

Filed 1/30/2007

At a Term, Part 29, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse at 360 Adams St. Brooklyn NY, on the 30th day of January, 2007.

Present: HON. WAYNE P SAIITA,

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In The Matter of the Application of
PAUL PERITO,

Petitioner,

Index No.: 6155/2006

- against -

For An Order Directing Service of Subpeona
Upon KATHEINE EBAN FINKELSTEIN,
Respondent, Pursuant to CPLR §3102(e) Under A Commission
Issued in a Certain Action Entitled State of Florida v. Paul Perito,
Pending in the Circuit Court of the Seventeenth Judicial Circuit in
and for Broward County in the State of Florida

DECISION AND ORDER

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Respondent, KATHERINE EBAN FINKELSTEIN, (hereinafter "Finkelstein" or "Eban"

or "Respondent"), filed a Notice of Motion pursuant to New York C.P.L.R. §2304 seeking to quash Petitioner's Second Amended Subpoenas together with such other and further relief as the Court deems just and proper. She moves in response to an Application made by Petitioner PAUL PERITO, (hereinafter "Perito" or "Petitioner"), pursuant to C.P.L.R. §3102(e) seeking to compel Respondent's testimony and document production in a criminal action pending against Petitioner in the State of Florida.

Upon reviewing Respondent's Notice of Petition dated July 14th, 2006 together with Katherine Eban Finklestein's Affidavit, dated July 13th, 2006 and attached exhibits; Memorandum of Law In Support of Respondent's Motion to Quash Petitioner's Amended Subpoena *Ad Testificandum* and Subpoena *Duces Tecum*, dated July 14th, 2006; the Affirmation of Aimee E. Saginaw, Esq., counsel for Respondent, dated July 14th, 2006; the Affirmation of Ellen M. Murphy, Esq., counsel for Petitioner, Paul Perito, dated September 1st, 2006, together with attached exhibits; Petitioner's Memorandum of Law in Opposition to Respondent's Motion to Quash Petitioner's Amended Subpoena *Ad Testificandum* and *Duces Tecum* dated September 1st, 2006; Respondent's Reply Memorandum of Law in Support of Respondent's Motion to Quash Petitioner's Amended Subpoenas *Ad Testificandum* and *Duces Tecum* dated September 29th, 2006; Ellen Murphy, Esq.'s letter dated November 15th, 2006 together with attached exhibits; Steven J. Hyman, Esq.'s, counsel for Katherine Eban Finkelstein, letter dated December 1st, 2006; Ellen Murphy, Esq.'s letter dated December 8th, 2006; Steven J. Hyman, Esq.'s, counsel for Katherine Eban Finkelstein, letter dated December 12th, 2006; the court file, all the proceedings had herein and after due deliberation, the petition is denied in part and granted in

part.

SUMMARY

The underlying criminal action, (hereinafter the "Florida Action"), charged the Petitioner with various offenses stemming from the alleged sale of counterfeit pharmaceuticals.

Respondent is a New York based professional journalist who investigated and reported events related to the illegal pharmaceutical trade. She published an article entitled "Pharmacy Fakes" in March 2003, and a book entitled *Dangerous Doses*, released by Harcourt, Inc. in May 2005, which dealt with the investigation of Petitioner by Florida Authorities.

Petitioner was granted a commission by Circuit Court for Broward County in Florida to depose Respondent within the State of New York. On April 18th, 2006, this Court issued an Order pursuant to CPLR §3102(e) granting Petitioner's counsel leave to issue subpoenas to be served upon Respondent. Petitioner served Respondent with the Second Amended Subpoena *Ad Testificandum* and Subpoena *Duces Tecum* on June 23rd, 2006. On July 14th, 2006, Respondent moved to Quash Petitioner's Second Amended Subpoenas.

FACTS

Petitioner seeks to subpoena testimony and documents from Respondent which he states are material and necessary in support of his defense in the Florida Action.

Petitioner states he specifically seeks:

- (1) Eban's testimony regarding (a) information she received from disclosed sources, the substance of which she has published in her book; and (b) any relevant information Eban may have as an eyewitness to many of the events described in the book; and
- (2) the production of any documents that Eban received in connection with the preparation of her book from the Florida law enforcement officers that were involved in the investigation or other Florida State employees.

Petitioner's Memo of Law, p.1

ARGUMENTS

Petitioner states the information sought is relevant to the Florida Action noting that both the Respondent and her book have been discussed in status conferences in the Florida Action, that the book "describes in detail the actions of the investigation and the alleged misdeeds of Dr.

Perito.” (*Petitioner’s Memo of Law, p. 2*), and that Respondent acknowledges the extensive assistance of the Operation Stone Cold Task Force, which was responsible for the investigation (*Id., at 5*). Petitioner claims the information is not confidential by virtue of having already been disclosed, and thereby is not protected by any privilege. He further argues the information sought involves key law enforcement officers who will be the State’s witnesses against him, alleging that at least two of whom have denied speaking with Respondent about the investigation or the charges brought against the Petitioner, in apparent contravention of representations made by the Respondent. Unable to otherwise verify information related to said officers in *Dangerous Doses*, Petitioner seeks to depose Respondent. Petitioner also alleges the law enforcement officers knew of a book deal and a potential movie prior to Petitioner’s arrest which may have influenced their conduct during the investigation. Finally, Petitioner alleges that Respondent witnessed many of the reported events first hand.

Respondent moves to oppose the subpoenas stating that as a New York based professional journalist she is protected by the absolute and qualified privileges of the New York Shield Law given that the sources used in her investigation relied upon the assurance of strict

confidentiality. She further asserts the subpoenas lack the specificity required for her to comply were she not immune as a journalist and/or were she otherwise compelled to comply.

Petitioner counters that Respondent should not be protected by any state's shield law as the information sought is not confidential, that in the event any state shield law applies it should be the Florida Shield Law, and that Petitioner meets the three pronged test under the Florida Shield Law to compel Respondent's compliance with the subpoenas.

ANALYSIS

Petitioner seeks testimony and production from the Respondent which is relevant to his formulating a defense to the criminal charges against him; in particular *Dangerous Doses* provides details of the investigation which led to Petitioner's arrest. However, Respondent is a professional journalist based in New York and thereby subject to protection by the N.Y. Civil Rights Law §79-h.

The legislative intent in creating the privilege contained in Section 79-h was, quoting from the memorandum of the original proponent of the bill, Assemblyman Erneel S. Betras (N.Y.Legis.Am., 1970, p. 33):

“ . . . protecting persons and news media from being called by

investigative bodies or individuals and being forced to reveal the sources of their information on material which they have broadcast or published . . . ”.

The N.Y. Civil Rights Law §79-h, also referred to as the New York Shield Law, shall apply in this instance as foreign courts “are bound to give full faith and credit to New York laws when necessary to protect the statutory rights of New York citizens”. *Superior Court v. Farber*, 94 Misc.2d 886, 405 N.Y.S.2d 989, N.Y.Sup.,1978. While the case against the Petitioner is in Florida, the journalist he seeks to subpoena is a New York based journalist. New York’s legislature has a more compelling interest in protecting New York journalists than has Florida. Therefore the New York Shield Law should apply to this case as Eban, a New York journalist, was subpoenaed in New York. In any event, Florida’s Shield Law is similar to New York and the minor differences between the two would not require a different result in this case.

The New York Shield Law provides two levels of privilege; a qualified privilege for non-confidential news and an absolute privilege for confidential news. Under the New York Shield Law there is an absolute protection when the party seeking the privilege asserts the information was

“obtained or received in confidence”. Eban states she agreed to protect some of her sources in her affidavit dated July 13, 2006:

“I spent two-and-one half years investigating and writing *Dangerous Doses*. During this time, I conducted more than 160 interviews with people connected with counterfeit medicine and reviewed thousands of pages of documents. Some of these sources explicitly demanded anonymity and/or offered me information on the express condition that I not reveal the identity of such sources. I agree to those restrictions and received the information on that explicit understanding.”

Petitioner states he seeks only non-confidential news. Petitioner claims he is not seeking information that has not been disclosed, but only a sworn statement affirming disclosed information in order to have it in a form that is admissible at trial.

- (1) **Questions regarding (a) information she received from disclosed sources, the substance of which she has published in her book;**

Under the New York Shield Law, non-confidential news is protected “unless the party seeking such news has made a clear and specific showing that the news: (i) is highly material and relevant; (ii) is critical or necessary to the maintenance of a party's claim, defense or proof of an issue material thereto; and (iii) is not obtainable from any alternative source.” CRL § 79-h [c].

Petitioner correctly states non-confidential news is subject to the qualified privilege analysis.

In order for this Court to consider the release of the information sought, it must be able to analyze

Petitioner’s need for the specific information.

Petitioner fails to specify the news sought, except by stating it is “information she received from disclosed sources, the substance of which she has published in her book”. *Petitioner’s Memo of Law, p.1.* By failing to specify the news sought, Petitioner does not allow this Court to determine at this stage which items are confidential and which are non-confidential. The fact that Eban has listed certain persons as sources does not allow Perito to question her as to whether they are the source of information published in her book if that information was not specifically attributed

to a specific source.

Petitioner has also failed to demonstrate that the information he seeks would be allowed even under the qualified privilege for non-confidential news. For example, Petitioner seeks to obtain verification that certain passages in her book are based upon conversations she had with agents who deny speaking with her. In fact, although the information may be relevant and necessary, it is obtainable from an alternative source, namely from the agents themselves. The fact that the agents deny having the conversations is not a sufficient basis, even under the qualified privilege, to allow the New York Shield Law to be penetrated. The New York Shield Law does not provide for piercing the protections afforded to journalists merely for the purposes of impeachment of witnesses.

An independent showing of need is required. People v. Troiano, 1985, 127 Misc.2d 738, 486

N.Y.S.2d 991. Criminal Law 627.5(6)

- (1) **Questions regarding (b) any relevant information Eban may have as an eyewitness to many of the events described in the book;**

Petitioner seeks "any relevant information Eban may have as an eyewitness to many of the events described in the book". *Petitioner's Memo of Law, p. 1.* Again, Petitioner neither sets forth

which events Eban may have witnessed other than her conversations with confidential sources, nor does he present any specific arguments as to why the need for the information will satisfy the qualified privilege analysis. Furthermore Eban specifically states she “..never witnessed first-hand anything directly related to Perito”. (Reply Memorandum of Law in Support of Respondent’s Motion to Quash Petitioner’s Amended Subpoenas *Ad Testificandum* and *Duces Tecum*, dated September 29, 2006.)

- (2) **Production of any documents that Eban received in connection with the preparation of her book from the Florida law enforcement officers that were involved in the investigation or other Florida State employees.**

Petitioner’s subpoena of Respondent also seeks “any and all documents relating to your preparation of *Dangerous Doses* which were furnished to you by law enforcement officers, or by employees or officers of the State of Florida”.

Petitioner is not entitled to any document or any portion of a document which has not already been published or quoted. The mere fact that Eban cited or referred to specific documents as sources does not waive the protection against their production nor does it open the door for an inquiry as to where Respondent obtained them. Petitioner has failed to demonstrate that he is unable

to obtain the documents elsewhere. Presumably any document generated by the Florida law enforcement officers should be obtainable from the officers or from the state of Florida, absent any independent privilege.

Waiver

The N.Y. Civil Rights Law §79-h(g) does provide that one entitled to the protection under the New York Shield Law waives said exemption "if such person voluntarily discloses or consents to disclosure of the specific information sought to be disclosed to any person not otherwise entitled to claim the exemptions provided by this section". This applies to both confidential and non-confidential news. Petitioner cites Section 79-h(g) of the New York Civil Rights Law as an explicit waiver of Respondent's right to claim exemption from providing testimony both through information already published and due to statements made in her Congressional testimony and in her book that she witnessed many events described in the book firsthand.

Eban's statement to Congress and mention in her book that she had witnessed many events firsthand neither implicates any confidential information nor source and is therefore not enough to

constitute a waiver of any privilege established to protect information obtained.

Published Information

Eban has waived protection under the New York Shield Law as to any information she has published.

However, the scope of the waiver of privilege due to disclosure mirrors the specific information disclosed. It does not waive the privilege for related information which has neither been disclosed, nor the source of the published information if the source has not been disclosed.

Petitioner may legitimately seek testimony from Respondent for the purposes of putting the already disclosed information into a transcript so it might be entered as evidence in the Florida Action.

Petitioner is not entitled to use the published information as a basis to seek out further undisclosed information, either as clarification of the published information or as to the sources of the published information where the sources has not been specifically published. Petitioner's inquiry will be expressly limited to information already publically disclosed, and shall not include analysis of events or contents of or copies of documentation not previously published.

For example, in *Dangerous Doses*, Eban wrote, "But as Arias and Odin examined the medicine, it looked perfect even to their practiced eyes", at 141. However, in Petitioner's deposition of Officer Arias, (See Murphy Aff. Exh. D), the witness affirms the truth of that statement but denies having declared it to Eban, further stating he did not know how she got that information. Petitioner may not ask Respondent to confirm whether she was told that by Arias or Odin, nor can he inquire from whom Respondent learned that fact. Although the observation was published, the source of the observation was not.

Similarly, where, on page 261 of *Dangerous Doses*, Eban directly quotes Venema as stating "You know, I don't mind ruining your entire life", Petitioner may ask Eban if he said that to her, but in the event she answers in the negative, she cannot be compelled to disclose her source.

Likewise in the endnotes on page 402 of *Dangerous Doses*, Eban writes, "Page 257 Odin and Aria seized a total of \$445,477.50 in adulterated Lipitor and Celebrex from a wholesaler in Jensen Beach, Florida, as documented in an FDLE

investigative report dated April 11, 2003, and in a BSPS investigation report dated April 12, 2003. A significant portion of the medicine was in Arias's Buick that day."

Petitioner may inquire as to whether Eban personally saw the report and its contents, but he may not ask where she got the report.

Also, on page 197 of *Dangerous Doses*, Eban states writes "The club manager, Benjamin R. Ojeda, a convicted cocaine distributor who had spent four years in prison, began taking notes on the men [Perito and Just], in case one day he'd be forced to answer someone's questions about their activities." Petitioner may inquire if she witnessed Ojeda taking notes but not who the source was for the statements regarding Ojeda.

Given the difficulties in determining in advance which inquiries are permissible, written interrogatories, as opposed to an oral deposition, are a more appropriate manner to conduct discovery of Eban. Since Petitioner's legitimate goal in subpoenaing Eban is to obtain information disclosed in her book in a form admissible at trial, and not to seek additional information, he will not be prejudiced by having to conduct discovery of Eban by interrogatories rather than deposition.

The interrogatories must be specifically limited to *confirming information already published*; *they shall not seek the source of any published information where the source has not been disclosed nor the content of any conversation or interaction which is not already published.*

WHEREFORE, Petitioner's motion is granted to the extent of permitting him to serve Eban with interrogatories within 30 days of entry of this Order. Respondent Eban shall respond to the interrogatories or shall specify her objections on or before twenty days after service of the interrogatories, pursuant to CPLR R 3133. This shall constitute the decision and order of this Court.

ENTER,



HON. WAYNE P. SAITTA
J.S.C.

WAYNE P. SAITTA, J.S.C.