

Brummer v Wey

2018 NY Slip Op 30024(U)

January 8, 2018

Supreme Court, New York County

Docket Number: 153583/2015

Judge: Manuel J. Mendez

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

CHRISTOPHER BRUMMER,
Plaintiff,
-against-

INDEX NO. 153583/2015
MOTION DATE 12-13-17
MOTION SEQ. NO. 027
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 8 were read on this motion to/for compel disclosure or preclude the defendants:

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 4</u>
Answering Affidavits — Exhibits _____ cross motion _____	<u>5 - 8</u>
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is ordered that plaintiff's motion to compel disclosure and production of computer devices including without limitation, desktop and laptop computers, tablets, smartphones and plug-in devices for forensic examination, alternatively precluding the defendants; directing defendant Benjamin Wey to respond to all interrogatories and document requests served on May 8, 2017 and for costs and attorney fees, is granted to the extent stated herein.

The Amended Complaint asserts causes of action for defamation, defamation per se, and intentional infliction of emotional distress. Defendant FNL Media, LLC (hereinafter referred to individually as "FNL") is described in the Complaint as a division or subsidiary of NYG Capital LLC (hereinafter referred to individually as "NYG"), and the owner of *TheBlot*, a website and online digital magazine that claims to combine investigative journalism with reader-submitted comments. The Complaint alleges that defendant Benjamin Wey is the CEO of NYG, a publisher and contributor to *TheBlot*. It is alleged that nearly a month after the NAC panel plaintiff was a member of upheld a FINRA lifetime ban on non-parties William Scholander and Talman Harris, *TheBlot* began publishing numerous articles defaming the plaintiff. It is alleged that Defendant Benjamin Wey has testified previously that he is *TheBlot's* publisher, that FNL owns *TheBlot* and that as the sole owner of NYG he has the power to take down or remove articles that appear on *TheBlot*, or write articles for *TheBlot* under his own name and pseudonyms.

Plaintiff's motion seeks an Order compelling disclosure and production of: (1) all of the defendants' computer devices including without limitation, desktop and laptop computers, tablets, smartphones and plug-in devices (hereinafter referred to as "computer devices") for forensic examination: (a) used in connection with production of *TheBlot*, unitedpressnews.com, investigativepress.com or any other websites created by defendants in connection with defendant Benjamin Wey's activities as an investigative journalist or publisher in connection with *TheBlot*, unitedpressnews.com, investigativepress.com or other websites created by defendants; and (b) to produce all computer devices in their possession, custody, and control, any in possession of their attorneys or agents regardless of who owns the computer devices or who personally interfaces with the devices; alternatively, (2) producing all computer devices within the defendants possession or control for forensic examination regardless of the purpose and use; (3) alternatively precluding the defendants from contesting (a) the ownership and structure of, defendant Benjamin Wey in *TheBlot*, FNL Media LLC, NYG Capital LLC and related websites; (b) defendants responsibility for authoring and publishing online

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

content about the plaintiff; and (c) defendants' state of mind in authoring and publishing the content in the *TheBlot* as set forth in Paragraphs 1, 4-7, 14-21, 23-37, 53, 55-56, 58, 60, 63, 65, 72-73 and 79 of the First Amended Complaint as detailed in Exhibit 30 to the Morgenstern Affidavit; (4) directing defendant Benjamin Wey to respond to all interrogatories and document requests served on May 8, 2017 and (5) for costs and attorney fees associated with this motion and Motion Sequence 016.

Plaintiff argues that defendants have failed to comply with this Court's June 6, 2017 Decision and Order filed under Motion Sequence 016 directing that they produce for forensic examination "all computer devices used for business purposes." The computers were to be available "within ninety (90) days of this Order, an independent computer expert agreed upon by both parties" was to conduct a forensic examination of all computer devices (See NYSCEF Docket #475). The parties did not agree to any of the forensic experts proposed by plaintiff. Defendants' eventually stated that computers responsive to plaintiff's demand do not exist and to the extent they exist they are in possession of the Federal Bureau of Investigation (hereinafter "FBI") in connection with a case brought against the defendants in the federal courts, that has since been resolved. Plaintiff argues that defendant Benjamin Wey has continued to post on the blog and provides twitter feeds, and that pursuant to a declaration of FBI agent Matt F. Kumar dated July 8, 2016, in or around February of 2012, Agent Kumar personally arranged the return of the computers to defendants' counsel in the federal action. To the extent thumb drives and personal electronic devices were retained, electronic images were provided to counsel (Mot. Exh. 18).

Pursuant to CPLR §3124 compliance with demands may be compelled upon failure of a party to provide discovery. It is within the Court's discretion to determine whether the discovery sought is "material and necessary" as legitimate subject of inquiry or is being used for purposes of harassment. "Material and necessary" is to be liberally interpreted as requiring disclosure of any relevant facts which will assist in trial preparation (Roman Catholic Church of the Good Shepard v. Tempco Systems, 202 A.D. 2d 257, 608 N.Y.S. 2d 647 [1st Dept., 1994]). Discovery should lead to disclosure of admissible proof. Parties to an action are entitled to reasonable discovery of any relevant facts to the action (Allen v. Crowell-Collier Publ.Co., 21 N.Y. 2d 403, 288 N.Y.S. 2d 449, 235 N.E. 2d 430 [1968]; Spectrum Systems International Corporation v. Chemical Bank, 78 N.Y. 3d 371, 581 N.E. 2d 1055, 575 N.Y.S. 2d 809 [1991]). Courts have discretion to order forensic examinations of a party's computer after repeated refusal to produce all requested discovery to determine if other documents should have been turned over (Jackson v Open Commc'ns Omnimedia, LLC, 147 AD3d 709, 49 NYS3d 389 [1st Dept. 2017] citing to Suffolk P.E.T. Mgt., LLC v Anand, 105 AD3d 462, 962 NYS2d 138 [1st Dept 2013])

Plaintiff has stated a basis to compel disclosure of "computer devices" as stated in the June 6, 2017 Decision and Order filed under Motion Sequence 016. Defendants arguments that the computers do not exist, or are in the possession of the FBI are disingenuous. The claim that computer devices were not returned to the defendants by the FBI is not supported by any documentation. Mr. Wey has not stated a basis to avoid turning over his cellphone used for business purposes for forensic evaluation, especially since he claims to have not used a computer or laptop related to the remaining defendants. The family's home computer containing personal material will remain privileged and not subject to discovery in this action.

Plaintiff is entitled to have any of the defendants' computer devices in the possession of their [defendants] attorneys turned over for forensic evaluation. The remainder of the relief sought for computer devices of attorneys and agents, "regardless of who owns the computer devices or who personally interfaces with the devices" is overbroad and does not warrant the relief sought. Plaintiff is not entitled to any of the defense attorneys personal computers or the potentially privileged materials they contain. The generalized term "agents" with no definition or identity of any specific

individual is overbroad, and this relief was not included in the prior order filed under Motion Sequence 016, warranting denial.

Defendants argue that they have provided responses to plaintiff's interrogatories dated May 8, 2017 while this motion was pending, but failed to annex a copy of the responses. Defendants only provide correspondence from their attorney dated December 11, 2017 stating responses to the May 8, 2017 interrogatories were provided (See *Wipper Aff. In Opp. Exh. B*). To the extent responses were not actually provided to plaintiff's counsel, defendants are to provide responses within 30 days.

Pursuant to 22 NYCRR 130-1.1, sanctions are applied to conduct which is continued when its lack of legal or factual basis should have been apparent to counsel or the party (*Emery v. Parker*, 107 A.D. 3d 635, 968 N.Y.S. 2d 480 [1st Dept. 2013]). The defendants conduct is subject to sanctions pursuant to 22 NYCRR 130-1.1, related to this motion and the claims that defendants are intentionally preventing discovery, or delaying this litigation, as a result of the need for repeated and separate motion practice for discovery (22 NYCRR 130-1.1 and *Visual Arts Foundation, Inc. v. Egnasko*, 91 A.D. 3d 578, 939 N.Y.S. 2d 13 [1st Dept. 2012]). Plaintiff has not stated a basis for attorney fees related to the prior motion filed under Motion Sequence 016 and that relief is denied.

Accordingly, it is ORDERED, that plaintiff's motion compelling disclosure and production of: (1) all of the defendants' computer devices including without limitation, desktop and laptop computers, tablets, smartphones and plug-in devices (hereinafter referred to as "computer devices") for forensic examination: (a) used in connection with production of *TheBlot*, *unitedpressnews.com*, *investigativepress.com* or any other websites created by defendants in connection with defendant Benjamin Wey's activities as an investigative journalist or publisher in connection with *TheBlot*, *unitedpressnews.com*, *investigativepress.com* or other websites created by defendants; and (b) to produce all computer devices in their possession, custody, and control, any in possession of their attorneys or agents regardless of who owns the computer devices or who personally interfaces with the devices; alternatively, (2) producing all computer devices within the defendants possession or control for forensic examination regardless of the purpose and use; (3) alternatively precluding the defendants from contesting (a) the ownership and structure of, defendant Benjamin Wey in *TheBlot*, FNL Media LLC, NYG Capital LLC and related websites; (b) defendants responsibility for authoring and publishing online content about the plaintiff; and (c) defendants' state of mind in authoring and publishing the content in *TheBlot* as set forth in Paragraphs 1, 4-7, 14-21, 23-37, 53, 55-56, 58, 60, 63, 65, 72-73 and 79 of the First Amended Complaint as detailed in Exhibit 30 to the *Morgenstern Affidavit*; (4) directing defendant Benjamin Wey to respond to all interrogatories and document requests served on May 8, 2017 and (5) for costs and attorney fees associated with this motion and Motion Sequence 016, is granted as stated herein, and it is further,

ORDERED that within sixty (60) days from the date of this Order, defendants' shall produce to a forensic computer expert agreed upon by both parties for purposes of conducting a forensic examination: all of their computer devices including without limitation, desktop and laptop computers, tablets, Benjamin Wey's cellphone used for business purposes, smartphones and plug-in devices (hereinafter referred to as "computer devices") for forensic examination, that are used in connection with production of *TheBlot*, *unitedpressnews.com*, *investigativepress.com* or any other websites created by defendants in connection with defendant Benjamin Wey's activities as an investigative journalist or publisher in connection with *TheBlot*, *unitedpressnews.com*, *investigativepress.com* or other websites created by defendants; to determine if documents requested by Plaintiff exist and are not privileged, and it is further,

ORDERED that defendants failure to produce the "computer devices" within sixty (60) days of the date of this Order shall result in their preclusion from contesting (a) the ownership and structure of defendant Benjamin Wey in *TheBlot*, FNL

Media LLC, NYG Capital LLC and related websites; (b) defendants responsibility for authoring and publishing online content about the plaintiff; and (c) defendants' state of mind in authoring and publishing the content, and it is further,

ORDERED that within twenty (20) days after the examination a report by the independent forensic computer expert be given to Defendants Benjamin Wey, FNL Media LLC, and NYG Capital LLC d/b/a New York Global Group, and it is further,

ORDERED that within thirty (30) days from the date of this Order Defendants serve responses to plaintiff's interrogatories dated May 8, 2017, and it is further,

ORDERED that plaintiff, shall pursuant to e-filing protocol, serve a copy of this Order with Notice of Entry on the Defendants and the special referee clerk located in the General Clerk's Office, who is directed to assign this matter to a special referee for a hearing to determine the amount of reasonable attorney fees and costs to be awarded to plaintiff for this motion and as a result of the defendants contempt as stated in Motion Sequence 028, and it is further,

ORDERED, that the remainder of the relief sought in this motion is denied, and it is further,

ORDERED, that the parties appear for a Preliminary Conference on March 14, 2018 at 9:30 a.m. in IAS Part 13 at 71 Thomas Street, New York, NY 10013.

ENTER:


MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Dated: January 8, 2018

Check one: **FINAL DISPOSITION** **NON-FINAL DISPOSITION**
Check if appropriate: **DO NOT POST** **REFERENCE**