

11-1591-cv
Baker v. Goldman Sachs & Co., et al.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2011

(Argued: August 23, 2011 Decided: February 15, 2012)

Docket No. 11-1591-cv

JANET BAKER and JAMES BAKER,
Plaintiffs-Appellants,

v.

GOLDMAN SACHS & CO., GOLDMAN SACHS GROUP, INC.,
and GOLDMAN SACHS & CO., LLC,
Defendants-Appellees,

JESSE EISINGER,
Non-Party Movant-Appellee.

B e f o r e: WINTER, MINER, and HALL, Circuit Judges.

Appeal from an order entered by the United States District
Court for the Southern District of New York (Barbara Jones,
Judge), granting a motion to quash a subpoena pursuant to New
York's journalists' "Shield Law." We affirm.

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Smith LLP, New York, New York, on the
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1 PAUL VIZCARRONDO, JR. (Tracy O.
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8
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13

14 WINTER, Circuit Judge:

15 James and Janet Baker appeal from Judge Jones's quashing of
16 a subpoena directed to Jesse Eisinger, a former Wall Street
17 Journal ("WSJ") reporter. Her decision was based on New York's
18 journalists' Shield Law, New York Civil Rights Law § 79-h. We
19 affirm.

20 New York's Shield Law provides journalists an absolute
21 privilege from testifying with regard to news obtained under a
22 promise of confidentiality but only a qualified privilege with
23 regard to news that is both unpublished and not obtained under a
24 promise of confidentiality. N.Y. Civ. Rights Law § 79-h(b)-(c)
25 (McKinney 2011). It is the qualified privilege that is at issue
26 on this appeal.

27 Under this privilege, reporters "who, for gain or
28 livelihood, [are] engaged in . . . writing . . . news intended
29 for a newspaper" are protected from coerced disclosure of "any
30 unpublished news obtained or prepared . . . in the course of
31 gathering or obtaining news . . . , or the source of any such

1 news, where such news was not obtained or received in
2 confidence." N.Y. Civ. Rights Law §§ 79-h(a)(6), (c);
3 Guice-Mills v. Forbes, 819 N.Y.S.2d 432, 434 (N.Y. Sup. Ct. 2006)
4 ("[The] Shield Law[] protects professional journalists from
5 contempt citations when they refuse to disclose information
6 obtained by them during the course of their reporting."). The
7 qualified privilege applies only to unpublished information.

8 A party seeking unpublished "news" may overcome the
9 qualified privilege by making "a clear and specific showing that
10 the news: (i) is highly material and relevant; (ii) is critical
11 or necessary to the maintenance of a party's claim, defense or
12 proof of an issue material thereto; and (iii) is not obtainable
13 from any alternative source." N.Y. Civ. Rights Law § 79-h(c).
14 To determine that unpublished news is either "critical or
15 necessary within the meaning of § 79-h, there must be a finding
16 that the claim for which the information is to be used virtually
17 rises or falls with the admission or exclusion of the proffered
18 evidence." In re Application to Quash Subpoena to Nat'l Broad.
19 Co., 79 F.3d 346, 351 (2d Cir. 1996) (internal quotation marks
20 omitted) (also stating that the critical or necessary clause must
21 mean something more than "useful"). "The test is not merely that
22 the material be helpful or probative, but whether or not . . .
23 the action may be presented without it." In re Am. Broad. Cos.,
24 735 N.Y.S.2d 919, 922 (N.Y. Sup. Ct. 2001) (internal quotation
25 marks omitted).

1 The underlying action in this matter was brought by the
2 Bakers against Goldman Sachs & Co., et al., and is currently
3 ongoing in the District of Massachusetts. The Bakers' claims
4 arose out of Goldman's service as the Bakers' financial advisor
5 in a June 2000 sale of their company, Dragon Systems ("Dragon")
6 to Lernout & Hauspie ("L&H") in exchange for L&H stock that soon
7 became worthless. The Bakers' various legal theories assert that
8 Goldman breached a duty to discover an accounting fraud at L&H.
9 In particular, they claim that Goldman failed to exercise proper
10 diligence in investigating and analyzing both L&H's customer
11 relationships and a significant spike in L&H's revenue from Asian
12 customers before its acquisition of Dragon.

13 The Bakers seek to depose Eisinger regarding two articles
14 published in the WSJ. The first article, which he authored
15 alone, was published on February 16, 2000 -- just before the
16 L&H/Dragon deal was announced in March -- and principally quoted
17 a Lehman Brothers analyst who raised concerns about L&H's
18 earnings and stock valuation.

19 The second article, published in August 2000, was written by
20 Eisinger and several co-authors and concerned L&H's Asian
21 earnings. It stated that L&H's CEO had "volunteered the names of
22 about a dozen Korean customers" in May "while being questioned
23 about Asian sales by a reporter," and "[s]ubsequently, the
24 company disclosed more names" to the WSJ. App. 58. It also
25 reported that the WSJ contacted and received responses from 13 of

1 the approximately 30 customers supplied by L&H and found that
2 "some companies that L&H [had] identified as Korean customers
3 [said] they [did] no business at all with L&H. Others [said]
4 their purchases [had] been smaller than L&H says." Although the
5 article identified many of the companies that responded and
6 described the responses, it did not provide specifics concerning
7 the WSJ investigation, including details on who at the WSJ
8 contacted the Korean customers and when or how that contact was
9 made. The Bakers now wish to take a videotaped deposition of
10 Eisinger to be used at trial.

11 During oral arguments in the district court over Eisinger's
12 motion to quash the subpoena, the court inquired about the
13 Bakers' intended interrogation of Eisinger. Appellants' counsel
14 stated: "Well, we're going to ask him to confirm what he says was
15 done in the articles which is, among other things, that he
16 received from L&H directly a list of customers which they
17 voluntarily provided to him and that he and his colleagues then
18 proceeded to call those customers and they subsequently published
19 their findings about what those customers told them in the
20 [WSJ]." Counsel further stated that there "may be a few
21 additional questions related to the articles" that were published
22 before August 8, 2000. He then argued that "Mr. Eisinger's
23 experience and what . . . he published proves or helps prove"
24 that it was simply not the case that a "forensic accounting firm
25 with international expertise," which Goldman had recommended the

1 Bakers hire, was necessary to discover the L&H fraud, but that
2 Goldman should have discovered the fraud itself. He stated, "The
3 fact that I need to establish is that [Eisinger] did pick up the
4 phone and that he was told by L&H you can contact these 20 or 30
5 customers and that he and his colleagues proceeded to do it and
6 they proceeded to publish their findings in the newspaper. So I
7 would establish the truth of those statements."

8 In response, counsel for Goldman argued that if the Bakers
9 were permitted to go into "what Mr. Eisinger did," then Goldman
10 would need to address on cross-examination how the circumstances
11 surrounding the acquisition of Dragon differed from those facing
12 the WSJ at the time the story was written several months later.
13 He noted that those differences included what type of information
14 was available to the public at those times and the fact that
15 Goldman was bound by a confidentiality agreement in place at the
16 time of the acquisition that prohibited them from contacting L&H
17 customers.

18 The court granted Eisinger's motion to quash, holding that:
19 (i) Eisinger, as a journalist, could claim the Shield Law's
20 protection; (ii) the information sought was covered by the Shield
21 Law; and (iii) the Bakers had failed to overcome the privilege by
22 establishing through "clear and convincing evidence" that the
23 testimony "would be critical and relevant" to the maintenance of
24 their claim. It noted the testimony "invariably require[d]
25 disclosure of the unpublished details of the newsgathering
26 process."

1 The court found that the scope of questions could not be
2 confined to published information, because even the most basic
3 questions -- such as who made the calls and interviewed the
4 Korean companies -- were unpublished details of the newsgathering
5 process. Further, to show that a forensic accounting firm was
6 not required to unearth the information obtained by Eisinger, the
7 Bakers "inevitably would have to ask questions regarding
8 Eisinger's techniques for conducting his investigation, the
9 backgrounds of Eisinger's co-authors and the [WSJ's] editorial
10 staff, and whether he consulted with any experts or other sources
11 in the course of the investigation" -- all inquiries into the
12 newsgathering process protected by the Shield Law. Furthermore,
13 to mount an effective defense, Goldman would need to cross-
14 examine Eisinger broadly about the WSJ investigation.

15 The district court also held that Eisinger's testimony was
16 not critical or necessary to maintain the Bakers' claims. It
17 stated that it "is even doubtful Mr. Eisinger's testimony would
18 be relevant to Plaintiffs' claims." The first WSJ article,
19 although published before the merger, reported only on an
20 earnings conference and a followup research note written by a
21 Lehman Brothers analyst, without any apparent original
22 investigation by the WSJ. The second article, in which the WSJ
23 investigated L&H's customers, was not published until two months
24 after Dragon's merger with L&H, during which time L&H's financial
25 picture and the ease of contacting customers could have changed.

1 For all these reasons, the court quashed the subpoena. This
2 appeal followed.

3 An order granting a motion to quash a subpoena is considered
4 final and appealable when such an order denies discovery from a
5 non-party in a suit pending in another jurisdiction. Cf. Corp.
6 of Lloyd's v. Lloyd's U.S., 831 F.2d 33, 34 (2d Cir. 1987)
7 (citing Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551, 554
8 (2d Cir. 1967)). This court reviews "[a] district court's ruling
9 on a motion to quash a subpoena . . . for abuse of discretion."
10 Arista Records, LLC v. Doe 3, 604 F.3d 110, 117 (2d Cir. 2010).

11 The above description of the oral argument and the findings
12 of the district court render it virtually self-evident that the
13 Shield Law would protect Eisinger from compelled testimony.
14 Perhaps in recognition of these obstacles, appellants' counsel
15 took a new tack during oral argument in this appeal, announcing
16 that the only question he intended to ask -- apart from the usual
17 pedigree inquiries -- was whether the published information,
18 which is not subject to the qualified privilege, was "accurately
19 reported." In answer to an inquiry from the bench about such a
20 question "open[ing] the door to [defendants] asking all sorts of
21 questions," counsel responded "because someone else wants to
22 cross-examine in a way that may implicate the shield law, that
23 does not prohibit us from asking legitimate questions that do not
24 implicate the shield law." We reject this argument.

1 First, the question counsel proposes to ask cannot be
2 divorced from unpublished material relating to the article. The
3 question seeks an opinion from one of the authors as to the
4 accuracy of a particular news article. This opinion's relevance
5 to the underlying litigation lies entirely within inferences
6 appellants hope will be drawn by the trier of fact with regard to
7 the ability, efficiency, and diligence of the WSJ reportorial
8 personnel; their newsgathering methods generally and as applied
9 in preparing the article; and the witness's personal knowledge
10 and assessment of these matters. The question's purpose is to
11 provide a basis for inferences as to these matters.

12 Indeed, the opinion sought would not be admissible under
13 Federal Rule of Evidence 701 without foundation evidence showing
14 that the opinion was "rationally based" on Eisinger's perception
15 and "helpful to . . . determining a fact in issue," which would
16 require testimony squarely within the shielded area. Even if
17 some component of the opinion was deemed to involve "technical"
18 or "specialized" knowledge regarding journalism -- i.e., an
19 expert opinion -- Federal Rule of Evidence 702's requirement of a
20 showing that such knowledge was "reliably applied . . . to the
21 facts of the case" would enter the protected area.

22 Second, even if the limited question proposed were assumed
23 for purposes of argument to avoid the privileged area, we
24 disagree with appellants' argument that the nature of the cross-
25 examination that would inevitably follow is not before us at this

1 time. Once any direct examination is concluded, cross-
2 examination within the scope of the direct follows. Fed. R.
3 Evid. 611. It is beyond cavil that such cross-examination would
4 have to dwell on the inferences that the question is intended to
5 support and thus would enter the area of the privilege.

6 Subpoenas seek attendance and testimony at a deposition or
7 trial to be questioned about matters relevant to the underlying
8 litigation. The compulsion applies to both testimony on direct
9 and cross-examination on that subject matter. See App. at 50
10 (subpoena of Jesse Eisinger); Fed. R. Evid. 611. The would-be
11 cross-examiner is not required to seek a second subpoena to ask
12 questions within the scope of the direct. See App. at 50; Fed.
13 R. Evid. 611. This is so even when the witness asserts a
14 privilege. Cf. In re von Bulow, 828 F.2d 94, 102 (2d Cir. 1987).

15 Indeed, in a criminal case, we have recently held with
16 regard to a journalist's privilege that once the prosecution has
17 overcome the claim of privilege and conducted its desired direct
18 examination, the Confrontation Clause requires that the usual
19 cross-examination as to credibility and matters within the scope
20 of the direct examination be allowed. United States v. Treacy,
21 639 F.3d 32, 44-45 (2d Cir. 2011). We see no great impediment to
22 extending that approach to civil cases. The law of evidence
23 embodies a rule of completeness requiring generally that
24 adversaries be allowed to prevent omissions that render matters
25 in evidence misleading. With regard to writings, one cannot

1 introduce only the favorable portion of a document without the
2 adversary successfully demanding production of the entire
3 writing. Kenneth S. Broun et al., McCormick on Evidence § 93
4 (6th ed. 2007); Fed. R. Evid. 106. The same applies to testimony
5 as to only part of a privileged communication: the remainder
6 must also be produced. In re von Bulow, 828 F.2d at 102;
7 McCormick on Evidence § 93. With regard to testimony generally,
8 the adversary has the right to cross-examine within the scope of
9 the direct examination, Fed. R. Evid. 611, and as to issues
10 relating to credibility. See, e.g., Fed. R. Evid. 607, 608(b).
11 To be sure, some close questions may arise in future proceedings
12 in which the need for cross-examination into materials privileged
13 under the Shield Law would be doubtful. That is not a problem in
14 this matter, however, because the need for cross-examination
15 within the area of the privilege is absolutely clear.

16 Third, under the New York statute, the application of the
17 privilege turns on the subject matter of the inquiry and does
18 not distinguish between direct and cross-examination. The
19 burden of overcoming the privilege, once asserted, is on the
20 party seeking direct testimony, but that procedure does not
21 divorce direct and cross-examination. Rather it is simply a
22 burden of going forward that is pragmatically necessary -- the
23 adversary usually has no interest in overcoming the privilege
24 -- and universally employed with regard to assertions of
25 privilege. See, e.g., New York Times Co. v. Gonzales, 459 F.3d

1 160, 169-71 (2d Cir. 2006); Am. Sav. Bank, FSB v. UBS
2 Painewebber, Inc., No. M8-85, 2002 WL 31833223, at *3 (S.D.N.Y.
3 Dec. 16, 2002), aff'd sub nom. In re Fitch, 330 F.3d 104 (2d
4 Cir. 2003) (per curiam).

5 Appellants' position, if adopted, would undermine the
6 privilege created by New York's statutory shield law. If the
7 proposed question was allowed to be asked and answered on the
8 ground that it sought information outside the protected area, the
9 cross-examiner could then easily overcome the privilege by
10 showing a critical need to establish Goldman's defense to the
11 inferences to be drawn from the answer. The result would turn
12 the statute on its head by allowing an evasion of the privilege
13 through a question deliberately framed to be (supposedly) outside
14 the scope of the privilege to have the effect of compelling
15 testimony on cross-examination within the privilege. We decline
16 to follow a route leading to this result.

17 We therefore affirm.