

Dawson v Schoenberg
2011 NY Slip Op 32033(U)
July 8, 2011
Supreme Court, New York County
Docket Number: 16502/09
Judge: Anthony L. Parga
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SHORT FORM ORDER

SUPREME COURT-NEW YORK STATE-NASSAU COUNTY
PRESENT:

HON. ANTHONY L. PARGA
JUSTICE

-----X PART 8
JOETTA DAWSON f/k/a JOETTA DEAN,

Plaintiff,

INDEX NO.: 16502/09

-against-

MOTION DATE: 05/27/11
SEQUENCE NO. 001, 002

RONALD SCHOENBERG,

Defendant.

-----X

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Upon the foregoing papers, plaintiff's motion for a protective order, pursuant to CPLR §3103(a), is denied, and defendant's cross-motion for an order compelling plaintiff to provide an authorization for copies of the trial transcript of the plaintiff's second criminal trial, pursuant to CPLR §3124, is granted to the extent directed below.

The following facts are taken from pleadings and submitted papers and do not constitute findings of fact by this Court.

This is an action for legal malpractice arising from the defendant's representation of the plaintiff in the action entitled, *People of the State of New York v. Joetta Dean*. Defendant was retained to defend the plaintiff following her arrest stemming from allegations that she sexually abused her three minor children. Plaintiff was indicted with three counts of Course of Sexual Conduct Against a Child (PL §130.80, a Class D Felony) and one count of Sexual Abuse in the Second Degree (PL §130.60(2), a Class A Misdemeanor). Defendant represented plaintiff through her first criminal trial, after which, on March 28, 2006, she was convicted of all counts. Plaintiff was sentenced to twenty-one years in prison.

After her conviction, plaintiff terminated the services of the defendant and hired

successor counsel, Kevin Keating, Esq., who brought a motion on plaintiff's behalf to vacate the judgment pursuant to CPL §440.10 (hereinafter referred to as "440 motion"). After a hearing was held before the first trial judge, the plaintiff's 440 motion was denied.

Thereafter, plaintiff appealed her conviction to the Appellate Division, Second Department, which, on April 22, 2008, overturned plaintiff's conviction based upon a finding that the defendant rendered "ineffective assistance of counsel." In its decision, the Appellate Division, Second Department stated, "[w]e do not find that any single example of deficient representation was sufficient to deprive the defendant of the effective representation of counsel. Rather, we conclude that, given the totality of her counsel's deficient representation, the defendant was denied meaningful representation."

Based upon the appellate court's ruling, the plaintiff was granted a new trial before a new judge. Represented by successor counsel, plaintiff was re-tried and acquitted of all charges in October 2008. After plaintiff's acquittal, the court record was sealed pursuant to N.Y. CPL §160.50.

The parties have entered into a confidentiality stipulation governing the use of the materials disclosed during the course of discovery in this action. The materials which were to be disclosed by plaintiff were the first trial transcripts, the 440 motion, transcript of the 440 hearing, and documents relating to plaintiff's appeal to the Appellate Division, Second Department, in connection with her conviction after her first criminal trial. Although the plaintiff would not disclose the second criminal trial transcript to the defendant, the parties agreed to make the terms of the confidentiality stipulation applicable to any subsequent discovery disclosure.

Plaintiff now moves for a protective order denying, limiting, conditioning, or regulating the use of Defendant's discovery demands, in particular denying defendant's demand for an authorization to obtain the trial transcripts for plaintiff's second criminal trial.

Defendant cross-moves to compel plaintiff to provide the outstanding discovery, including the remainder of the transcripts from the 440 hearing, the People's opposition papers to the 440 motion, the first trial judge's decision after the 440 hearing, and, most notably, the second criminal trial transcript.

The defendant is entitled to disclosure of the second trial transcripts, as the plaintiff has placed the underlying criminal action at issue in this civil lawsuit, and as a failure to disclose the second trial transcripts is prejudicial to the defense of this matter by the defendant. A cause of action for criminal legal malpractice accrues when the criminal proceeding is terminated, i.e., on the date when the indictment against the plaintiff is dismissed. (*Britt v. Legal Aid*, 95 N.Y.2d 443 (2000)). Accordingly, plaintiff's claim for legal malpractice herein did not even accrue until the conclusion of the second trial when she was acquitted of the charges brought against her. As

such, the transcripts from the second criminal trial, and the jury's verdict resulting therefrom, are needed by both the plaintiff to prove legal malpractice, and the defendant to defend against said claim. Further, as the second trial was conducted by a different criminal defense attorney, presided over by a different judge, possibly prosecuted by a different Assistant District Attorney, and held before a different jury, factors other than the defendant's alleged malpractice may have attributed to the favorable verdict for the plaintiff in the second trial.

It is well settled that an attorney is liable for malpractice if it can be proven that his or her conduct fell below the ordinary and reasonable skill and knowledge commonly possessed by a member of the profession and if it can be proven that the plaintiff would have recovered, or been acquitted, "but for" the alleged malpractice. (*Ashton v. Scotman*, 260 A.D.2d 332, 686 N.Y.S.2d 322 (2d Dept. 1999); *Saferstein v. Klein*, 250 A.D.2d 831, 672 N.Y.S.2d 799 (2d Dept. 1998); *Carmel v. Lunney*, 70 N.Y.2d 169 (1987)). A plaintiff must establish that the attorney's negligence was a proximate cause of the loss sustained, that the plaintiff incurred actual damages as a direct result of the attorney's action, and that the plaintiff would have been successful in the underlying action if the attorney had used due care. (*Porello v. Longworth*, 21 A.D.3d 541, 799 N.Y.S.2d 918 (2d Dept. 2005); *Britt v. Legal Aid*, 95 N.Y.2d 443 (2000); *Carmel v. Lunney*, 70 N.Y.2d 169 (1987); *Andrews Beverage Distributor, Inc. v. Stern*, 215 A.D.2d 706, 627 N.Y.S.2d 423 (2d Dept. 1995); *Turner v. Robins*, 267 A.D.2d 376, 699 N.Y.S.2d 728 (2d Dept. 1999); *Zasso v. Maher*, 226 A.D.2d 366, 640 N.Y.S.2d 244 (2d Dept. 1996)). In proving malpractice in a criminal action, the test is whether a proper defense would have altered the result of the prior action. (*Carmel v. Lunney*, 70 N.Y.2d 169 (1987)).

Contrary to plaintiff's contentions, while N.Y. CPL §160.50 seals the proceedings which were terminated in favor of the one being prosecuted, where a person "affirmatively places the underlying conduct at issue by bringing a civil suit, the statutory protection afforded by section 160.50 is waived, as the privilege, which is intended to protect the accused, may not be used as 'a sword to gain an advantage in a civil action.'" (*Best v. 2170 5th Ave. Corp.*, 60 A.D.3d 405, 873 N.Y.S.2d 631 (1st Dept. 2009), citing *Green v. Montgomery*, 95 N.Y.2d 693 (2001)). Where there is a possibility that "the sealing of criminal records might substantially prejudice the defendant in a civil action by precluding it from establishing a meritorious defense, our courts have applied the concept of implied waiver of the statutory rights contained in CPL §160.50." (*Ragland v. New York City Housing Authority*, 201 A.D.2d 7, 613 N.Y.S.2d 937 (2d Dept. 1994); *Maxie v. Gimbel Bros.*, 102 Misc2d 296, 423 N.Y.S.2d 802 (Sup. Ct. N.Y. Cty. 1979)). When an individual commences a civil action and affirmatively places the information protected by N.Y. CPL §160.50 at issue, the confidentiality privilege is waived. (*Gebbie v. Gertz Div. of Allied Stores*, 94 A.D.2d 165, 463 N.Y.S.2d 482 (2d Dept. 1983); *Claim of Weigand*, 187 A.D.2d 791,

590 N.Y.S.2d 142 (3d Dept. 1992); (*Maxie v. Gimbel Bros.*, 102 Misc2d 296, 423 N.Y.S.2d 802 (Sup. Ct. N.Y. Cty. 1979)(a plaintiff who places the criminal matter at issue in a civil suit may not use the privilege as both a shield and a sword)). A plaintiff may not continue to enforce a right to suppress the criminal record while simultaneously continuing to prosecute a civil claim for damages arising out of the same incident and identical facts. (*Maxie v. Gimbel Bros.*, 102 Misc2d 296, 423 N.Y.S.2d 802 (Sup. Ct. N.Y. Cty. 1979)).

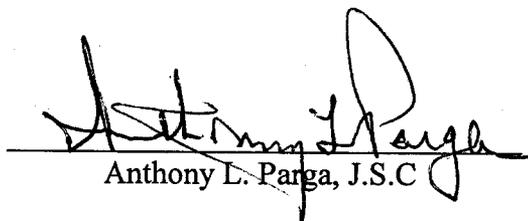
Further, the confidentiality stipulation entered into between the parties protects the plaintiff from disclosure of the records at issue to anyone other than those people and entities listed in the agreement, for the sole purposes listed in the agreement, and thereby prevents the plaintiff from suffering from any stigma as a result of having been the object of unsustained accusations - serving a similar purpose to that contemplated by N.Y. CPL §160.50.

Accordingly, plaintiff is hereby ordered to provide the defendant with an authorization to obtain the entire trial transcript from the second criminal trial entitled, *People v. Joetta Dean*, Indictment No. 1728N-2005 (Nassau County), resulting in plaintiff's acquittal, within thirty (30) days. The failure of the plaintiff to provide said authorization in accordance with this Court's directive shall result in the preclusion of plaintiff from presenting any evidence with regard to the second criminal trial, including the verdict acquitting her. In addition, plaintiff is further ordered to provide to defendant with copies of the remainder (and entirety) of the transcripts from the 440 motion hearing, the People's opposition papers to the 440 motion, and the first trial judge's decision after the 440 hearing, within (30) days. To the extent that plaintiff is not in possession of same, plaintiff is directed to provide defendant with an authorization to obtain the above-noted missing discovery within thirty (30) days.

The compliance conference currently scheduled in this Part for July 20, 2011 is hereby adjourned to **September 14, 2011** at 9:30 A.M.

This constitutes the decision and order of this Court.

Dated: July 8, 2011


Anthony L. Parga, J.S.C

Cc: Thaler & Gertler
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East Meadow, NY 11554

Furman Kornfeld & Brennan, LLP
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ENTERED
JUL 13 2011
NASSAU COUNTY
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