SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD Justice

PART 35

Index Number : 107129/2011
PRINCE, MATTHEW
vs.
FOX TELEVISION STATIONS, INC.
SEQUENCE NUMBER : 003
COMPEL DISCLOSURE

INDEX NO. 107129/11
MOTION DATE 5/22/12
MOTION SEQ. NO. 003

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by plaintiffs to compel defendants to produce certain discovery withheld from disclosure is denied; and it is further

ORDERED that plaintiffs shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 8/28/12

HON. CAROL EDMEAD, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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MATTHEW PRINCE individually and on behalf of D'LITES L.A.M.D. B.H., INC.,

Plaintiffs,

-against-

FOX TELEVISION STATIONS, INC. and ARNOLD DIAZ,

Defendants.

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Index No. 107129/2011

DECISION/ORDER
Motion Seq. 003

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION[1]

In this action, plaintiff Matthew Prince ("Prince") individually and on behalf of D'lites L.A.M.D. B.H., Inc. ("D'Lites") (collectively, "plaintiffs") assert claims against defendants, Fox Television Stations, Inc. ("Fox TV") and Arnold Diaz ("Diaz") (collectively, "defendants") for, *inter alia*, defamation/slander. Plaintiffs allege that defendants knowingly published false information even after the plaintiffs gave documents to the defendants establishing that the information published was false.

Plaintiffs now move to compel defendants to produce certain discovery withheld from disclosure.

Factual Background[2]

D'Lites Emporium, Inc. ("DEI") offers a diet-friendly alternative to traditional ice cream.

In order to operate DEI's alternative ice cream stores in the tri-state area, Prince established D'Lites, and entered into a sub-licensing agreement with First Class Products Group,

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[1] The Court wishes to thank Alexandra Lopez, Brooklyn Technical High School, Class of 2013 for her assistance with this Decision.

[2] The Factual Background is taken in large part from the Amended Complaint.

LLC (the tri-state license holder) ("First Class") to open three stores in Long Island, New York.

It is alleged that on March 2011, defendants began investigating D'Lites's nutritional claims, and collected samples of its ice cream for testing at Sani-Pure Food Laboratories ("Sani-Pure"). Defendants instructed Sani-Pure to label the samples as ½ cup (40-gram) samples, when in fact, they were 160 grams (Amended Complaint ¶29), causing the corresponding results in a report dated March 21, 2011 (the "Sani-Pure Initial Report") to be false and misleading.

On April 12, 2011, Angela Cascarano, a Fox TV employee, contacted First Class's co-president Magda Abt ("Abt") feigning interest in opening a retail ice cream store. After a meeting on April 27, 2011 between Cascarano and First Class, camaramen and Diaz confronted Abt, and advised customers at that location that D'Lites was "lying to customers."

D'Lites then obtained the Sani-Pure Initial Report, and advised Sani-Pure about the alleged discrepancies. Sani-Pure corrected its Initial Report, and notified defendants of the corrections. Sani-Pure then provided defendants with a Supplemental Report on May 5, 2011 (the "Sani-Pure Supplemental Report").

Yet, on May 12, 2011, defendants began broadcasting, on its popular TV show "Shame, Shame, Shame," the Sani-Pure Initial Report, stating that based on tests of the product on a ½ cup serving size, D'Lites's product was not heathier and was misleading customers. For example, defendants indicated that the small cup contained at least 198 calories, even though the Sani-Pure Supplemental Report indicated that a small cup contained 53.39 calories. Defendants' "malicious" broadcast was repeated in several other radio and television broadcasts, and internet postings in New York and New Jersey in May 2011 (hereinafter referred to as the "May segment").

After this action was commenced, on November 10, 2011 defendants aired a follow-up

segment discussing a lawsuit in Florida against D'Lites Enterprises, Inc. and its owner, Gerald Corsover ("Corsover") (the "November segment"). In that lawsuit, a group of store owners in Florida claimed that test results showed a higher calorie content than Corsover represented.

Plaintiffs then served upon defendants discovery demands, for *inter alia*, research materials reviewed in creating the "Report,"[3] *i.e.*, the May segment (No. 21), to which defendants agreed to provide, subject to several objections, "relevant, non-privileged documents responsive to this request." Plaintiffs also sought documentation on industry and Federal Food and Drug Administration ("FDA") standards of volume and measurement of ice cream (No. 30)," documents of defendants' efforts to determine the percentage of "overrun" (No. 29), communications between, *inter alia*, D'Lites, defendants, DEI, Abt, First Class, and Corsover, that were made regarding the May segment (Nos. 31 and 37), and notes and memoranda or laboratory testing regarding the May segment (No. 36). To these four, latter demands, defendants agreed to provide, subject to several objections, "relevant, non-privileged documents responsive to this request that were made or obtained in the course of producing the [May segment]."

In reply, plaintiffs pointed out that the relevant period was defined to include up to the present day, and that defendants' production was "deficient because defendants' failed to produce relevant documents after approximately May 19, 2011."

Defendants then responded that they either produced all relevant documents or that to "the extent Plaintiffs seek information obtained in the course of producing news reports *other than the one at issue in this litigation*, such information is both irrelevant and protected from disclosure by the New York State Shield Law, N.Y. Civ. Rights Law § 79-h." (the "Shield Law")

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[3] "Report" is defined in plaintiffs' demand as referring to the "'Shame, Shame, Shame' report that [defendants] televised in May 2011. . . ." (Demand, Instructions ¶9).

(emphasis added).

Plaintiffs now move to compel defendants to produce the aforementioned documents and information, arguing that defendants have arbitrarily withheld documents created after May 19, 2011,[4] which are nonetheless relevant and likely to lead to admissible evidence. On October 3, 2011, in connection with the November follow up segment, Angela Cascarano inquired of Corsover as to whether the ice cream cones and cups pictured on the Dlitesemporium.com website were "still the recommended serving sizes?" Such question was similar to and pertains to the same information that defendants asked in May 2011 prior to the airing of the May Segment, *i.e.*, "Is the small cup of ice cream that consumers are being served supposed to weigh 40 grams?" Corsover's attorney stated that the small cup was not advertised on the website as weighing 40 grams. The fact that Angela Cascarano asked the same question subsequent to the May Segment is relevant and material to whether the defendants intentionally failed to omit this information in the May Segment. Such information can help determine whether defendants' conduct was reckless or irresponsible in publishing false nutritional values of D'Lites' ice cream.

As to Nos. 21 and 30, and 29, if defendants were aware that the FDA allowed certain variances in ice cream nutritional reporting and failed to take this into account in producing the May or November segment, a jury could find defendants' conduct grossly irresponsible.

As to Nos. 31 and 37, plaintiffs argue that the defendants' claim, that the Shield Law applies to all documents after the May 19, 2011 cutoff date, has no basis. There is no showing that every communication or document made after May 19, 2011 did not refer or relate to the May segment, and any internal or external correspondence referring to the May segment should

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[4] Plaintiffs claim they obtained other source documents generated after May 19, 2011 that defendants failed to produce.

not be considered "newsgathering," and thus, be produced. Further, caselaw holds that the tripartite test requiring plaintiffs to show that the material sought is: 1) highly material and relevant; 2) critical or necessary to the maintenance of a party's claim, defense or proof of an issue material thereto; and 3) not obtainable from any alternative source, does not apply where the reporter is a party to the litigation. Even if documents created after May 2011 overlap with the November segment, such documents are still "at issue in this litigation" as defendants themselves have labeled the November segment a follow-up and seek to depose the parties that they have interviewed for the November segment. Thus, the standard applicable herein to the news organization which is a party to the litigation is closer to the CPLR 3101 standard requiring full disclosure.

In opposition, defendants deny withholding any documents based on an arbitrary date of May 19, 2011, and contend that they have produced all relevant, non-privileged documents, regardless of the document's date. The documents plaintiffs seek relate to an entirely different broadcast six months after the May segment, which broadcast did not mention the plaintiff, plaintiff's stores, or location of plaintiff's stores. Additionally plaintiffs have made no effort to overcome the three pronged test required under the Shield Law. Defendants deny they are abusing the Shield Law to hide evidence. Further, the Shield Law does not distinguish between parties and non-parties; it protects both confidential and non-confidential newsgathering materials from disclosure.

In reply, plaintiffs argue that because defendants' two segments both involved the nutritional accuracy of D'Lites ice cream, it is impossible for defendants to distinguish what documents pertain solely to the May segment and which documents pertain only to the November segment. In addition, plaintiffs have sought internal memos, correspondence, and

other documents that should not be considered "newsgathering" or qualified. Consequently, plaintiffs' discovery requests simply do not implicate a reporter's constitutional privilege because the documents sought challenge defendants' inaccurate public statements that caused plaintiffs' injury.[5]

Discussion

The court is vested with broad discretion to control its calendar and supervise disclosure in order to facilitate the resolution of cases (*Alveranga-Duran v New Whitehall Apartments* LLC, 836 NYS2d 24, 25 [1st Dept 2007]) *citing SKR Design Group v Avidon*, 32 AD3d 697, 699 [1st Dept 2006]).

CPLR § 3101(a) entitles parties to "full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." What is "material and necessary" is left to the sound discretion of the lower courts and includes "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Andon v 302-304 Mott Street,* 94 N.Y.2d 740, 746 [2000]).

In recognizing New York's policy favoring open disclosure as a means for discovering the truth, this court must consider plaintiffs' need for the information requested against its possible relevance, the burden of subjecting defendants to the disclosure and the potential for unfettered litigation on collateral issues. The court must evaluate competing interests and conduct a discretionary balancing of those interests (*Andon v 302-304 Mott Street,* 94 NY2d at 745-747).

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[5] The Court declines to consider plaintiffs' Supplementary Memorandum of Law in Further Support of Plaintiffs' Motion to Compel the Production of Documents and Information.

In this instance, the interests competing with plaintiffs' pursuit of their claims for, *inter alia*, defamation are those of defendants' stemming from the New York State Shield Law, which provides qualified protection of newsgathering activities as follows:

> (c) Exemption of professional journalists and newscasters from contempt: Qualified protection for nonconfidential news. . . . [N]o professional journalist or newscaster . . . shall be adjudged in contempt by any court . . . for refusing or failing to disclose any unpublished news obtained or prepared by a journalist or newscaster in the course of gathering or obtaining news as provided in subdivision (b) of this section, or the source of any such news, where such news was not obtained or received in confidence, unless the party seeking such news has made a clear and specific showing that the news: (I) is highly material and relevant; (ii) is critical or necessary to the maintenance of a party's claim, defense or proof of an issue material thereto; and (iii) is not obtainable from any alternative source. . . .

New York's Shield Law "is one of the broadest in the country, protecting both identity and information and vesting the media with the option to disclose or to refuse to disclose" (*Greenberg v CBS Inc.*, 69 AD2d 693, 419 NYS2d 988 [2d Dept 1979]). "[W]hen newsgathering materials are sought, the court's inquiry must go beyond the general considerations typically relevant to discovery matters" (*Flynn v NYP Holdings*, 235 AD2d 907, 652 NYS2d 833 [3d Dept 1997]).

Contrary to plaintiffs' contention, caselaw indicates that the Shield Law may be invoked by a newsreporting entity even where such entity is a party in a litigation (*Flynn v NYP Holdings*, *supra*; *Greenberg*, 69 AD2d 693 (stating that if defendants, at trial, chose to rely on the Shield Law, "they should be precluded from any use of those sources and information as proof of verification or evidence of responsibility"); *Sharon v Time, Inc.*, 599 FSupp 538, 582 [DCNY1984] (stating that the privilege "may be asserted by *press defendants* in libel cases"]). In the case cited by plaintiff, *Sands v News Am. Publ.* (161 AD2d 30, 560 NYS2d 416 [1st Dept 1990]), the Court declined to extend the privilege to the reporter and magazine defendants

therein because not only were they parties to the litigation, but the "information sought was not obtained in the course of news gathering or news preparing activities but rather for the media defendants' own litigation purposes." Therefore, the fact that Fox TV and Diaz are defendants in this litigation, in and of itself, does not preclude them from invoking the Shield Law as a basis to withhold the information sought.

As framed in plaintiffs' demand, all of the information, materials, and documentation at issue relate to defendants' production of the May segment. Therefore, it follows that plaintiffs seek information that defendants used in the course of newsgathering. That plaintiffs do not seek information concerning the identity of confidential news sources is immaterial, since the Shield Law expressly protects "*any* unpublished news obtained or prepared [by defendants] in the course of gathering" as well as the identity of the source of such news, from disclosure. Thus, plaintiffs' suggestion that their demand is subject to the more lenient standard found in CPLR 3101 is unwarranted (*Flynn v NYP Holdings Inc.*, 235 AD2d 907 [3d Dept 1997] ("The tripartite test of Civil Rights Law § 79–h (c) is 'more demanding than the requirements of CPLR 3101(a)' and the 'ability of the press freely to collect and edit news, unhampered by repeated demands for its resource materials, requires more protection than that afforded by [CPLR 3101]'")).

Furthermore, plaintiffs' contention that the documents they seek should not be considered "newsgathering" or qualified lacks merit, as the May segment was indeed a broadcast, and not a mere press release and all documents relied upon in producing the May segment were exchanged (*cf. Westmoreland v CBS, Inc.*, 97 FRD 703, 707 [SDNY 1983] (stating that defendants could not rely on the "Benjamin Report" to substantiate "its accusations and, when challenged, decline to reveal the Report contending that it is a confidential internal study"; and "the Sauter Memorandum was not the publication of news. It was a press release, not a news broadcast)).

Therefore, as the Shield Law has been properly invoked, plaintiffs must first establish that the documents and information they seek are "highly material and relevant."

As relevant herein, to recover damages for defamation plaintiffs must demonstrate that defendants acted '"in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties" (*Khan v New York Times Co., Inc.*, 269 AD2d 74, 710 NYS2d 41 [1st Dept 2000] *citing Chapadeau v Utica Observer-Dispatch*, 38 NY2d 196, 199 [1975]). Factors used to determine whether defendants acted "without due consideration for the standards of information gathering and dissemination," (*Chapadeau v Utica Observer-Dispatch, supra*, at 199) include "whether sound journalistic practices were followed in preparing the defamatory article ... whether normal procedures were followed and whether an editor reviewed the copy ... whether there was any reason to doubt the accuracy of the source relied upon so as to produce a duty to make further inquiry to verify the information ... and whether the truth was easily accessible" (*Hawks v Record Printing and Pub. Co., Inc.,* 109 AD2d 972, 486 NYS2d 463 [3d Dept 1985]; *Dalbec v Gentleman's Companion*, 828 F2d 921, 924-925 [2d Cir 1987]).

It is uncontested that defendants provided plaintiffs with all the newsgathering materials in defendants' possession generated prior to the May segment (Transcript, pp. 12-13). Thus, plaintiffs must establish that the materials generated *after* the May segment are "highly material and relevant" (Shield Law 79-h(c)). Here, plaintiffs failed to establish that any materials utilized in preparation of the November segment are highly material and relevant to establishing whether defendants followed "sound journalistic practices" and normal procedures, an editor reviewed the May segment, whether there was any reason to doubt the accuracy of the source relied upon, and whether the truth was easily accessible concerning and in preparation of the May segment.

Caselaw indicates that it is the conduct of defendants *prior to the publication* that is relevant to the inquiry of whether such conduct was grossly irresponsible (*see e.g., McCormack v County of Westchester*, 286 AD2d 24, 731 NYS2d 58 [2d Dept 2001] ("*Before publication*, the Times's section editor, deputy editor, and copy editor all reviewed and edited the article" at issue) (emphasis added); *Weiner v Doubleday & Co.*, 142 AD2d 100 [1st Dept 1988] (". . . the record before us indicates that, *before placing them [the alleged libelous statements] in the book*, [defendant] Ms. Alexander did substantial research") (emphasis added); *Ortiz v Valdescastilla*, 102 AD2d 513 [1st Dept 1984] ("Dismissal of the action against the publishers of El Diario is required for the further reason that the article was editorially reviewed *before publication* by both the newspaper's Sunday magazine editor and its production manager") (emphasis added)).

Whether defendants' conduct was grossly irresponsible is to be based on the information available to defendants leading up to the production of the May segment. Further, there is no showing that the issue of whether defendants intentionally failed to omit information in the Report, such as FDA standards and overruns information, cannot be assessed with the information already exchanged with plaintiffs. That post-May segment information and correspondence may relate to both the May and November segments is no basis to justify its production because any information used for the November segment is irrelevant to defendants' state of mind at the time of the May segment's broadcast. And, it bears repeating that defendants already exchanged all of the information and resources upon which they relied in producing the May segment. Furthermore, that the May segment was thereafter continuously made available online does not alter the analysis, since under the "single publication rule," the posting on the internet of the May segment does not constitute a republication of same (*Firth v State of New York*, 98 NY2d 365 [1965] (mere modifications to a website by the addition of the alleged

defamatory report did not constitute a republication of the report so as to start the statute of limitations anew)).

Furthermore, even if the post May segment documentation somehow revealed information of defendants' state of mind concerning the May segment,[6] nowhere do plaintiffs argue that these documents, even if highly material and relevant, are critical and necessary to plaintiffs' claims.

To satisfy the requirement that the documents were "critical or necessary" to the maintenance of the underlying action, plaintiff cannot merely show that the materials were useful (*Flynn v NYP Holdings*, 235 AD2d 907, 908, 652 NYS2d 833 [1st Dept 1997]). Plaintiff must establish that the claim "virtually rises or falls with the admission or exclusion of the proffered evidence" (*id.*, 235 AD2d at 908). Plaintiffs' moving papers are silent as to how the records they have obtained thus far from defendants are wholly and completely inadequate to establishing their claims, so as to render the post-May segment information critical and necessary to the maintenance of their suit.

Furthermore, as to the last factor, plaintiff must detail the "efforts made to obtain the requested documents or the information contained therein" (*Flynn v NYP Holdings*, 235 AD2d at 909). To the degree that the newsgathering materials regarding the November segment are relevant to the assessing the conduct of defendants in connection with the May segment, the record indicates plaintiffs may obtain additional information from public filings in the Florida action. There is no indication that plaintiffs attempted to obtain such public records in the

[6] During oral argument, plaintiffs added that post-May segment internal communications may reveal what defendants knew prior to the May segment (Transcript, pp. 19, 20-21).

Florida action.[7]

Conclusion

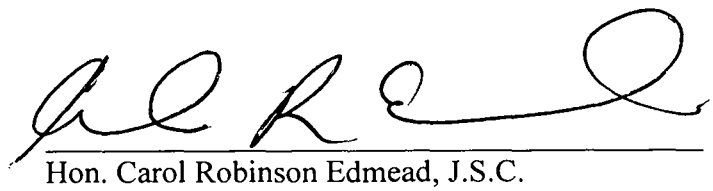
Therefore, based on the foregoing, it is hereby

ORDERED that the motion by plaintiffs to compel defendants to produce certain discovery withheld from disclosure is denied; and it is further

ORDERED that plaintiffs shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: August 28, 2012



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

[7] It is noted that if plaintiffs satisfied the tri-parte statutory test, the court may review the videotapes *in camera* and redact any irrelevant material prior to release (*People v Combest*, 4 NY3d 341, 828 NE2d 583 [2005]).