

Shin v Binet
2020 NY Slip Op 34165(U)
December 16, 2020
Supreme Court, New York County
Docket Number: 155437/2018
Judge: J. Machelle Sweeting
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. J. MACHELLE SWEETING **PART** **IAS MOTION 62**

Justice

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CAROLINE SHIN, ELENI GIANNOUSIS,

Plaintiff,

- v -

JOHN BINET, DAVID MORRISON, THE NEW YORK CITY
DEPARTMENT OF EDUCATION

Defendant.

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INDEX NO. 155437/2018

MOTION DATE 02/12/2020

MOTION SEQ. NO. 005

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 005) 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 103, 104, 105, 106, 107, 108, 109, 110, 111, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 134, 136

were read on this motion to/for QUASH SUBPOENA, FIX CONDITIONS.

In the underlying action Plaintiffs allege, *inter alia*, gender discrimination, hostile work environment and retaliation, while employed as teachers at Hillcrest High School, in violation of, *inter alia*, New York State Human Rights Law, Executive Law, and the New York City Human Rights Law and the New York City Administrative Code. Pending before the court is a motion filed by defendants New York City Department of Education (“DOE”), Assistant Principal John Binet and Principal David T. Morrison (collectively, the “Defendants”) seeking to quash the undated non-judicial Subpoena Duces Tecum served by Plaintiffs upon the United Federation of Teachers Educational Foundation, Inc., e-mailed to Defendants’ counsel on February 1, 2020. Defendants are also seeking a protective order limiting the scope of the deposition testimony of Michael Feruso as demanded in the subpoena ad testificandum served by Plaintiffs on February 10, 2020.

By order dated December 19, 2019, the Honorable Julio Rodriguez III, had directed Defendants to “produce copies of substantiated complaints of harassment and/or dishonesty against John Binet and David Morrison by January 24, 2020.” The parties had also entered into a stipulation that states in relevant part that: “This stipulation is without prejudice to plaintiff’s motion being renewed with good cause shown.”

As the City correctly argued, and as this court finds, if Plaintiffs were relying on that provision of the so ordered stipulation that allowed Plaintiffs motion to compel to be “renewed, with good cause shown,” then the proper procedure should have been for Plaintiffs to file a motion to renew and/or reargue, rather than a subpoena. Nevertheless, good cause having been shown;¹ and all parties having had a fair and full opportunity to be heard both orally and in writing;² and in the absence of any prejudice to either party; oral arguments were held before this court regarding the merits of the subpoena and the motion to quash.

Upon review of all of the foregoing documents and the oral arguments held before the undersigned on December 15, 2020, (the findings of which were made on the record and are incorporated herein), this court finds as follows:

¹ Plaintiffs allege that the transcripts of the deposition testimony of Claude Ertel had not yet been obtained at the time the stipulation had been entered and that such testimony revealed “egregiously dishonest” conduct by defendants Binet and Morrison.

² All counsel was present at oral arguments held before the court on December 15, 2020 and had engaged in motion practice on the motion to quash. Additionally, counsel was given an opportunity to submit letter applications detailing their respective positions prior to the court appearance.

Subpoena Duces Tecum to the UFT

The “purpose of a subpoena duces tecum is to compel the production of specific documents that are relevant and material to the facts at issue in a pending judicial proceeding.” Velez v. Hunts Point Multi-service Ctr., 29 AD3d 104, 112 (1st Dep’t 2006). An application to quash a subpoena should be granted only where the futility of the process to uncover anything legitimate is inevitable of obvious . . . or where the information sought is utterly irrelevant to any proper inquiry. The party moving to quash the subpoena has the burden. Liberty Petroleum Realty, LLC v Gulf Oil, L.P., 164 AD3d 401 (1st Dept 2018); Anheuser-Busch, Inc. v. Abrams, 71 NY2d 327 (1988).

Contrary to the arguments made by Defendants, that “unsubstantiated complaints are wholly irrelevant to this action because they prove only that a complaint was lodged,” this court finds that the information requested in the subpoenas is both material and relevant as the claims asserted by Plaintiffs involve retaliation; Plaintiffs allege that Defendants caused, created and continue to maintain a hostile work environment; and even more importantly, Plaintiffs further allege that Defendants themselves - John Binet (in his capacity as Assistant Principal) and David Morrison (in his capacity as Principal) - determined which complaints were substantiated or not.

Accordingly, Defendants are directed to produce:

- 1)
 - a. A certified copy of all complaints of harassment and/or dishonesty and sexually inappropriate conduct (both substantiated and unsubstantiated) made by students, teachers, parents and employees of the DOE about John Binet and David T. Morrison for the period of January 1, 2014 to present. The students’ names are subject to redaction and a protective order for privacy and confidentiality;
 - b. All complaints made by the plaintiffs (whether substantiated or not). Such production shall not be limited to complaints involving harassment and/or dishonesty, but shall include any/all complaints made by plaintiffs about John Binet and David T. Morrison for the period of January 1, 2014 to present;

- 2) A certified copy of all responsive documents to the above-mentioned complaints and all other documents generated due to said complaints in the UFT's possession and control;
- 3) Responsive documents shall include physical and electronic documents as well as audio and visual recordings.

Subpoena Ad Testificandum to Depose Michael Ferruso³

A subpoena ad testificandum requires a witness to appear and give testimony. Pursuant to CPLR §3101(a)(4) there shall be full disclosure of all matters material and necessary in the prosecution or defense of an action regardless of the burden of proof by any other person upon notice stating the circumstances or reasons such disclosure is sought or required.

Here, Michael Ferruso was noticed to be deposed and his deposition testimony may include inquiry and examination about:

- 1)
 - a. All complaints of harassment and/or dishonesty made by Michael Ferruso, in his capacity as UFT Representative at Hillcrest High School (both substantiated and unsubstantiated) about John Binet and David Morrison;
 - b. All complaints made by plaintiffs about John Binet and David Morrison. The complaints made by plaintiffs are not limited to those of harassment and/or dishonesty but shall include all complaints made by plaintiffs (both substantiated and unsubstantiated);
- 2) The applicable period for the above complaints in 1a above is January 1, 2014 to August 31, 2019. The applicable period for the complaints in 1b above is January 1, 2014 to present, as plaintiffs assert alleged claims of retaliation;
- 3) His [Michael Ferruso's] first-hand interactions with John Binet and David Morrison, namely about the alleged claims made by Claude Ertel or other similar and/or material allegations regarding dishonesty;

³ Name is spelled interchangeably as Ferruso/Ferruso.

- 4) The outcome of the complaints in 1a and 1b above;
 - 5) The procedures employed regarding the complaints in 1a and 1b above and the names of the individuals and organizations that handled the complaints;
- (6), (7) and (8) are denied as vague. Except, Mr. Feruso may be examined about the statements made by Claude Ertel and other similar and/or material allegations regarding dishonesty (*see* #3 above);
- 9) The procedures employed regarding complaints made by students about sexually inappropriate conduct and;
 - 10) The records generated regarding the complaints in 9 above. Records concerning student complaints are subject to redaction and a protective order for privacy and confidentiality.

Counsel is further directed to appear before Sam Wilkenfeld for a conference regarding the scheduling of dates, including depositions; such conference to be arranged by Mr. Wilkenfeld directly. All counsel should be prepared on the date of conference with dates of availability of their respective witnesses.

12/16/2020
DATE


J. MACHELLE SWEETING, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE