

**Brummer v Wey**

2020 NY Slip Op 30186(U)

January 17, 2020

Supreme Court, New York County

Docket Number: 153583/2015

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 46

-----X

CHRISTOPHER BRUMMER,

Index No. 153583/2015

Plaintiff

- against -

DECISION AND ORDER

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

Defendants

-----X

APPEARANCES:

For Plaintiff

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For Defendants Wey and NYG Capital LLC

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For Nonparty Financial Industry Regulatory Authority

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LUCY BILLINGS, J.S.C.:

In this action for defamation and infliction of emotional distress, defendants Wey and NYG Capital LLC move to compel production of documents by nonparty Financial Industry Regulatory Authority (FINRA) that defendants subpoenaed and that defendants claim FINRA stipulated to produce. C.P.L.R. § 3124. For the reasons explained below, the court grants defendants' motion to the extent set forth.

I. THE DOCUMENTS LISTED IN FINRA'S PRIVILEGE LOG

First, defendants Wey and NYG Capital move to compel production, C.P.L.R. § 3124, of 33 documents that plaintiff and FINRA claim are protected from disclosure under C.P.L.R. § 3101(c) as attorney work product or under C.P.L.R. § 3101(d)(2) as material prepared in anticipation of litigation. FINRA's privilege log further characterizes the subject of eight withheld documents as "mitigation of litigation risks arising out of public statements concerning anticipated litigation."

An in camera review of the documents reveals that they are first and foremost proposed strategies by a public relations firm APCO Worldwide and comments by plaintiff and FINRA on those strategies, for plaintiff and FINRA to counteract and thus mitigate damages from the defamatory statements concerning plaintiff on the internet, about which he sues. That defamation, not this litigation or its anticipated commencement, prompted this public relations campaign. Depending on defendants' future conduct, APCO Worldwide proposed as part of the campaign the creation of new, readily searchable online text and images positively portraying plaintiff, unrelated to the litigation.

Of course when plaintiff anticipated commencing this litigation, he, his attorneys, and APCO Worldwide anticipated that he might need to respond to inquiries about the litigation or respond to retaliatory defamation by defendants and might use the litigation as another opportunity to explain and counteract

the defamation. If other media portrayed the underlying facts or the litigation inaccurately, APCO Worldwide proposed to correct and halt the spread of misinformation. Consequently, plaintiff's attorneys were kept abreast of the proposals, to advise APCO Worldwide and plaintiff in the event the proposals might negatively impact the litigation or expose plaintiff to liability for any statements by him about defendants: hence the label, "mitigation of litigation risks arising out of public statements concerning anticipated litigation." The documents reveal no such event, however, nor any advice by plaintiff's attorneys, other than their concern that they be kept abreast.

While the work product protection may extend to an attorney's information, impressions, or observations conveyed to experts retained as consultants to assist in analyzing or preparing plaintiff's action, the documents at issue thus show that the attorneys conveyed no such information, impressions, or observations, nor did APCO Worldwide assist in analyzing or preparing plaintiff's action. See Beach v. Touradji Capital Mgt., LP, 99 A.D.3d 167, 170 (1st Dep't 2012); MBIA Ins. Corp. v. Countrywide Home Loans, Inc., 93 A.D.3d 574, 574 (1st Dep't 2012); Hudson Ins. Co. v. Oppenheim, 72 A.D.3d 489, 490 (1st Dep't 2010). The documents include no communications by attorneys that are the product of their legal training or skills or that reflect any legal research, analysis, theory, strategy, or conclusion. Venture v. Preferred Mut. Ins. Co., 153 A.D.3d 1155, 1159 (1st Dep't 2017); Matter of New York City Asbestos

Litig., 109 A.D.3d 7, 12 (1st Dep't 2013); Fewer v. GFI Group Inc., 78 A.D.3d 412, 413 (1st Dep't 2010); Plimpton v. Massachusetts Mut. Life Ins. Co., 50 A.D.3d 532, 533 (1st Dep't 2008). Their occasional communications reflect only their desire to be apprised of APCO Worldwide's, plaintiff's, or FINRA's proposed public relations strategies in the event they called for the attorneys' input. To the extent that any FINRA attorney offered public relations advice, it was only public relations advice, not legal advice. Therefore the documents include no attorney work product. C.P.L.R. § 3101(c); Fewer v. GFI Group Inc., 78 A.D.3d at 413; Plimpton v. Massachusetts Mut. Life Ins. Co., 50 A.D.3d at 533; Brooklyn Union Gas Co. v. American Home Ins. Co., 23 A.D.3d 190, 190-91 (1st Dep't 2005).

The documents also make abundantly clear that they were not prepared primarily for purposes of the litigation. C.P.L.R. § 3101(d)(2); Bank of N.Y. Mellon v. WMC Mtge., LLC, 140 A.D.3d 585, 585 (1st Dep't 2016); MBIA Ins. Corp. v. Countrywide Home Loans, Inc., 93 A.D.3d at 575, but to mitigate the damage to plaintiff's reputation, rehabilitate his reputation, and assure that his communications in an effort at mitigation would not instead call more attention to the claimed defamatory statements and amplify the harm from them. Defendants are entitled to this relevant information regarding plaintiff's efforts to mitigate the past and future effects of the claimed defamation and any communications that might reveal the impact of the defamation on plaintiff's reputation and his mental and emotional condition,

whether minimal or severe. Relevance of the material to the litigation does not equate to material prepared in anticipation of litigation. The latter is material regarding how plaintiff intends to prove his mitigation of damages, not the facts regarding his mitigation of damages. Even his strategies as to how he communicates to his professional community or the public and to whom he communicates about the claimed defamation and whether his communications call attention to the defamation and enhance rather than mitigate his damages still bear on mitigation and do not amount to strategies as to how he will plead or prove defamation, damages, or their mitigation.

In sum, APCO Worldwide's advice to plaintiff and FINRA and their comments on that advice, which they shared with their attorneys, but to which the attorneys did not contribute, was to assist plaintiff in his public relations strategy, not in his litigation strategy, in rehabilitating his reputation, and in mitigating his damages. At most, APCO Worldwide provided plaintiff advice regarding how to communicate about the litigation so as not to enhance his damages, but not how to prepare, present, or support his claims in the litigation so as not to enhance his damages or for any other purpose in the litigation.

## II. DOCUMENTS DEFENDANTS SOUGHT PREVIOUSLY

Because the withheld documents include communications among APCO Worldwide, FINRA and its attorneys, and plaintiff and his attorneys, plaintiff contends that the court's prior order

(Mendez, J.) denying a prior motion by defendants to compel production of communications between FINRA and plaintiff governs the production defendants now seek. That order denied production because the deliberative process privilege protected the communications sought. Department of Interior v. Klamath Water Users Protective Assn., 532 U.S. 1, 8-9 (2008); New York Times Co. v. City of N.Y. Fire Dept., 4 N.Y.3d 477, 488 (2005). Since those communications pertained to the deliberative process of FINRA's National Adjudicatory Council on which plaintiff served, they were necessarily in documents distinct from the documents pertaining to plaintiff's public relations campaign surrounding the later commencement of this action, which arose from plaintiff's previous service on the National Adjudicatory Council. In any event, plaintiff fails to show any overlap among the documents sought here and the documents defendants sought in their prior motion.

### III. OTHER DOCUMENTS ENCOMPASSED BY DEFENDANTS' AND FINRA'S STIPULATION

The documents FINRA lists in its privilege log are documents FINRA agreed to produce, subject to any applicable privilege or protection, in a stipulation dated August 9, 2019. Defendants Wey and NYG Capital also move to compel disclosure of documents that FINRA claims are excluded from the stipulation, but that defendants claim are also included, along with the documents in the privilege log and the documents FINRA produced pursuant to the stipulation. C.P.L.R. § 3124. The stipulation requires production of: "Communications between FINRA and other third

parties regarding defendant Benjamin Wey or plaintiff Christopher Brummer" during a specified period. Aff. of Jonathan D. Lupkin Ex. 1 ¶ 1(c). Defendants interpret "other third parties" to mean anyone other than the parties to the stipulation, FINRA and defendants, which would include FINRA's communications with plaintiff or his attorneys in the required production. FINRA and plaintiff interpret "other third parties" to mean nonparties to the litigation other than FINRA, which would exclude its communications either with plaintiff or with defendants from the production.

Obviously the communications most relevant and in which defendants are most interested are between FINRA and plaintiff or his attorneys and between FINRA and defendants or their attorneys, to the extent that there are any in the latter category that defendants do not possess. The stipulation refers to nonparties to the litigation, such as FINRA and its employees Richard Ketchum and Robert Colby, as "nonparties," not "third parties." Therefore "third parties" must mean either third parties to the stipulation, which is anyone other than FINRA or defendants, or third parties to the subject of the communication. See Banos v. Rhea, 25 N.Y.3d 266, 278 (2015); Miller v. Miller, 82 A.D.3d 469, 469 (1st Dep't 2011); 1029 Sixth v. Riniv Corp., 9 A.D.3d 142, 147 (1st Dep't 2004). Under this latter interpretation, if the communication is regarding Wey, other third parties are anyone other than Wey and thus would include plaintiff and his attorneys. If the communication is regarding



plaintiff, other third parties are anyone other than plaintiff and thus would include Wey and his attorneys.

Under either of these two potential interpretations, defendants are entitled to FINRA's communications with plaintiff or his attorneys regarding Wey. Under the first of these two potential interpretations, which is the interpretation defendants espouse, defendants also would be entitled to FINRA's communications with plaintiff or his attorneys, third parties to the stipulation, regarding plaintiff. Since plaintiff worked with FINRA, these communications extend far beyond this action's scope and thus may not reasonably have been encompassed by the stipulation. See Frenk v. Solomon, 173 A.D.3d 490, 490 (1st Dep't 2019); Ember v. Denizard, 160 A.D.3d 537, 538 (1st Dep't 2018). Therefore the court adopts the interpretation that "other third parties" means third parties to the subject of the communication. See Independent Chem. Corp. v. Puthanpurayil, 165 A.D.3d 578, 579 (1st Dep't 2018). When the subject was Wey, the stipulation requires production of FINRA's communications about him with anyone other than him. When the subject was plaintiff, the stipulation requires production of FINRA's communications about him with anyone other than him. This interpretation also explains the use of the qualifier "other" third parties, because FINRA, too, is not the subject of the communication. See id.

#### IV. CONCLUSION

In sum, for the reasons explained above, the court grants the motion by defendants Wey and NYG Capital LLC to compel

nonparty Financial Industry Regulatory Authority (FINRA) to produce the 33 documents that it has listed on its privilege log. C.P.L.R. §§ 3101(c) and (d)(2), 3124. The court also grants these defendants' motion to compel FINRA to produce the following communications pursuant to its stipulation dated August 9, 2019, unless the communications are privileged or protected, consistent with the above decision requiring production of communications to which APCO Worldwide was a party that FINRA erroneously designated as protected. C.P.L.R. § 3124. Where the subject of the communication is Wey, FINRA shall produce its communications about him with anyone other than him. Where the subject of the communication is plaintiff, FINRA shall produce its communications about him with anyone other than him. To the extent defendants seek a broader category of documents under the stipulation, the court denies defendants' motion.

FINRA shall produce all documents required to be produced within 20 days after entry of this order. C.P.L.R. §§ 3120(1)(i), 3124. If FINRA claims any documents to be produced beyond the 33 documents previously listed on its privilege log are privileged or protected, within the same 20 days FINRA shall serve a new privilege log listing these new documents comparable to its previous privilege log. C.P.L.R. § 3122(b).

DATED: January 17, 2020



LUCY BILLINGS, J.S.C.

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