

**Brummer v Wey**

2017 NY Slip Op 31587(U)

July 28, 2017

Supreme Court, New York County

Docket Number: 153583/2015

Judge: Manuel J. Mendez

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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: MANUEL J. MENDEZ PART 13
Justice

CHRISTOPHER BRUMMER, Plaintiff,
-against-

INDEX NO. 153583/2015
MOTION DATE 06-21-17
MOTION SEQ. NO. 017
MOTION CAL. NO.

BENJAMIN WEY, FNL MEDIA LLC, and
NYG CAPITAL LLC d/b/a NEW YORK GLOBAL
GROUP, Defendants.

The following papers, numbered 1 to 9 were read on this motion to: Quash Subpoena and for a protective order:

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits cross motion
Replying Affidavits

Table with 2 columns: PAPERS NUMBERED, 1-4, 5-8, 9

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that defendants FNL Media LLC and NYG Capital LLC's (hereinafter referred to jointly as "defendants") motion pursuant to CPLR §2304 to quash the non-party subpoena dated January 11, 2017 issued to Google, Inc. and for a protective order pursuant to CPLR §3103 precluding plaintiff from any further efforts to enforce the non-party subpoena, is denied. It is Ordered that defendants FNL Media LLC and NYG Capital LLC's motion filed under Motion Sequence 019, pursuant to CPLR §2304 to quash the non-party subpoena dated March 6, 2017 issued to SiteLock, LLC and for a protective order pursuant to CPLR §3103 precluding plaintiff from any further efforts to enforce the non-party subpoena, is denied. It is Ordered that defendants FNL Media LLC and NYG Capital LLC's motion filed under Motion Sequence 020, pursuant to CPLR §2304 to quash the non-party subpoena dated March 13, 2017 issued to Yahoo!, Inc. and for a protective order pursuant to CPLR §3103 precluding plaintiff from any further efforts to enforce the non-party subpoena, is denied.

Plaintiff, a professor of law at Georgetown University Law Center and the sole African-American on the National Adjudicatory Council (NAC) brings this action to recover against the defendants for defamation. He was part of a panel that upheld a decision by the Financial Industry Regulatory Authority, Inc. ("FINRA"), issuing a lifetime ban from the security industry against two African-American stockbrokers: non-parties William Scholander and Talman Harris. NYG Capital LLC d/b/a New York Global Group (hereinafter referred to individually as "NYG") is a U.S. and Asia based strategic market entry advisory venture capital and private equity investment group, that services clients worldwide. FNL Media, LLC (hereinafter referred to individually as "FNL"), is described in the Complaint as a division or subsidiary of NYG, and the owner of TheBlot, a website and online digital magazine that claims to combine investigative journalism with reader-submitted opinions. According to the Complaint Benjamin Wey is the CEO of NYGG a publisher and contributor to TheBlot.

The Complaint alleges that almost a month after the NAC panel wrote the decision upholding the FINRA lifetime ban on non-parties William Scholander and Talman Harris, TheBlot began publishing a series of articles defaming the plaintiff. Plaintiff also alleges that the defendants posted comments under a false identity and altered photographs of the plaintiff. Plaintiff claims that he is a private individual that had an excellent professional and personal reputation which has been damaged by the defendants' defamatory statements.

Plaintiff commenced this action on April 13, 2015, by filing a Summons with Notice. The Complaint, filed on April 22, 2015, asserts three causes of action for

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

defamation, defamation per se, and intentional infliction of emotional distress. Plaintiff filed an Amended Complaint on January 13, 2017, asserting additional facts resulting from subsequent postings of statements and articles on various websites.

On January 11, 2017 plaintiff issued a non-party subpoena to Google, Inc., in California, referencing nine specifically named "gmail" accounts, and seeking:

1. First and Last names associated with Gmail Accounts;
  2. Mobile phone numbers provided to register the Gmail Accounts;
  3. Alternate email addresses provided to register the Gmail Accounts;
  4. Dates the Gmail Accounts were registered;
  5. Dates, if any, that the Gmail Accounts were deleted;
  6. Internet Protocol addresses from which the Gmail Accounts were created;
- and
7. All Internet Protocol address history logs for the Gmail Accounts."(Mot. Exh. A)

Defendants' motion pursuant to CPLR §2304 seeks to quash the non-party subpoena dated January 11, 2017 issued to Google, Inc. and a protective order pursuant to CPLR §3103 precluding plaintiff from any further efforts to enforce the non-party subpoena. Defendants argue that the information sought is overbroad and amounts to a fishing expedition to ascertain the information. It is claimed that there are no time limitations stated or other measures to avoid harassment of the individuals owning the accounts including two individuals whose names or e-mail accounts are not included in the complaint.

On March 6, 2017 plaintiff issued a subpoena for Sitelock LLC c/o Corporation Service Company, a website security company in Arizona, seeking in relevant part:

"...documents containing all identifying information relating to the identity of the person who operates, or pays Sitelock in conjunction with the hosting of, the website located at the following domain (URL): TheBlot.com (www.theblot.com)."

Defendants' motion filed under Motion Sequence 019, seeks an Order pursuant to CPLR §2304 quashing the non-party subpoena dated March 6, 2017 issued to Sitelock LLC and for a protective order pursuant to CPLR §3103 precluding plaintiff from any further efforts to enforce the non-party subpoena. Defendants argue that this subpoena is overbroad by failing to provide time limitations and that it amounts to a fishing expedition to ascertain information. They also argue that plaintiff is improperly conflating ownership and operation of the website with authorship of the defamatory materials. Defendants claim that at best plaintiff will obtain the name of the purchaser and/or user of the internet security services for *TheBlot* and have not shown the relevance of this information to any of the causes of action in the complaint.

On March 17, 2017 plaintiff issued a subpoena to Yahoo!, Inc., in California, for a single e-mail address, seeking:

1. First and Last names associated with the Yahoo! Account;
  2. Mobile phone numbers provided to register the Yahoo! Account;
  3. Alternate email addresses provided to register the Yahoo! Account;
  4. Dates the Yahoo! Account was registered;
  5. Internet Protocol addresses from which the Yahoo! Accounts were created;
- and
7. All Internet Protocol address history logs for the Yahoo! Accounts." (Mot. Seq. 020, Exh. A).

Defendants' motion filed under Motion Sequence 020, seeks an Order pursuant to CPLR §2304 quashing the non-party subpoena dated March 13, 2017 issued to Yahoo!, Inc. and for a protective order pursuant to CPLR §3103 precluding plaintiff from any further efforts to enforce the non-party subpoena. Defendants argue that this subpoena

is overbroad by failing to provide time limitations and that it amounts to a fishing expedition to ascertain information. Defendants argue that there is no proof of authorship or that the e-mail address was used to spread defamatory statements, and the information sought could be obtained through the course of discovery in this action.

A subpoena must not be used as a tool of harassment or for a “fishing expedition to ascertain the existence of evidence” (Reuters Ltd. v. Dow Jones Telerate, Inc., 231 A.D. 2d 337, 662 N.Y.S. 2d 450 [1<sup>st</sup> Dept. 1997]) and Law Firm of Ravi Batra, P.C. v. Rabinowich, 77 A.D. 3d 532, 909 N.Y.S. 2d 706 [1<sup>st</sup> Dept., 2010]). The determination of whether the discovery sought is appropriate rests within the sound discretion of the trial court, the discovery sought must be “material and necessary.” The quashing of a subpoena should be granted, only when the futility of uncovering anything legitimate is obvious, or the information sought is, “utterly irrelevant to any proper inquiry” (Kapon v. Koch, 23 N.Y. 3d 32, 11 N.E. 3d 709, 988 N.Y.S. 2d 559 [2014]). The burden of establishing the information sought is irrelevant or futile is on the non-party being subpoenaed (Velez v. Hunts Point Multi-Serv. Ctr., Inc., 29 A.D. 3d 104, 811 N.Y.S. 2d 5 [1<sup>st</sup> Dept., 2006]). The subpoena, may be overbroad if the materials sought include matter that is privileged, or is “clearly irrelevant.” A subpoena is required to, “specify with reasonable precision the records sought.”(Grotallio v. Soft Drink Leasing Corp., 97 A.D. 2d 383, 468 N.Y.S. 2d 4 [1<sup>st</sup> Dept., 1983]).

Plaintiff's subpoena on Google, Inc. is seeking specific information that is relevant to his causes of action. The names and e-mail addresses were obtained through other subpoenas for the lists of websites that hosted or uploaded the offending material. Plaintiff is entitled to information to determine how the alleged defamatory material was uploaded. Defendants have not, through discovery exchanged to date, shown that the material sought can or will be provided through deposition testimony. Defendants' general assertions that privileged material may be provided is not specific enough to quash the subpoena. There has been no objection from non-party Google, Inc. and although specific time frames were not provided it is possible to determine the limitations on the information sought from the requests.

Defendants have not shown entitlement to the relief under Motion Sequence 020, to quash the subpoena served on Yahoo!, Inc.. Plaintiff received e-mails from the address identified in the Yahoo!, Inc. subpoena that were racist and defamatory and provided links to postings on *TheBlot*. Plaintiff has shown that the subpoena is material and relevant to discovering whether there is a connection with the defendants. Defendants have not, through discovery exchanged to date, shown that the material sought can or will be provided through deposition testimony. There has been no objection from Yahoo! Inc. to the discovery sought and defendants have not shown that the discovery sought is overbroad, since it is seeking direct information for only one account.

Defendants have not shown that the subpoena served on Sitelock LLC should be quashed. There has not been a showing that Sitelock LLC objected to the subpoena. Plaintiff has shown that the identity of the person “that operates, or pays Sitelock in conjunction with the hosting of the website,” is necessary to determine if there is a relationship with those responsible for uploading the allegedly defamatory materials.

CPLR §3103 permits a protective order on a subpoena served on a non-party, when the discovery sought is not “material and necessary” to the case (Ilas v. Nihagen & Co., Inc., 303 A.D. 2d 298, 756 N.Y.S. 2d 573 [1<sup>st</sup> Dept., 2003] and De Leonardis v. Hara, 136 A.D. 3d 558, 25 N.Y.S. 3d 185 [1<sup>st</sup> Dept. 2016]). The party serving a subpoena for privileged information is required to establish it is valid, material and necessary (IDT Corp. v. Morgan Stanley Dean Witter & Co., 107 A.D. 3d 451, 967 N.Y.S. 2d 51 [1<sup>st</sup> Dept., 2013]).

Defendants are not entitled to a protective order. Plaintiff has shown that the discovery sought by the subpoenas is “material and necessary” to this action.


Accordingly, it is ORDERED that defendants FNL Media LLC and NYG Capital LLC's motion pursuant to CPLR §2304 to quash the non-party subpoena dated January

11, 2017 issued to Google, Inc. and for a protective order pursuant to CPLR §3103 precluding plaintiff from any further efforts to enforce the non-party subpoena, is denied, and it is further,

ORDERED that defendants FNL Media LLC and NYG Capital LLC's motion filed under Motion Sequence 019, pursuant to CPLR §2304 to quash the non-party subpoena dated March 6, 2017 issued to SiteLock, LLC and for a protective order pursuant to CPLR §3103 precluding plaintiff from any further efforts to enforce the non-party subpoena, is denied, and it is further,

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ENTER:

  
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MANUEL J. MENDEZ,  
J.S.C.

MANUEL J. MENDEZ  
J.S.C.

Dated: July 28, 2017.

Check one:  FINAL DISPOSITION    X NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST     REFERENCE