

Smartmatic USA Corp. v Fox Corp.

2023 NY Slip Op 31351(U)

April 25, 2023

Supreme Court, New York County

Docket Number: Index No. 151136/2021

Judge: David B. Cohen

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

PRESENT: HON. DAVID B. COHEN PART 58

Justice

-----X

SMARTMATIC USA CORP., *et al.*,

Plaintiffs,

- v -

FOX CORPORATION, *et al.*,

Defendants.

-----X

INDEX NO. 151136/2021

MOTION DATE 03/09/2023

MOTION SEQ. NO. 016

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 016) 1144, 1145, 1158, 1159, 1160, 1162, 1164, 1165, 1166, 1167, 1168, 1169, 1170, 1171, 1172, 1173, 1174, 1175, 1176, 1177, 1197, 1198

were read on this motion to/for MODIFY ORDER/JUDGMENT.

By notice of motion, plaintiffs move for an order modifying two orders issued by Judicial Hearing Officer (JHO) Alan C. Marin on November 28, 2022 and December 21, 2022. Fox Corporation and Fox News Network LLC (collectively, Fox defendants) oppose.

While JHO Marin appropriately and thoroughly analyzed the issues before him in November and December 2022, recent disclosures in Dominion Voting Systems, Inc.’s action against Fox News Network, LLC and Fox Corporation, filed in Delaware Superior Court, warrant the broadening of discovery, as discussed further below.

I. Modifying Paragraph 1 of the November 28, 2022 Order to compel Fox Defendants to produce documents responsive to the relevancy topics identified in Paragraph 1 of that Order and documents responsive to topics (f), (g), and (h)

A. Section (f)

Section (f) refers to documents relating to the credibility of “sources” upon which Fox Defendants relied and/or considered in connection with their allegedly defamatory publications of plaintiffs.

Plaintiffs contend that they are entitled to these documents as the credibility of sources is relevant to their claims of malice and recklessness against Fox defendants. Fox defendants argue that plaintiffs are already getting source evidence related to several identified people, including defendant Giuliani, and also will be getting it to the extent that identified “custodians” discussed sources.

As cited by plaintiffs, the caselaw provides that one way to establish recklessness and actual malice, which plaintiffs must do in order to prevail on their claims here, is to show how Fox defendants assessed and considered information from both credible and incredible sources (*see eg. Ortiz v Valdescastilla*, 102 AD2d 513 [1st Dept 1984], *app withdrawn* 63 NY2d 773 [1984] [in analyzing defamation claim, “a publisher is privileged to publish information received from a dependable source of news unless he had, or should have had, substantial reasons to question the accuracy of the information or the bona fides of his source.”]). Thus, plaintiffs demonstrate that the information is or may be relevant to their claims. Fox defendants’ argument would place plaintiffs in the position of getting source information only if it overlaps with other discovery that is being produced, and they offer no authority to controvert plaintiffs’ showing that the information may be relevant here.

JHO Marin’s order is therefore modified to the extent of directing Fox defendants to provide any documents related to the credibility of the sources on which they relied and/or considered in publishing statements about plaintiffs.

B. Section (g)

Section (g) refers to documents relating to Fox Defendants’ motive for defaming plaintiffs, including documents showing that Fox Defendants embarked on the alleged

defamatory campaign to appease President Trump's supporters and maintain or improve their broadcast ratings.

Plaintiffs contend that they are entitled to "motive" evidence, or evidence related to why defendants defamed them, which is an element of their defamation claim and is also relevant to their punitive damages claim. They allege that defendants' defamation arose, in part, from their fear that they were losing viewers and ratings as a result of their coverage of the 2020 election.

Fox defendants maintain that plaintiffs are already receiving motive evidence to the extent that provided documents discuss Fox defendants' ratings as related to or connection with plaintiffs, Dominion, or claims of election fraud.

Plaintiffs demonstrated that evidence related to Fox defendants' ratings, in general and not just limited to certain shows or topics, is or may be relevant to their claim that Fox defendants' motive in defaming them was to improve or maintain their overall ratings. Moreover, Fox defendants do not argue that such evidence would not be relevant, but instead seek to limit it, without any supporting authority.

Therefore, JHO Marin's orders are modified to the extent of directing Fox defendants to provide documents related to their motive for defaming plaintiffs.

C. Section (h)

Section (h) refers to documents relating to Fox Corporation's involvement in any decisions regarding any of the topics of relevant information.

Plaintiffs argue that they need information related to Fox Corporation's involvement in this case, especially given caselaw that provides that any person or entity that engages in defamation may be held liable. They observe that discovery exchanged in the *Dominion* matter

shows that Fox Corporation executives and employees were briefed on and involved with 2020 election programming and business decisions related to Fox News generally.

Defendants contend that plaintiffs will get relevant documents to the extent that JHO Marin ordered them to produce all non-privileged documents, from October 1, 2020 to February 4, 2022, related to Fox Corporation's involvement with the allegedly defamatory statements at issue. Defendants assert that the only relevant documents are those showing a connection between Fox Corporation and allegedly defamatory statements made about plaintiffs.

As plaintiffs allege, and are trying to prove, that Fox Corporation was involved with the alleged defamation for various reasons, including those related to the 2020 election and viewership and ratings, they demonstrate that evidence of its involvement should not be limited to only evidence connecting Fox Corporation with the allegedly defamatory statements.

Thus, JHO Marin's orders are modified to the extent of directing Fox defendants to provide documents relating to Fox Corporation's involvement in any decisions regarding any of the topics of relevant information.

II. Compelling Fox Defendants to produce responsive documents for the timeframe of September 1, 2020 through April 30, 2021

JHO Marin limited the timeframe for defendants' production to the period between October 1, 2020 and February 4, 2021 (when the complaint in this action was filed).

Plaintiffs argue that they should be given the same timeframe as in the *Dominion* action, from September 1, 2020 to April 30, 2021. They contend that there is relevant information from September 2020, when Fox defendants created the "Election Integrity Unit," among other events. Plaintiffs also assert that information from between February and April 2021 must be disclosed as post-complaint statements and events are relevant in defamation cases, especially as to the actual malice element.

Fox defendants observe that as the allegedly defamatory statements about plaintiffs were made during a 28-day period from November 12, 2020 to December 10, 2020, the timeframe established by JHO Marin is appropriate and sufficient. As a showing of actual malice depends on the person's state of mind at the time that the statement was made, post-statement evidence is inadmissible, defendants argue.

In reply, plaintiffs observe that exchanged discovery in the *Dominion* matter reflects that documents exist from September 2020 and February to April 2021 that are or may be relevant to their claims here.

Absent any reason offered by defendants for using a different timeframe than that permitted in the *Dominion* action, and as plaintiffs identified specific evidence that may be relevant arising from events that occurred in September 2020 and March and April 2021, JHO Marin's order is modified to extend the applicable discovery timeframe to between September 1, 2020 to April 30, 2021.

III. Compelling Fox Defendants to produce responsive documents and any deposition transcripts from certain custodians

In JHO Marin's November 28, 2022 order, he directed Fox defendants to produce documents from 51 custodians listed in Appendix A to the order, and denied plaintiffs' request for more custodians, finding that "no other custodians are appropriate at this time."

Plaintiffs argue that defendants in the *Dominion* action provided discovery related to 90 custodians, but here are limited to 39 custodians. All of the individuals identified by plaintiffs as additional custodians have potentially relevant information, plaintiffs contend, and JHO Marin erred by limiting them.

According to defendants, the only people with relevant information are those that either made the allegedly defamatory statements at issue or were responsible for preparing and

disseminating the shows which aired the defamatory statements. Specifically, they assert that the following categories of people identified by plaintiffs have no relevant information:

- (1) Individuals with general election coverage responsibilities;
- (2) Fox executives who did not produce or publish the allegedly defamatory statements;
- (3) Fox “dissenting witnesses”, ie, those people who objected to the alleged defamation, to the extent that the person did not work on any of the shows at issue; and
- (4) Fox employees who worked in Fox’s “Brainroom” or “Election Integrity Unit,” as they were not involved in the production of any allegedly defamatory shows.

In reply, plaintiffs contend that discovery in the *Dominion* matter shows that the 19 additional people they identified have or may have discoverable information. Specifically, they argue that Fox executives participated in the editorial process in general and attended editorial meetings in November and December 2020, and have information about Fox’s motive related to its coverage about election fraud, and that dissenting witnesses and employees from the Brainroom and Election Integrity Unit have information relevant to a showing of actual malice.

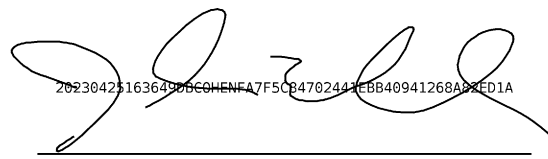
Plaintiffs have established that the 19 people identified by them have, or may have, relevant information or information that may lead to relevant evidence. Fox defendants’ attempt to limit the custodians is unavailing, and while JHO Marin did not err in limiting the number in November and December 2022, the recent disclosures in the *Dominion* matter demonstrate that there are many possible witnesses to the defamation and to Fox defendants’ motives. Thus, at this juncture, adding additional custodians to the discovery exchange is warranted.

IV. Conclusion

Accordingly, it is hereby

ORDERED, that plaintiffs’ motion is granted, and JHO Marin’s orders of November 28, 2022 and December 21, 2022 are modified to the extent indicated above; and it is further

ORDERED, that defendants are directed to provide any discovery directed in this decision within 30 days of the date of this order.



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4/25/2023
DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE