

Pellegrino v Oppenheimer & Co., Inc.

2006 NY Slip Op 30339(U)

October 26, 2006

Supreme Court, New York County

Docket Number: 0107834/2004

Judge: Rolando T. Acosta

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SUPREME COURT OF THE STATE OF NEW YORK / NEW YORK COUNTY

HON. ROLANDO T. ACOSTA

PRESENT:

PART 1

Index Number : 107834/2004

PELLEGRINO, CHRISTINE

vs

OPPENHEIMER

Sequence Number : 004

SUBST/RELIEVE/WITHDRAW COUNSEL

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1, 2 (by E-O) >
4 (by B.W), 5, 6, 7
9,

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

FILED

NOV 02 2006

NEW YORK COUNTY CLERK'S OFFICE

SO ORDERED

Dated: 10/26/06



ROLANDO T. ACOSTA, S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART 61**

Christine Pellegrino,

Plaintiff,

– against –

Oppenheimer & Co., Inc. f/k/a Fahnestock &
Co., Inc. and Eric Shames,

Defendants.

DECISION/ORDER

Index No. 107834/04

Motion Seq. 4

Present:

Hon. Rolando T. Acosta
Supreme Court Justice

The following documents were considered in reviewing defendant's motion to disqualify plaintiff's counsel and for an order sealing the papers related to the motion and plaintiff's cross-motion for sanctions:

| Papers | Numbered |
|---|-----------------|
| Notice of Motion, Affirmation | 1, 2 (Ex. A-B) |
| Memorandum of Law in Support of Motion | 3 |
| Affirmation in Opposition to Motion | 4 (Ex. A-N) |
| Memorandum of Law in Opposition to Motion | 5 |
| Notice of Cross-Motion | 6 |
| Memorandum of Law in Support of Cross-Motion | 7 |
| Reply Brief | 8 |

FILED

NOV 02 2006

NEW YORK
COUNTY CLERK'S OFFICE

Before the Court is one of three related state court sexual harassment suits against defendants Oppenheimer & Co. Inc. ("Oppenheimer") and Eric J. Shames, Esq., in his individual capacity under the New York State Human Rights Law and the New York City Human Rights Law wherein plaintiffs in all three actions are represented by the law firm of Storch, Amini & Munves.¹ In the instant action, defendants move to have the law firm of Storch, Amini & Munves disqualified from representing plaintiff Christine Pellegrino ("Pellegrino") and sealing the papers related to this motion. Plaintiffs cross-move for sanctions against the defendants. The motion and cross-motion are denied.

Defendants allege that Pellegrino's counsel obtained confidential and privileged information related to all her lawsuit from Evelyn Bukchin ("Bukchin"), who at all relevant times was an in-house attorney in defendant Oppenheimer's legal department. Specifically, defendants claim that between the summer of 2002 and the spring of 2003, Irina Alter ("Alter")², a former paralegal in Oppenheimer's legal department, began confiding in Bukchin about purported sexual harassment by defendant Shames, and in fact established an attorney-client

¹ Although the three actions are not consolidated, the parties have voluntarily agreed to coordinate discovery amongst themselves.

² Alter currently has a related action against defendants under Index No. 121188/03 before the Hon. Justice Gische.

* 4] .

relationship with Bukchin. Both Alter and Bukchin subsequently attended a meeting at Storch, Amini & Munves to discuss the work environment at Oppenheimer's legal department. Defendants further contend that the attorney-client relationship continued between Alter and Bukchin beyond this initial meeting and continued after Alter's termination from Oppenheimer in 2003. That is, after her termination, Alter and Bukchin continued communicating with each other about the work environment at Oppenheimer's legal department. Thus, defendants claim that Bukchin was passing on confidential and privileged information to Alter and ultimately to Storch, Amini & Munves when Alter filed her lawsuit. Defendants contend, therefore, that Bukchin's position as an in-house attorney for defendant Oppenheimer and her clandestine relationship with Alter was used to convey protected information to Storch, Amini & Munves against Oppenheimer and its General Counsel, Eric Shames, in the *Alter* action, the related action of Andrea Bertoline v. Oppenheimer & Co., Inc. f/k/a Fabnestock & Co., Inc. and Eric Shames, Index No. 121187/03, Braun J., and the instant action.

Without reaching the issue of whether the collateral estoppel doctrine precludes granting defendants' motion, the Court agrees with Justice Braun and Justice Gische's conclusion that there was no attorney-client relationship between Alter and Bukchin, and thus there was no attorney-client protected information

[* 5] .
conveyed to Alter and Storch, Amini & Munves by Bukchin.

Bukchin attended the initial meeting with Alter and a third woman at Storch, Amini & Munves not as an attorney acting on behalf of Oppenheimer in the sexual harassment suit³, but rather to seek advice as to what she could do to assist women being harassed by Shames. Bukchin was not acting as counsel for Oppenheimer or Shames in a potential sexual harassment suit. This reality did not change after the sexual harassment suits were filed.

Rather, after the suit were filed, Shames began to express his concerns to Bukchin about the claims even after being advised by his attorneys to not speak about the lawsuits to anyone in Oppenheimer's legal department, including Bukchin. Ignoring these complaints, Shames beseeched Bukchin to speak in his behalf to the women who filed suit against him to convince them to drop their lawsuits. Shames did this notwithstanding Bukchin's continued protest to stop doing so. The sum and substance of his conversation with Bukchin regarding the suits were therefore, not based on privilege information. However, defendants maintain that the information relayed to Bukchin was somehow privilege and Bukchin in turn conveyed this to Alter, who shared it with her counsel and plaintiff's counsel in the instant action. Defendants have failed to show with any

³ No lawsuit had been commenced at this time against Oppenheimer or Shames.

[* 6].

specificity what confidential information was actually disseminated. See Muriel Siebert & Co., Inc. v. Intuit Inc., 32 A.D.3d 284 (1st Dept. 2006). Indeed, as noted, Shames was represented by counsel at this juncture and was advised not to speak with anyone in the legal department regarding the lawsuits, and defendants have failed to provide any reasonable basis for defendants and specifically Shames, to assume Bukchin was acting in her capacity as an attorney for Shames in the sexual harassment lawsuits. In fact, Bukchin had previously filed sexual harassment complaints against Shames on behalf of other employees in Oppenheimer's legal department. Thus, defendants have failed to demonstrate that the concerns Shames expressed to Bukchin regarding the lawsuits are privileged and confidential and would not otherwise be discoverable. See Mancheski v. Gabelli Group Capital Partners, Inc., 22 A.D.3d 532 (2nd Dept. 2005) (Party seeking disqualification of attorney must show at least reasonable probability that confidential information will be disclosed at trial).

Turning to that branch of defendants' motion to have the records of this motion sealed, defendants have not overcome the presumption that all Court documents and records are available to the public. 22 NYCRR 216.1. That is, defendants have failed to demonstrate a good cause to seal the documents related to this motion against the public's right to access court documents. Danco

* 7]
Laboratories Limited v. Chemical Works of Gedeon Richter, Ltd., 274 A.D.2d 1
(1st Dept. 2000).

Plaintiff cross-moves, arguing that defendants' application to disqualify Storch, Amini and Munves is without merit and utilized simply to delay resolution of the matter, thus warranting sanctions. While it is true that courts have become increasingly weary of disqualification motions inasmuch as they are often used as part of dilatory tactics, *see* S& S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp., 69 N.Y.2d 437 (1987); Matthews v. LeBoeuf, Lamb, Greene & MacRae, 902 F.Supp. 26 (S.D.N.Y. 1995) in the present action, the Court finds that defendants neither acted in bad faith nor improperly in bringing this disqualification application. There was a good faith concern by defendants as to whether or not plaintiff possessed confidential information that could be used to its disadvantage in this litigation. Defendants were logically and understandably concerned about such a scenario. It was this legitimate concern, rather than an attempt to delay, which appears to have led to defendants' motion. Accordingly, based upon the forgoing, it is hereby

ORDERED that defendants' motion to disqualify the law firm of Storch, Amini and Munves from representing plaintiff Christine Pellegrino is denied; and it is further

ORDERED that defendants' motion to seal the documents related to this motion is denied; and it is further

ORDERED that plaintiff's cross-motion for sanctions pursuant to NYCRR § 130-1.1 against defendants is denied.

This constitutes the Decision and Order of the Court.

Dated: October 24, 2006

ENTER
SO ORDERED
Rolando T. Acosta
ROLANDO T. ACOSTA
Rolando T. Acosta, J.S.C.
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

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