Cedeno v Pacelli			
2021 NY Slip Op 32660(U)			
December 13, 2021			
Supreme Court, New York County			
Docket Number: Index No. 452016/2018			
Judge: Frank P. Nervo			
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT:	HON. FRANK NERVO	PART	04	
	Justice			
	X	INDEX NO.	452016/2018	
PETER CED P.C.,	DENO, PETER L. CEDENO & ASSOCIATES,	MOTION DATE	11/23/2021	
	Plaintiff,	MOTION SEQ. NO.	015	
	- V -			
ATESA PACELLI, ANTHONY PACELLI, JOHN DOES, BEING THE NAME OF THE THIRD PARTY OR PARTIES EMPLOYED BY ATESA PACELLI AND ANTHONY PACELLI TO HARASS AND DEFAME PLAINTIFFS				
	Defendant.			
	X			
	e-filed documents, listed by NYSCEF document nu 5, 406, 407, 408, 409, 410, 411, 412, 413, 414	mber (Motion 015) 39	9, 400, 401, 402,	
were read on	this motion to/for QUASH S	UBPOENA, FIX CON	DITIONS .	
Defendants move to quash a subpoena issued to ViacomCBS Inc by				
plaintiffs.	The subpoena was initially served on J	anuary 23, 2017 ir	n the related	
matter und	der index number 158224/2016 and re-ser	ved in this matte	er on	
November	18, 2021, the day after the parties repres	ented, at Court c	onference,	
that all kno	own discovery in the 2016 matter was co	ompleted, save fo	or previously	
filed motic	ons (NYSCEF Doc No. 388 & 398).			

A party seeking discovery from a nonparty must state the "circumstances or reasons" underlying the subpoena, on its face, and the party seeking to quash the subpoena must establish the material sought is "utterly irrelevant" or "the futility of the process to uncover anything legitimate is inevitable or obvious" (*Kapon v. Koch*, 23 NY3d 32, 34 [2014]). Should the witness opposing the subpoena make such a showing, the burden shifts to subpoenaing party to establish the material sought is "material and necessary" to the action (*id.* at 34).

CPLR § 2304 requires a motion to quash a subpoena be made "promptly," thus making the issue of timeliness *sui generis*. However, where a motion to quash is made returnable after the return date of the subpoena, the motion risks futility if the subpoena is obeyed (*Brunswick Hospital Center, Inc. v., Hynes*, 52 NY2d 333, 339, "a motion to quash or vacate no longer is available"; *see also Santangello v. People*, 38 NY2d 536, 539 "motion to quash ... should be made prior to the return date").

As an initial matter, to the extent that plaintiffs seek to extend their time to oppose this motion, such request is denied. Plaintiffs' brisk letter seeking same is untimely, dated three days after the Court imposed deadline to submit opposition, and provides only that counsel is in the process of "meeting and conferring with the non-party concerning the terms of the subpoenas."¹ The

¹ The Court is constrained to note that the order to show cause restrained plaintiffs from soliciting or obtaining documents or information in response to the subpoena, yet plaintiffs' letter implies, at a minimum, that plaintiffs have actively been contacting the subpoenaed

Court finds this an insufficient basis to extend plaintiffs' time to submit opposition. Furthermore, if granted, plaintiffs' request would entirely truncate defendants' opportunity to submit papers in reply, as provided by the signed order to show cause. Consequently, the motion is unopposed.

Here, as relevant on this motion, the instant action alleges defamation by plaintiffs' former client and the client's former husband related to, inter alia, the plaintiffs' representation of their former client. The instant subpoena seeks to compel ViacomCBS to provide material related to an Inside Edition interview of defendants; however, and most notably, the subpoena seeks nonpublic statements and material which were not broadcast to the public, including unedited recordings of the interviews and communications between defendants and ViacomCBS related to the interview. There is no dispute that the requested material was never broadcast or published as part of the interview, and thus, cannot form the basis for a defamation claim. Accordingly, the subpoena seeks utterly irrelevant material and the burden therefore shifts to plaintiffs, as the subpoenaing party, to show the material and necessary. Having failed to timely oppose this motion to quash, plaintiffs have

non-party seeking information in response to the subpoena (NYSCEF Doc. No. 413). Such conduct may well support sanctions or a finding of contempt, though the Court need not reach same at this time.

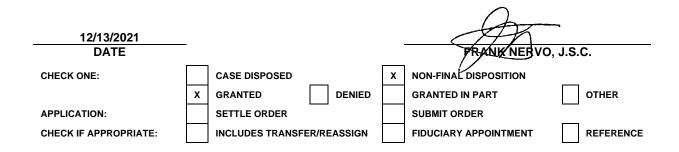
not made any showing that the subpoena seeks material and necessary information.

Accordingly, it is

ORDERED that the motion to quash, served November 18, 2021 (NYSCEF

Doc. No. 393) is granted and ViacomCBS Inc. need not, and shall not, produce the material sought therein.

This constitutes the Decision and Order of the Court.



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