

Detomaso v County of Cayuga Nursing Home

2006 NY Slip Op 30137(U)

April 28, 2006

Supreme Court, Cayuga County

Docket Number: 0008462/0051

Judge: Mark H. Fandrich

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF CAYUGA

REBEKAH DETOMASO,

Plaintiff,

v.

COUNTY OF CAYUGA NURSING HOME,
CAYUGA COUNTY and ROBERT FLYNN,

Defendants.

DECISION

Index No. 05-846

HON. MARK H. FANDRICH
ACTING SUPREME COURT JUSTICE

STEWART L. WEISMAN, ESQ.

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MATTHEW R. FLETCHER, ESQ.

Attorney for Defendants

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Fandrich, Mark H., Acting Justice

In this action for sexual harassment, plaintiff brings this motion to have defense counsel for defendants, County of Cayuga Nursing Home (“Nursing Home”) and Cayuga County (“County”), disqualified from representing the defendants. As grounds for her motion, plaintiff alleges that she was given legal advice by Attorney Randy Ray, defense counsel for defendants County and Nursing Home, with respect to the subject of the lawsuit, and that an attorney-client relationship existed between her and Mr. Ray. Plaintiff also alleges that she disclosed confidential and relevant information to defense counsel. Furthermore, she alleges that Attorney Ray ought to be called as a witness in her case. Plaintiff cites various alleged breaches of the Code of Professional Responsibility, more particularly DR 4-101 (b) (Preservation of Confidences and Secrets of a Client), DR 5-108 (Conflict of Interest; Former Client), and DR 5-102 (Lawyers as Witnesses).

I.

Plaintiff alleges that she was sexually harassed by co-worker, defendant, Robert Flynn. When she reported a disturbing voice recorded message from the alleged perpetrator, defendant Flynn, plaintiff states that she was directed by defendant Nursing Home’s Controller to speak with Mr. Ray, who was and is an attorney for defendants County and Nursing Home. Plaintiff met with Mr. Ray on May 24, 2004. At that meeting she told Mr. Ray that she was seeking personal legal advice as to what steps she should take. Ray did not tell her that he could not render advice, and he did not direct her to seek other counsel. Mr. Ray then listened to plaintiff’s recitation of the facts of the case, and he listened to the voice mail recording. Mr. Ray then

outlined for plaintiff the legal nature of sexual harassment and the steps she should take. He also told plaintiff that from everything she said, he doubted that Flynn would leave plaintiff alone. Plaintiff stated to Ray that Flynn scared her and that Flynn was “psycho”. She also alleges that she told Ray that she couldn’t understand how someone could have such deep feelings for her when they have had no relationship outside of the workplace. Plaintiff alleges that Ray then told her that she could not handle someone being in love with her and that he felt sorry for her boyfriend, or words to that effect.

After this action was commenced, defendant County served plaintiff with charges and initiated a Civil Service Law § 75 dismissal hearing. Mr. Ray represents defendant County in this matter as well.

Plaintiff states that in the Amended Answer of defendants County and Nursing Home, which were verified by Mr. Ray, defendant County alleges that it took reasonable care to prevent further harassment against her even though plaintiff had complained to Mr. Ray and he said that he doubted defendant Flynn would leave her alone. Attorney Ray admits that the entire conversation between plaintiff and him is set forth in her affidavit, and that there is no other information, confidential or otherwise. He also acknowledges that plaintiff did play the tape recorded voice message for him. (Plaintiff alleges that in the tape recorded message, Flynn reiterated his feelings towards plaintiff.). Ray also agrees that he informed plaintiff that she could file a sexual harassment complaint with defendant County. He states that he did not give her legal advice and was not retained by her as her attorney.

It appears that the parties agree on the facts of the matter; the only disagreement is as to whether Ray should be disqualified under those facts.

II.

A motion to disqualify another party's attorney is within the sound discretion of the trial court. (*Juergens v. Schanman*, 182 A.D.2d 740, 2nd Dept., 1992). A court may disqualify an attorney when the attorney is called as a witness for an adverse party and his or her testimony may be prejudicial to the client. (*Cooley v. Brooks*, 210 A.D.2d 1994, 4th Dept.). An attorney may also be disqualified when the attorney "ought" to testify to a significant issue on behalf of the client. (*DR 5-102*). However, the attorney having relevant knowledge or being involved in a transaction does not always warrant his or her disqualification, especially in circumstances when it is likely that the testimony to be given by the attorney-witness is unnecessary. Testimony may be relevant and even highly useful but still not strictly necessary. A finding of necessity takes into account such factors as the significance of the matter, weight of the testimony and availability of other evidence. (*S&S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp.*, 69 NY2d 437, 1987).

Furthermore, an attorney may not accept employment relating to matters that adversely affect a former client if he previously represented that client in a matter related to the subject of the new employment. In such a case, a breach of a confidential relationship is not needed. (*Strianese v. Amalgamated Cordage Corp.*, 201 A.D.2d 977, 4th Dept., 1994). And, an attorney may be disqualified in order to preserve confidences or secrets. In such cases, the movant needs to show the existence of a prior attorney-client relationship [by showing specific, relevant and confidential information – see *Nowak v. Pillich*, 186, A.D.2d 1018, 4th Dept., 1992], and that current and former representations are related and adverse. (*Solow v. W.R. Grace Co.*, 83 N.Y.2d 303, 1994).

III.

It appears there was no attorney-client relationship between plaintiff and Attorney Ray. Plaintiff knew that Ray represented her employer and she went to see him in that capacity. In her job, plaintiff had worked with Ray before on other employment matters. Plaintiff made an appointment to see Ray on a potential sexual harassment matter concerning Flynn, who was her co-worker. Ray told plaintiff about sexual harassment and advised her of her right to file a complaint with defendant County. This kind of alleged “advice” was merely information given to aid the employee in the administrative processes attendant to sexual harassment matters in the workplace. Attorney Ray was fulfilling his responsibilities as defendant County’s attorney. No specific, relevant or confidential information was given to establish a professional relationship. (*Nowak v. Pillich, supra.*). Furthermore, there was no explicit undertaking to perform a specific task given by Attorney Ray to plaintiff. (*Chang v. Pi*, 288 A.D.2d 378, Second Dept., 2001; *Sucese v. Kirsch*, 199 A.D.2d 718, Third Dept., 1993; *Jane Street Company v. Rosenberg & Estis, P.C.*, 192 A.D.2d 451, First Dept., 1993) Plaintiff’s unilateral belief that an attorney-client relationship existed is not enough. (*Chang v. Pi, supra.*; *Sucese v. Kirsch, supra.*; *Jane Street Company v. Rosenberg & Estis, P.C., supra.*). A court must review the action of the parties to ascertain whether such a relationship existed. An examination of the actions of plaintiff and Attorney Ray reveals that an attorney-client relationship did not exist between them.

However, Attorney Ray may be called as a witness in plaintiff’s case with regard to an element of plaintiff’s cause of action for sexual harassment, to wit: whether the employer knew or should have known of the harassment and whether the employer failed to take appropriate remedial action. (*Vitale v. Rosina Food Products Incorporated*, 283 A.D.2d 141, Fourth Dept., 2001; *Pace v. Ogden Servs. Corp.*, 257 A.D.2d 101, Third Dept., 1999). In her May 24, 2004

meeting with Attorney Ray, plaintiff told Ray that she couldn't understand how someone could have such deep feelings for her when they have had no relationship outside of the workplace. Plaintiff alleges that Ray then told her that she could not handle someone being in love with her and that he felt sorry for her boyfriend or words to that effect. Whether Ray is discounting what plaintiff is telling him goes to the issue of defendant Nursing Home's knowledge and defendant County's knowledge of the harassment and their efforts to stop the harassment. In addition, plaintiff alleges that in their meeting, Attorney Ray told plaintiff that he did not believe that defendant Flynn would stop the harassment. Attorney Ray's statement goes to the question of the steps such defendants took or didn't take to remediate the problem and Attorney Ray would be a potential witness. Attorney Ray's testimony on these issues is likely to be necessary and significant in this lawsuit. (*S&S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp, supra.*; DR 5-102). Therefore, Attorney Ray should be disqualified as counsel for defendants Nursing Home and County.


However, there is nothing in the record to preclude Matthew R. Fletcher, Esq., who is the attorney of record for defendants, County and Nursing Home, to continue his representation of them. It appears that Attorney Fletcher had no contact with plaintiff regarding the allegations in her Complaint, and that no attorney-client relationship existed between Mr. Fletcher and plaintiff. Furthermore, it does not appear that Attorney Fletcher "ought" to be called as a witness. (*Talvy v. American Red Cross in Greater New York*, 87 N.Y.2d 826, 1995; *Davin v. JMAM, LLC*, 2006 N.Y.App.Div. LEXIS 3712). And, Attorney Ray's capacity as "of Counsel" to Mr. Fletcher does not, by itself, preclude Attorney Fletcher from representing defendants, County and Nursing Home, herein.

By reason of the foregoing, plaintiff's motion as to Attorney Ray, only, is granted,
without costs.

SUBMIT ORDER.

Dated: April 28, 2006
At Auburn, New York

ENTER,



HON. MARK H. FANDRICH
Acting Supreme Court Justice