FILED: BRONX COUNTY CLERK 03/20/2018 11:46 AM INDEX NO. 22446/2017E
NYSCEF DOC. NO. 155 RECEIVED NYSCEF: 03/20/2018

SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15

PRESENT: Honorable Mary Ann Brigantti

----------X

TICHAONA BROWN, TABRESE WRIGHT, and MONICA DOUGLAS,

Plaintiffs,

-against-

DECISION / ORDER
Index No. 22446/2017E

TWENTY-FIRST CENTURY FOX, INC., FOX NEWS NETWORK, LLC., JUDITH SLATER, in her individual and professional capacities, and DIANNE BRANDI, in her individual and professional capacities,

Defendants.

----------X

The following papers numbered 1 to 6 read on the below motions noticed on October 27, 2017 and duly submitted on the Part IA15 Motion calendar of **October 27, 2017:**

Papers Submitted	Numbered
Defs.' Notice of Motion, Exhibits	1,2
Pls.' Cross-Motion, Exhibits	3,4
Defs.' Aff. In Opp. To Cross-Motion and in Further Support of Motion, Exhibits	5,6

Upon the foregoing papers[1], the defendants Twenty-First Century Fox, Inc., Fox News Network, LLC., Judith Slater, and Dianne Brandi ("Defendants") collectively move for (1) a protective order staying discovery pending a decision on the parties' respective motion and cross-motion which are *sub judice*, and (2) an order quashing the plaintiffs' subpoenas *ad testificandum* and deposition notices, and (3) for such other relief as this Court deems just and proper. The plaintiffs Tichaona Brown, Tabrese Wright, and Monica Douglas ("Plaintiffs") oppose the motion and cross-move for an order compelling Defendants to produce documents and information. Defendants oppose the cross-motion.

That branch of Defendants' motion seeking a protective order staying all discovery pending the resolution of Plaintiffs' motion to amend and Defendants' cross-motion to *inter alia* compel arbitration and for declaratory relief is denied as moot. Since this motion and cross-

[1]In its discretion, this Court denies the Plaintiff's request for oral argument, as it was not necessary for disposition of the motion (22 NYCRR §202.8[d]).

motion were made, those pending motions were decided. As a result of that motion practice, eight plaintiffs were added to this action, and those branches of Plaintiffs' motion seeking to add Kelly Wright and Mustiq Rahman as party plaintiffs were denied. Defendants assert that Plaintiffs' discovery demands improperly seek information relating to those individuals. However, CPLR 3101 broadly "mandates full disclosure of all matter material and necessary in the prosecution or defense of an action," and the person seeking to avoid disclosure bears the burden of establishing that the requested information is "utterly irrelevant" (*see Ledonne v. Orsid Realty Corp.*, 83 A.D.3d 598, 599 [1st Dept. 2011][internal quotations omitted]). Defendants' papers fail to carry their initial burden of showing that Plaintiffs' requests for *inter alia*, documents, records, or an inspection of Defendants' premises, are "utterly irrelevant" to Plaintiffs' employment discrimination claims, or have been rendered moot as a result of Defendants' successful prior cross-motion.

Defendants seek a protective order on the additional grounds that Plaintiffs' discovery demands are "obscenely overbroad and purposely designed to be vexatious and harassing." CPLR 3103(a) provides that a court may make a protective order denying or limiting disclosure in order to "prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts." Protective orders are necessary and proper when the disclosure process is "used to harass or unduly burden a party" (*see Jones v. Maples*, 257 A.D.2d 53, 57 [1st Dept. 1999], quoting *Barouh Eaton Allen Corp. v. International Bus. Machs. Corp.*, 76 A.D.2d 873, 874 [2nd Dept. 1980]). However, a plaintiff is entitled to full disclosure of all matter material and necessary to the prosecution of their case, "regardless of the burden of proof" (CPLR 3101[a]; *Andon ex rel. Andon v. 302-304 Mott Street Assoc.*, 94 N.Y.2d 740, 746 [2000]). Information that is "material and necessary" "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'" (*id.*, quoting *Allen v. Crowell-Collier Publ. Co.*, 21 N.Y.2d 403, 406 [1968]). Most importantly, the burden of showing that discovery is improper is on the party seeking a protective order (*see Sage Realty Corp. v. Proskauer Rose LLP.*, 251 A.D.2d 35, 40 [1st Dept. 1998]; *see also Koump v. Smith*, 25 N.Y.2d 287, 294 [1969]).

In this case, Defendants fail to carry their burden of demonstrating that the demanded

discovery is overbroad, vexatious, or harassing. Defendants note that Plaintiffs have served thirty-five deposition notices on individuals not mentioned in the complaint, however they present no admissible evidence beyond conclusive statements to demonstrate that these individuals have no relevant information. Defendants provide no affidavit from an individual with personal knowledge alleging that the proposed deponents have no connection with Plaintiffs' claims, or to substantiate counsel's assertions concerning the proposed deponents' employment history. With respect to the document demands, Defendants again fail to demonstrate that the requests are overly broad or harassing on their face, that compliance with the demands would be unduly burdensome, or that any of the requests, including questions surrounding the termination of nonparty Mr. Rahman, are "utterly irrelevant" to Plaintiffs' claims.

Defendants, however, have established that the nineteen (19) subpoenas *ad testificandum* issued to non-parties (annexed as Exhibit "A" to the motion papers) are facially deficient. According to CPLR 3101(a)(4), a party may obtain discovery from a nonparty in possession of material and necessary evidence, so long as the nonparty is apprised of the reasons requiring such disclosure (*see Bianchi v. Galster Management Corp.*, 131 A.D.3d 558, 559 [2nd Dept. 2015]). This notice requirement "obligates the subpoenaing party to state, either on the face of the subpoena or in a notice accompanying it, 'the circumstances or reasons such disclosure is sought or required'" (*see Kapon v. Koch*, 23 N.Y.3d 32, 39 [2014], quoting CPLR 3101[a][4]). Here, Defendants established that the non-party subpoenas are facially deficient because none of them state "the circumstances or reasons such disclosure is sought or required" and there is no evidence that they were accompanied by such an explanation. Therefore, the subpoenas must be quashed on those grounds (*see DeStefano v. MT Health Clubs, Inc.*, 220 A.D.2d 331 [1st Dept. 1995]). In addition, the two subpoenas served on out-of-state non-parties must be quashed because those witnesses are beyond this State's subpoena power (*see White v. Bronx Lebanon Hosp. Center*, 240 A.D.2d 212 [1st Dept. 1997]). Defendants, however, failed to show that the subpoenas are improper because the information sought is "utterly irrelevant" to the claims, or that the "futility of the process to uncover anything legitimate is inevitable or obvious'" (*see Menkes v. Beth Abraham Health Services,* 120 A.D.3d 408, 409 [1st Dept. 2014]; quoting *Matter*

of Kapon v. Koch, 23 N.Y.3d 32 [2014]).

Plaintiffs' deposition notices (Exhibit "B") must be quashed because a plaintiff cannot serve a deposition notice without leave of court on a party prior to the time the defendant has to serve a responsive pleading (CPLR 3106[a]). Plaintiff will be directed to re-notice those depositions, including any deposition notices served after Defendants' motion was filed. Defendants, however, provide no admissible evidence demonstrating that proposed deponents Susan Lovallo and Kimberly Ho are not presently employed by Defendants, and Defendants also fail to sufficiently demonstrate that the other proposed deponents have no relevant information regarding Plaintiffs' claims, or that the requests are excessive or harassing in nature and would reveal redundant information.

Plaintiff's cross-motion to compel defendants to produce documents and information is denied without prejudice. Defendants were entitled to obtain a decision on this motion prior to entry of an order compelling them to respond to the outstanding discovery demands. Defendants have recently served their answer, and a Preliminary Conference is to take place on March 27, 2018, where the parties will enter into a court-ordered discovery schedule. Following the conference, if necessary, Plaintiffs may renew their cross-motion, and Defendants may, if necessary, raise their objections concerning additional deposition notices that were allegedly served after this motion was made.

Any relief requested but not granted herein is specifically denied.

This constitutes the Decision and Order of this Court.

Dated: 3/15, 2018

Hon. Mary Ann Brigantti, J.S.C.