

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

PRESENT : DONNA M. MILLS PART 58  
*Justice*

*In the Matter of the Motion to Quash Subpoena/Subpoena  
Duces Tecum served upon WALL STREET JOURNAL,*

Index No. 100270/13

Petitioner, \_\_\_\_\_ MOTION DATE \_\_\_\_\_  
-against- \_\_\_\_\_ MOTION SEQ. NO. 001  
SHELDON ADELSON, \_\_\_\_\_  
Respondent. \_\_\_\_\_ MOTION CAL NO. \_\_\_\_\_

**FILED**  
MAY 31 2013  
NEW YORK  
COUNTY CLERK'S OFFICE

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion \_\_\_\_\_

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits- Exhibits...	<u>1, 2</u>
Answering Affidavits- Exhibits	<u>3, 4</u>
Replying Affidavits	<u>5, 6</u>

CROSS-MOTION: \_\_\_\_\_ YES  NO

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED ORDER.

Dated: 5/28/13

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

Check one:  FINAL DISPOSITION \_\_\_\_\_ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
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Respondent.

DECISION/ORDER

**FILED**

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Donna M. Mills, J.:

MAY 31 2013

In this proceeding, Dow Jones & Company, Inc. (Dow Jones"), publisher of the Wall Street Journal, brings this action for an order pursuant to CPLR § 2304 quashing the subpoena/subpoena duces tecum, issued to the Wall Street Journal pursuant to the Uniform Interstate Deposition and Discovery Act and CPLR § 3119, seeking deposition testimony and documents in underlying civil litigation brought by plaintiff Sheldon G. Adelson against defendant Steven C. Jacobs in the State of Florida for defamation. Dow Jones also seeks a protective order, pursuant to CPLR § 3103, preventing the deposition from going forward.

BACKGROUND

Mr. Adelson is the plaintiff in a defamation action brought in the Florida state court system against a Florida resident, Steven Jacobs. The Florida action arises out of an alleged defamatory statement made by Mr. Jacobs concerning a supposed prostitution promotion strategy that Mr. Jacobs purportedly claimed that Mr. Adelson condoned. Mr. Jacobs published this statement in an affidavit concerning discovery issues in a pending Nevada employment action he brought against Las Vegas Sands

Corporation ("LVSC"), a company headed by Mr. Adelson, for alleged wrongful termination. The alleged defamatory statement was republished by various media outlets, including in Florida and New York.

The Wall Street Journal soon published, under a reporter named Kate O'Keefe's by-line, an article entitled "Sands Suit Claims 'Prostitution Strategy,'" emphasizing the assertions that Mr. Jacobs made regarding Mr. Adelson's alleged support of prostitution. At his deposition in the Florida defamation action, Mr. Jacobs testified that he considered Ms. O'Keefe to be his friend and that he had met with her for lunch meetings. Additionally, document production by Mr. Jacobs revealed, that he retained dozens of email communication from Ms. O'Keefe in which she was seeking quotes and tips from Mr. Jacobs regarding Mr. Adelson and his business. Counsel for Mr. Adelson contends that Ms. O'Keefe is not an impartial reporter with respect to Mr. Adelson and his companies, and claims that Ms. O'Keefe has engaged in her own independent defaming of Mr. Adelson.

On January 14, 2013, Mr. Adelson, through his New York attorneys, served upon Dow Jones a subpoena/subpoena duces tecum in the Florida action under the authority of the Supreme Court of New York, New York County pursuant to the Uniform Interstate Deposition and Discovery Act and CPLR § 3119. The Subpoena seeks to depose in New York the corporate representative of the Wall Street Journal with the most knowledge regarding communications between Mr. Jacobs and any agent, employee, representative, officer, or director of the Wall Street Journal. The Subpoena also seeks three categories of document: (1) emails, letters, and other written communications between Mr. Jacobs and the Wall Street Journal, dating from January 1, 2010 to the

present; (2) any documents that Mr. Jacobs provided to the Wall Street Journal, dating from January 1, 2010 to the present; and (3) phone records of the Wall Street Journal and its employees reflecting any calls with Mr. Jacobs, dating from July 1, 2010 to the present.

Mr. Adelson further contends that prior to and immediately following the termination of Mr. Jacobs's employment, he suspects that Mr. Jacobs began leaking false and inflammatory information to the news media relating to Jacobs's employment with the company. These leaks then led to a succession of new stories regarding Mr. Adelson and LVSC many of which were published by the Wall Street Journal, and which culminated with Jacobs's publication of the alleged defamatory statement that is the subject of the Florida action.

#### LEGAL DISCUSSION

In New York, a news reporter's qualified privilege regarding non-confidential news gathering materials derives from New York State Constitution Article 1, Section 8, as well as New York Civil Rights Law § 79-h, based on a tripartite test "more demanding than the requirements of CPLR 3101(a)" (O'Neill v. Oakgrove Constr., 71 N.Y.2d 521, 527, 528 N.Y.S.2d 1, 523 N.E.2d 277 [1988]).

Under the tripartite test, discovery may be ordered only if the litigant demonstrates, clearly and specifically, that the items sought are (1) highly material, (2) critical to the litigant's claim, and (3) not otherwise available. Accordingly, if the material sought is pertinent merely to an ancillary issue in the litigation, not essential to the maintenance of the litigant's claim, or obtainable through an alternative source, disclosure may not be compelled .... *Id.* These requirements subsequently were

incorporated into an amended Civil Rights Law § 79–h, which affords an absolute privilege for confidential news gathering materials, N.Y. Civ. Rights Law § 79–h(b), and a qualified privilege for non-confidential news gathering materials. N.Y. Civ. Rights Law § 79–h ( c). To overcome the privilege for non-confidential materials, the party seeking the evidence still must meet the statute's three-pronged test formulated by the Court of Appeals (see CBS Inc. v. Vacco, 232 A.D.2d 291, 292, 648 N.Y.S.2d 443 (1<sup>st</sup> Dept. 1996). Respondent, Sheldon Adelson has not shown why he is entitled to the material sought, nor the deposition he seeks under any of these criteria.

Under the factual circumstances presented in this case, it is the finding of the Court that Mr. Adelson has failed to overcome the qualified privilege for non-confidential news gathering material. This Court does not find that the material sought is highly material and critical to Mr. Adelson's Florida defamation action. Even assuming that Mr. Adelson has met the first two prongs of the tripartite test for disclosure of unpublished nonconfidential news under the Shield Law ("highly material and relevant" and "critical or necessary to the maintenance" of the Florida action), he fails to demonstrate that such information is "not obtainable from any alternative source," to wit, Mr. Jacobs himself.

**FILED**

MAY 31 2013

NEW YORK

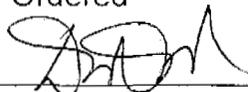
COUNTY CLERK'S OFFICE

Accordingly, it is

ORDERED that petitioner's motion to ~~grant the subpoena~~ a protective order to prevent the deposition that respondent seeks is granted.

Dated: 5/28/13

So Ordered



Donna M. Mills, J.S.C.

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