

46

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2181CV2271

CARLO DEMARIA, SR.
Plaintiff

vs.

EVERETT LEADER, LLC., JOSHUA RESNEK,
SERGIO CORNELIO, MATTHEW PHILBIN, AND
ANDREW PHILBIN, SR.
Defendants

MEMORANDUM AND ORDER ON PLAINTIFF'S MOTION TO COMPEL
SUPPLEMENTARY DISCOVERY
(Sources for Article)

Plaintiff filed a motion seeking to compel various categories of discovery including but not limited to the identities of witnesses that Defendant's Everett Leader, Resnek and both Philbins have sought to protect as confidential sources for their news articles on Plaintiff. After oral arguments and review of the parties' filings and attachments, Defendant's Motion to Compel the identity of the redacted witnesses is **Allowed in Part and Denied in Part** for the following reasons.

The First Amendment does not allow defendant in a libel action to refuse to disclose the identity of its "confidential source" whose quoted and allegedly defamatory statements formed the basis of the suit..." on the grounds of some privilege. *Matter of Roche*, 381 Mass. 624, 638, n 15. "Some protection" is [, however,] provided by the First Amendment for 'any person' who gathers information and prepares it for expression." *Matter of Roche, supra*, 381 Mass. 624, 632 (1980). See *Branzburg v. Hayes*, 408 U.S. 665, 707 (1972). This obviously includes the defendants' Everett Leader, LLC and reporter Joshua Resnek at the very least.

Although there is no constitutional, statutory, or common law privilege protecting a news reporter against disclosure of his sources, in supervising discovery, a presiding judge is obliged to consider the effect that compelled discovery would have on the values protected by the First Amendment. *Wojcik v. Boston Herald, Inc.*, 60 Mass. App. Ct. 510, 516-517 (2004) This is the balancing test used by the Supreme Judicial Court and presented in *Petition for the Promulgation of Rules Regarding the Protection of Confidential News Sources & Other Unpublished Information*, 395 Mass. 164, 172 (1985). A major consideration by the Court in assessing the competing interests is whether the Court can avoid needlessly disclosing any confidential relationships with the press. *Wojcik v. Boston Herald, Inc.*, 60 Mass. App. Ct. at 516-517.

A threshold question facing the Court is whether Defendants have insufficiently supported their claim that the 12 sources used by Resnik in the articles core to this litigation were given a promised of confidentiality in exchange for their information. While the claim of confidentiality has been generally asserted by Defendants in responses to interrogatories and document requests, that simply preserved the objection for this matter before the Court. While the parties briefed these issues, this Court requested additional information from the Defendants to support their claim of confidentiality as the record was sparse on this limited issue. Defendant Resnek subsequently filed an affidavit which stated that all the sources at issue had “provided information to me based on the promise/understanding that their names/ identities would not be revealed and would be kept confidential.” Not only does this averment lack specificity for each of the 11 alleged confidential sources, but it’s unclear whether each source was promised or merely understood or believed that their identities would not be disclosed. If they understood, what was the basis for that understanding? Regardless, the affidavit must be viewed in the

context of all the relevant facts and reasonable inferences drawn therefrom in determining whether Defendants' have met their threshold burden of demonstrating that the claim of confidentiality is legitimate for each source. See *Matter of Roche*, 381 Mass. at 638 n.15.

In this respect, this Court finds that any person working for the City of Everett, which Plaintiff in his capacity of Mayor has some degree of power over, would have expected confidentiality before speaking with Defendant Resnek based upon the reasonable inferences draw from that relationship dynamic and the facts presented. Regardless, this Court shall move to the balancing stage for all sources and then evaluate each source on a case by case basis both in the context of the balancing test as well as relevance to the dispute between the parties. In other words, is the disclosure of the witnesses identity essential to the Plaintiff's preparation of his case or defense of the counterclaims. See *Wojcik v. Boston Herald Inc.*, *supra*.

This next stage requires that this Court engage in a case specific adjudication by balancing "the public interest in every person's evidence and the public interest in protecting the free flow of information." *Commonwealth v. Corsetti*, 387 Mass. 1, 5-6 (1982) and *Petition for the Promulgation of Rules Regarding the Protection of Confidential News Sources & Other Unpublished Information*, 395 Mass. 164, 172 (1985). The Supreme Judicial Court has "...cautioned, however, that those seeking to prevent disclosure sought by valid requests must make some showing that the asserted damage to the free flow of information is more than speculative or theoretical. *Matter of Roche*, 381 Mass. 624, 635 (1980)

While defendants assert that Plaintiff Demaria has a history of retribution and stands in a powerful place as Mayor to effectuate such, the asserted damage to the free flow of information is mostly speculative or theoretical. *Id.* None of the prior reported allegations, except those in the instant matter, suggested that Plaintiff DeMaria had retaliated against a specific complainant

for reporting alleged misconduct. The allegations in the instant matter, which have not yet been adjudicated, are sufficient to raise concerns regarding the willingness of Everett town employees to speak with the press about matters of public interest if they're identities were revealed. A penultimate question is whether This Court shall, therefore, weigh the relevant public interests for each source to determine whether their identities need to be revealed.

Source #2

While Source #2 says she is afraid she could lose her job, there is no basis to believe she works for the City of Everett. The claim of confidentiality is, therefore, weak substantively given the facts relayed in Defendant's brief and lack of specificity in Resnik's affidavit. More importantly, Source #2 is a member of defendant Cornelio's family with who Defendant shared details about the alleged exploits central to this suit. Consequently, this Court finds that the public interest in Plaintiff Demaria having his day in Court outweigh whatever theoretical concerns this source has about retaliation and the public's interest the free flow of information. Plaintiff's Motion to Compel identity of Source # 2 is **Allowed**. All discovery responses relating to this witness may not redacted or withheld based upon a claim of confidentiality relevance.

Source #3

This witness is not an employee for the City of Everett, but is, instead, an elected official. The claim of confidentiality is, therefore, weak substantively given the facts relayed in Defendant's brief and lack of specificity in Resnik's affidavit. The information provided by this source related to both information provided by Defendant Cornelio and Plaintiff DeMaria regarding the underlying facts of this suit. This witness claims to have information that is disputed by Plaintiff and contends should have been verified by Defendant Resnek. While

Source #3 indicates he/she has personal knowledge of Plaintiff's interest in retaliation, there are no specifics and no allegation that he/she is fearful of such retaliation. Even if Source #3 did, that would be less probative given Source #3 is an elected official. Consequently, this Court finds that the public interest in Plaintiff Demaria having his day in Court outweigh the public's interest in the free flow of information. Plaintiff's Motion to Compel identity of Source # 3 is **Allowed**. All discovery responses relating to this witness may not redacted or withheld based upon a claim of confidentiality relevance.

Source #4

This witness is an employee of the City of Everett where a heightened concern for tacit retaliation exists given the facts and nature of small town politics. The nature of this position and connection to Plaintiff creates a strong inference that Source #4 expected to remain confidential. In so much that this witness is simply regurgitating remarks made by Defendant Cornelio, the probative value of this witness to Plaintiff for a defamation case is unclear. This witness was not quoted in the articles objected to by Plaintiff and, frankly, and Source # 4's information does not appear to assist in proving that Defendant Resnek had actual malice when these articles were printed. This court, therefore, finds the public's interest in the free flow of information and confidentiality outweigh the public's interest in Plaintiff Demaria having access to the identity of this witness for purposes of preparing his case given that the low probative value of Source #4's testimony. Plaintiff's Motion to Compel identity of Source # 4 is **Denied**.

Source # 5

The claim of confidentiality for Source #5 is weak substantively given the facts relayed in Defendants' brief and lack of specificity in Resnik's affidavit. After conducting the

appropriate balancing test, this Court finds that the public interest in Plaintiff Demaria having his day in Court outweigh the public's interest the free flow of information. This witness has information relevant to the underlying suit which are necessary for Plaintiff to investigate so he can be properly prepared for trial. Plaintiff's Motion to Compel identity of Source #5 is **Allowed.** All discovery responses relating to this witness may not redacted or withheld based upon a claim of confidentiality relevance.

Source # 6

The claim of confidentiality for Source #6 is weak substantively given the facts relayed in Defendants' brief and lack of specificity in Resnik's affidavit. After conducting the appropriate balancing test, this Court finds that the public interest in Plaintiff Demaria having his day in Court outweigh the public's interest the free flow of information. This witness has information relevant to the underlying suit which are necessary for Plaintiff to investigate so he can be properly prepared for trial. Plaintiff's Motion to Compel identity of Source #6 is **Allowed.** All discovery responses relating to this witness may not redacted or withheld based upon a claim of confidentiality relevance.

Source #8

This witness is not an employee for the City of Everett, but is, instead, an elected official. The history of this witness and his/her involvement with town politics raises a stronger inference that Source #8 expected confidentiality when speaking with Resnik. Unlike Source #3, the information he obtained primarily came from Cornelio directly. The information provided by this source, therefore, relates less to Plaintiff's claims and is primarily limited to Defendant Cornello's counterclaims and credibility. In so much as Cornelio's statements to Source #3

contradict or are inconsistent with any other witness who spoke with Cornelio, the Source #8's information is probative and his/her identity must be provided along with those contradictory details. Under those limited circumstances, this Court finds that the public interest in Plaintiff Demaria having his day in Court outweigh the public's interest in the free flow of information. Plaintiff's Motion to Compel identity of Source #8 is **Allowed**. All discovery responses relating to this witness may not be redacted if the above circumstances arise.

Source #9

The claim of confidentiality for Source #9 is weak substantively given the facts relayed in Defendants' brief and lack of specificity in Resnik's affidavit. After conducting the appropriate balancing test, this Court finds that the public interest in Plaintiff Demaria having his day in Court outweigh the public's interest the free flow of information. This witness has information relevant to the underlying suit which are necessary for Plaintiff to investigate so he can be properly prepared for trial. Plaintiff's Motion to Compel identity of Source #9 is **Allowed**. All discovery responses relating to this witness may not redacted or withheld based upon a claim of confidentiality relevance.

Source #10

This witness has no relevance to the instant case. After conducting the appropriate balancing test, this Court finds that the public's interest the free flow of information public interest in Plaintiff Demaria having his day in Court outweigh. Plaintiff's Motion to Compel is **Denied** as to the identity of Source #10.

Source #11

The claim of confidentiality for Source #11 is weak substantively given the facts relayed in Defendants' brief and lack of specificity in Resnik's affidavit. After conducting the appropriate balancing test, this Court finds that the public interest in Plaintiff Demaria having his day in Court outweigh the public's interest the free flow of information. This witness has information relevant to the underlying suit which are necessary for Plaintiff to investigate so he can be properly prepared for trial. Plaintiff's Motion to Compel identity of Source #11 is **Allowed**. All discovery responses relating to this witness may not redacted or withheld based upon a claim of confidentiality relevance.

Source #12

The claim of confidentiality for Source #12 is weak substantively given the facts relayed in Defendants' brief and lack of specificity in Resnik's affidavit. After conducting the appropriate balancing test, this Court finds that the public interest in Plaintiff Demaria having his day in Court outweigh the public's interest the free flow of information. This witness has information relevant to the underlying suit which are necessary for Plaintiff to investigate so he can be properly prepared for trial. Defendants' request for a protective order for Source #12 is **Allowed**. All discovery responses relating to this witness may not redacted or withheld based upon a claim of confidentiality relevance.

Source #13

The claim of confidentiality for Source #13 is weak substantively given the facts relayed in Defendants' brief and lack of specificity in Resnik's affidavit. After conducting the appropriate balancing test, this Court finds that the public interest in Plaintiff Demaria having his

day in Court outweigh the public's interest the free flow of information. This witness has information relevant to the underlying suit which are necessary for Plaintiff to investigate so he can be properly prepared for trial. Plaintiff's Motion to Compel identity of Source #13 is **Allowed**. All discovery responses relating to this witness may not redacted or withheld based upon a claim of confidentiality relevance.

Source #14

The claim of confidentiality for Source #14 is weak substantively given the facts relayed in Defendants' brief and lack of specificity in Resnik's affidavit. The mere fact that this source is a reporter does not provide any special protections. This witness is relevant to Resnik's actual malice in this case given the information provided by parties. After conducting the appropriate balancing test, this Court finds that the public interest in Plaintiff Demaria having his day in Court outweigh the public's interest the free flow of information. Plaintiff's Motion to Compel identity of Source #14 is **Allowed**. All discovery responses relating to this witness may not redacted or withheld based upon a claim of confidentiality relevance.

ORDER

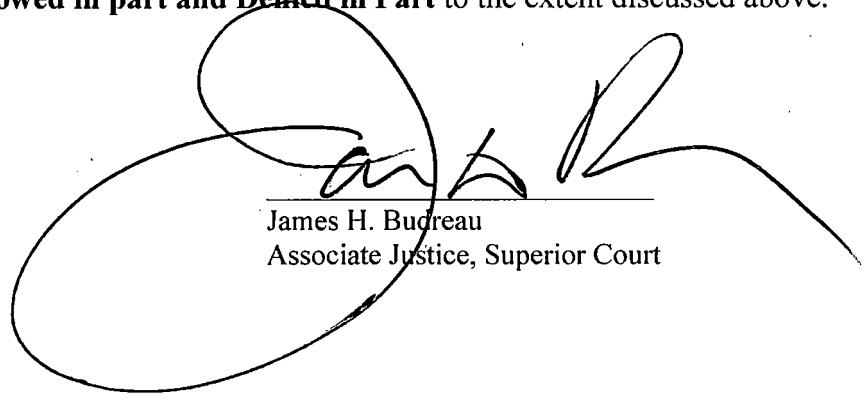
Based upon the above reasoning, Defendants shall provide the identities of the above witnesses consistent with the above reasoning and in so much that Defendants expect to call any of the sources in any capacity, then that the identity of this witness must be provided to Plaintiff by the Final Pre -Trial Conference and Plaintiff will be given an opportunity to depose the specific source at that time.

ORDER

Plaintiff's motion is **Allowed in part and Denied in Part** to the extent discussed above.

So Ordered,

Dated: 6/30/22

A large, stylized handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

James H. Budreau
Associate Justice, Superior Court