

People v Trump

2024 NY Slip Op 31177(U)

March 1, 2024

Supreme Court, New York County

Docket Number: Ind. No. 71543/2023

Judge: Juan M. Merchan

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 59

THE PEOPLE OF THE STATE OF NEW YORK

- against -

DONALD J. TRUMP,

Defendant.

DECISION AND ORDER ON
MOTION TO QUASH
DEFENDANT'S SUBPOENA
AND FOR A PROTECTIVE
ORDER

Ind. No. 71543/2023

HON. JUAN M. MERCHAN J.S.C.:

On April 4, 2023, Donald J. Trump, the Defendant, was arraigned before this Court on an indictment charging him with 34 counts of Falsifying Business Records in the First Degree, in violation of Penal Law § 175.10.

On January 25, 2024, Defendant served a subpoena *duces tecum* on Skyhorse Publishing, seeking production of "all documents, including drafts and communications regarding revisions, notes, and edits" relating to "Disloyal: A Memoir: The True Story of Former Personal Attorney to President Donald J. Trump." Also on January 25, 2024, the Defendant served a subpoena *duces tecum* on Melville House Publishing, seeking production of "all documents, including drafts and communications regarding revisions, notes, and edits" relating to "Revenge: How Donald Trump Weaponized the US Department of Justice Against His Critics." The People moved to quash the subpoena pursuant to Criminal Procedure Law (hereinafter "CPL") §610.20(4), or in the alternative, for this Court to enter a protective order pursuant to CPL §245.70. The People also requested that this Court order the Defendant to disclose any other trial subpoenas he has issued since December 18, 2023. On February 6, 2024, counsel for Skyhorse Publishing, who is not a party to this action, filed a motion to quash. On or about February 16, 2024, Defendant filed his opposition to the motions. Melville Publishing has not filed any such motion.

CONTENTIONS OF THE PARTIES

First, the People submit that they have standing to move to quash the subpoena, relying on *Matter of Morgenthau v. Young*, 204 AD2d 118 [1st Dept 1994] and this Court's December 18, 2023, decision (hereinafter "December Decision") on the People's motion to quash a subpoena that the Defendant previously issued to Michael Cohen (hereinafter "Cohen Matter"). People's memorandum

of law in support of their motion to quash defendant's subpoenas to Skyhorse Publishing and Melville House Publishing and for a Protective Order at pg. 4 (hereinafter "People's Memo"). The December Decision granted the People's motion to quash the subpoena to Cohen, in part. Specifically, the Court granted the People's motion to quash that portion of Defendant's subpoena request seeking all manuscripts, contracts with the publisher, and all compensation documents related to the books "Disloyal" and "Revenge." The People argue that the subpoenas in the instant matter, much like in the Cohen Matter, should be quashed because they are overbroad, not narrowly tailored, and are being used for the purpose of improper general discovery. People's Memo at pg. 4. In the alternative, the People ask this Court to order that any material Defendant obtains through the subpoena be subject to this Court's Protective Order dated May 8, 2023. People's Memo at pg. 7.

Counsel for Skyhorse moves to quash the subpoena on similar grounds: that it is overbroad, not narrowly tailored, and is being used for the purpose of improper general discovery. Skyhorse further argues that the subpoena is unreasonably burdensome in violation of CPL § 610.20(4) and that Defendant is improperly searching for impeachment material. Memorandum of law in support of the motion of non-party Skyhorse Publishing, Inc., to quash Defendant Donald Trump's subpoena *duces tecum* at pgs. 4-5 (hereinafter "Skyhorse Memo").

Defendant counters that the People lack standing to move to quash both, the Skyhorse subpoena and the Melville subpoena and that the subpoena requests are appropriate because they seek specific materials that are relevant and material to the facts at issue in this case. *See* Defendant's opposition to the motions to quash at pgs. 2, 5-6 (hereinafter "Defendant's Opposition").

STANDING

As Defendant argued in his opposition to the People's motion to quash the Cohen subpoena, he relies on *People v. Weiss*, 176 Misc2d 496, 497 [Sup. Ct. N.Y. Cnty. 1998] (*citing People v. Grosunor*, 108 Misc2d 932, 936 [Crim. Ct. Bronx Cnty. 1981]) to support the argument that the People have no standing to quash a subpoena to a third party when the third party has no interest in the proceeding. Defendant's Opposition at pg. 5. The Defense argues that not only are Skyhorse and Melville *not* parties to the current litigation, but that Melville has not even moved to quash their subpoena. Defendant further argues that because neither Skyhorse nor Melville have any interest in the resolution of this case, their compliance has no direct impact on the instant proceeding. *Id.* at pg. 5. To differentiate the instant motion to quash from the Cohen Matter, the Defendant refers to this Court's December Decision. He references the following language in the Decision: "However, *Weiss* is

distinguishable from the instant matter for several reasons, not the least of which is that in *Weiss*, Defendant's subpoena was not issued to Ms. Marx, the witness in the criminal case, as Michael Cohen is here, but to NYNEX, who played absolutely no role in the criminal matter." December Decision at 3. As such, the Defendant argues, Skyhorse and Melville House "are not prosecution witnesses in this proceeding" and therefore their compliance "has no direct impact on the proceeding." Defendant's Opposition at pg. 5. This Court notes, however, that this was not the sole reason it held that *Weiss* was distinguishable from the Cohen Matter. December Decision at pg. 3. Defendant stresses that Melville has not moved to quash but instead has only asked that the return date be moved to February 22, 2024. Defendant's Opposition at pg. 5. Therefore, Defendant argues, the People cannot be "permitted to step into the shoes of a third party who has the ability to move to quash but has no interest in doing so." The People assert standing and rely, as they did in their motion to quash in the Cohen Matter, on the *Matter of Morgenthau v. Young*, 204 AD2d 118 [1st Dep' 1994]. The People also refer to this Court's December Decision where it held that the People had standing to challenge the subpoenas issued to Cohen. People's Memo at pg. 4., *Id.* The Defendant does not argue, nor is there any dispute, that Skyhorse Publishing has standing to move to quash Defendant's subpoena.

As this Court reasoned in the December Decision, the court in *Morgenthau* clearly held that "the District Attorney ... has standing to move to quash subpoenas that would have an impact on the underlying criminal case." December Decision at pg. 5; *Morgenthau*, 204 AD2d at 118. As such, and despite third party Melville not filing its own motion to quash, this Court finds that the New York County District Attorney's Office does have standing to move to quash both subpoenas.

MOTION TO QUASH

CPL § 610.20 provides that any party to a criminal proceeding may issue a subpoena. CPL § 610.20(3) specifically provides that an attorney for a defendant in a criminal action may issue a subpoena of any witness whom the defendant is entitled to call in such action or proceeding. To "sustain a subpoena," the issuing party must demonstrate "that the testimony or evidence sought is reasonably likely to be relevant and material to the proceedings and that the subpoena is not overbroad or unreasonably burdensome." *See*, CPL § 610.20(4); *see also*, *People v. Kozłowski*, 11 NY3d 223, 242 [2008] (the proper purpose of a subpoena *duces tecum* is to compel the production of specific documents that are relevant and material to facts at issue in a judicial proceeding). When disputes arise concerning the "validity or propriety" of a subpoena, the court must resolve whether the subpoena is enforceable. *See*, *Application of Davis*, 88 Misc2d 938, 940 [Crim. Ct. N.Y. Co. 1976]; *see also*, *People v. Natal*, 75 NY2d

379, 385 [1990]. Because the subpoenaed materials are returnable to the court, it follows that the court retains the ultimate authority on the outer parameters of the subpoena powers. See, *People v. D.N.*, 62 Misc3d 544 [Crim. Ct. N.Y. Co. 2018], internally citing *Matter of Terry D.*, 81 NY2d 1042 [1993].

The Court of Appeals has held that a subpoena is properly quashed when the party issuing the subpoena fails “to demonstrate any theory of relevancy and materiality, but instead, merely desire[s] the opportunity for an unrestrained foray into confidential records in the hope that the unearthing of some unspecified information [will] enable [them] to impeach witness[es].” *People v. Gissendanner*, 48 NY2d 543, 549 [1979]. A subpoena *duces tecum* may not generally be “used for the purpose of discovery or to ascertain the existence of evidence.” *Id.* at 551.

Conversely, courts have denied a motion to quash where the subpoena demands production of specific documents which are relevant and material to the proceedings. See, *People v. Duran*, 32 Misc3d 225, 229 [Crim. Ct. Kings Co. 2011, Laporte, JJ] (“the defendant established that the solicited data is relevant and material to the determination of guilt or innocence, and not sought solely in the speculative hope of finding possible impeachment of witness’ general credibility”); *People v. Campanella*, 27 Misc3d 737 [Dist. Ct. Suffolk Co. 2009, Horowitz, JJ].

When deciding on a motion to quash a subpoena, “access must be afforded to ... data relevant and material to the determination of guilt or innocence, as, for example, when a request for access is directed toward revealing specific ‘biases, prejudices or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand’ or when it involves other information which if known to the trier of fact, could very well affect the outcome of the trial ... there is no such compulsion when requests to examine records are motivated by nothing more than impeachment of witnesses’ general credibility.” *People v. Gissendanner* at 548, quoting *Davis v. Alaska*, 415 US 308, 316 [1974]. Thus, this Court must determine, among other things, whether the subpoena seeks information to be used for impeachment of general credibility or is instead directed towards revealing specific biases, prejudices or ulterior motives related directly to personalities or issues in the instant matter; whether the solicited information is material to the question of guilt or innocence, or nothing more than a ‘fishing expedition.’”

Skyhorse Subpoena

The Defendant’s subpoena to Skyhorse Publishing requests the following:

Request 1. Please provide all documents, including drafts and communications regarding revisions, notes, and edits, relating to, “Disloyal: A Memoir: The True Story of the Former Personal Attorney to President Donald J. Trump.”

Request 2 For the period from September 8, 2019 through September 8, 2020, please produce all communications with Michael Cohen.

Request 3 For the period from September 8, 2019 through September 8, 2020, please produce all documents relating to Michael Cohen.

The People argue that all three requests should be quashed because they seek information on topics unrelated to the subject matter of this case; they attempt to circumvent limits on criminal discovery; the “testimony or evidence sought” is not reasonably likely to be relevant and material to the proceedings; the demands are burdensome and overbroad; this is just a fishing expedition for additional discovery; and the subpoenas are merely Defendant’s attempt to evade the Court’s December Decision. People’s Memo at pg. 5-7. The People further argue that the information Defendant is attempting to obtain from Skyhorse is similar to what he sought in the subpoena to Michael Cohen which this Court quashed. People’s Memo at pg. 5. Specifically, the People note that in its December Decision, this Court held that the requested draft manuscripts are not “reasonably likely to be relevant and material to the proceedings as required by CPL § 610.20(4).” *Id.*; December Decision at pg. 11. Skyhorse’s arguments in support of its motion to quash are similar to those of the People. Skyhorse further contends that a subpoena may not be used as a fishing expedition for impeachment material, citing to *Constantine v. Leto*, 157 AD2d 376, 378 (3d Dept 1990); Skyhorse Memo at pg. 5. Skyhorse further argues that the Defendant’s subpoena violates CPL § 610.20(4) because it is “facially overbroad and unduly burdensome.” *Id.*

Defendant claims that the subpoenas to Skyhorse and Melville contain targeted requests that are narrowly tailored to the identification of materials that are relevant and material to the facts of the case. Defendant’s Opposition at pgs. 5-6. Defendant further contends that the time frame is not overbroad because the subpoena seeks information covering only a one-year period. As the People did, Defendant refers to this Court’s December Decision to support his argument. Specifically, Defendant claims that it is “inconsequential that the request contains no specific date limit when it is otherwise limited by subject matter.” Defendant’s Opposition at pg. 6. To support this argument, Defendant cites to the portion of the December Decision directing Cohen to comply with Request 3, which sought “All documents or communications regarding or relating to Stephanie Clifford and alleged “catch-and-kill” or hush money payment schemes.” December Decision at pg. 9. Finally, Defendant asks this Court to conduct an *in camera* inspection of the requested materials in lieu of quashing the subpoenas in their entirety.

The People’s motion to quash the subpoena to Skyhorse and Melville is granted. Defendant’s subpoena requests are strikingly similar to those that were quashed by this Court in the December

Decision. In the earlier subpoena to Cohen, Defendant sought in Request 8 “All draft manuscripts for the books ‘Disloyal’ and ‘Revenge.’” Request 9 sought “Your contract with the publisher for the books ‘Disloyal’ and ‘Revenge,’ as well as documents sufficient to show the compensation you received from the books ‘Disloyal’ and ‘Revenge,’ and from the podcast *Mea Culpa*.” *Id.* In denying Request 8, this Court held that, even after Defendant narrowed the requests in his opposition to the motion to quash, there is “no reasonable likelihood that the information sought is relevant or material to these proceedings.” *Id.* In denying Request 9, this court held that the request “calls for documents and information that may possibly have been relevant to other legal proceedings involving Mr. Cohen and the Defendant, but in the context of this criminal proceeding, the Request seeks nothing more than general discovery.” *Id.* The same reasoning applies here.

The People argue that Defendant is attempting to “evade the Court’s earlier order” issued in connection with the Cohen subpoena. In the Cohen subpoena, Defendant sought general discovery on unrelated matters strictly for the purpose of impeaching Cohen’s credibility. In the instant matter, Defendant appears to have broadened his argument. Defendant now claims that the materials sought are relevant and material because they contain information about statements Cohen allegedly made, i.e. describing his “alleged discussions with President Trump and others within the Trump Organization concerning the payments at issue in this case.” Defendant’s Opposition at pg. 6.

Defendant’s arguments now fail for two principal reasons. First, unlike the subpoena in *Kozłowski*, which Defendant relies upon, the instant subpoena is still far too broad and still seeks general discovery. In *Kozłowski*, the court held that the subpoena met the “minimal threshold necessary” for enforcement, but the requests there were highly specific and narrowly tailored. *Kozłowski* 869 NYS2d at 242. The defendants in *Kozłowski* made requests that sought “specifically identified statements.” *Kozłowski*, at 235. Whereas in the instant matter, the Defendant seeks “all” documents and communications between Skyhorse and Cohen.

Second, as counsel for Skyhorse correctly points out, a subpoena may not be used to fish for impeachment material. *Constantine v. Lato*, 157 AD2d 576, 378 [3d Dept 1990]. A “subpoena *duces tecum* may not be used as a fishing expedition for the purpose of discovery or to ascertain the existence of evidence.” *Decrosta v. State Police Laboratory*, 182 AD2d 930 [4th Dept 1992]. Though *Gissendanner* reasoned that when access to information is directed toward revealing “specific biases, prejudices or ulterior motives,” the party must also “put forth in good faith some factual predicate which would make it reasonably likely that the file will bear such fruit and that the quest for its contents is not merely a desperate grasping at a straw.” *Gissendanner*, 48 NY2d at 549. Defendant here attempts to do

just that, i.e. “grasping at a straw”. Defendant makes the argument that “The materials sought – draft manuscripts, communications with Mr. Cohen concerning revisions, and other documents relating to the publications of each book – are highly probative of the facts in this case, as well as Mr. Cohen’s bias and motive to lie.” Defendant’s Opposition at pgs. 2-3. Based on this language in Defendant’s subpoenas, it is clear that what Defendant seeks is a trove of documents that he hopes will contain impeachment material or material that goes to Cohen’s biases and credibility for purposes of cross examination. *Leto*, 157 AD2d at 378. This does not meet the standard set forth by of CPL § 610.20(4). Therefore, the People’s and Skyhorse’s motions to quash the subpoena to Skyhorse must be granted. Defendant’s motion for an in camera inspection of these documents is denied.

Melville House Publishing Subpoena

The Defendant’s request as it pertains to the subpoena issued to Melville Publishing requests the following:

- Request 1. Please provide all documents, including drafts and communications regarding revisions, notes, and edits, relating to, “Revenge: How Donald Trump Weaponized the US Department of Justice Against His Critics.”
- Request 2. For the period from October 1, 2021 through October 1, 2022, please produce all communications with Michael Cohen.
- Request 3. For the period from October 1, 2021 through October 1, 2022, please produce all documents relating to Michael Cohen.

Aside from the titles of the books and the date ranges, the Melville and Skyhorse subpoenas are identical, as are the respective arguments of the parties. Having already found that the People have standing to move to quash the subpoena to Melville, the People’s motion is granted for the reasons stated in the Skyhorse section *supra*.

Remaining Contentions

The People make two additional requests: (1) that the Court direct the Defendant to disclose any other trial subpoenas he has issued pursuant to this Court’s authority, since December 18, 2023; and (2) in the alternative, that any materials Defendant obtains from such subpoenas be subject to the restrictions on use and disclosure imposed by the May 8, 2023 Protective Order.

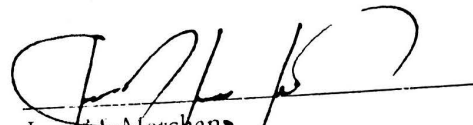
As to the People’s first request, Defendant, in his affirmation in support of his opposition to quash, disclosed two additional subpoenas that have been issued since December 18, 2023 and has not indicated that any additional subpoenas have been issued. Defendant is hereby directed to immediately disclose all other subpoenas, if any, issued since December 18, 2023.

In light of this Court's decision, the People's request for a protective order is moot.

The foregoing constitutes the Decision and Order of this Court.

March 1, 2024
New York, New York

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Juan M. Merchan
Acting Justice of the Supreme Court
Judge of the Court of Claims

JUAN M. MERCHAN