

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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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. FRANK NERVO PART 04

Justice

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PETER CEDENO, PETER L. CEDENO & ASSOCIATES,
P.C.,

Plaintiff,

INDEX NO. 452016/2018

MOTION DATE 11/23/2021

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.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 015) 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414

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

Defendants move to quash a subpoena issued to ViacomCBS Inc by plaintiffs. The subpoena was initially served on January 23, 2017 in the related matter under index number 158224/2016 and re-served in this matter on November 18, 2021, the day after the parties represented, at Court conference, that all known discovery in the 2016 matter was completed, save for previously filed motions (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 Santangelo 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 non-public 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.

12/13/2021			
DATE		FRANK NERVO, J.S.C.	
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE