

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

HON. JOAN A. MADDEN

PRESENT: J.S.C.  
Justice

PART 11

TRUMP

INDEX NO. 103939/08

- v -

MOTION DATE \_\_\_\_\_

SULZBERGER

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion *is determined in accordance with the annexed decision and order.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: August 20, 2008

*[Signature]*

HON. JOAN A. MADDEN J.S.C.

*[Signature]*

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 11

-----X  
In the Matter of the Application of DONALD J. TRUMP  
for an Order authorizing service of Subpoenas Ad  
Testificandum and Duces Tecum on

INDEX NO. 103939/08

ARTHUR OCHS SULZBERGER JR., WILLIAM  
KELLER and LAWRENCE INGRASSIA,

pursuant to a Commission issued in the action  
entitled Donald J. Trump v. Timothy L. O'Brien, Time  
Warner Book Group, Inc., Warner Books Inc.,  
Docket No. L-545-06, pending in the Superior Court of  
New Jersey, Law Division, Civil Part, Camden County.

-----X  
JOAN A. MADDEN, J.:

Respondents Arthur Ochs Sulzberger Jr. ("Sulzberger") and William Keller ("Keller")  
move for an order pursuant to CPLR 3102(e), 3103(a) and 2304 quashing certain non-party  
subpoenas served on them, and for a protective order. This proceeding relates to a defamation  
action pending in New Jersey entitled Donald J. Trump v. Timothy L. O'Brien, Time Warner  
Book Group Inc. and Warner Books Inc. (Docket No. CAM-L-545-06, Superior Court of New  
Jersey, Law Division, Camden County)(the "underlying action"), which is based on allegedly  
false statements about Donald J. Trump ("Trump") contained in a book written by Timothy L.  
O'Brien ("O'Brien"), *TrumpNation: The Art of Being the Donald*. O'Brien resides in New Jersey  
and in his "day job," he is employed as journalist for *The New York Times* ("The Times").

In January 2006, Trump commenced the underlying action, against O'Brien and the  
publishers of his book, Time Warner Book Group Inc. and Warner Books. The complaint  
alleges that O'Brien's book falsely states that Trump's net worth "was some where between \$150

and \$250 million” and that Trump “was not remotely close to being a billionaire.”<sup>1</sup> The complaint also alleges that as a result of the “false and defamatory statements,” Trump has “suffered injury to his personal and professional reputation,” and is entitled to compensatory and punitive damages at a minimum of \$2.5 billion.<sup>2</sup>

In or about November 2007, Trump moved in the underlying action for commissions to take non-party out-of-state depositions of three executives of The Times: Sulzberger, the Chief Executive Officer of the New York Times Company and publisher of The Times; Keller, the executive editor of The Times; and Lawrence Ingrassia, the business editor of the Times and

---

<sup>1</sup>Trump’s complaint also alleges that “O’Brien and Warner have knowingly made egregiously false and reprehensible statements about Trump, his family, his personal life and his business dealings, including statements grossly misrepresenting Trump’s net worth, business acumen and success. Those defamatory statement have been made in a book, in a major article in the *New York Times* containing excerpts from that book, and in interviews about the book, both on camera and off . . .”

Aside from the two statements quoted above from O’Brien’s book, the additional allegedly defamatory statements specified in the complaint are oral or other written statements by O’Brien that Trump “adds zeros here and there”; he is “a figure out of a fairy-tale world of his own creation”; he “doesn’t have much money to invest”; he is “a cartoon figure. . . he’s Baby Huey with P.T. Barnum mixed in”; he is “not a good businessman . . . as a businessman, he is a train wreck,”; his “net worth is definitely inflated. *Forbes Magazine* puts his worth at \$2.7 billion, but I am almost certain that is a complete work of fiction”; “Donald represents success, big shiny buildings, shiny wives, airplanes. And to someone outside of NY he represents the apex of business. In reality he is the walking embodiment of financial pornography. He is a comical unrealistic version of what business is about”; “a cursory examination of Trump’s finances suggests that his claims of being a multi-billionaire may be greatly exaggerated.”

<sup>2</sup>The complaint further alleges that “[d]efendants’ defamatory campaign, including their knowingly false statements dramatically understating his net worth, is clearly intended to damage Trump’s business, brand and reputation by, among other things, undermining the perception of Trump as a businessman of extraordinary means and ability (which he is), deterring those in the business community from dealing with him, and influencing the consuming public to avoid his goods and services. . . .By falsely stating that Trump is worth at least ten times less than his actual net worth, defendants maliciously and intentionally have undermined the public’s association of Trump with the pinnacle of success in business and the luxury lifestyle, and the financial community’s confidence in Trump’s considerable financial resources and success.”

O'Brien's supervisor. Although The Times published an excerpt from O'Brien's book in the Sunday business section on October 23, 2005, it is not named as a defendant in the underlying action. However, in the context of the instant proceeding to quash the subpoenas, The Times asserts that it was not involved in the writing, editing or researching of the book.

In support of the motion to depose Sulzberger, Keller and Ingrassia, Trump submitted an attorney's certification that their testimony was "absolutely indispensable" to establish "actual malice" by O'Brien, and "is reasonably likely to lead to the discovery of admissible evidence."<sup>3</sup> Specifically, Trump argued that discovery was necessary from Sulzberger, Keller and Ingrassia to determine what conversations they had about O'Brien's alleged efforts "to inappropriately influence" The Times to accept first serial rights to the book, and to determine the efforts made by The Times "to ensure compliance with internal standards concerning the use of confidential sources." As to Sulzberger alone, Trump asserted that he needed to be questioned about: 1) his September 6, 2005 e-mail correspondence with O'Brien, when O'Brien wrote that portions of the book would make Trump "go ballistic"; 2) about his 2005 lunch meeting with Trump and O'Brien, when they discussed the real estate business; and 3) any other conversations Sulzberger may have had with O'Brien after that lunch meeting. Trump also argued that Keller needed to be questioned about the details of any conversations he had with O'Brien about Trump's lawsuit, and that both Keller and Ingrassia need to be questioned about O'Brien's alleged "contemplated departure" from The Times and his transfer to the Sunday business section in May 2006.

On December 7, 2007, the Hon. Michael J. Kassel of New Jersey Superior Court granted

---

<sup>3</sup>Most of the attorney's certification focuses on reasons for deposing Ingrassia, who is O'Brien's direct supervisor at The Times. Ingrassia not a party to this motion and presumably has no objection, at least at this time, to the subpoena served on him.

Trump's motion on the record. In considering the motion, Judge Kassel reasoned that as a public figure, Trump must establish actual malice and that "in a classic [defamation] case, there is very little direct evidence of reckless indifference, it's all circumstantial." While acknowledging that Sulzberger, Keller and Ingrassia "occupy some prominent positions" with The Times, Judge Kassel found that the information sought was not privileged or confidential, there was no "real prejudice" to defendants, there was a "good faith basis for making such request," and the depositions were not "a wild fishing expedition or an attempt to harass or intimidate" the deponents or The Times. Addressing possible objections by the deponents or The Times, Judge Kassel ruled that as non-parties, their objections would have to be raised in New York after the subpoenas were served, and that he was only "looking at whether or not the defendants are prejudiced." Judge Kassel concluded that "[t]he bottom line is this, and I can't give a better reason, other than the fact that my sense that it's not a wild goose chase. . . . I'm going to permit the depositions, at least from New Jersey's end."

On March 19, 2008, Trump filed an ex parte application in the Supreme Court of the County of New York, for an order pursuant to CPLR 3201(e) authorizing New York service of subpoenas ad testificandum and duces tecum on Sulzberger, Keller and Ingrassia. On that same day, the Hon. William J. Davis issued an ex parte order granting the application, and directing Sulzberger, Keller and Ingrassia to appear for depositions, and to produce the demanded documents. Sulzberger and Keller<sup>4</sup> are now moving to quash the subpoenas, arguing that they impose an unreasonable burden on senior executives of a non-party who have no direct knowledge of the facts in the dispute, and that the "tangential information" sought from these

---

<sup>4</sup>As noted above, Ingrassia is not participating in the motion to quash.

witnesses is not legitimately needed in the New Jersey action.

CPLR 3102(e) provides that when a court in another state issues a mandate or commission requiring testimony by a New York witness, the witness “may be compelled to appear and testify in the same manner and by the same process as may be employed for the purpose of taking testimony in actions pending in the state.” CPLR 3102(e). Under section 3102(e), a New York court can order the testimony of a witness or compel the production of documents in aid of an action pending outside the state. The purpose of CPLR 3102(e) is to make available the mechanism of New York courts to secure disclosure from persons subject to New York jurisdiction for use in an action in any other jurisdiction. See Kirkland & Ellis v. Chadbourne & Parke LLP, 176 Misc2d 73, 76-77 (Sup Ct, NY Co 1998); 7B McKinney’s §3102, Commentary C3102:9 at 500-500. “It is appropriate for the Sister State court which has the underlying case, and is therefore in a better position to determine the appropriate scope of disclosure, to make the threshold determination as to whether to permit the discovery. The New York court’s role is necessarily more limited.” Matter of Welch, 183 Misc2d 890, 891 (Sup Ct, NY Co 2000).

If the court in another state permits the discovery, the New York “court’s inquiry with respect to objections raised by persons required to testify pursuant to CPLR 3102(e) is limited to determining (1) whether the witnesses’ fundamental rights are preserved; (2) whether the scope of inquiry falls within the issues of the pending out-of-state action; and (3) whether the examination is fair.” Matter of Ayliffe & Cos, 166 AD2d 223, 224 (1<sup>st</sup> Dept 1990), lv app den 76 NY2d 714 (1990) (citing Matter of Brandes v. Harris, 78 AD2d 638, 639 [2<sup>nd</sup> Dept 1980]). “The courts ‘will not prejudge the materiality or the competency of the evidence in a cause pending in

another jurisdiction and will afford the widest possible latitude in the conduct of such examinations.” Id (quoting Matter of Roberts, 214 AD 271, 275 [1<sup>st</sup> Dept 1925]).

Notwithstanding the foregoing, New York courts retain discretionary authority under CPLR 3103(a) to issue a protective order or to quash a subpoena issued pursuant to CPLR 3102(e), due to over breadth or to prevent unnecessary harassment, see Matter of Dier, 297 AD2d 577 (1<sup>st</sup> Dept 2002), Law Office of Paul A. Lange v. Roman Catholic Diocese of Dallas, 245 AD2d 118, 119 (1<sup>st</sup> Dept 1997), due to an independent determination that the material sought is not critical or necessary, see Brown & Williamson Tobacco Corp. v. Wigand, 228 AD2d 187 (1<sup>st</sup> Dept 1996), app withdrawn 90 NY2d 901 (1997), or due to the inclusion of material protected by the attorney-client privilege, see Bombadier Capital Inc. v. Schoengold Sporn Laitman & Lometti P.C., 46 AD3d 323 (1<sup>st</sup> Dept 2007), Kirkland & Ellis v. Chadbourne & Parke, supra. These cases require this court to exercise its discretion and review the subpoenas under the standards enumerated above, rather than simply “rubber stamping” the determination of the New Jersey court. See id at 77.

The New Jersey court agreed with Trump in ruling that the testimony of Sulzberger and Keller is relevant to the issue of actual malice. To sustain a claim for defamation under both New Jersey and New York law, Trump, as a public figure, is required to prove that O’Brien’s statements are false and that O’Brien published such statements with “actual malice,” that is with knowledge that they were false, or with reckless disregard of whether they were false. See New York Times Co. v. Sullivan, 376 US 254, 279 (1964); Lynch v. New Jersey Education Ass’n, 161 NJ 152, 165 (1999); Sweeney v. Prisoners’ Legal Services, 84 NY2d 786, 793 (1995). “To satisfy the actual malice standard, plaintiff must establish by clear and convincing evidence, that

defendant published the statement with ‘knowledge that it was false or with reckless disregard of whether it was false.’” DeAngelis v. Hill, 180 NJ 1, 13 (2004) (quoting New York Times Co. v. Sullivan, *supra*). To demonstrate reckless disregard, “plaintiff must show that the statements were published with a ‘high degree of awareness of their probable falsity.’” Id (quoting Garrison v. Louisiana, 379 US 64, 74 [1964]). In other words, “[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of the publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.” St. Amant v. Thompson, 390 US 727, 731 (1968); accord DeAngelis v. Hill, *supra* at 13. “A publisher’s hostility or ill will is not dispositive of malice.” Id at 14. “Although ‘[s]pite, hostility, hatred, or the deliberate intent to harm demonstrate possible motives for making a statement,’ only evidence demonstrating that the publication was made with knowledge of its falsity or a reckless disregard for its truth will establish the actual malice requirement.” Id (quoting Lynch v. New Jersey Education Ass’n, *supra* at 166-167).

Here, a close examination of Trump’s discovery request reveals that to a large extent the scope of the inquiry does not bear on the issue of actual malice raised in the underlying defamation action, and that much of the information is essentially sought for the collateral purpose of impeaching O’Brien. See Matter of Ayliffe & Cos, *supra* at 297. For example, Trump seeks to question Sulzberger and Keller about O’Brien’s alleged efforts “to inappropriately influence” The Times to acquire first serial rights to the book, which Trump asserts is “necessary as to O’Brien’s credibility.” In seeking to question Sulzberger and Keller about the Times’ efforts “to ensure compliance with internal standards concerning the use of confidential sources,” Trump likewise asserts that such information is necessary “to assess”

O'Brien's "veracity." Moreover, even if O'Brien represented that he observed the same professional methods and tools in writing the book as he would in writing an article for The Times, since O'Brien did not write the book in his capacity as a reporter for The Times, The Times could not have an interest in imposing its own standards on O'Brien in his capacity as the author of the book.

As to Keller alone, the information Trump seeks about O'Brien's alleged "contemplated departure" from the Times and his "transfer" to the Sunday business section in May 2006, bears no relationship to the issue of actual malice. Notably, the New Jersey court previously ruled that O'Brien's personnel file and other documents relating to his employment at The Times are not relevant to the underlying action.<sup>5</sup> Based on O'Brien's deposition testimony, Trump also seeks to question Keller about the details of any conversations he had with O'Brien about Trump's lawsuit. Specifically, at the deposition, O'Brien was asked if he had "ever spoken to Mr. Keller about the lawsuit," and O'Brien responded that he had one "brief" conversation with Keller about the lawsuit "shortly" after it was filed, but O'Brien could not recall the details. Keller's single isolated conversation about Trump's lawsuit which took place after publication of O'Brien's book, is at best, peripherally related to the issue of actual malice as defined above. In view of the foregoing, none of the inquiry addressed to Keller falls within the issue of actual malice, and the subpoena served on him is quashed. Id.

The balance of the testimony sought from Sulzberger alone is directed at his e-mail

---

<sup>5</sup>On April 12, 2007, the Hon. Irvin J. Snyder, Superior Court of New Jersey, issued a decision on the record, quashing without prejudice, Trump's subpoena for production of documents by The Times, which requested, *inter alia*, O'Brien's personnel file and other employment related documents.

correspondence with O'Brien on September 6, 2005, when O'Brien wrote that parts of the book would make Trump "go ballistic," and Sulzberger's lunch meeting with O'Brien and Trump in 2005, prior to the publication of the book, when they discussed the real estate business. Since Sulzberger has personal and direct knowledge of the details of these events, which arguably may have some significance bearing on the issue of actual malice, Sulzberger's deposition shall be limited to the subject matter of the e-mails and the lunch meeting.

Accordingly, it is hereby

ORDERED that the motion to quash the subpoena served on William Keller is granted and the subpoena is quashed; and it is further

ORDERED that the motion to quash the subpoena served on Arthur Ochs Sulzberger, Jr., is granted to the extent that the subject matter of his deposition shall be limited to his September 6, 2005 e-mail correspondence with Timothy L. O'Brien, and to his 2005 lunch meeting with Timothy L. O'Brien and Donald J. Trump.

DATED: August 20, 2008

ENTER:



J.S.C.