

EXHIBIT 33

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

GAWKER MEDIA, LLC,
Petitioner,

INDEX NO. 151324/14

-against-

MOTION SEQ. NO. 001

EJ MEDIA GROUP, LLC and ELIZABETH ROSENTHAL
TRAUB,
Respondents.

The following papers, numbered 1 to 5, were read on this motion by petitioner to compel the production of documents.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1, 2</u>
Answering Affidavits — Exhibits (Memo) _____	<u>3, 4</u>
Reply Affidavits — Exhibits (Memo) _____	<u>5</u>

Cross-Motion: Yes No

This is a special proceeding commenced by Order to Show Cause (OSC) by petitioner Gawker Media, LLC (Gawker), pursuant to CPLR 3119, to enforce two New York subpoena *duces tecum* (subject subpoenas) it issued to respondents in connection with an underlying litigation entitled *Bollea v Clem*, currently pending in Florida (Florida action). Specifically, the subject subpoenas seek discovery for use as a defense in the Florida action, which was commenced by the wrestler Terry Gene Bollea (Bollea), professionally known as Hulk Hogan, against Gawker. Gawker served the subject subpoenas on respondents, Bollea's professional media representatives, on January 6, 2014. Respondents provided some responsive documents, redacted documents, and withheld documents on the basis of privilege and submitted a privilege log to Gawker.

In its OSC, Gawker seeks an order directing respondents to produce: (1) all documents responsive to Gawker's subpoenas that respondents have not yet produced; (2) full copies of all

documents which respondents have produced in redacted form; and (3) the nine emails from October 2012 listed in respondents' privilege log. Specifically, Gawker states that respondents have produced no documents relating to many of Bollea's press appearances and instead responded with redacted documents without any explanation or notation in its privilege log. Gawker also proffer that the emails respondents are withholding are not privileged nor do four of them constitute work-product as respondents claim.

Respondents are in opposition to the OSC and maintain that they produced all the relevant, non-privileged, and responsive documents to the subject subpoenas. Respondents contend that the communications they are withholding are protected by the attorney-client privilege and attorney work-product doctrine because they are communications between Bollea's litigation counsel and respondents regarding the Florida action and its subject matter, which includes strategy and legal advice

DISCUSSION

"The burden of satisfying each element of the attorney-client privilege rests on the party asserting it" (*Miranda v Miranda*, 184 AD2d 286, 286 [1st Dept 1992]; see also *Blair Communications v Reliance Capital Group*, 182 AD2d 578 [1st Dept 1992]); *Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 377 [1991] ["[T]he burden of establishing any right to protection is on the party asserting it"]; *Ambac Assur. Corp. v DLJ Mtge. Capital, Inc.*, 92 AD3d 451, 452 [1st Dept 2012] ["[T]he party challenging disclosure bears the burden of establishing that the information sought is immune from disclosure"]; *McNamee v Clemens*, 2013 WL 6572899 * 4 [EDNY 2013] ["The burden of establishing the existence of an attorney-client privilege or work product protection rests with the party asserting the privilege/protection"], citing *OneBeacon Ins Co. v Forman Int'l, Ltd.*, 2006 WL 3771010 * 4 [SDNY 2006]). Specifically, while attorney-client privilege "may be expanded to those assisting a lawyer in representing a client, such as public relations consultants and agents" (*McNamee*, 2013 WL

6572899 * 5), the question is whether the “communication with the [PR Firm] was made in confidence and for the purpose of obtaining legal advice” (*id.*). As such, “[t]he communication itself must be primarily or predominantly of a legal character” (*id.*).

On this record, respondents have only made conclusory assertions that the information sought from the petitioner in the emails is protected by the attorney-client privilege and/or attorney work-product doctrine, which in and of itself is insufficient to prevent disclosure (see *Miranda*, 184 AD2d at 286; *Witt v Triangle Steel Prods. Corp.*, 103 AD2d 742 [2d Dept 1984]). Moreover, after an *in camera* review of the October 2012 emails, this Court finds that respondents fail to show that they provided anything other than standard public relations services for Bollea, or that these communications were necessary to assist counsel in providing Bollea with legal advice (see *id.* at *6; *Haugh v Schroder Inv. Mgmt. N. Am. Inc.*, 2003 WL 21998674 *3 [SDNY 2003]). Contrary to respondents’ assertions, the fact that the emails were sent on the day of and within a few days of the commencement of the Florida action does not bring the emails within the ambit of protection. As such, they have failed to make such a showing that the documents sought are immune from disclosure.

CONCLUSION

Accordingly it is hereby,

ORDERED that respondents are directed to produce all documents responsive to Gawker’s subpoenas *duces tecum* that have not yet been produced; and it is further,

ORDERED that respondents are directed to produce full copies of all documents which respondents have produced in redacted form; and it is further,

ORDERED that the respondents are directed to produce the nine emails from October 2012 listed in respondents’ privilege log; and it is further,

ORDERED that the respondents are directed to produce all the aforementioned discovery within 21 days of Entry of this Order, or if these documents are not in respondents’

possession or control, respondents are to submit an affidavit to Gawker; and it is further,

ORDERED that petitioner is directed to serve a copy of this Order with Notice of Entry upon respondents.

This constitutes the Decision and Order of the Court.

Dated: 5/1/14


PAUL WOOTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE