UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ELIYAHU MIRLIS	:	**CASE NO. 3:16cv678 (MPS)**
	:	
V.	:	
	:	
DANIEL GREER	:	**AUGUST 23, 2019**

MEMORANDUM OF LAW IN SUPPORT OF PROPOSED INTERVENOR STATE OF CONNECTICUT'S MOTION TO INTERVENE AND UNSEAL AS TO STATE OF CONNECTICUT

Pursuant to Rule 24 of the Federal Rules of Civil Procedure, the State of Connecticut submits this memorandum of law in support of its motion to intervene and unseal the videotape of the deposition of Aviad Hack as to the intervenor, State of Connecticut, only. Intervention is sought in order to further the compelling interest of the State in the investigation and prosecution of criminal offenses—particularly those involving the abuse and/or exploitation of minors. For the reasons set forth below, the State requests that the Court grant its motion.

I. RELEVANT PROCEDURAL HISTORY

"Plaintiff Eliyahu Mirlis brought this lawsuit against his former high school principal, Rabbi Daniel Greer, along with his former high school, Yeshiva of New Haven, Inc. ('Yeshiva'). Mirlis claimed that he was repeatedly sexually assaulted as a student at Yeshiva by Greer, and that the school failed to respond appropriately." Order [ECF 277] at 1. After a trial in May 2017, "the jury returned a verdict in favor of the plaintiff, Eliyahu Mirlis, awarding $15,000,000 in compensatory damages and finding that punitive damages should be awarded for the plaintiff's recklessness, intentional infliction of emotional distress, and assault and battery claims." Judgment [ECF 163]. Judgment entered on June 6, 2017. The defendant appealed and that appeal remains pending, *Mirlis v. Greer*, Case No. 17-4023

Prior to trial, the deposition of a potential witness, Aviad Hack, was taken. "Hack testified, among other things, that Greer had sexually abused him while he was a minor and a student at the Yeshiva a few years before Mirlis attended, and also that Hack later learned—while he was a teacher at the Yeshiva—that Greer was abusing Mirlis." Order [ECF 277] at 2-3. At the time of trial, however, the plaintiff was unable to serve a subpoena on Hack. Therefore, the Court concluded that Hack was "an 'unavailable witness' for the purposes of Fed. R. Civ. P. 32(a)(4)(D)." Order [ECF 145]. Portions of the videotape of Hack's deposition were played to the jury.

After the 2017 trial, a non-party appears to have requested that certain materials be made publically available. The requested materials included the videotape of Hack's deposition. In response, Hack moved for a protective order. On January 26, 2018, the Court concluded that the non-party's "request to release the video of the deposition of Aviad Hack is granted with respect to those portions shown to the jury at trial." Order [ECF 277] at 14. In doing so, it noted that the "transcript of the entire deposition . . . has been publicly available since the parties filed it on the docket before trial as an exhibit to their joint trial memorandum to facilitate the Court's ruling on the admissibility of the specific testimony they had designated." Id. at 3. It stayed its order for 21 days and, subsequently, extended that stay. Order [ECF 277 and 284]. Hack and the defendants appealed. One appeal was withdrawn and the other remains pending. *Mirlis v. Greer*, Case Nos. 18-416 and 18-517. On April 18, 2018, the Second Circuit granted motions filed by the defendants and Hack and ordered that "the district court's order authorizing public access to certain videotapes" be stayed.

Meanwhile, the defendant, Daniel Greer, was arrested and charged with four counts of sexual assault in the second degree in violation of Connecticut General Statutes § 53a-71(a)(1) and four counts of risk of injury to a minor (sexual contact) in violation of Connecticut General Statutes § 53-21(a)(2) in the matter of *State v. Greer*, Superior Court, judicial district of New Haven, Docket No. NNH-CR17-0177934-T. Jury selection has commenced and evidence will begin on or about September 17, 2019.

II. ARGUMENT

The proposed intervenor, State of Connecticut, has an undeniably compelling interest in the detection, investigation, and prosecution of criminal offenses committed within its borders—particularly those involving the abuse and/or exploitation of minors. See *Osborne v. Ohio*, 495 U.S. 103, 109, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990) ("It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling'"); *New York v. Ferber*, 458 U.S. 747, 757, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982) ("The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance"); *United States v. Widmer*, 785 F.3d 200, 207 (6th Cir. 2015) ("Governmental entities have a traditional and transcendent interest in protecting children within their jurisdiction from abuse" [citation omitted]); *United States v. Johnson*, (7th Cir. 2004) ("the protection of children from sexual abuse and exploitation is a particularly compelling interest"). In order to properly perform its law enforcement function, the State now seeks to intervene in order to obtain a copy of those portions of the videotaped deposition of Aviad Hack that were viewed by the jury at the May 2017 trial in the instant matter.

Under Rule 24(a) of the Federal Rules of Civil Procedure a party may intervene as of right in an action when he "claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest. . ." Fed. R. Civ. P. 24(a)(2). The Second Circuit Court of Appeals has developed a four-pronged test for determining whether a party may intervene as of right under Rule 24(a)(2). The party must (1) file a timely motion; (2) demonstrate an interest in the litigation; (3) establish that its interest may be impaired by the disposition of the action; and (4) show that its interest is not adequately protected by the parties to the action. See *Hoblock v. Albany County Bd. of Election*, 233 F.R.D. 95, 97 (N.D.N.Y. 2005) (quoting *D'Amato v. Deutsche Bank*, 236 F.3d 78, 84 [2d Cir. 2001]). Additionally, Rule 24(b) allows permissive intervention "when an applicant's claim or defense and the main action have a question of law or fact in common." Fed. R. Civ. P. 24(b)(2). Rule 24(b) "gives the district court broad discretion to permit a nonparty to intervene in a private lawsuit where . . . that party's claims and the pending civil action share questions of law and fact and where such intervention would not 'unduly delay and prejudice the adjudication of the rights of the original parties.'" *Bridgeport Harbour Place I, LLC v. Ganim*, 269 F.Supp.2d 6, 8 (D. Conn. 2002) (quoting Fed. R. Civ. P. 24(b)). Here, the State seeks to intervene in this federal civil action because there is a pending state criminal action involving common questions of law or fact.

Alternatively, courts "have repeatedly recognized that members of the press (and other non-parties) may seek to pursue modification of confidentiality orders that have led to sealing of documents filed with the court, and . . . the appropriate procedural mechanism to do so is a motion to intervene. . . ." (Citations omitted; internal quotation marks omitted.) *Giuffre v. Maxwell*, 325 F.Supp.2d 428, 437 (S.D.N.Y. 2017), rev'd on other grounds, 929 F.3d 41 (2d Cir.

2019). "[I]ntervention for the purpose of challenging confidentiality orders is permissible even years after a case is closed. . . ." (Citations omitted.) Id. Given this additional authority, the State properly moves to intervene.

In this case, the Court already has determined that the "video of the deposition that was played for the jurors at trial and considered by them in rendering their decision is a judicial document." Order [ECF 277] at 7. In asking for the release of this videotape, the State does not seek to enforce the Court's earlier order, which presently is stayed by the Second Circuit. That order directed the videotape's release to the public[1] and the Second Circuit stayed the "order authorizing *public access* to certain videotapes." (Emphasis added.) The State's request is wholly unrelated. Unlike the non-party, whose request is presently on appeal to the Second Circuit, the State does not ask that the videotaped deposition be made public. Rather, it requests that those same portions of the videotape that were played to the jury—the same portions that the Court ordered disclosed--be released only to the State for purposes associated with its investigation and prosecution of allegations of the sexual abuse of a minor by the defendant.[2] The defendant, through his attorneys, already has a copy of the videotape. Any potential dissemination of the videotape beyond members of the prosecution team and law enforcement would only occur if, under certain limited circumstances, the state court judge admitted it as

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[1] Although the Court specifically ordered the release of the videotape to the nonparty, the nonparty stands in no superior position to any other member of the general public with respect to his ability to obtain judicial documents. Indeed, the Court's analysis of the issue focused on the generalized release of judicial documents to the public—not to any particular individual.

[2] The defendant, Daniel Greer, is presumed innocent of the charged offenses.

evidence during the criminal proceedings. At that point, the State would ask that it be sealed by the state court.

The State does not dispute that Aviad Hack's privacy concerns are valid. Those concerns focus on the heightened intrusion that results when testimony is preserved on videotape. Certainly, a paper transcript of a deposition does not invade an individual's privacy in the same manner as an electronic recording. When balanced against the compelling interests of the State in the prosecution of criminal charges arising from the alleged sexual abuse of a minor, however, those privacy concerns must give way in favor of releasing the videotape to the prosecuting officials of the State of Connecticut.

III. CONCLUSION

For the reasons set forth above, the State of Connecticut asks that the Court grant its motion to intervene and order that the videotaped deposition of Aviad Hack be unsealed and released to its prosecuting authority.[3]

Respectfully submitted,

STATE OF CONNECTICUT

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[3] The prosecutor's authority over criminal matters is established by the state constitution as well as the General Statutes. For example, Article fourth, Section twenty-seven of the Connecticut state constitution provides that "[t]here shall be established within the executive department a division of criminal justice which shall be in charge of the investigation and prosecution of all criminal matters." "The division, through the Chief State's Attorney, shall participate on behalf of the state in all appellate, post-trial and postconviction proceedings arising out of the initiation of any criminal action whether or not the proceedings are denominated civil or criminal for other purposes." Connecticut General Statutes § 51-277. The Division is required to "take all steps necessary and proper to prosecute all crimes and offenses against the laws of the state and ordinances, regulations and bylaws of any town, city, borough, district or other municipal corporation or authority." Id.

CERTIFICATION

I hereby certify that on August 23, 2019, a copy of foregoing document was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

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