SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: EDMEAD Justice

PART 35

HOME BOY OFFICE, INC.

-v-

CHRISTY LASTER

INDEX NO. 153946/19

MOTION DATE 5/15/19

MOTION SEQ. NO. 01

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

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

Annexed is the Memorandum Decision supplementing the Short Order dated May 15, 2019.

It is hereby

ORDERED that the application by Petitioner to quash the subpoena served by Respondent is granted in its entirety; and it is further

ORDERED that counsel for Petitioner shall serve a copy of this order, along with notice of entry, on all parties within 10 days of entry.

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

Dated: 6/5/2019

CAROL R. EDMEAD, J.S.C.

HON. CAROL R. EDMEAD J.S.C.

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------X **DECISION AND ORDER**

In the Matter of the Application of

HOME BOX OFFICE, INC.,

Petitioner,

Index No.: 153946/2019
Motion Seq. No. 001

For an Order Pursuant to CPLR 3119(e) and CPLR 2304 Quashing Subpoena Duces Tecum and for a Protective Order Pursuant to CPLR 3103 Served by:

CHRISTY LASTER,

Respondent,

In the action entitled *State of Florida v Laster*, No. F-16004530 in the Circuit Court of Miami Dade County in the State of Florida.

----------X

CAROL R. EDMEAD, J.S.C.:

In this special proceeding, Petitioner moves to quash the subpoena served upon it by Respondent, or in the alternative for a protective order vacating the subpoena, pursuant to CPLR §§ 3119(e), 2304, and 3103. In reply, Respondent opposes the motion. For the reasons set forth below, the motion is granted, and the subpoena issued by Respondent is quashed in its entirety.

BACKGROUND

Petitioner owns and operates the HBO premium television entertainment service, which offers a variety of programming including original series, movies, comedy specials, and documentaries. The latter are produced by HBO Documentary Films, which released "Rock and a Hard Place" in 2017. "Rock and a Hard Place" chronicles a rehabilitative six-month "bootcamp" program in Miami-Dade County, Florida incarcerated young people are afforded the

opportunity to complete in lieu of a harsher prison sentence (NYSCEF doc No. 3, ¶ 4). The

documentary was produced by famed wrestler and actor Dwayne "The Rock" Johnson, who also appears in the program and interacts with the youth. Respondent is a former correctional officer at the program who was employed there at the time Petitioner filmed the documentary. She is the defendant in a criminal action currently pending in the Circuit Court of Miami-Dade County, Florida, where she is facing a litany of charges including bribery, grand theft, and extortion (NYSCEF doc No. 16, ¶ 4).

On March 27, 2019, counsel defending Respondent in the Florida action served Petitioner with a subpoena issued under the Uniform Interstate Deposition and Discovery Act, CPLR § 3119. The subpoena sought "any and all recordings including, but not limited to, a copy of the documentary itself and any 'outtakes' from the [documentary]" (NYSCEF doc No. 4). Respondent contends that the "outtakes," footage Petitioner filmed but ultimately did not incorporate into the final documentary, are highly material and necessary to her defense in the criminal proceeding. Respondent is charged in part with extorting money from the program's cadets and stealing from a lockbox where valuables were kept in an office room, footage of which Respondent argues is captured in the outtakes. In response to the subpoena, Petitioner notified Respondent by letter that the subpoena was unnecessary for the documentary itself, as it is publicly available to view, and that the outtakes were protected pursuant to New York's Shield Law (NYSCEF doc No. 5). After receiving no response, Petitioner filed an Order to Show Cause seeking to quash the subpoena pursuant to CPLR § 2304, or in the alternative for a protective order pursuant to CPLR § 3103 vacating the subpoena.

The Court held oral argument on Petitioner's Order to Show Cause on May 15, 2019.

DISCUSSION

A subpoena duces tecum cannot be used as a discovery device or fishing expedition (*Mestel & Co., Inc. v Smythe Masterson & Judd, Inc.*, 215 A.D.2d 329, [1st Dept 1995]). Its purpose is to compel the production of specific documents that are relevant and material to the factual issues in a pending proceeding (*Matter of Terry D.*, 81 N.Y.2d 1042, [1993]). The standard for a motion to quash is whether the requested information is utterly irrelevant to any proper inquiry (*Ayubo v. Eastman Kodak Co., Inc.*, 158 A.D.2d 641, 551 N.Y.S.2d 944 [2nd Dept 1990]). Additionally, pursuant to CPLR § 3103, the court may "make a protective order denying, limiting, conditioning or regulating the use of any disclosure device" and "[s]uch order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts."

Petitioner contends that the subpoena should be quashed as the outtake footage Respondent seeks is guarded by New York's Shield Law, which protects journalistic information that may otherwise be relevant and thus would usually be proper under a subpoena[1]. The Shield Law is more than simply a codification of the common-law journalist's privilege. New York extends broader protection to the press than that which the common-law provides (*see American Sav. Bank, FSB v UBS Paine Webber, Inc. [In re Fitch, Inc.]*, 330 F3d 104, 109 [2d Cir 2003] [noting, in a case involving whether the Shield Law applies to information-gathering organizations, that the parties agreed that "the New York rule is more journalist-protective" than the common-law privilege]).

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[1] The Shield Law provides in relevant part that:

> "Notwithstanding the provisions of any general or specific law to the contrary, no professional journalist or newscaster ... shall be adjudged in contempt by any court ... for refusing or failing to disclose any unpublished news obtained ... in the course of gathering or obtaining news ..."

(New York Civil Rights Law § 79-h)

The Court of Appeals, in *Matter of Holmes v Winter*, traced New York's tradition "of providing the utmost protection of freedom of the press" back to colonial times (22 NY3d 300, 307 [2013]). This tradition, the Court pointed out, is not only embodied in the Shield Law, but also in Article I, § 8 of the New York Constitution, which adopts "more expansive language" than the First Amendment of the Bill of Rights (*id.*). The Court concluded:

> New York public policy as embodied in the Constitution and our current statutory scheme provides a mantle of protection for those who gather and report the news--and their confidential sources--that has been recognized as the strongest in the nation. And safeguarding the anonymity of those who provide information in confidence is perhaps the core principle of New York's journalistic privilege, as is evident from our colonial tradition, the constitutional text and the legislative history of the Shield Law"

(*id.* at 310).

Over the years, the Legislature has amended to strengthen the protections New York offers to the press. The statute defines a "professional journalist" as:

> "one who, for gain or livelihood, is engaged in gathering, preparing, collecting, writing, editing filming, taping or photographing of news intended for a newspaper, magazine, news agency, press association or wire service or other professional medium or agency which has as one of its regular function the processing and researching of *news intended for dissemination to the public*; such a person shall be someone performing said function either as a regular employee or as one otherwise professionally affiliated for gain or livelihood with such medium of communication"

(Civil Rights Law § 79-h [a] [6] [emphasis added]).

Moreover, the statute renders information subject to the privilege, such as the names of confidential sources "inadmissible in any action or preceding or hearing before any agency" (*id.* at § 79-h [d]). There is another branch of the statute that grants a "qualified privilege" where news was "not obtained or received in confidence" (*id.* at § 79-h [c]). Under this qualified privilege, where confidential information or sources are not involved, the party seeking disclosure still faces a high evidentiary burden. In such cases, courts will not compel the

revealing of nonconfidential news 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" (Civil Rights Law § 79-h [c]). The statute is equally applicable to "any civil or criminal proceeding" and makes no distinction between documentary or physical evidence (Civil Rights Law § 79-h).

The Shield Law's qualified privilege for nonconfidential information clearly applies to Petitioner's documentary, as documentary filmmakers have been deemed journalists and are thus entitled to the privilege (*People v Hendrix*, 820 NYS 2d 411, 415, [Sup. Ct., Kings County 2006]. Additionally, as noted above, the statute very broadly defines a "professional journalist" as anyone gathering "news intended for dissemination to the public" in some sort of professional capacity (Civil Rights Law § 79-h [a] [6]). Although Respondent does not challenge the applicability of the Shield Law in his opposition papers, at oral argument Counsel contended that the involvement of Dwayne "The Rock" Johnson rendered the project a "celebrity reality TV show," as opposed to a "documentary" entitled to protection (Oral Argument tr. at 5-6). Petitioner disagrees with this categorization, and Respondent cites no authority for the notion that the mere involvement of a celebrity in a project renders it somehow incapable of being classified as a documentary, or that a celebrity known for other endeavors cannot be deemed a "journalist" under the statute. As discussed, *infra,* the statute's very broad definition of "professional journalist" encompasses anyone involved in news gathering. Furthermore, the Court notes that even were the project more entertainment-focused, the broad definition would still likely apply as long as one of the purposes of the project was disseminating news to the public about the youth incarceration program.

As the statute undoubtedly applies to the material, the Court must evaluate whether Respondent can satisfy her evidentiary burden under the three-prong test for nonconfidential news. Each element is discussed in turn.

Highly Material and Relevant

Under the first prong of the statute, the news sought must be highly material and relevant. Respondent argues that the outtakes include footage that is highly material and relevant to her defense creating reasonable doubt in the criminal proceeding regarding her interactions with cadets and other officers in the program. Additionally, the Florida court found that the footage was "material" to the underlying criminal case in an evidentiary hearing on the matter (NYSCEF doc No. 16, ¶ 8). However, the Shield Law requires a showing not just that the footage is material, but rather that it is "highly" material. The Florida court's ruling that the footage is material therefore is not *prima facie* evidence that the footage satisfies this first prong. Respondent nevertheless contends that the footage satisfies the first prong because various cadets testified that Petitioner filmed the office where the money was kept, and also filmed Respondent instructing cadets on the proper procedures for the money. Respondent also points to the balancing test for nonconfidential information that the Court of Appeals articulated in *People v Combest*, 4 NY3d 341 (2005). The Court noted that while the Shield Law applies to civil and criminal cases, in the latter, a "defendant's interest in nonconfidential material weighs heavy" (*id.* at 346-47). The Court concluded that "a reporter's privilege in nonconfidential materials does not easily overcome a criminal defendant's fair trial rights" (*id.*).

While Respondent is correct that her interest in a fair trial may outweigh Petitioner's privilege, the Court in *Combest* notably declined to articulate "what standard is constitutionally required in order to overcome a criminal defendant's substantial right to obtain relevant

evidence" (*id.)*. The Court merely determined that the defendant there had met his burden. However, *Combest* involved footage that contained various statements made by the defendant to the police, and its relevance to the underlying proceeding was thus not in dispute. There was also no other primary evidence, such as the testimony of a witness who would be subject to cross-examination. The critical difference here is that unlike in *Combest*, Respondent is not able to definitively state what is contained in the outtake footage, and primary evidence is available in the form of the cadets' testimony. In the email to Petitioner explaining the request, Respondent's counsel wrote, "[W]e *believe* there *may* be exculpatory information [in the outtakes]" (emphasis added) (NYSCEF doc No. 6). Additionally, as Petitioner points out, this documentary project involved filming throughout several months, and the outtakes constitute hundreds of hours of footage (Oral Argument tr. at 4). The request for "all" outtakes is thus overbroad, as even if some of the outtakes include footage relevant to Respondent, the vast majority of it likely has nothing to do with the underlying criminal proceeding.

While Respondent clearly hopes that information is contained in the outtakes that exonerates her from the criminal charges, the fact remains that Respondent has no actual confirmation of what footage is included. Respondent instead relies on testimony from cadets that Petitioner was filming "everywhere," and they saw cameras "all the time" (NYSCEF doc No. 16 at 13-14). However, given that the cadets were obviously not the ones operating the cameras, their testimony cannot be taken as definitive evidence of what is contained in the footage. Indeed, when Respondent's counsel asked a cadet if the orientation process at the boot camp was videotaped by Petitioner, the cadet answered, "I am not even sure" *(id.)* Counsel again asked if the boot camp's policies and procedures were filmed, and the cadet answered "No..." *(id.)*. The testimony provided does not indicate that any specific footage exonerating Respondent

is included in the outtakes; it is merely speculation about what *may* have been picked up by Petitioner's cameras. Since Respondent does not know what is actually contained in the outtakes, she cannot factually assert that the footage is highly material and relevant to her defense. Therefore, the first prong of the test for the disclosure of nonconfidential information is not satisfied.

Given that the statute requires that the information sought satisfies all three elements of the test, Petitioner has satisfied its burden of showing that the subpoena should be quashed on this ground alone. However, the Court writes separately to address that Petitioner's motion is proper under each element of the test.

Critical or Necessary to the Party's Claim

As with the highly material prong, the "critical or necessary" requirement has been interpreted very strictly to prevent undue interference with the work of journalists, even when weighted against the urgent requirements of litigants (*O'Neill v Oakgrove Constr. Inc.*, 71 NY2d 521, 528 [1988]). Courts have held that to satisfy this prong, a defendant must show that her defense "virtually rises or falls with the admission or exclusion of the proffered evidence…the 'virtually rises or falls' formulation should be applied to determine whether the critical or necessary test has been met" (*Krase v. Graco Children Prods. [In re National Broad. Co.]*, 79 F.3d 346, 351 [2d Cir. 1996] [internal citations omitted]). "The test is not merely that the material may be helpful or probative, but whether or not the defense of the action may be presented without it" (*In re Subpoena Duces Tecum to American Broad. Cos.*, 753 NYS 2d 919 922 [Sup. Ct. NY Cnty. 2001]) [internal citations omitted]).

Here, Respondent has not demonstrated that her defense in the underlying criminal trial ises or falls" with the admission of the outtake footage. Respondent argues that footage of the

room where the money was kept and footage of her providing proper instructions to cadets will provide reasonable doubt as to her guilt in the criminal trial. However, Respondent has not shown that this footage is the only way she can establish her defense of reasonable doubt. Respondent also contends that the footage is critical because there is conflicting testimony among the cadets regarding whether the money room was locked at all times and whether Respondent followed the proper procedures. As Respondent believes the outtakes contain footage of the office, it would help to impeach the incorrect testimony. However, courts have made it clear that the critical or necessary prong "does not have in mind general and ordinary impeachment material or matters which might arguably bear on the assessment of credibility or witnesses" (*In Re American Broad. Cos,* 753 NYS 2d 919 at 922). The privilege may only be overcome when the "material can define the specific issue" as to which the privileged material "provides truly necessary proof" (*id.)*. To hold otherwise would "result in the piercing of the privilege far more often and with less basis than the legislative history suggests is appropriate" (*id.*).

Furthermore, it bears repeating that Respondent cannot argue that any information contained in Petitioner's outtakes is critical and necessary when Respondent does not know what the outtakes actually captured. Respondent cannot contend that her defense "rises or falls" on the basis of footage that may not even exist.

Not Obtainable from Any Alternative Source

Under the third prong, the party seeking disclosure must demonstrate that the news sought is not obtainable from any alternative source. As a preliminary matter, the Court notes that the statute states that the "news" sought must be not otherwise available, meaning the information or news within the footage, not the work product itself. If the statute were

interpreted otherwise, outtakes would always be obtainable under the Shield Law because there would never be an alternative source. Here, the information sought within the outtakes is obtainable from other sources. Respondent has already deposed many cadets and officers of the program to discuss her actions at the program and will presumably be able to have them testify at the criminal trial. The testimony of the cadets is the best evidence as to whether Respondent followed the proper procedures at the boot camp, as they will testify at trial and be subject to cross-examination, where their credibility will be assessed by a jury. The footage in the documentary would thus be cumulative, or used to bolster witness credibility, an improper use under the Shield Law.

While Respondent has demonstrated why she has an interest in viewing the outtakes, she has not met her evidentiary burden to overcome the qualified privilege under any elements of the statute that indicate when the privilege can be overridden. As such, Petitioner's motion to quash the subpoena must be granted.

CONCLUSION

Accordingly, it is

ORDERED that the application by Petitioner to quash the subpoena served by Respondent is granted in its entirety; and it is further

ORDERED that counsel for Petitioner shall serve a copy of this order, along with notice of entry, on all parties within 10 days of entry.

Dated: June 5, 2019

ENTER:

Hon. CAROL R. EDMEAD, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.