

<b>Matter of Hamm (Zuckerman)</b>
2014 NY Slip Op 32249(U)
August 21, 2014
Supreme Court, New York County
Docket Number: 154581/14
Judge: Donna M. Mills
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 58

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In the Matter of the Application of SUE ANN  
HAMM to Enforce a Subpoena Pursuant to  
CPLR 3119 (e) for the Testimony of Gregory  
Zuckerman

Index No.: 154581/14

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**MILLS, J.:**

Motion sequence numbers 001 and 002 are consolidated for disposition.

Petitioner, Sue Ann Hamm, seeks a determination that Gregory Zuckerman (Zuckerman) is in contempt of court for failing to comply with a subpoena for documents and his testimony. In the alternative, petitioner seeks to compel Zuckerman to comply with the subpoena. Zuckerman moves to quash the subpoena and for a protective order preventing petitioner from deposing him and obtaining the materials demanded.

Petitioner and her husband, Harold Hamm (Hamm); are the parties in an Oklahoma divorce case. Zuckerman submits an affidavit stating that he is a journalist for The Wall Street Journal (the WSJ) and authored the book *The Frackers: The Outrageous Inside Story of the New Billionaire Wildcatters* (the Book), in which Hamm is featured.

Petitioner served two subpoenas on Zuckerman, at different times, both of which commanded Zuckerman’s deposition (EBT) and the production of: “[a]ll audio and visual recordings, notes, interviews, emails, materials, records, well valuation, and all other documents related to Harold Hamm that are in your possession or control relating to [the Book]” as well as the production of “all other correspondence, emails and other written documents or records between you and Harold Hamm” (order to show cause, exhibit A). Petitioner served the second, amended subpoena in order to meet CPLR 3101 (a) (4)’s requirement that the subpoena describe

the circumstances or reasons that disclosure is sought. This subpoena described the underlying proceeding, and stated that, upon information and belief, Zuckerman was in possession of information about the marital estate, including the history of Hamm and a corporation of which he is the chief executive officer, Continental Resources, Inc. (CRI).

Zuckerman avers that, on or about April 3, 2014, the original subpoena was left for him at his office at the WSJ, and that the amended subpoena was left there on or about April 16, 2014. Both instruments scheduled Zuckerman's EBT for April 28, 2014. Zuckerman's counsel demonstrates that prior to the EBT, petitioner's counsel had been informed that Zuckerman would not appear (order to show cause, exhibit D at 5). On April 28, 2014, Zuckerman exchanged objections to document production after the time stated in the subpoena for the EBT, and, a week later, on May 5, 2014, supplemented his response with a privilege log.

In moving, petitioner states that she seeks documents and testimony from Zuckerman about topics in the Book, and argues that Zuckerman has unique insight and knowledge concerning a pivotal issue in the divorce case of whether or not Hamm's efforts, skills or expended funds contributed to the value of the marital estate. Petitioner provides excerpts from the Book which indicate that it was based on interviews with numerous witnesses, including Hamm.<sup>1</sup> Petitioner asserts that these witnesses have personal knowledge of material facts about Hamm's contributions to the marital estate.

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<sup>1</sup> Petitioner contends that in moving, she was hampered in her ability to make a showing because she was restrained by court order, in the Oklahoma proceeding, from revealing necessary materials. That order was later lifted to allow petitioner to make additional submissions. Zuckerman has had an opportunity to respond to the submissions.

Opposing the motion, Zuckerman avers that he is a professional journalist and that the Book was based on his newsgathering efforts, including interviews with confidential and nonconfidential sources, and that he is invoking New York's journalist's shield to avoid testifying and divulging information relating to the publication of or newsgathering for the Book. Zuckerman states that providing documents would have a negative impact on his career, and that he should not be compelled to testify or provide information relating to his newsgathering activities. Zuckerman avers that if he were required to give evidence in civil or criminal matters that have a connection to his journalism activities, he would cease being a journalist and would be forced to become a professional witness. Zuckerman maintains that his ability to obtain interviews and elicit information is dependent on his being able to provide assurances that he will not be compelled to testify in court when he researches or prepares articles. He also states that his objectivity may be compromised if he is compelled to provide information relating to his newsgathering activities, as he may be rendered an investigator for a litigant or the government.

CPLR 3101 (a) provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." "The prerequisites of materiality and necessity, though placing some limit on entitlement to disclosure, extend to any information or items bearing on the controversy which will be an aid to trial preparation, sharpening of the issues, or reducing delay. The test in such cases is usefulness and reason" (*O'Neill v Oakgrove Constr.*, 71 NY2d 521, 526 [1988] [internal quotation marks and citation omitted]). "The burden of establishing . . . [a] privilege rests on the party asserting the privilege" (*Anonymous v High School for Envtl. Studies*, 32 AD3d 353, 359 [1st Dept 2006]). "Where, however, the nonparty against whom discovery is sought is engaged in newsgathering or reporting activities, and the

materials requested [were prepared or developed] in the course of such endeavors, additional considerations are involved” (*O’Neill*, 71 NY2d at 526). Moreover, CPLR 3103 (a) provides that:

“[t]he court may at any time on its own initiative, or on motion of any party or of any person from whom or about whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.”

Petitioner argues that Zuckerman’s motion to quash should be denied because Zuckerman failed to request withdrawal of the subpoena (CPLR 2304). In opposition, Zuckerman’s counsel affirms that she engaged in written and oral communications with petitioner’s counsel before the motion was made urging withdrawal of the subpoena based on the New York’s journalist’s shield (*see* McNamara opposition affirmation, ¶ 3; McNamara good faith affirmation, ¶ 3). On a motion to quash, the moving papers should indicate that a request to withdraw the subpoena was made, but such an omission does not preclude the subpoenaed party from opposing a motion to compel compliance (*see Matter of Temporary State Commn. on Living Costs & Economy v Bergman*, 80 Misc 2d 448, 450 [Sup Ct, NY County 1975] [oral request sufficient]; Patrick M. Connors, Practice Commentary, McKinney’s Cons Laws of NY, Book 7B, CPLR C2304:4).<sup>2</sup> Moreover, the record reveals that the requirement was sufficiently met.

Petitioner argues that Zuckerman did not timely move to quash. CPLR 2304 does not specify the time within which a motion to quash must be made, but states that it “shall be made

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<sup>2</sup> Petitioner did not submit an affidavit of her good faith efforts to resolve this dispute (*see* 22 NYCRR 202.7 [a] [c]). Although such efforts may have been futile (*see Loeb v Assara N.Y. I L.P.*, 118 AD3d 457, 458 [1st Dept 2014]), the affidavit should have been provided in order for the court to make the determination as to futility, or the sufficiency of efforts made.

promptly in the court in which the subpoena is returnable.” The Court of Appeals has stated that a “motion to quash . . . should be made prior to the return date” (*Matter of Santangelo v People*, 38 NY2d 536, 539 [1976]). However, petitioner does not provide authority to demonstrate that the untimeliness of Zuckerman’s motion would waive his privilege objection, and “the courts permit the filing of an untimely objection if the information sought fits within one of the exceptions to the rule requiring promptly filed objections,” such as privilege (*Schumacher v Antiquorum USA, Inc.*, 2011 NY Slip Op 34086[U], \*4 [Sup Ct, NY County 2011] [denying application to dismiss motion to quash as untimely]). It follows that a court should permit a motion to quash, or for a protective order, made in response to a motion to compel information protected by privilege (*see id.*).

In addition, petitioner served a second subpoena, amending the original, and does not dispute that Zuckerman’s response was exchanged within 20 days thereafter, making her argument that the response is untimely unpersuasive. A determination that Zuckerman knowingly and intentionally relinquished his privilege objection would be inappropriate under the circumstances of this case. In any event, as mentioned above, even where waiver lies due to the failure to timely respond, courts generally do not issue orders directing parties to produce discovery protected by privilege or where a demand is palpably improper (*see Accent Collections, Inc. v Cappelli Enters., Inc.*, 84 AD3d 1283, 1284 [2d Dept 2011]; *Anonymous*, 32 AD3d at 358-359). Zuckerman’s objections were adequately stated in the privilege log, as their substance is clear, especially in context.<sup>3</sup>

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<sup>3</sup> This case is not like *Anonymous* (32 AD3d at 359), relied upon by petitioner, in which the defendants did not exchange a privilege log at all, and engaged in such behavior that the Court noted “the havoc” wrought by the defendants’ discovery abuses (*id.*).

Zuckerman argues that the subpoena was defective because it did not comply with CPLR 3101 (a) (4) by providing the reason the disclosure was sought.<sup>4</sup> This argument is unpersuasive, as this omission may be remedied by a showing made in response to a motion to quash the subpoena (*see Velez v Hunts Point Multi-Serv. Ctr., Inc.*, 29 AD3d 104, 111 [1st Dept 2006] [“although the better practice, indeed the mandatory requirement of CPLR 3101 (a) (4), is to include the requisite notice on the face of the subpoena or in a notice accompanying it,” the lack of notice did not constitute grounds to quash given the sufficiency of the opposition showing and lack of prejudice]; *but see De Stafano v MT Health Clubs*, 220 AD2d 331, 331 [1st Dept 1995], quoting CPLR 3101 [a] [4] [“subpoenas duces tecum with notice of deposition served . . . were facially defective for failure to” comply with CPLR 3101 (a) (4)]).

Substantively, these motions concern New York’s journalist’s shield, derived from NY Constitution, article I, § 8 and Civil Rights Law § 79-h.<sup>5</sup> Civil Rights Law § 79-h (b) affords an absolute privilege for confidential newsgathering materials. Civil Rights Law § 79-h (c) provides a qualified privilege for nonconfidential newsgathering information and materials, which are protected from disclosure unless a party shows, clearly and specifically, that the information and materials are (1) highly material, (2) critical to the litigant’s claim, and (3) not otherwise available

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<sup>4</sup> In response to Zuckerman’s assertion that petitioner did not provide the required description of the circumstances, petitioner states that Zuckerman was aware that she sought this information from well before the time that the subpoena was served, including through Zuckerman’s publisher. Zuckerman does not rebut this statement.

<sup>5</sup> The parties do not dispute: that confidential source information is not discoverable (*see e.g. reply*, ¶ 19, Civil Rights Law § 79-h [b]); that Zuckerman is a journalist; or the application of the shield law to the Book (*see Matter of Perito v Finklestein*, 51 AD3d 674, 675 [2d Dept 2008] [determining that criminal defendant that sought information from book author did not make sufficient showing of Civil Rights Law § 79-h [c] requirements]).

(see *Matter of CBS Inc. (Vacco)*, 232 AD2d 291, 292 [1st Dept 1996]). To demonstrate that unpublished newsgathering materials are critical to a litigant's claim, a petitioner must demonstrate "that the claim for which the information is to be used virtually rises or falls with the admission or exclusion of the proffered evidence" (*Baker v Goldman Sachs & Co.*, 669 F3d 105, 110–111 [2d Cir 2012] [citation and internal quotation marks omitted]). If the material sought is pertinent merely to an ancillary issue in the litigation, that is, it is not essential to the very maintenance of the litigant's claim, or is obtainable through an alternative source, disclosure may not be compelled (see *O'Neill*, 71 NY2d at 527).

In the subpoena, petitioner seeks Zuckerman's notes, interviews and other materials relating to the Book. Despite petitioner's contention that the subpoena seeks published information, she provides no support for the contention that Zuckerman's notes, documents, or videotaped interviews relating to the Book were published in the book.<sup>6</sup> Petitioner also does not sufficiently demonstrate that her claim concerning the marital estate in the divorce proceeding will rise or fall depending on whether or not she obtains the information sought from Zuckerman. Indeed, it appears that petitioner primarily seeks the information to address witness credibility and impeachment, which generally is not considered critical to a claim (*Matter of American Broadcasting Cos.*, 189 Misc 2d 805, 808 [Sup Ct, New York County 2001]).

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<sup>6</sup> While, as petitioner points out, some of the notes or interviews may not be from confidential sources, the tripartite test of Civil Rights Law § 79-h (c) applies to sources that are not confidential.

Petitioner makes what may be valid claims as to Zuckerman's exclusive possession of certain documents, for example, copies of emails between Zuckerman and employees at CRI.<sup>7</sup> However, even if CRI did not produce copies of those emails, petitioner does not demonstrate that she could not obtain the information contained in the emails through her own investigation and interview of employees or former employees from CRI. In fact, petitioner does not state that she could not obtain the information that she seeks about Hamm's conduct by investigating and interviewing those involved with CRI, banks, or others with whom Hamm has worked or associated (*CBS Inc.*, 232 AD2d at 292 [subpoena quashed where no clear and specific showing made that the relevant information was unavailable elsewhere]; *see also Flynn v NYP Holdings*, 235 AD2d 907, 909 [3d Dept 1997] [party seeking information failed to detail efforts made to obtain information contained in the documents requested]; *compare People v Nasser*, 15 Misc 3d 499, 502-503 [Sup Ct, Westchester County 2007] [denying reporter's motion to quash where criminal defendant sought information limited to that published in news article and critical to his defense]).<sup>8</sup> Undoubtedly, there were many witnesses to events and conduct involved in the development of business endeavors and wealth of the magnitude described in the submissions,

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<sup>7</sup> The court notes that petitioner submits a letter from CRI's counsel to demonstrate that that CRI "has no *additional* documents inclusive of items 6[-10 and 17-19] in Zuckerman's privilege log" (supplemental reply affirmation, ¶ 13 [emphasis supplied]; *id.*, exhibit 6).

<sup>8</sup> *Nasser* (15 Misc 3d at 502-503) involved the statement of a witness observed and published by a reporter. The criminal defendant's counsel clarified that he had no intention of seeking testimony regarding the circumstances under which the statement was made, but sought only to elicit the reporter's testimony regarding the contents of the published statement (*see also Matter of Eisinger*, US Dist Ct, SD NY, Jones, J., 2011, n 2, *affd sub nom. Baker*, 669 F3d 105 [discussing *Nasser* and quashing subpoena]).

including those issues listed in the supplemental reply, such as Hamm's business strategies, decisions and interactions.

In reply and supplemental papers, petitioner states that the court could limit her demand and compel Zuckerman to produce materials not used to publish news (reply affirmation, ¶ 24). Petitioner also states that, because Zuckerman and CRI had extensive interactions regarding articles Zuckerman wrote for the WSJ, as well as for the Book, that the court should order production of materials that were used to create the published news (*id.*, ¶ 21, 23). Petitioner does not indicate that Hamm or CRI have, or ever had, a relationship or communications with Zuckerman outside of Zuckerman's journalism activities. Zuckerman's log indicates that the materials withheld were notes/documents about interviews that he conducted or involved activities such as fact checking, and were part of his newsgathering efforts. There is no indication that these materials were published and, therefore, although perhaps not confidential, they are still subject to the tripartite test. In addition, the subpoena is not limited, as it demands all documents relating to the Book as well as Zuckerman's testimony. In her submissions, petitioner appears to expand the demands. The court is under no obligation to engage in the parsing out that petitioner seeks (*Bell v Cobble Hill Health Ctr., Inc.*, 621 [2d Dept 2005]), and declines to do so or to grant the relief petitioner seeks where she does not indicate that her inquiry would be restricted to published materials.

In light of the foregoing, it is

ORDERED that motion of petitioner Sue Ann Hamm is denied; and it is further

ORDERED that the motion of Gregory Zuckerman is granted and petitioner is precluded from deposing Gregory Zuckerman or obtaining the information sought in the

subpoena or amended subpoena served on him.

Dated:

8/21/14

ENTER:



J.S.C.

**DONNA M. MILLS, J.S.C.**