

Young v Quatela

2011 NY Slip Op 32143(U)

July 18, 2011

Sup Ct, Nassau County

Docket Number: 601658/09

Judge: Thomas Feinman

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SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

Hon. Thomas Feinman
Justice

RAYMOND YOUNG.

Plaintiff,

- against -

JOSEPH QUATELA and MORGANSTERN & QUATELA,

Defendants.

TRIAL/IAS PART 13
NASSAU COUNTY

INDEX NO. 601658/09

MOTION SUBMISSION
DATE: 5/25/11

MOTION SEQUENCE
NOS. 3, 4

The following papers read on this motion:

- Order to Show Cause and Affidavits..... X
- Notice of Cross-Motion and Affidavits..... X
- Affirmation in Opposition..... X
- Reply Affirmation..... X

The plaintiff moves by way of Order to Show Cause for an order (1) disqualifying the law firm of L'Abbate, Balkan, Colavita & Contini, LLP, from further representation in this case because of unauthorized ex parte contact with the plaintiff and plaintiff's father, (2) sanctioning defendant, Joseph Quatela and the law firm of L'Abbate, Balkan, Colavita & Contini, LLP, awarding plaintiff attorney's fees, (3) striking the Answer of defendant, Joseph Quatela based upon his misconduct, (4) suppressing any evidence improperly obtained by the defendants, (5) quashing a subpoena calling for the testimony of Raymond M. Young, (hereinafter referred to as "Sr."), father of Raymond Young, (hereinafter referred to as "plaintiff" and "Jr."). The parties herein, on April 15, 2011, consented to stay the subpoena and/or non-party notice of deposition calling for the deposition of Sr. issued by the defendants' law firm pending a determination of the instant Order to Show Cause. The defendants cross-move for an order pursuant to 22 NYCRR 130-1.1 sanctioning plaintiff and/or plaintiff's counsel for engaging in frivolous conduct, and opposes the plaintiff's motion. The defendants submit a Memorandum of Law in support of defendants' cross-motion and in opposition to plaintiff's motion. The plaintiff submit a Memorandum of Law in opposition to the defendants' cross-motion.

While the movant's motion, by way of Order to Show Cause, seeks to disqualify the law firm of L'Abbate, Balkan, Colavita & Contini, LLP, (hereinafter referred to as the "law firm"), "because of ex parte contact with *plaintiff* and plaintiff's father", (emphasis added), counsel's affirmation in support of the motion only refers to purported ex parte communications with Sr. only, not plaintiff/Jr. , a party in this action.

Sr. is not a party to this action. Black's Law Dictionary defines *ex parte* as "[o]n one side only, by or for one party, done for, in behalf of, or in the application of, one party only". (6th ed. 1990). Black's Law Dictionary defines party as "[a] 'party' to an action is a person whose name is designated on record as plaintiff or defendant. *M&A Elec. Power Co-op v. True, Mo. App.*, 480 SW2d 310, 314". (6th ed. 1990).

Plaintiff's counsel also refers to Sr., (a non-party), as his "client". Plaintiff's counsel avers that the law firm should be disqualified and the "defendant, Joseph Quatela, and his attorneys should be sanctioned because they had *ex parte* contact with the undersigned's client".

Plaintiff initiated this action for legal malpractice in plaintiff's underlying matrimonial action. The plaintiff claims that the defendants negligently represented him in his matrimonial action, and maintains that the defendant, Joseph Quatela, committed malpractice for, among other things, failure to seek a hearing to reinstate his visitation rights, failure to request sex expert validations, and failure to seek court intervention with respect to the plaintiff's complaints that the house where his wife and children were living were damaged. Plaintiff provides that on February 21, 2007, plaintiff went to the matrimonial house and discovered thousands of bottles filled with urine, dead animals, and garbage bags filled with feces pouring out of them, a broken pipe, collapsed ceiling and black mold. Plaintiff maintains that defendant's neglect caused plaintiff to sustain significant expense in remedying these conditions.

Plaintiff's counsel later avers that he was retained to represent Sr. in a federal action brought by plaintiff's wife, Deborah Young, against Sr. and defendant, Joseph Quatela, whereby Deborah Young apparently claimed that the defendants wrongfully gained access to her home, while the matrimonial action between Deborah Young and plaintiff/Jr. was pending.

Although the plaintiff has not provided this Court with the name or action number of such federal action, the defendants have annexed a copy of the summons of the civil action entitled, *Deborah Young, Individually and as the parent and natural guardian of Melissa Young, Emmalee Young and Cecelia Young v. Suffolk County, Suffolk County Department of Social Services, Suffolk County Police Department, Michael Delgado, Joseph Quatela, Edmond J. Coppa, Individually and Edmond J. Coppa Photography, Raymond L. Young, Raymond M. Young, News 12, Newsday, New York Post, New York Daily News, WCBSIV.COM*, bearing Index Number CV-3325/09, pending in the United States District Court for the Eastern District of New York, to the defendants' cross-motion. The plaintiff, Deborah Young, and the infant plaintiffs, allege that the defendants essentially violated their civil rights. The plaintiffs allege, *inter alia* that on or about February 21, 2007, Jr., "and others", brought garbage, debris, urine, feces and other matters into the premises and strewn them about, creating unsanitary, uninhabitable and unsafe conditions while plaintiff left her residence for vacation. The complaint in the federal action also alleges that after Jr. trashed the premises, he summoned workers, friends, his father, the police, his attorney, [defendant herein, Joseph Quatela], the Department of Social Services, the media and others, defaming, embarrassing, ridiculing and humiliating the plaintiff, Deborah Young, and their three children. Thereafter, the complaint provides that the plaintiff children were placed into the custody of the Department of Social Services.

The plaintiff, in the instant action, provides that the February 21, 2007 incident drew a significant amount of media coverage, and therefore, plaintiffs ex-wife brought the federal action. Plaintiff's counsel submits that he learned that defendant, Joseph Quatela, and defendant's counsel, had an ex parte communication with Sr. with respect to a proposed affidavit prepared for Sr.'s signature, as a result of receiving of notice for a deposition, and submits such communication violates 22 NYCRR §1200 and DR 7-104(A)(1), and warrants disqualification.

The defendants set forth that Sr. was contacted by defendants' counsel to take a deposition concerning plaintiff's claimed expenses in this action, and that the communication made by defendants to Sr. concerned only expenses claimed in this action. The defendants set forth that the plaintiff alleges he incurred legal fees and damage to the matrimonial property as a result of the defendant's alleged malpractice, and yet plaintiff, at his deposition, testified that Sr., and/or Sr.'s company, paid for all of the plaintiff's claimed expenses. The plaintiff has claimed pecuniary losses including repair to this home in the amount of One Hundred Forty Thousand and 00/100 Dollars, (\$140,000.00), loss of value to his home, Seventy-Five Thousand and 00/100 Dollars, (\$75,000.00), attorney's fees, Three Hundred Sixty-Eight Thousand and 00/100 Dollars, (\$368,000.00), and psychological treatment, Fifteen Thousand and 00/100 Dollars, (\$15,000.00). The defendants' counsel submits that Sr. discussed the option of providing an affidavit in lieu of testimony with defendants' counsel, and therefore, an affidavit was prepared, after discussions with Sr., and forwarded to Sr. for signature. Apparently, plaintiff intercepted the facsimile, and thereafter, as a result of the interception, defendants' counsel submits that Sr. opted not to sign the affidavit, and rather, discussed what dates he would be available for deposition. Accordingly, the defendants apparently thereafter served Sr. with a subpoena.

DR-7104(a)(1) is a rule of professional courtesy to regulate attorney conduct. (*People of the State of New York v. Abu Kabir*, 822 NYS2d 864). "This disciplinary rule is codified in Section 1200.35 of Article 22 of the New York Code of Rules and Regulations as DR 7-104(a)(1), and cited by many of the authorities quoted herein as DR 7-104 9(A)(1). Both cites refer to the same rule." (*Id.*)

"Specifically, the text of DR 7-104 sets out the parameters governing contact only between an attorney and a 'party'. Since the disciplinary rules are intended to govern the conduct of attorneys, it must be assumed that, unless otherwise indicated in the text, the drafters of the disciplinary rules chose the terms that they used in light of the plain and commonly understood meaning of those terms in the legal profession. With respect to the practice of law, the term party means '[o]ne of the opposing litigants in a judicial proceeding.' (Ballentine's Law Dictionary 918 [3rd ed. 1969]; see also defendants' Reply Memorandum at 5, n.1 ["the term 'party' means 'one by or against whom a lawsuit is brought' "] [quoting Black's Law Dictionary 1144 (7th ed. 1999)]). Thus, given its plain and commonly understood meaning, the term party does not include a witness to an event which is the subject of a judicial proceeding unless such witness is also one of those by or against whom the same judicial proceeding was brought." (*Id.*)

“Commonly referred to as a “no-contact rule” (*see, e.g., U.S. v. Thompson*, 35 F.3d 100, 105 n. 1 [2nd Cir. 1994]), DR 7-104 is entitled “Communicating With Represented and Unrepresented Parties” and commands in relevant part:

(a) During the course of the representation of a client a lawyer shall not:

(1) Communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer *in that matter* unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so.” (*Id.*, emphasis added).

Here, defendants’ counsels’ contact with Sr. was clearly contact with a non-party, who was not one of the opposing litigants to this action, concerning expenses in this action, and therefore, defendants’ counsel did not violate the no-contact rule. Plaintiff’s counsel refers to Sr. as plaintiff’s client, however, unfortunately, this Court must state the obvious: Sr. is not represented by plaintiff’s counsel in this action, and Sr. is not a party in this action. Plaintiff’s counsel relies on the following cases, which are distinguishable from the case at bar, to support the proposition that “jurisprudence has interpreted the term broadly to include people who were not actively involved in a lawsuit to be represented ‘parties’ for the purpose of the no contact rule”. However, *In Re Rogers*, 257 AD2d 59, the respondent attorney communicated directly with a party to a contract, (albeit litigation was not pending), a party who retained counsel, concerning the terms of the contract that was being negotiated. *In the Matter of Losner*, 217 AD2d 376, the respondent attorney communicated directed with parties he knew were represented by counsel, (albeit litigation was not pending), potential parties to a contract as sellers concerning a contract to purchase a home. “[T]he respondent, without the knowledge or consent of the seller’s attorney, induced the sellers to deed their property to him, depriving them of the safeguards customarily afforded sellers of real property.” (*Id.*) In *People v. Skinner*, 52 NY2d 24, the Court of Appeals reversed the order of the Appellate Division and granted a motion to suppress the defendant’s statements, and ordered a new trial, and held that an individual who has retained counsel in a criminal matter under investigation may not be interrogated on the very same subject in a non custodial setting, after the defendants’ attorney instructed the police not to question the defendant in his absence. Here, defendants’ counsels’ contact with Sr. is not similar to the communication made to a party who retained counsel concerning terms of a contract, or questioning by the police in a criminal investigation outside the presence of retained counsel.

Plaintiff, by way of Memorandum of Law in further support of plaintiff’s motion, and in opposition to defendants’ cross-motion, argues that the motion is not frivolous, maintains that disqualification is appropriate, and avers that the motion was brought on good-faith. Plaintiff’s counsel further submits that he is not seeking to prevent the defendants from having the benefit of Sr.’s testimony.

This Court has considered the defendants’ cross-motion for sanctions very carefully. Plaintiff’s counsel submits that the motion was made in good faith, was not a delay tactic, and that plaintiff’s counsel has “no problem with Raymond M. Young being deposed”, and submits that plaintiff’s counsel had a reasonable grounds to assert that the contact inappropriate. Plaintiff moved for an order to disqualify defendants’ counsel from further representation because of unauthorized ex parte contact with “plaintiff and plaintiff’s father”, however, the contact in dispute was not with “plaintiff” but rather, only with “plaintiff’s father”. Plaintiff also moved by way of Order to Show

Cause for an order sanctioning the defendant, Joseph Quatela and the law firm, striking the answer of defendant, Joseph Quatela, and suppressing any evidence improperly obtained by the defendants based upon the purported misconduct, the "ex parte contact". While the argument has been made that plaintiff's attempt, by way of Order to Show Cause, appears to be a transparent devise to delay the proceedings, or a back door device to prevent the deposition of Sr. as a non-party witness, this Court has accepted plaintiff's counsel's representation as an officer of the court that the motion was not a tactical motion, and was made on a good faith basis that the defendant's counsel's contact with Sr. was inappropriate. However, this Court hereby places counsel for plaintiff on notice that sanctions will be imposed for frivolous conduct pursuant to 22 NYCRR 130-1.1 in the event that counsel attempts to misstate an application, or misuse an application, in these proceedings in the future.

In light of the foregoing, it is hereby

ORDERED that the plaintiff's application, by way of Order to Show Cause, is denied in its entirety, and it is hereby further

ORDERED that the defendants' cross-motion is denied, and it is hereby further

ORDERED that defendants are hereby granted leave to serve a new Subpoena Ad Testificandum and Notice To Take Deposition Upon Oral Examination upon Raymond M. Young, (Sr.), for the limited purpose of the expenses claimed in this action, within twenty (20) days of service of this order with notice of entry.

ENTER: 

J.S.C.

Dated: July 18, 2011

cc: Law Office of Michael H. Joseph, P.L.L.C.
L'Abbate, Balkan, Colavita & Contini, L.L.P.

ENTERED
JUL 28 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE