

Verdi v Dinowitz

2018 NY Slip Op 32544(U)

October 9, 2018

Supreme Court, New York County

Docket Number: 158747/2016

Judge: Arlene P. Bluth

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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**

<p>PRESENT: <u>HON. ARLENE P. BLUTH</u></p> <p style="text-align: center;"><i>Justice</i></p> <p style="text-align: center;">-----X</p> <p>MANUEL VERDI,</p> <p style="padding-left: 100px;">Plaintiff,</p> <p style="text-align: center;">- v -</p> <p>JEFFREY DINOWITZ,</p> <p style="padding-left: 100px;">Defendant.</p>	<p>PART</p>	<p>IAS MOTION 32</p> <p>INDEX NO. <u>158747/2016</u></p> <p>MOTION DATE <u>09/20/2018</u></p> <p>MOTION SEQ. NO. <u>003_004</u></p>
DECISION AND ORDER		

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 104, 105, 106, 107, 108, 109, 110, 111, 112
were read on this motion to/for QUASH SUBPOENA, FIX CONDITIONS

The following e-filed documents, listed by NYSCEF document number (Motion 004) 115, 116, 117, 118, 119, 120, 121, 132, 143
were read on this motion to/for CONTEMPT

Motion Sequence Numbers 003 and 004 are consolidated for disposition. The motion (MS003) by non-party Andrew Cohen to quash the subpoena for his deposition is denied. The motion (MS004) by plaintiff to *inter alia* hold both Cohen and his attorney in contempt and to sanction Cohen's attorney is granted only to the extent that Motion Sequence 003 is advanced (and will be decided in this opinion) and Cohen is directed to appear for a deposition on or before November 9, 2018.

Background

This defamation case is about an overcrowding crisis at P.S. 24 in Riverdale in 2015. The school lost the lease for an annex in a nearby co-op building, which forced the

school to find space for those students whose classrooms were in the annex. The community was outraged and directed its anger at school administrators, including plaintiff (then the assistant principal at P.S. 24).

Plaintiff alleges that defendant unfairly blamed him for losing the lease despite knowing that plaintiff was not responsible for obtaining or renewing the annex's lease. Plaintiff contends that defendant defamed him with numerous statements blaming plaintiff as responsible for the overcrowding at P.S. 24.

During the controversy, non-party Andrew Cohen (a City Council member from Riverdale) published an op-ed in the *Riverdale Press* in which he claimed that both he and defendant reached out to the School Construction Authority, the principal of P.S. 24, plaintiff and to some officers of the Parent Association about the annex's lease negotiations (NYSCEF Doc. No. 77).

Non-Party Cohen moves to quash a subpoena for his deposition on the grounds that the subpoena failed to meet CPLR 3101 requirements, this Court ordered that the Cohen deposition should take place after all paper discovery was completed and that Cohen is a high-ranking official and should not be deposed unless plaintiff can show that his testimony would be unique or unavailable from other sources.

In opposition,¹ plaintiff claims that this Court has already opined that Cohen must sit for a deposition and that Cohen's attorney should be sanctioned for raising issues that were already decided in a previous motion. Plaintiff also moves *inter alia* to hold Cohen

¹ As requested by plaintiff, the Court will treat plaintiff's order to show cause (MS004) as his opposition to Cohen's motion (MS003).

in contempt for failing to appear for a deposition and for the appointment of a court referee to supervise completion of discovery in this matter.

In a decision filed March 20, 2018, this Court ruled that plaintiff was entitled to a deposition of Cohen after paper discovery and the parties' depositions were completed (NYSCEF Doc. No. 87 at 8). The Court rejected Cohen's claim that he could not be deposed due to his claimed status as a high-ranking official—the Court noted that there was no evidence that Cohen was taking official action when writing the op-ed and found that the op-ed suggested that Cohen might have personal knowledge about plaintiff's allegations (*id.* at 3-5).

Discussion

As an initial matter, the Court already found that Cohen must be deposed because he might possess relevant information about what defendant knew and when he knew it (*see id.*). In the previous decision, the Court held that Cohen should be deposed regardless of his status as a purportedly "high-ranking" official because the op-ed he wrote suggests that he had direct and personal information about defendant's knowledge concerning the annex. The op-ed states that "Principal Connelly told us that lease renewals are not under a principal's purview and that it is the job of the [School Construction Authority] to negotiate the lease. The [Parent Association] officers supported that position" (NYSCEF Doc. No. 77). This clearly implies that both Cohen and defendant were told that administrators, including plaintiff, had no role in negotiating a new lease for the annex. That is relevant to plaintiff's theory that defendant defamed

plaintiff by blaming plaintiff for losing the lease even though defendant was told that plaintiff had no role in lease negotiations.

Plaintiff is entitled to ask Cohen about the op-ed, defendant's role (if any) in writing the op-ed, other conversations Cohen may have had with defendant about the annex's lease and any other relevant questions. After all, Cohen uses the pronouns "We" and "Us" in the op-ed to describe his efforts—that term refers to both Cohen and defendant. The Court also notes that even a high-ranking official can be compelled to sit for a deposition if that official has personal knowledge about an issue (*see e.g., State of New York v United States Dept. of Commerce*, 2018 WL 4539659 [SD NY, Sept. 21, 2018, No. 18 Civ 2921, Furman, J.] [holding that plaintiffs were entitled to a deposition of the Secretary of Commerce of the United States]).

At oral argument, plaintiff raised concerns about Cohen's potential invocation of legislative privilege in response to questions posed by plaintiff's counsel at a future deposition. As this Court stated in its previous decision, Cohen's attorney is entitled to raise legitimate objections and this Court cannot offer an advisory opinion about an objection that has not yet been raised. However, this Court also stated in its previous decision that it questioned whether a City Council member's op-ed about school overcrowding, in which he had no official role, constituted the performance of legislative duties (NYSCEF Doc. No. 87 at 6). Cohen was not working on proposed legislation or helping to explain a newly-enacted law. Instead, he was opining about a community issue that involved the School Construction Authority, a local elementary school and a co-op.

The Court declines to appoint a referee to oversee discovery or to set a specific date and location for the deposition. At this point, the parties have informed the Court that paper discovery and party depositions have been completed. Only non-party depositions remain. While plaintiff's counsel anticipates that there will be numerous disputes requiring Court intervention relating to Cohen's deposition, the possibility of potential future disputes is not a basis to micromanage discovery. The attorneys will have to learn to cooperate with each other. If the parties are unable to complete the deposition, then this Court might revisit the issue. But at this stage, the parties appear capable of completing discovery. Mr. Cohen's deposition must take place on or before November 9, 2018.

Obviously, the Court cannot hold Cohen in contempt for failing to appear for a deposition given that the subpoena at issue called for his deposition to occur on September 14 and plaintiff filed his order to show cause to hold Cohen and his attorney in contempt on September 13—the day before Cohen was to appear. To the extent that Cohen seeks a stay of his deposition until after the appellate court renders a decision on his appeal of MS002, the Court denies that request. The Court finds that Cohen has potentially unique and necessary information relating to plaintiff's allegations and there is no reason to delay discovery in this case. Plaintiff need not prove that Cohen has such information—that is the purpose of a deposition.

Sanctions

Although Cohen raised the same issues that this Court had already decided, the Court declines to sanction Cohen's attorney or award plaintiff's counsel costs and fees at

this time. It is possible that, because Cohen is a non-party, he did not realize that paper discovery was complete. Now he knows and there is no excuse to refuse to be deposed.

Accordingly, it is hereby

ORDERED that the motion (MS003) by non-party Andrew Cohen is denied; and it is further

ORDERED that the motion (MS004) by plaintiff is granted only to the extent that MS003 is advanced and decided in this opinion, Cohen must appear for a deposition on or before November 9, 2018 and all stays of discovery made pursuant to Cohen's motion are hereby vacated and the remaining reliefs requested are denied.

Next Conference: November 13, 2018 at 2:15 p.m.

10/9/18
DATE



ARLENE P. BLUTH, J.S.C.

HON. ARLENE P. BLUTH

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: