Proskauer Rose LLP Eleven Times Square New York, NY 10036-8299

June 7, 2019

Adam M. Lupion
Member of the Firm
d +1.212.969.3358
f 212.969.2900
alupion@proskauer.com
www.proskauer.com

VIA ECF

Hon. Gabriel W. Gorenstein
Chief U.S. Magistrate Judge
Daniel Patrick Moynihan
United States Courthouse
500 Pearl Street
Courtroom 6B
New York, New York 10007-1312

Re: *Angel Hernandez v. The Office of the Commissioner of Baseball, et al.*
18 Civ. 9035 (JPO) (GWG)

Dear Judge Gorenstein:

We represent Defendants The Office of the Commissioner of Baseball and MLB Baseball Blue, Inc. (together, "MLB") in the above-referenced matter. Pursuant to Your Honor's Individual Rule of Practice 2(A), we write in response to Plaintiff's June 5 and June 7, 2019 letters. (Dkts. 73, 75.). As set forth below, Plaintiff's request that this Court stay enforcement of or quash the subpoena *duces tecum* ("Subpoena") issued on the Major League Baseball Umpires Association ("MLBUA") is baseless and should be denied. The sole contention advanced in Plaintiff's letter application is that MLB is not entitled to discovery concerning Plaintiff's communications with his union – communications concerning the very subjects at issue in this litigation – because of a purported "union relations privilege." However, for the reasons set forth in MLB's May 23, 2019 letter requesting that Plaintiff be compelled to provide testimony and documents concerning his communications with the MLBUA, there is no cognizable privilege that shields these communications. (*See* Dkt. 66.) Accordingly, Plaintiff's request that this Court stay enforcement or quash the subpoena served on the MLBUA is legally baseless and therefore should be denied in its entirety.

On June 4, 2019 (nearly two weeks after Defendants notified Plaintiff of the intent to serve the subpoena), Plaintiff's counsel requested for the first time that Defendants withdraw the subpoena. We advised Plaintiff's counsel that we were not willing to do so. Following the Court's Order on June 6 (Dkt. 74), the parties spoke again on the morning of June 7, 2019. Although Plaintiff purports to set forth Defendants' position in his letter of that same date (Dkt. 75 at 2), his description is incomplete. In addition to advising Plaintiff again that Defendants do not consent to any stay, we also advised him why, namely because the purported "union relations privilege" is not legally cognizable and does not provide a basis for withholding discovery. For the reasons set forth in greater detail below, Plaintiff's assertion of a "union relations" privilege as a ground for withholding discovery should be rejected out of hand.

There is no "union relations privilege" under federal law. *See In re Grand Jury Subpoenas Dated Jan. 20, 1998*, 995 F. Supp. 332, 334, 336 (E.D.N.Y. 1998) ("declin[ing] to recognize a common law privilege shielding conversations between union officials and members on matters of union concern" and noting that "[t]he inability of New York's executive and legislative branches to reach agreement on the costs and benefits of a union privilege strongly cautions against this court finding that such a privilege should now be enshrined in common law.") Plaintiff's attempt to limit the holding of *In re Grand Jury Subpoenas* to its facts is inapt. As the court expressly stated, the union in that case had "failed to demonstrate that *any* privilege shields its officials from answering any and all grand jury questions about conversations they may have had with [its] members." *Id.* at 334 (emphasis added). *See also, Jenkins v. Bartlett*, 487 F.3d 482, 491 n.6 (7th Cir. 2007) ("We do not suggest that an independent privilege exists for communications between an individual and his union representative."); *Burwell v. City of Peoria*, No. 09-1309, 2012 WL 13006042, at *3 (C.D. Ill. Feb. 22, 2012) ("The relationship between a union member and a union representative has been found several times to fall short of the level of societal importance that justifies privilege."). Plaintiff provides no basis whatsoever for this Court to take the extraordinary step of recognizing a new privilege.

In support of that futile endeavor, Plaintiff continues to rely on two inapposite New York state court decisions. (Dkt. 73 at 2; Dkt. 75 at 2.) As Judge Raggi recognized in *In re Grand Jury Subpoenas Dated Jan. 20, 1998*, both *Seelig v. Shepard* and *City of Newburgh v. Newman* "held it to be an unfair labor practice for an employer to seek to question a union representative about statements made by an employee who the representative was assisting *in an internal disciplinary proceeding*." *See In re Grand Jury Subpoenas*, 995 F. Supp. at 336 (emphasis added). Here, MLB is not seeking materials related to an internal disciplinary proceeding *against* Hernandez, but rather communications concerning employment decisions concerning him that are indisputably relevant to defend against the litigation that *he commenced against MLB*, rendering *Seelig* and *Newburg*h inapplicable. And although Plaintiff seeks to extend *Newburgh's* holding by claiming that it should apply to private employers, this ignores that the court in *Newburgh* emphasized that any privilege it established "operates only as against the public employer." *City of Newburgh*, 70 A.D.2d 362, 366 (3d Dep't 1979). The court in *In re Grand Jury Subpoenas* also found this distinction significant. *See In re Grand Jury Subpoenas*, 995 F. Supp. at 336 (describing that *Newburgh*'s holding applied only "against the public employer").[1]

[1] Plaintiff's suggestion that the inclusion of his state law claims requires this court to consider state law privilege is simply wrong. "Where evidence is 'relevant to both the federal and state claims, privileges are governed by the principles of federal law.'" *Universal Standard Inc. v. Target Corp.*, No. 18-cv-6042, 2019 WL 1983944, at *4 (S.D.N.Y. May 6, 2019). And even were this Court to consider privilege under state law, "New York courts have deferred to the Legislature as to the creation of any new evidentiary privilege." *Lamitie v. Emerson Elec. Co – White Rodgers Div.*, 142 A.D.2d 293, 299 (3d Dep't 1988). As noted *supra*, the New York legislature has declined to enact legislation to recognize the privilege Plaintiff purports to assert here.

The other cases Plaintiff cited in his May 28, 2019 letter (which he purports to incorporate into his June 5, 2019 letter, *see* Dkt. 73 at 2, n.1) actually compel rejection of a "union relations privilege" here. For example, in *Bell v. Village of Streamwood*, the court predicated its decision on the fact that "Illinois ha[d] codified a union agent-union member privilege." 806 F. Supp. 2d 1052, 1056 (N.D. Ill. 2011). Further, *Bell*, like *Seelig* and *Newburgh*, limited its holding to communications "relating to anticipated or ongoing disciplinary proceedings." *Id.* at 1056. Similarly, *Peterson v. State* held that a union relations privilege existed in Alaska "by implication of Alaska statutes." 280 P.3d 559, 560 (Alaska 2012). In sharp contrast to Alaska or Illinois, there is no such privilege codified under New York law. In fact, attempts to codify such a privilege failed at the executive and legislative levels. *See In re Grand Jury Subpoenas*, 995 F. Supp. at 336. Finally, *United States Department of Justice v. Federal Labor Relations Authority* merely analyzed an ALJ's determination whether questioning by the Office of Inspector General of the Department of Justice constituted an unfair labor practices under the Federal Service Labor-Management Relations Statute. *See U.S. Dep't of Justice*, 39 F.3d 361, 368–69 (D.C. Cir. 1994). Simply put, there is no cognizable "union relations privilege" applicable here.

Once the Court determines that there is no privilege, Plaintiff lacks standing to object to the MLBUA subpoena on any other basis. "Parties generally do not have standing to object to subpoenas issued to non-party witnesses." *Hughes v. Twenty-First Century Fox, Inc.*, 327 F.R.D. 55, 57 (S.D.N.Y. 2018). "In the absence of a claim of privilege a party usually does not have standing to object to a subpoena directed to a non-party witness." *Samad Bros., Inc. v. Bokara Rug Co. Inc.*, No. 09-cv-5843, 2010 WL 5094344, at *2 (S.D.N.Y. Nov. 30, 2010). Plaintiff has asserted no interest in the materials at issue other than his meritless "union relations privilege." Once that challenge is recognized as unfounded, Plaintiff loses any right to challenge the subpoena.

For these reasons, MLB respectfully requests that this Court deny Plaintiff's letter motion to stay enforcement of and/or to quash the MLBUA subpoena.

Respectfully submitted,

/s/ Adam L. Lupion
Adam M. Lupion

cc: All counsel (via ECF)