SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

MORDECHAI TENDLER,

Plaintiff,

-against-

BAIS KNESSES OF NEW HEMPSTEAD, INC., d/b/a THE RAV ARON JOFFEN COMMUNITY SYNAGOGUE,

Defendant.

Index No. 2284/2006

Assigned to:
Hon. Victor J. Alfieri

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO QUASH SUBPOENA

PRELIMINARY STATEMENT

This memorandum of law is respectfully presented by Plaintiff, Mordechai Tendler ("Plaintiff" or "Tendler"), in opposition to the motion to quash a subpoena served upon Google, Inc. ("Google"), made by certain the anonymous bloggers, JewishSurvivors, JewishWhistleblower, NewHempsteadNews and RabbinicIntegrity ("Movants").

For the reasons set forth herein, the motion should be denied in its entirety. Any defect in the Subpoena regarding notice of the circumstances or reasons the disclosure was being sought has been cured by the service of an amended subpoena on Google, Inc., dated April 6, 2011 ("the Subpoena").

The other basis for the motion should also be denied, because the requested evidence is extremely relevant on the issue of whether Defendant, through its officers, directors or members, has impeded and frustrated Plaintiff's ability to obtain new employment, so that Defendant should not be allowed to assert its affirmative defense of failure to mitigate damages. Should Plaintiff be able to demonstrate that Defendant is connected to such postings, Defendant would be precluded from

presenting the mitigation of damages defense at trial.

STATEMENT OF FACTS

The relevant facts have been fully set forth in the accompanying affidavit of Rabbi Mordechai Tendler, dated May 12, 2011. For the sake of brevity, the facts will not be repeated here., but will be referred to herein, when necessary, as follows: "(Tendler ¶ __)" and the exhibits annexed thereto will be referred to as follows: "(Exhibit "__")".

In brief, Rabbi Tendler commenced this action against Defendant for breaching his employment contract when it terminated him as rabbi of the synagogue. (Tendler ¶ 23) By Order dated June 3, 2008, the Appellate Division, Second Department, granted Rabbi Tendler summary judgment on liability and returned the case to the Supreme Court for a determination of damages on Plaintiff's breach of contract claim. (Tendler ¶ 25)

Central to the issue of damages is Rabbi Tendler's efforts and ability to obtain other employment and the affirmative defense raised by Defendant of failure to mitigate damages. (Tendler ¶ 29)

It is Rabbi Tendler's belief that officers, directors or members of Defendant have made it impossible for him to mitigate his damages. By spreading malicious gossip about Rabbi Tendler and otherwise discouraging potential employers, *inter alia*, through the blogs that are the subject of the Subpoena, the officers, directors or members of Defendant have made it impossible for him to obtain new employment and thereby mitigate damages. (Tendler ¶ 9-19, 30-43)

Thus, Rabbi Tendler is seeking to discover and determine the connection between the owners of the subject blogs and Defendant; something only attainable by discovering the identities of the subject bloggers. (Tendler ¶ 43, 64, 73, 94, 95)

POINT I

THE AMENDED SUBPOENA COMPLIES WITH CPLR 3101

Movants argue that the Subpoena is facially defective because it failed to contain notice of the circumstances requiring the discovery sought.

As acknowledged by Movants, in *Kooper v. Kooper*, 74 A.D.3d 6, 901 N.Y.S.2d 312 (2nd Dept. 2010), the Second Department abandoned its longstanding requirement of "special circumstances" when disclosure is sought from a nonparty, stating

> we disapprove further application of the 'special circumstances' standard in our cases, except with respect to the limited area in which it remains in the statutory language, *i.e.*, with regard to certain discovery from expert witnesses (*see*, CPLR 3101[d][1][iii]).

Id. supra, 74 A.D.2d at 16.

All that is now needed in this Department under CPLR 3101(a)(4), is just something a bit more than "mere relevance and materiality" to obtain disclosure from a nonparty.

Moreover, contrary to Movants statement, the statute does not state that the notice of "circumstances or reasons" must be contained in the subpoena itself. Both the First Department, in *Velez v. Hunts Point Multi-Serv. Ctr., Inc.*, 29 A.D.3d 104, 111, 811 N.Y.S.2d 5, 10-11 (1st Dept 2006) and the Fourth Department, in *Hauzinger v. Hauzinger*, 43 A.D.3d 1289, 842 N.Y.S.2d 646 (4th Dept 2007), explicitly allow a party who has not provided the circumstances or reasons for the disclosure on the face of the subpoena served on a nonparty, to do so in its opposition papers on a motion to quash.[1]

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[1] All of Movants' citations to Third Department cases are misplaced since, unlike the other Departments, the Third Department still expressly adheres to the "special circumstances" rule. *Matter of John H.*, 56 A.D.3d 1024, 1026, 868 N.Y.S.2d 790, 792 (3rd Dept 2008).

While the *Kooper*, decision left open the question of whether the Second Department will follow the rulings of those departments in this regard, in this case we need not reach that question any longer, since the Subpoena was amended to remedy any procedural defects that may have been present in the original Subpoena. (Tendler ¶ 3, 5-6) *See*, *Gilani v Kumar*, 2011 NY Slip Op 30863U, 2011 N.Y. Misc. LEXIS 1506 (Sup Ct, Nassau County, 2011)

The Subpoena now contains the following notice:

> **PLEASE TAKE NOTICE**, that you are required to appear and produce the above mentioned documents and information, as you are deemed and are likely witness to and/or have obtained and/or been provided with information, documents and things which are material and necessary to the prosecution of this action *and that such items, things, documents, information is material and necessary on the issue of damages and the defenses asserted by the defendants herein including but not limited to the defense of failure to mitigate damages for which you have material evidence as requested herein.* (Emphasis added.)

(Tendler ¶ 6, Movants' Exhibit "P")

Thus, since the Subpoena now provides adequate notice of the circumstances for which the discovery is sought and, as set forth in detail below, the requested evidence is relevant on the issue of whether Defendant, through its officers, directors and/or members, has made it impossible for Rabbi Tendler to obtain new employment to mitigate his damages, the motion to quash should be denied.

POINT II

THE SUBPOENA IS PROPER AND SHOULD BE ENFORCED

Movants argue that the subpoena violates their First Amendment rights of anonymous speech. However, those rights are not without limit.

While the First Amendment protects anonymous speech, "[a]nonymous speech, like speech from identifiable sources, does not have absolute protection." *Sony Music Entertainment Inc. v. Does 1-40*, 326 F.Supp.2d 556, 562-63 (S.D.N.Y. 2004). Thus, there is no First Amendment right for the anonymous speaker to engage in obscenity, *Roth v. United States*, 354 U.S. 476, 483, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957), libel, *Beauharndis v. Illinois*, 343 U.S. 250, 266, 77 S.Ct. 725, 96 L.Ed. 919 (1952), copyright infringement, *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 555-56, 105 S.Ct. 2218, 85 L.Ed. 2d 588 (1985), misleading commercial speech, *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of NY*, 447 U.S. 557, 563-64, 100 S.Ct. 2343, 75 L.Ed. 351 (1980), or use of "fighting words," *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573, 62 S.Ct. 766, 86 L.Ed. 1031 (1942).

> Those who suffer damages as a result of tortious or other actionable communications on the Internet should be able to seek appropriate redress by preventing the wrongdoers from hiding behind an illusory shield of purported First Amendment rights." *In re Subpoena Duces Tecum to America Online, Inc.*, 2000 WL 1210372 (Va.Cir.Ct.), revd. on other gds, 261 Va. 350, 542 S.E.2d 377 (Va.Sup.Ct.2001) (quoted in *Public Relations Society of America, Inc. v. Road Runner High Speed Online, supra.*)

Cohen v. Google, Inc., 25 Misc.3d 945, 952, 887 N.Y.S.2d 424 (Sup. Ct., 2009)

As set forth herein, Rabbi Tendler only seeks to identify the bloggers to obtain evidence for use in the current action for breach of contract. This is not a prelude to an action for defamation.

Accordingly, as acknowledged by Movants, on p. 15 of their memorandum of law, the test to be applied for the disclosure of the identity of the bloggers is the four part test set forth in *Doe v. 2TheMart.com*, 140 F. Supp. 2d 1088 (W.D. Wash. 2001)

Under the *2TheMart.Com*, test, the Court considers (1) whether the subpoena was issued in good faith; (2) whether the information sought relates to a core claim or defense; (3) whether the identifying information is directly and materially relevant to that claim or defense; and (4) whether information sufficient to establish or to disprove that claim or defense is unavailable from any other source. *Doe v. 2TheMart.com*, 140 F. Supp. 2d at 1095. *See also, Sedersten v. Taylor*, 2009 U.S. Dist. LEXIS 69598 (W.D. Mo. Aug. 10, 2009); *Indep. Newspapers, Inc. v. Brodie*, 407 Md. 415, 966 A.2d 432 (2009); *McVicker v. King*, 266 F.R.D. (W.D. Pa. 2010)

Plaintiff has clearly met all four of these criteria:

(1) The Subpoena Was Issued in Good Faith

Plaintiff acted in good faith in having the Subpoena issued. (Tendler ¶ 96). There is no basis for finding otherwise. Rabbi Tendler has valid reasons for believing that Movants are connected to Defendant and, therefore, the Subpoena was issued for proper purposes. (Tendler ¶ 33-42)

(2) and (3) The Information Sought Not Only Relates to a Core Claim or Defense, it Is Clearly Materially Relevant to That Claim or Defense

After the Appellate Division's ruling, the sole remaining issue on Plaintiff's case is the amount of damages. Under New York law, there is a general requirement that a party suing for breach of an employment contract, absent a liquidated damages provision, must mitigate his damages by seeking to obtain other like employment. *Cornell v. T. V. Dev. Corp.*, 17 N.Y.2d 69, 74, 268 N.Y.S.2d 29, 215 N.E.2d 349 (1966); *Abady v. Interco, Inc.*, 76 A.D.2d 466, 478, 430 N.Y.S.2d 799

(1st Dept. 1980)

Accordingly, Defendant had raised an affirmative defense of failure to mitigate damages in this case (Exhibit "H"), which remains in the case even after taking into consideration the Appellate Division reversal and award of judgment on liability.

As with all stages of contract interpretation, there is a covenant of good faith and fair dealing. Accordingly, the law in New York is that when a party makes it impossible for the other party to perform an obligation, the performance of such obligation is excused. It is the general rule that a party cannot rely on the failure of another to perform when he or she has frustrated or prevented the performance. *ADC Orange, Inc. v. Coyote Acres, Inc.*, 7 N.Y.3d 484, 824 N.Y.S.2d 192, 857 N.E.2d 513, (2006).

> An allegation, therefore, that title did not close because of the vendor's neglect and refusal to discharge liens against the property is sufficient to avoid the defense of non-performance of a condition precedent under the well-established rule that one may not take advantage of a condition precedent, the performance of which he himself has rendered impossible. *Sibbald v. Bethlehem Iron Co.*, 83 N.Y. 378, 384, 38 Am.Rep. 441; *Vandegrift v. Cowles Engineering Co.*, 161 N.Y. 435, 443, 55 N.E. 941, 48 L.R.A. 685

Stern v. Gepo Realty Corporation, 289 N.Y. 274, 277, 45 N.E.2d 440 (1942)

As stated by the Court of Appeals in *Dolan v Rodgers*, 149 N.Y. 489, 491, 44 N.E. 167 (1896):

> If, however, the impossibility arises, even indirectly, from the acts of the promisee, as, for instance, where one of the contracting parties so conducts himself as to subject the other to an action by some third person, if he duly performs the contract, it is a sufficient excuse for non-performance. (Citations omitted)

Dolan v Rodgers, supra, 149 N.Y. at 491.

See also, *Vandegrift v. Cowles Engineering Co.*, 161 N.Y. 435, 443, 55 N.E. 941 (1900) ("if the impossibility arises, directly or even indirectly from the acts of the promisee, it is a sufficient excuse for non-performance. This is upon the principle that he who prevents a thing may not avail himself of the non-performance which he has occasioned."); *Kooleraire Service & Installation Corp. v. Board of Education*, 28 N.Y.2d 101, 106, 320 N.Y.S.2d 46, 268 N.E.2d 782 (1971) (general rule is that a party cannot rely on the failure of another to perform a condition precedent where he has frustrated or prevented the occurrence of the condition).

Thus, should it be proven that Defendant was involved in frustrating Rabbi Tendler's ability to gain other new employment as a rabbi, even indirectly, the affirmative defense of failure to mitigate damages must be dismissed.

Accordingly, it is vital to Plaintiff's ability to proceed on the damages claim and obtain dismissal of that affirmative defense, to learn the identity of the bloggers in order to establish the connection between the bloggers and Defendant herein. (Tendler ¶ 29, 64) Without such knowledge, Plaintiff will be unable to prove that Defendant's affirmative defense of mitigation of damages should be dismissed because Defendant, through the bloggers, has impeded and frustrated Plaintiff's ability to mitigate damages by foreclosing him from obtaining new employment.

There are good grounds to think that a connection between Movants and Defendant exists.

Movants' blogs contain posts that show an intimate knowledge the inner workings of Defendant, including invitations to Defendant's board and membership meetings, and details of such meetings and other aspects of the inner workings of Defendant. (Tendler ¶35, Exhibit "A," p. 5, 15, 28-29, Exhibit "C," 2, 4, Exhibit "D," p. 10, 13, 17, 20, 24, 28) Some posts contained letters and emails to and from Defendant's board of directors as well as other official documents related to the

board. (Tendler ¶ 35, (Exhibit "A," p. 5, 9-10, 14-15, 32)

This strongly indicates that Movants are either officers, directors or members of Defendant or working in concert with officers, directors or members. Moreover, it appears that these blogs formed a mode of communication among Defendant's members and its Board which was used to fabricate facts used to smear Plaintiff's reputation on the internet.

In addition, the postings on another blog, www.canonist.com, show that one of the Movants, NewHempsteadNews, may be Abraham Kiss (Tendler ¶ 38, Exhibit "J"), who is a very involved and active member of Defendant. In fact, NewHempsteadNews admits that he attended Defendant's membership meetings. (Tendler ¶ 34, Exhibit "A," p. 15-16) Posts by RabbinicIntegrity contain statements such as, "the community in which we all live" and "as long as we stick together as one Kehilah of Monsey," and discussed the details of many classes that Rabbi Tendler gave at the synagogue. (Tendler ¶ 37, Exhibit "D," p. 21, 28)

Finally, and quite significantly, Movants' choice of Jeffrey Cohen to be co-counsel for them is very telling and indicative of the connection between Movants and Defendant. Indeed, it is rather illustrative as to the necessity and purpose of the Subpoena, and why this motion should be denied. Mr. Cohen is personally very deeply involved in this controversy. He not only is, or was, a member and officer of Defendant (Tendler ¶ 39, Exhibit "K"), but he has spent countless hours extensively posting dozens of entries on blogs about Rabbi Tendler in a highly negative and inflammatory manner. (Tendler ¶ 39, Exhibit "L")

(4) There Is No Alternative Source for the Information

Finally, Plaintiff has shown that the information is unavailable from any other source. Based on the abject failure of Defendant to comply with the rules of discovery in this case (Tendler ¶ 44-

65), it is clear that Defendant will never admit to any connection with bloggers.

Defendant has lied about the existence of material documents (Tendler ¶ 44, 58-62) and refused to present witnesses who, based on their relationship with Defendant, are under its control. (Tendler ¶ 46-57)

Accordingly, the only way for Plaintiff to prove a connection is to go to a third-party source, in this case, Google, for the information. (Tendler ¶ 65, 94) Once Plaintiff obtains the identity of the bloggers from Google, he will then be in a position to prove the connection between the bloggers and Defendant. (Tendler ¶ 64, 95)

For the reasons set forth in Rabbi Tendler's Affidavit (Tendler ¶¶ 81-93), neither Plaintiff nor this Court should rely upon any offer of a self-serving representation by Movants' attorney that there is no such connection between Defendant and the blogs.

With regard to notice of the Subpoena, since Plaintiff had no knowledge of the identity of the bloggers, Plaintiff reasonably relied on Google's assertion that it would provide notice to the bloggers. (Tendler ¶ 76, Exhibit "S") And, in point of fact, the bloggers *actually* obtained timely notice and moved to quash before Google provided any information to Plaintiff. (Tendler ¶ 80)

Likewise, the above facts demonstrate that Plaintiff has also met the applicable test enunciated in *Dendrite v Doe*, 342 N.J. Super. 134, 775 A.2d 756 (App. Div. 2001), as it has been applied by some New York courts. *Ottinger v. Non-Party The Journal News*, 2008 N.Y. Misc. LEXIS 4579, 36 Media L. Rep. (BNA) 2018, 240 N.Y.L.J. 10 (N.Y. Sup., 2008)

That test requires: (1) notice, (2) specificity, (3) a *prima facie* claim together with sufficient evidence supporting each element of the claim, and (4) balancing the First Amendment right of anonymous free speech against the strength of the *prima facie* claim presented and the necessity for

the disclosure of the anonymous individual's identity to allow the claim to properly proceed

In this case, Movants have been given notice and an appropriate means of defending their anonymity. (Tendler ¶ 74-80)

Plaintiff has identified the specific speech which affects his rights. (Tendler ¶ 13-16, Exhibits "A," "B," "C" and "D,")

As set forth above in Point II (2) and (3), Plaintiff has shown that it has a valid claim to dismiss the affirmative defense of failure to mitigate damages and has presented evidence for each element of that claim.

Since, as explained above in Point II (4), Plaintiff cannot proceed with his claim to dismiss the mitigation defense without the identity of the Movants (Tendler ¶ 42, 64, 73), the balance is in favor of obtaining the disclosure from Google.

POINT III

THERE IS NO BASIS TO AWARD SANCTIONS AGAINST PLAINTIFF

Movants request, pursuant to 22 NYCRR § 130, that an award of sanctions should be imposed against Plaintiff for allegedly frivolous conduct.

Other than a conclusory statement at the very end of Movant's memorandum of law, that because Plaintiff refused to withdraw the Subpoena and "forcing" Movants to have to make the motion to quash, Movants offer no support for their contention that Plaintiff's conduct is frivolous. In fact, Movants have made no showing whatsoever that Plaintiff's conduct in issuing the Subpoena has been frivolous in any way, as required and as defined in 22 NYCRR §130-1.1(c).

As set forth above, in Point II, Plaintiff has valid grounds for the issuance of the Subpoena, and in, fact, firmly believes that the motion to quash should be denied.

The issue before this Court on this motion is the propriety of serving the Subpoena on Google seeking identification information of anonymous blog owners. As conceded by Movants, there are no appellate decisions in New York on the issues raised by the Subpoena. Thus, since these are valid issues, raised in good faith, sanctions are inappropriate. *See*, *Ain v. Glazer*, 216 A.D.2d 428, 628 N.Y.S.2d 181 (2nd Dept. 1995) (appeal not frivolous since it raised valid issues); *Mazo v. NYRAC, Inc.*, 191 A.D.2d 61, 595 N.Y.S.2d 241 (2nd Dept. 1993) (where motion for change of venue had both legal and factual basis, award of sanctions was reversed); *Rosmarin v. Lamontanaro*, 261 A.D.2d 599, 690 N.Y.S.2d 719 (2nd Dept. 1999) (appeal not frivolous even though Appellate Division had earlier affirmed denial of summary judgment motion, where appeal predicated upon issues not raised in summary judgment motion).

Additionally, in determining whether conduct can be considered frivolous, Part 130 calls upon courts to consider, among other things, "whether or not the conduct was continued when its lack of legal or factual basis was apparent." 22 NYCRR § 130-1.1(c). Here, Movants have not shown that there is any lack of legal or factual basis for the issuance of the Subpoena or the refusal to withdraw it.

Moreover, 22 NYCRR §130-1.1(c) explicitly states that frivolous conduct includes the making of a frivolous motion for costs or sanctions. The fact that Movants made such a motion for sanctions without setting forth any basis therefor, and, in fact, making no argument whatsoever to support the award of sanctions, demonstrates that the motion for sanctions, itself, is frivolous.

Based on the foregoing, Movants request for sanctions must be denied. Should the Court determine that it is proper under the circumstances at bar, then under 22 NYCRR §130-1.1, this Court should award sanctions against Movants or their attorneys for making the sanctions request without any basis, especially in light of the personal animus towards Rabbi Tendler by Movants' counsel shown by posting extrajudicial statements on public blogs, relating to the character, credibility, and reputation of Plaintiff, that have a substantial likelihood of materially prejudicing the adjudicative proceedings in this matter (Tendler ¶ 86-89, Exhibit "T"), in apparent violation of Rule 3.6 of the New York Rules of Professional Conduct, or by blogging dozens of negative posts about Plaintiff. (Tendler ¶ 39, 90-92, Exhibit "L")

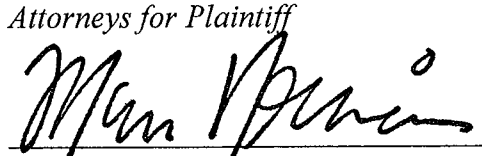
CONCLUSION

For all the foregoing reasons, it is respectfully requested that this Court deny the motion to quash in its entirety, direct Google to comply with the Subpoena and award such other and further relief as the Court deems just and proper.

Dated: New York, New York
May 12, 2011

Respectfully submitted,

NEIMAN & MAIRANZ, P.C.
Attorneys for Plaintiff

By: 

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