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

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JOHN M. ROAZZI,

Plaintiff,

-against-

UA BUILDERS CORP., UNITED ALLIANCE ENTERPRISES LLC, GRANIT GJONBALAJ and ALBERT GJONBALAJ OGAWA,

Defendants.

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Index No. 152129/2016

AFFIRMATION OF GREGORY O. TUTTLE IN OPPOSITION TO PLAINTIFF'S APPLICATION FOR PROTECTIVE ORDER

GREGORY O. TUTTLE, an attorney duly admitted to practice before the Courts of the State of New York, hereby affirms the following under penalties of perjury:

1. I am affiliated with law firm Tuttle Yick LLP, counsel to defendants UA Builders Corp., United Alliance Enterprises LLC, Granit Gjonbalaj and Albert Gjonbalaj ("UA" or the "Defendants") in this action. I am fully familiar with the matters set forth in this affirmation.

2. I respectfully submit this affirmation in opposition to John M. Roazzi's ("Roazzi" or "Plaintiff") application by Order to Show Cause for a protective order striking Request No. 12 and modifying Request No. 15 of Defendants' Notice for Discovery and Inspection dated July 11, 2016 relating to plaintiff's employment records.

PRELIMINARY STATEMENT

3. Under New York law, a party is entitled to full disclosure of all nonprivileged matters which are "material and necessary" to the defense or prosecution of an action, which standard is to be interpreted liberally. Roazzi's pre- and post-termination employment records are material and necessary to the claims and defenses in this matter,

especially when the plaintiff himself has put his employment experience and competence directly at issue in this case. Accordingly, Plaintiff's application for a protective order with respect to his employment records should be denied.

STATEMENT OF RELEVANT FACTS[1]

4. Plaintiff is 64 years old and brings this age discrimination case against the Defendants based on the brief time period time during which he was employed by UA as a project manager involved in managing construction projects. Plaintiff was hired by UA on **February 3, 2015**, and alleges that five months later, Defendants began a "campaign" of age discrimination. (Complaint, ¶¶ 24, 28). Plaintiff was terminated **on January 15, 2016** due to performance issues (¶¶ 32, 34). Plaintiff disputes that his performance was deficient, and avers that he has "over 30 years of experience in the construction industry," was "an outstanding, dedicated, and hardworking employee," and "received excellent feedback from the client" (Cafaro Aff. ¶ 2; Complaint, ¶¶ 25, 26). Plaintiff alleges that the defendants terminated him on the basis of age in violation the New York City Human Rights law, *despite that the very same defendants saw fit to hire plaintiff when he was less than a year younger*. ¶¶37-38.

5. Defendants answered the Complaint on May 3, 2016, Cafaro Aff. Ex. 2, and served a Notice for Discovery of Inspection on Plaintiff on July 11, 2016 (*id.* Ex. 3), requesting among other things:

> No. 12. Duly executed and correctly addressed authorization for employment records from all of Your employers for the period from ten (10) years prior to your purported

[1] The Statement of Facts is derived from the allegations of the Complaint, the allegations of which are assumed to be true only for the purposes of this motion. *Horn v. New York Times*, 100 N.Y.2d 85, 97 (2003). Citations to "¶__" refer to Plaintiff's March 10, 2016 Complaint, attached as Exhibit 1 to the Affirmation of William Cafaro ("Affaro Aff."). Emphasis has been added to, and internal quotations, brackets and citations omitted from, quoted material in the brief, except as indicated.

employment with Defendants through to the commencement date of Your purported employment with Defendants.

No. 15. All documents and communications concerning Your efforts to find employment since Your termination seeking subsequent job searches.

6. Plaintiff seeks a protective order striking request No. 12 in its entirety and a prospective order prohibiting the Defendants from serving any subpoenas to third parties for information responsive to Request No. 15 unless and until Plaintiff has 30 days prior notice to decide whether or not move for a protective order. Plaintiff asserts vaguely—and without any factual submission whatsoever, but only an attorney's affirmation—that Plaintiff will suffer annoyance, embarrassment, disadvantage and other prejudice because Plaintiff will find it harder to find a job if his former or future employers are asked to produce records. ¶¶7, 9. As explained below, this is not a basis to prevent defendants from obtaining discovery material and necessary to their defense. Accordingly, Plaintiff's application should be denied.

ARGUMENT

7. Under CPLR 3101(a), "there shall be full disclosure of all matter *material and necessary* in the prosecution or defense of an action." The words "'material and necessary' are to be interpreted liberally to require disclosure of any facts which will assist the good faith preparation for trial." *Johnson v Nat'l. R.R. Passenger Corp.*, 83 A.D.2d 916, 916 (1st Dep't 1981). "The prerequisites of materiality and necessity, though placing some limit on entitlement to disclosure, extend to any information or items bearing on the controversy which will be an aid to trial preparation, sharpening of the issues or reducing delay. The test in such cases in usefulness and reason." *O'Neill v. Oakgrove Constr.*, 71 N.Y.2d 521, 526 (1988).[2]

[2] Curiously, Plaintiff cites the federal discovery rules and federal cases construing those rules in support of his application. Cafaro Aff. ¶14. To justify this, Plaintiff relies on *Morrison v. N.Y. City Police Dep't*, which holds that "when a State court **entertains a Federally created**

8. When evaluating discovery requests for non-parties — such as Plaintiff's former employers — such requests should only be denied "where the materials sought are utterly irrelevant to any proper inquiry." *Velez v. Hunts Point Multi-Service Ctr.*, 29 A.D.2d 104, 112 (1st Dep't 2006). *See also Matter of Kapon v. Koch*, 23 N.Y. 3d 32, 38 (2014) (third party discovery denied only "where [the movant demonstrates] the futility of the process to uncover anything legitimate is inevitable or obvious or where the information sought is utterly irrelevant to any proper inquiry"). Plaintiff does not remotely meet this substantial burden.

I. PLAINTIFF HAS FAILED TO DEMONSTRATE THAT HIS PRIOR EMPLOYMENT RECORDS (REQUEST NO. 12) ARE "UTTERLY IRRELEVANT"

9. Defendants seek authorizations from Plaintiff for Plaintiff's employment records during the years immediately preceding his hiring by the Defendants. These prior employment records are plainly relevant to the claims and defenses in this action and clearly within the permissible scope of pre-trial discovery.

A. Plaintiff's Employment Records are Relevant as Plaintiff Has Placed His Own Employment History at Issue

10. To start, Plaintiff specifically relies on his record to support his claims in this lawsuit. Plaintiff holds himself out to be an "outstanding, dedicated and hardworking employee" who received "excellent feedback" from clients, ¶¶25-26, and cites his "30 years" of experience in the construction industry. Cafaro Aff. ¶2. Accordingly, Plaintiff has placed his own past record in the construction industry squarely at issue in this case, thereby making

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cause of action, the federal right cannot be defeated by the forms of local practice. 225 A.D.2d 463, 463 (1st Dep't 1996). This is true, but irrelevant. Unlike in *Morrison*, in which the Plaintiff brought claims under 28 U.S.C. § 1983, Roazzi does not bring any federal causes of action in this case. Rather, Roazzi relies entirely on New York City law. *See* ¶¶41-51. The federal cases relied on by Plaintiff—all of which rely on Fed. R. Civ. P. 26, are inapposite. But even assuming the federal discovery rules apply, Plaintiff's motion should be denied for the reasons set forth below.

information relating to his record relevant and material and necessary to the claims and defenses in this action. Defendants must be entitled to such discovery in order to defend against plaintiff's self-serving pronouncements regarding his record. For instance, Defendants are entitled to discovery of Plaintiff's prior work performance to rebut his claims that he is an outstanding employee, to probe the actual substance of his supposed "30 years" of experience, and test whether he is the capable employee he asserts he is. Information from Roazzi's former employers that would tend to undermine any of these claims—*e.g.*, if Roazzi actually did not have relevant experience in the field, his work was incompetent, and received poor reviews—would support Defendants' legitimate, nondiscriminatory reason for terminating Plaintiff: his deficient performance.

11. Contrary to Plaintiff's assertion, such discovery would not inevitably lead to inadmissible evidence of character or propensity evidence. *See* Cafaro Aff. ¶16-17. Rather, where Roazzi's job performance is directly at issue and disputed by the parties, the Plaintiff's former employers' evaluation can provide objective evidence of the Plaintiff's ability to do his job. *See Mirkin v. Winston Resources, LLC*, No. 07 Civ. 02734, 2008 WL 4861840, at *1 (S.D.N.Y. Nov. 10, 2008) (denying motion to quash; former employers can provide relevant discovery as to "Plaintiff's lack of certain job skills, providing evidence that would be relevant to a defense that Plaintiff was terminated for legitimate non-discriminatory reasons"); *During v. City Univ. of N.Y.*, 2006 WL 2192843, at *4 (S.D.N.Y. Aug. 1, 2006) (in discrimination case, employment records from different job are relevant "because they have a reasonable possibility of commenting on [plaintiff's] *performance and attendance records which are directly at issue in this matter*").

12. In addition, Defendants suspect Plaintiff misled Defendants prior to his

hiring, and misled the Court in this litigation, as to his qualifications to manage construction projects. Prior employment records—which will shed light on Roazzi's actual experience level—are therefore relevant in connection with evaluating both Plaintiff's credibility and with the doctrine of after-acquired evidence in connection with his claims for lost wages. *See McCarthy v. Pall Corp.*, 214 A.D.2d 705, 705, 625 N.Y.S.2d 296, 296 (2d Dep't 1995) (after-acquired evidence of employee's fraud is relevant to determination of damages and what other remedies to impose).

13. Though Defendants submit that the record will amply rebut Plaintiff's assertions of competence *during* his tenure with UA, the reality is that Plaintiff's past employment performance is particularly important in this case where Plaintiff was employed by UA *for less than a year*. Roazzi's short tenure at UA was rife with incompetence, failures to meet expectations, and substantial client complaints about his deficient performance. Accordingly, Defendants suspect that Plaintiff intends to rely on Roazzi's history and experience in the construction industry to establish his alleged competence. Indeed, he already has. *See* Cafaro Aff. ¶2 (touting Roazzi's "30 years" of experience in the construction industry). As Plaintiff has acknowledged, his actual job performance prior to joining UA is squarely at issue and therefore relevant to the claims and defenses in this action. Defendants are entitled to Plaintiff's pre-termination employment records.

B. Plaintiff's Alleged "Burden" Is Illusory

14. Plaintiff claims that discovery into his pre-hiring employment records and performance would cause him "annoyance, embarrassment, disadvantage and other prejudice." Cafaro Aff. ¶6. But the only prejudice Plaintiff identifies is his attorney's utterly speculative and conclusory assertion that documents requested from Plaintiff's former employers will make it

"harder . . . for Plaintiff to get another job" because it will call attention to the instant discrimination lawsuit, and the "people who hire construction project managers in New York City is finite." *Id.* ¶9. This is baseless.

15. *First*, Plaintiff submits nothing to indicate that he actually intends to seek employment with a former employer. Merely obtaining employment records from prior employers would have no impact on potential future employers.

16. *Second*, while Plaintiff avers that his lawsuit is currently not "google[able]," *id.*, it is easily findable by any sophisticated employer or client through the New York's courts' electronic filing system. Moreover, Plaintiff's concession that New York is a "big town," *id.*, is an understatement to say the least. Not only is New York one of the largest construction markets in the world, it is growing.[3] The suggestion that a subpoena addressed to Plaintiff's handful of *former* employers will somehow prevent him from finding future work in New York's construction industry is ridiculous.

17. Finally, Plaintiff's privacy concerns, if indeed there are any, must give way to Defendants' legitimate right to discovery to defend themselves from Plaintiff's allegations in this case. *See, e.g.*, *Mirkin*, 2008 WL 4861840, at *1 (S.D.N.Y. Nov. 10, 2008) (any embarrassment a plaintiff may face from the enforcement of a subpoena seeking testimony from another employer because it "would negatively affect her current and future employment prospects" was "slight" and "marginal"); *During*, 2006 WL 2192843, at *5 ("a litigant himself must reasonably anticipate that his personal matters will be disclosed" and in an employment discrimination case, the plaintiff "should reasonably expect that matters ***relating to his***

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[3] *See* Josh Barbanel, *Construction in New York City Goes Through the Roof*, Wall Street Journal, (July 29, 2015), *available at* http://www.wsj.com/articles/construction-in-new-york-city-goes-through-the-roof-1438217274.

employment performance . . . will be disclosed").

18. The cases relied on by Plaintiff are either inapposite or confirm that Defendants' request is well within the bounds of legitimate pre-trial discovery. For instance, in *Pecile v. Titan Capital Group, LLC*, (see Cafaro Aff. ¶12), the First Department held that defendants' demands for employment records should be *granted* to the extent they related to matters "placed . . . at issue" by plaintiffs. 113 A.D.3d 526, 527 (1st Dep't 2014). As set forth above, Plaintiff's performance and capability at performing his job are squarely at issue here.

19. Similarly, in *Henry v. Morgan's Hotel Grp, Inc.*, (*see* Cafaro Aff. ¶15), a federal case by United States Magistrate Judge (*see* supra ¶ 7 n.2), there was no assertion that the Plaintiff had placed his performance and prior experience at issue in the case. 2016 WL 303114, at *3 (S.D.N.Y. Jan. 25, 2016). Rather, the Court specifically found that the third-party subpoenas solely sought evidence for impeachment and after-acquired evidence. *Id.* Finally, the plaintiff in *Henry*, a waiter, submitted actual support for the assertion that the subpoenas served on his former employers could adversely effect his employment in the future, because the subpoena recipients owned 16 other restaurants in the area, and thus raised a real risk to his future livelihood. *Id.* at *2. Plaintiff offers nothing but the vaguest conclusory assertion that merely obtaining past employment records will somehow jeopardize his future livelihood. Cafaro Aff. ¶9.

20. Defendants are entitled to seek discovery relating to Plaintiff's prior employment.

II. There Is No Dispute That Defendants' Request For Documents Concerning Post-Termination Employment Efforts Seeks Relevant Information

21. Plaintiff's request for a protective order as to post-termination employment records sought from as yet unidentified third parties is unripe, and in any event,

meritless. Defendants have asked for "documents and communications concerning Your efforts to find employment since Your termination seeking subsequent job searches" within Plaintiff's custody and control. Plaintiff concedes that these are "relevant for the purposes of mitigation of damages," Cafaro Aff. ¶18, and even agrees that he will comply with this request. *Id.* ¶7. And none of the cases cited by Plaintiff remotely establish that discovery of post-termination employment is objectionable. It is not. It is directly relevant to mitigation of damages and Plaintiff's claim for lost wages.

22. Plaintiff, however, citing no authority, seeks a protective order that would provide him 30-days advance notice of any third party subpoenas Defendants plan to serve on any entities or individuals identified by the documents produced in response to No. 15. There is no basis for this kind of prospective relief under New York law, particularly where Plaintiff concedes the relevance of these hypothetical documents. Defendants have yet to seek any third party discovery in this case. If and when Defendants provide notice of the third-party subpoena under the CPLR, that is the time Plaintiff can seek appropriate relief if Plaintiff believes the subpoenas are somehow improper. At that point, Plaintiff will have the "burden of establishing that the requested documents and records are utterly irrelevant." *Velez*, 29 A.D.2d at 112. All Plaintiff has done so far is confirm that such documents are indeed relevant. In light of their plain relevance, the fact that such subpoenas have not even been contemplated yet, and Plaintiff's heavy burden in quashing a subpoena if and when it is deemed necessary, there is no basis for a protective order providing Plaintiff advance notice beyond what is contemplated by the CPLR. Plaintiff has made no showing of the necessity for such an order, which will only serve to delay this case, and mire the parties and this Court in discovery disputes.

23. For the reasons set forth above, Plaintiff's application for a Protective

Order should be denied in its entirety.

Dated: New York, New York
August 15, 2016

By: 
Gregory O. Tuttle