

**Galvin v Hinkle**

2004 NY Slip Op 30342(U)

June 14, 2004

Sup Ct, NY County

Docket Number: 106595/03

Judge: Joan A. Madden

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

**PRESENT: HON. JOAN A. MADDEN**  
*Justice*

**PART 11**

EMILIO A. GALVIN,

**Plaintiff,**

**- v -**

ROBERT KEVIN HINKLE and 23<sup>rd</sup> STREET  
LOFT CORPORATION,

**Defendants.**

INDEX NO. : 106595/03

MOTION DATE: *5/13/04*

MOTION SEQ. NO.: 002

MOTION CAL. NO.;

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to compel.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

**FILED**

JUN 24 2004

COUNTY CLERK, NEW YORK

**Cross-Motion: [ 3 Yes [ x ] No**

Plaintiff Emilio Galvan (“Galvan”) moves for an order pursuant to CPLR 3214 compelling (1) defendant Robert Kevin Hinkle (“Hinkle”) to appear for his continued deposition and to respond to certain questions, and (2) compelling non-party witness Dr. Darrell Greene to appear for a deposition in this matter to testify concerning his meetings with plaintiff and Hinkle, without regard to any asserted psychologist-patient privilege. Hinkle opposes the motion, which is granted in part and denied in part.

This action arises out of a dispute regarding the ownership of property jointly held by the

Galvin and Hinkle during a relationship in which they became domestic partners.’ Their relationship began in 1992 and ended in or around February 2003. On **April 8, 2003**, Galvan, who is a lawyer representing himself, commenced this action seeking (i) an order to partition the jointly owned cooperative apartment where the parties resided together,<sup>2</sup> and (ii) a declaration that he is entitled to receive all of the proceeds of the sale of the apartment and all the money and other assets that the parties held or hold in their joint names on the ground that he alone contributed all of the funds to purchase the cooperative apartment and to create the assets.

Hinkle filed a verified answer and counterclaims in which he asserted, inter alia, that Galvan breached the parties’ oral agreement to share all income, assets, liabilities and debts equally, and that Hinkle detrimentally relied on this oral agreement when he left a Ph.D program in Texas to move to New York with plaintiff in 1992. Hinkle also alleges that when the parties returned to New York in 1992, he obtained full time employment and continued to work full time until 2001, when he returned to his graduate school studies. Hinkle alleges that he deposited all of his earnings in the parties’ joint bank accounts, and that during the course of the parties’ relationship it was agreed that although both parties were working full time, Hinkle would perform and did perform the majority of housework.

Galvan disputes Hinkle’s characterization of their relationship and, in particular, Hinkle’s allegation that he was required to perform the majority of the housework. On this motion, he seeks to compel the deposition of a psychologist, Dr. Darrell Greene, who provided the parties

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<sup>1</sup>Defendant 23<sup>rd</sup> Loft Corporation is the owner in fee simple of the apartment building where the cooperative apartment in which the parties own shares is located and is joined as a necessary defendant to the partition claim. For the purposes of this motion, the parties refers to Galvin and Hinkle.

<sup>2</sup>By so-ordered stipulation dated August **14, 2003**, Hinkle agreed to move out of the apartment but retained his claim to ownership and title of the apartment and any and all proceeds derived from the sale of the apartment. Plaintiff agreed to all efforts to market the apartment with reasonable diligence to facilitate the sale apartment at a commercially reasonable and fair market value.

with counseling before they ended their relationship. Galvan contends that Dr. Greene's testimony will demonstrate that the allegations in the Hinkle's answer and counterclaims are "false and grossly mischaracterize[] the parties' relationship and that [he] is entitled to seek the counselor's testimony to obtain [Hinkle's] more truthful description of the parties' relationship."

In addition, Galvan contends that Hinkle's statements to Dr. Greene would constitute an admission of a party and since they would contradict the sworn statement in his verified pleading, such statements would also be admissible at trial to impeach Hinkle's veracity.

Although Galvan acknowledges that in general statements made to a psychologist are privileged he argues that since plaintiff was present at the counseling sessions, Hinkle had no expectation of privacy with respect to the statements made to Dr. Greene. Galvan also argues that since the parties are not married, Hinkle cannot assert any marital privilege.

In opposition, Hinkle argues that the request to compel Dr. Greene to testify must be denied the communications made during the parties' counseling sessions are protected by the psychologist-client privilege.

The court agrees. CPLR 4507 provides that "[t]he confidential relations and communications between a psychologist registered under the provisions of ... the education law and his client are placed on the same basis as those provided by law between attorney and client, and nothing in this article shall be construed to require any such privileged communications to be disclosed." The Court of Appeals has held that based on the language in the statute, the psychologist-client privilege is equivalent to the attorney-client privilege and therefore is broader than the physician-patient privilege. People v. Wilkins, 65 N.Y.2d 172 (1985).

"[T]he waiver or suspension of [the psychologist-client privilege] is a drastic remedy which should only be granted upon a showing by the party seeking the examination of protected records that a party's mental or emotional condition is in controversy." Perry v. Fiumano, 61 AD2d 512, 517 (4<sup>th</sup> Dept 1978); see also, State of New York v. Hickox, 64 AD2d 412 (1<sup>st</sup> Dept 1978). Under this standard, it has been held that the psychologist-client privilege can be waived

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or limited when it is shown that the invasion of the privilege is necessary and material to determine child custody matters (Perry v. Fiumano, 61 AD2d ut 519; Shepard v. Roll, 278 AD2d 755 (3d Dept 2000)), or when a party places his or her mental and emotional health in issue. See LeVien v. Lacorte, 168 Misc2d 952 (Sup Ct. Suffolk Co. 1996).

In this case, however, which concerns the proper division of jointly held property, Hinkle has in no way put his emotional or mental health in issue. Indeed, the gravamen of the allegations in the amended verified answer and counterclaims does not concern the nature of the parties' personal relationship but rather their alleged oral agreement regarding the division of their assets and liabilities. Under these circumstances, there is no basis for invading the psychologist-client privilege.

Furthermore, the court rejects Galvan's position that his presence at the counseling sessions negates any expectation of privacy attached to such sessions. The Court of Appeals has stated that the issue of whether the presence of a third person destroys the physician-patient privilege, which is narrower than the psychologist-client privilege, depends on "the surrounding circumstances, and particularly the occasion for the presence of the third person [and whether] the communication was intended to be confidential." People v. Decina, 2 NY2d 133, 145 (1956). Here, as the parties were engaged in counseling sessions concerning their relationship, the presence of Galvan at the sessions would not suggest an intent to waive the confidentiality of the communications made to Dr. Greene during such sessions.

Notably, the courts have not exempted family or other group counseling sessions from the protection provided under CPLR 4507. See e.g. LeVien v. Lacorte, 168 Misc2d 952 (Sup Ct. Suffolk Co. 1996). And, although the parties are not married, unlike the spousal privilege provided under CPLR 4502(b), the psychologist-client privilege applies without regard to the marital status of the individuals undergoing counseling. Compare Greenwald v. H&P 29<sup>th</sup> Street Associates, 241 AD2d 307 (1<sup>st</sup> Dept 1997). Accordingly, Galvan's motion to compel the deposition of Dr. Greene is denied.

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Galvan also seeks to compel the further deposition of Hinkle in light of certain objections made by Hinkle's counsel during Hinkle's deposition. He first argues that Hinkle's counsel erroneously objected to certain questions regarding the allegations in the complaint on the ground that such questions constituted "cross examination" and were not the proper subject of a deposition. As the objected to line of questioning is relevant to the action and there is no prohibition against asking leading questions at a deposition, Galvan should be permitted to question Hinkle regarding the allegations in the complaint, while Hinkle can answer such questions with a yes or no response if appropriate. See generally Siegel, New York Practice (3d ed. 1999) § 356, at 554.

Galvan also contends that Hinkle's counsel inappropriately objected on the ground of attorney-client privilege when Hinkle was questioned regarding a letter written by Hinkle's counsel to the legal department of the Vanguard Group, where the parties had a joint money market account. In the letter, the lawyer informs the Vanguard Group that he has been retained by Hinkle to bring an action against the Vanguard Group for wrongful distribution of funds. The verified answer and counterclaims allege that Galvan wrongfully removed \$181,499.41 from the Vanguard account.

At the deposition, Galvan sought to question Hinkle regarding a statement in the letter that Hinkle was advised by counsel that "he had every right to remove any portion of the Vanguard fund or all of it..." Hinkle's lawyer objected to this question on the ground of attorney-client privilege.

"In order to raise a valid claim of [attorney-client] privilege, the party seeking to withhold the information must show that it was a 'confidential communication' made between the attorney and the client in the context of legal advice or services." Bertalo's Restaurant Inc. v Exchange Ins. Co., 240 AD2d 452,454 (2d Dept), lv. dismissed 91 NY2d 848 (1997) . A communication is not privileged if it is made known to third parties People v Harris, 57 NY2d

335 (1982), cert denied 460 US 1047 (1983). Here, as the attorney-client communication regarding the right to withdraw funds was made known to the Vanguard Group in the letter, Galvan is entitled to question Hinkle regarding the specific communication.

In view of the above, it is

ORDERED that the motion to compel the deposition of non-party witness Dt. Darrell Greene is denied; and it is further

ORDERED that the motion to compel Hinkle to appear for his continued deposition and to respond to certain questions is granted in accordance with the foregoing and such deposition shall be taken on or before July 2, 2004.

DATED: June <sup>14</sup> 2004

  
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J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

**FILED**  
JUN 24 2004  
COUNTY CLERK'S OFFICE  
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