relevant to that litigation, its position prior to its receipt of Peerenboom's subpoena was substantially similar to the defendant insurer in MetLife Auto & Home v Joe Basil Chevrolet, Inc., supra. In both instances, the putative spoliator may have been aware that it possessed evidence that might be sought in a pending or future litigation that did not otherwise directly concern it but had not received a court order or litigation hold letter or any other request for preservation.

Moreover, even where a duty to preserve evidence is present, the Court of Appeals has held that "the tort of third-party negligent spoliation of evidence . . . is not cognizable in this state." Ortega v City of New York, 9 NY3d 69, 73 (2007). To be sure, a third party to an underlying litigation may be sanctioned for *intentional* spoliation of evidence. See IDT Corp. v Morgan Stanley Dean Witter & Co., 63 AD3d 583, 586 (1st Dept. 2009). However, Peerenboom has not demonstrated that Marvel's failure to preserve the subject computer was intentional. Indeed, given the volume of Marvel's production to Peerenboom in response to his subpoena, including its production of Garcia's emails concerning her preparation, at Perlmutter's direction, of the 2011 mailing, it is evident that the company did not intentionally destroy any evidence.

In any event, Peerenboom also fails to demonstrate that the replacement of Garcia's computer in 2014 resulted in the loss of *any* relevant information, or even of any information at all, that could result in prejudice. Indeed, as demonstrated by Peerenboom's own submissions, Marvel retained Garcia's emails and produced them to Peerenboom. Other than vague speculation that Garcia's lost hard drive contained "electronic and other evidentiary residue" of the 2011 mailing, Peerenboom does not establish what relevant information was contained on Garcia's computer that was not retained by Marvel and produced to him in response to his subpoena. See Rossi v Doka USA, Ltd., supra. Further, even assuming Garcia's computer contained additional information that Marvel did not retain and produce to Peerenboom, and that Marvel's failure to preserve Garcia's computer, though unintentional, was grossly negligent (see Ahroner v Israel Discount Bank of NY, supra at 482), and that the additional, unproduced information should therefore be presumed relevant (see VOOM HD Holdings LLC v EchoStar Satellite, LLC, supra), Peerenboom does not demonstrate that he suffered any prejudice.

In its summary judgment decisions in the Florida Action, the Circuit Court conclusively determined that Perlmutter was not involved in any of the mailings at issue therein other than the June 2011 mailing. As already noted, Marvel retained Garcia's emails concerning her preparation of the June 2011 mailing at Perlmutter's direction and produced those emails to Peerenboom. Moreover, Perlmutter admitted at his deposition in the Florida Action that he issued the 2011 mailing. And, as Peerenboom repeatedly states in his motion papers, the purpose of the subpoena served on Marvel was to obtain evidence tying Perlmutter to the "hate mailings" at issue in the Florida Action. As such, any presumption of relevance is rebutted by the demonstration that Peerenboom has not been prejudiced because any additional evidence he might have gleaned from Garcia's computer would have been cumulative of the evidence he already has access to establishing Perlmutter's responsibility for the 2011 mailing. See VOOM HD Holdings LLC v EchoStar Satellite, LLC, supra.

b. False Representations

Peerenboom contends that Marvel's outside litigation counsel, David Fleischer, made knowingly false statements in Marvel's initial memorandum of law in support of its application for cost-shifting, filed under Fleischer's signature on January 20, 2016, when he asserted that Marvel is "a stranger to the Florida Action" and "is not privy to the facts of that case." According to Peerenboom, Marvel "is no ordinary uninvolved third party" but instead "acted as an extension of Perlmutter," coordinating with and assisting him in the litigation of the Florida Action and allowing him to "control [its] response to the Subpoena" herein. Peerenboom further contends that Marvel had an interest in the Florida Action because it was concerned that it might be implicated in Perlmutter's alleged wrongdoing, or else because it was at risk of reputational harm due to Perlmutter's position at the company.

In support of these contentions, Peerenboom submits a series of emails from October 2013 in which: (i) Fleischer provides Perlmutter recommendations that he received from other partners at his firm for attorneys that might represent Perlmutter in the Florida Action; (ii) a bill of discovery filed by Peerenboom in the Florida Action was forwarded to Fleischer; and (iii) a draft motion to dismiss the initial complaint in the Florida Action was sent to Fleischer and Marvel's chief in-house counsel, John Turitzin. Peerenboom also submits (iv) an email dated March 2014 indicating Turitzin's intention to confer with Fleischer about whether prospective new counsel in Florida were strong enough to handle a different, newly filed lawsuit by Peerenboom, as well as (v) legal bills from Perlmutter's Florida counsel for 2013 and 2014 that reflect a

conference call with Fleischer and Turitzin on October 30, 2013, and regular correspondence with Turitzin thereafter.

First, Peerenboom has not demonstrated that Marvel's challenged statements regarding its lack of involvement in the Florida Action in a memorandum of law were false. As previously stated, Peerenboom never named Marvel as a party to the Florida Action, as it was purely a personal dispute between him and Perlmutter, and none of the claims therein had anything to do with Marvel, its business, or with Perlmutter's duties at Marvel. The suggestion that Marvel must nonetheless be considered an interested party in the Florida Action since it may be concerned that it might be implicated in Perlmutter's alleged wrongdoing by virtue of his use of Marvel resources and personnel is speculative and specious. Marvel cannot be held liable for an employee's torts committed outside the scope of his or her employment. See RJC Realty Holding Corp. v Republic Franklin Ins. Co., 2 NY3d 158, 164 (2004) (employer not liable for tort where the employee "departed from his duties for solely personal motives unrelated to the furtherance of [the employer's] business"); Hammond v Equinox Holdings LLC, 193 AD3d 586 (1st Dept. 2021) (fitness club cannot be held liable for defamatory statements made by club employee about plaintiff regardless of whether employee was on or off duty at the time he made the statement). That Marvel may have feared that it was at risk of reputational harm due to Perlmutter's position at the company does not make it an interested party in the Florida Action.

Furthermore, Peerenboom's assertions that Perlmutter controls Marvel, including the manner and extent of its response to the subpoena, and that Marvel "acted as an extension of Perlmutter," are not supported by any persuasive proof. Moreover, in that regard, Marvel submits an affirmation from Fleischer, its lead counsel in this proceeding, made under penalty of perjury, in which he avers that Perlmutter did not direct, formulate, or otherwise influence Marvel's decisions in responding to the subpoena. Marvel also submits an affidavit filed by Perlmutter in the Florida Action in which he explains that, in an effort to comply with Peerenboom's discovery requests, he had sought access to information maintained on Marvel's servers or on Marvel owned devices, but was told by Marvel that all such information is the sole property of the company, and that access to such information for use in the Florida Action would only be granted in response to a subpoena or court order addressed to Marvel. In that affidavit, Perlmutter further averred that Marvel is a wholly-owned subsidiary of, and is directly controlled

by, The Walt Disney Company ("Disney") and that he reports to the CEO of Disney[1], is not himself an executive officer of Disney and owns less than 5% of its outstanding common stock.

Contrary to Peerenboom's further contention, the fact that Fleisher passed along recommendations by his partners for Florida counsel to represent Perlmutter in 2013, received a handful of emails shortly thereafter attaching copies of pleadings in the Florida Action, and possibly weighed in on the qualifications of prospective new counsel for Perlmutter in 2014 does not demonstrate that Marvel coordinated with or assisted Perlmutter in the Florida Action, at least not to such a degree that it could be considered to have been directly involved in that litigation. To be sure, given that Marvel was in possession of relevant evidence that was eventually made the subject of Peerenboom's subpoena, as well as Perlmutter's assertions of privilege and motions for protective orders, a degree of coordination was to be expected in order to comply with court orders. However, that alone does not establish that Marvel was directly involved in litigating the Florida Action from behind the scenes on Perlmutter's behalf, as Peerenboom suggests.

The only evidence submitted that lends any meaningful support to Peerenboom's contention that Marvel assisted Perlmutter in the Florida Action are the billing records showing Turitzin's communications with Perlmutter's Florida attorneys. However, Marvel submits an affirmation from Turitzin, made under penalty of perjury, in which he states that, in addition to being Marvel's chief counsel, he has represented Perlmutter for nearly thirty years in a wide range of personal legal and non-legal matters unrelated to Marvel, and that his communications with Perlmutter and others about the Florida Action were made in this long-standing role as an independent advisor, and not in his capacity as Marvel's in-house counsel. Peerenboom dismisses this affirmation as self-serving but does not submit evidence to rebut it or otherwise demonstrate that Turitzin could not or did not play the role of independent advisor to Perlmutter on matters unrelated to Marvel, as described in his affirmation.

c. Obstructive and Frivolous Conduct

Peerenboom's motion is likewise denied to the extent it seeks sanctions for alleged obstructive and/or frivolous conduct. 22 NYCRR § 130-1.1(a) provides, in relevant part, that the

[1] In 2023, Perlmutter, who had sold Marvel Entertainment LLC to Disney for $4 billion in 2009, was removed from the Disney board of directors after Marvel's operations, including Marvel Comics and Marvel Games, was folded into larger Disney divisions. Perlmutter had been a Marvel executive for approximately 30 years.

court, "in its discretion, may award to any party or attorney in any civil action . . . costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct." Frivolous conduct includes conduct that 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 primarily to harass or maliciously injure another, or asserts material factual statements that are false. See 22 NYCRR § 130-1.1(c). Peerenboom has not made this showing.

Peerenboom contends, without evidentiary support, that Marvel attempted to obstruct Peerenboom's discovery, including by demanding reimbursement for its costs in responding to the subpoena. However, as discussed in greater detail below, Marvel, as a non-party to the Florida Action, was statutorily entitled to request reimbursement of its costs pursuant to CPLR 3111 and 3122(d). Peerenboom's opposition to cost-shifting is based on the assertion that Marvel is an "extension" of Perlmutter and that Perlmutter "directed his company's response to the subpoena," which, as previously discussed, is wholly unsubstantiated. Insofar as Peerenboom faults Marvel for "allow[ing] Perlmutter to interpose groundless privilege objections," his assertion is entirely without merit. Perlmutter was represented by his own counsel independent of Marvel, and Peerenboom has proffered no proof to suggest that Marvel had any role in his decisions to seek protective orders.

Peerenboom's additional claim that Marvel refused to comply with the subpoena is demonstrably false. Marvel was entitled to move for protective orders before this court and also submits on this motion extensive email communications documenting its attorneys' efforts, following service of the subpoena but before the commencement of this proceeding, to communicate with Peerenboom regarding the scope of the subpoena and the most efficient and effective way to capture relevant documents. Marvel was entitled take the position that the subpoena was overbroad and the costs of compliance unduly burdensome. Indeed, the court agreed and repeatedly granted relief to Marvel in its interim orders. Marvel satisfied its production obligations in compliance with the orders.

Additionally, insofar as Peerenboom seeks sanctions against non-party Perlmutter, the motion must be denied because all of the purportedly sanctionable conduct alleged is specifically attributed to Marvel, not Perlmutter, and, as discussed above, there is no proof to

support the contention that Perlmutter controlled Marvel's responses to the subpoena or may otherwise be held liable for Marvel's actions.

2. Marvel's Motion for Subpoena Expenses – MOT SEQ 001

Marvel seeks reimbursement of $339,448.01 in out-of-pocket costs it incurred in complying with the subpoena, including $59,499.53 in third-party data-vendor costs, $263,538.10 in attorney review and litigation support time, and $16,460.38 in production costs. Marvel submits invoices from its attorneys and vendors substantiating these sums.

Pursuant to CPLR 3111 and 3122(d), the "reasonable production expenses of a non-party witness shall be defrayed by the party seeking discovery." If a court finds that a non-party is required to produce information, including electronically-stored information (ESI), the "court should allocate the costs of this production to [the party seeking the discovery]." Tener v Cremer, 89 AD3d 75, 82 (1st Dept. 2011). While specific reference to attorneys' fees or data-vendor costs is omitted from CPLR 3111 and 3122(d), the Peerenboom provides and research reveals no decisional authority prohibiting the allocation of such fees or costs. Indeed, the Rules of the Commercial Division of the Supreme Court specifically allow for the allocation of such fees and costs "in accordance with Rules 3111 and 3122(d) of the CPLR." 22 NYCRR § 202.70(g), Comm. Div. Rules, Appendix A, Guidelines for Discovery of Electronically Stored Information ("ESI") from Nonparties, V., A & B. In light of the foregoing, Peerenboom may be held liable for all reasonable production expenses incurred by Marvel in responding to the subpoena, which may include attorney's fees and data-vendor costs.

It is well settled that the reasonableness of legal fees "can be determined only after consideration of the difficulty of the issues and the skill required to resolve them; the lawyers' experience, ability and reputation; the time and labor required; the amount involved and benefit resulting to the client from the services; the customary fee charges for similar services; the contingency or certainty of compensation; the results obtained and the responsibility involved." Morgan & Finnegan v Howe Chemical Co., Inc., 210 AD2d 62, 63 (1st Dept. 1994) [citations omitted]; see Matter of Freeman, 34 NY2d 1 (1974). An award of reasonable attorney's fees is within the sound discretion of the court. See O'Mahony v Whiston, 224 AD3d 609 (1st Dept. 2024); Diakrousis v Maganga, 61 AD3d 469 (1st Dept. 2009).

In support of its motion, Marvel submits a series of affirmations by its lead attorney, David Fleischer, a partner of Haynes and Boone, LLP, in which he broadly summarizes the services rendered by his firm in this proceeding and to comply with Peerenboom's subpoena, starting in 2015 and continuing through 2020. Marvel also submits copies of the invoices for its third-party vendors, as well as Haynes and Boone's billing records, which detail the attorneys' fees and costs incurred in complying with the subpoena, including the billing rates and hours for each attorney who performed work.

Peerenboom's principal objection to Marvel's application is that Marvel is not a true non-party in the Florida Action because it is an "extension" of Perlmutter and had an interest in the outcome of the defamation and related tort claims against Perlmutter in the Florida Action. For the reasons already discussed above, this contention is unavailing. The court has considered Peerenboom's additional arguments concerning the parties' relative financial resources and the public interest and finds them similarly unavailing. It is undisputed that Peerenboom is a multi-millionaire, and he presents no evidence to demonstrate that his payment of Marvel's production costs would present any economic hardship. Nor does Peerenboom present any compelling argument as to why his personal dispute with Perlmutter is a matter of public concern.

As to the total $339,448.01 sought by Marvel, Peerenboom argues that the amount is unreasonable, raising a series of objections to various aspects of the attorney and vendor invoices submitted in support of Marvel's application. The court has considered Peerenboom's objections and finds them unavailing, with one exception relating to the reasonableness of Marvel's legal fees. Specifically, Peerenboom contends that Marvel's attorneys overbilled by having a senior associate perform more than 120 hours of document review, at a rate of $580 per hour, when that work could have been done by a more junior attorney.

Review of the submitted records demonstrates that, although the junior associate performed some of the document review related to this proceeding, a substantial amount, if not the majority, of the document review was performed by the senior associate at an initial rate of $580 per hour, rising to $630 per hour as of 2017. Those rates are far higher than the estimated blended associate rate of $420 per hour for document review that Fleischer quoted when negotiating with Peerenboom's counsel prior to the commencement of this proceeding. In that regard, Marvel contends that the subject senior associate did not bill close to 120 hours on document review, as Peerenboom claims, and that any document review she conducted was

"undoubtedly" done more quickly and at less cost than if it was done by someone more junior. Because the descriptions of this senior associate's work often include multiple related tasks, the billing records do not make clear exactly how many hours she devoted simply to document review though it does appear to be less than the 120 hours claimed by Peerenboom. Nonetheless, the records reflect that she performed up to 67.8 hours of work related to document review, at a rate of $580 per hour, before a more junior associate was assigned to take over the principal document review function. The billing records further reflect that no junior associate was assigned to this matter from early 2017 onward and that, during this period, the senior associate performed up to 42.3 hours of work related to document review, at a rate of $630 per hour.

Based upon a review of the foregoing submissions and in light of the standards set forth herein, the court finds that the attorneys' fees sought by Marvel are reasonable save for the rate billed for a senior associate who performed document review that could have been completed by a more junior attorney. The subject senior associate did up to 110.1 hours of work related in some way to document review during periods when there was no junior associate handling the document review function, billing a total of $65,973 for that time. Applying Fleischer's estimated blended associate rate of $420 per hour to this same quantity of work yields a cost of $46,242, for a resulting cost difference of $19,731. Therefore, the $263,538.10 in attorneys' fees sought by Marvel will be reduced by $19,731, for a total of $319,697.01.

Finally, as previously noted, by two stipulations so-ordered by the court in 2016, Peerenboom was required to deposit $40,000 in escrow with his then counsel, Kasowitz, Benson, Torres & Friedman LLP, to secure payment toward Marvel's expenses. That escrowed funds shall be released and paid to Marvel toward the $319,697.01 directed by this order.

CONCLUSION

Accordingly, and upon the foregoing papers, it is

ORDERED that the respondent's motion pursuant to CPLR 3111 and 3122(d) for reimbursement of its reasonable expenses incurred in responding to the subject subpoena (MOT SEQ 001) is granted, and the petitioner is directed to reimburse the defendant in the sum

of $319,697.01, less the escrowed funds released by the escrow agent, within 60 days of the date of this order, and it is further

ORDERED that, within 30 days of the date of this order, the designated escrow agent shall release to the respondent the $40,000.00 being held in escrow pursuant to this court's prior orders dated January 27, 2016, and June 2, 2016, and it is further

ORDERED that the petitioner's motion for sanctions (MOT SEQ 013) is denied.

This constitutes the Decision and Order of the court.

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

7/18/2024
DATE

CHECK ONE: [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION

[ ] GRANTED [ ] DENIED [ ] GRANTED IN PART [ ] OTHER