

Alter v Oppenheimer & Co., Inc.

2006 NY Slip Op 30340(U)

August 1, 2006

Supreme Court, New York County

Docket Number: 0121188/2003

Judge: Judith J. Gische

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

HON. JUDITH J. GISCHE

PRESENT:

PART 10

Justice

ALTERZ
- v -
OPPENHEIMER + Co.

INDEX NO. 121188/03

MOTION DATE 5/25/06

MOTION SEQ. NO. 004

MOTION CAL. NO.

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

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this ~~motion~~

~~motion (s) and cross-motion(s)~~ decided in accordance with the annexed decision/order of even date.

FILED

AUG 08 2006

NEW YORK

COUNTY CLERK'S OFFICE

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IAS MOTION SUPPORT OFFICE

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

C

AUG 01 2006

Dated: _____

JUDITH J. GISCHE, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MPH

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

IRINA ALTER,

Plaintiff,

-against-

OPPENHEIMER & CO., INC. f/k/a
FAHNESTOCK & CO., INC., and ERIC
SHAMES,

Defendants.

DECISION/ORDER

Index No.: 121188/03

Seq. No.: 004

Present:

Hon. Judith J. Gische

J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers

Numbered

Defs' OSC#4 [dismiss] w/SS affid, affirm in support (JAL),	1
Defs' affirm in further support (ROJ) w/exhs	2
Pltf's x-motion w/RB affirm in opp, exhs	3
Pltf's exhibits G through K (separate back)	4
Pltf's supp affirm (RB)	5
Defs' response (5/25/06)	6
Steno record and order (5/25/06)	7
Unredacted documents	8

FILED
AUG 08 2006
NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, the decision and order of the court is as follows:

This is an employment discrimination/sexual harassment action. The court has before it a motion by defendants Oppenheimer & Co., Inc. f/k/a Fahnestock & Co., Inc. and Eric Shames ("Oppenheimer" and "Mr. Shames") seeking the dismissal of this action, or alternatively, disqualifying plaintiff's law firm, Storch Amini & Munves, P.C. ("plaintiff's law firm" or "Storch Amini") from representing Ms. Alter in this action.

004

The defendants also ask that the court seal the file on this motion.

Storch Amini has cross-moved for Part 130 sanctions under the Uniform Rules for Trial Court.

This court's prior decision of June 30, 2005, sets forth in extensive detail the factual allegations by plaintiff against the defendants. In that decision, the court denied plaintiff's motion for consolidation with two other actions pending in Supreme Court, New York County before other judges (Andrea Bertoline v. Oppenheimer & Co., Inc. f/k/a Fahenstock & Co., Inc. and Eric Shames, Index No. 121187/03, Braun J., and Christina Pellegrino v. Oppenheimer & Co., Inc. and Eric Shames, Index No. 101834/04, Acosta J.). Although the three actions have not been consolidated, the parties have agreed to coordinate their discovery demands; therefore the documents and depositions held in the *Bertoline* action are relied upon and referred to in this action.

Presently, Oppenheimer and Mr. Shames seek the disqualification of the attorneys who represent plaintiff in this action (the Storch Amini firm) based upon their claim that Oppenheimer's in house counsel, Evelyn Bukchin, Esq., who also at one time acted as plaintiff's attorney, imparted confidential Oppenheimer information to Storch Amini.

Defendants contend that while Ms. Bukchin was in house counsel for Oppenheimer, she introduced and took Ms. Alter to the law firm of Storch Amini where they and another Oppenheimer employee met, without the defendants' knowledge. Defendants claim that Ms. Bukchin revealed certain confidential information she obtained from Mr. Shames and/or Oppenheimer, that was only available to her because

of (and as a direct result of) her status with Oppenheimer.

Defendants contend further that Ms. Bukchin and Mr. Shames had an attorney-client relationship and that information she obtained from Mr. Shames, and revealed to plaintiff has so "tainted" this case that the defendants cannot obtain a fair trial and, therefore, plaintiff's case must be dismissed. Alternatively, the defendants contend that Storch Amini must be disqualified because it has acquired privileged information that is damaging to defendants' case, and erodes their defenses.

It is undisputed that Ms. Alter approached Ms. Bukchin about Mr. Shames' alleged harassing treatment of her. She asked Ms. Bukchin for advice and whether the conversations between them were as attorney and client. Ms. Bukchin, then a recent law school graduate, agreed and said they were. As Ms. Bukchin became more alarmed by the situation revealed to her, she suggested that Ms. Alter meet with a lawyer who knew about sexual harassment claims.

Ms. Bukchin was also concerned about her own job and her own liability if the Oppenheimer firm got sued. It was in this context that Ms. Bukchin, Ms. Alter and a third person from Oppenheimer attended a meeting at the Storch Amini firm. At the meeting they discussed, among other things, Ms. Alter's allegations, Ms. Bukchin's concerns, and the legal ramifications.

When Ms. Alter and Ms. Bukchin met with the Storch Amini law firm, Ms. Bukchin was herself seeking legal advice about her own situation. No decisions were made at the meeting, nor did anyone discuss or decide who would retain Storch Amini. Some time after this meeting, Ms. Alter decided to retain the Storch Amini firm and to start this lawsuit. Ms. Bukchin is not a party to this action and is not presently an

attorney representing any party to this action. Ms. Bukchin was never associated with the law firm of Storch Amini. Nor did she ever retain them to represent herself personally.

After the lawsuit was begun, and while Ms. Bukchin and Mr. Shames were both still employed by Oppenheimer, Mr. Shames' approached Ms. Bukchin about this case to talk about the allegations. He confided in Ms. Bukchin and expressed his anxiety about being named a defendant. He also told Ms. Bukchin that as between the other plaintiffs, Ms. Alter had the strongest action, even though he believed none of them had a very good case against him. At his EBT, Mr. Shames testified that he sought out Ms. Bukchin. He testified he did so because he trusted her and respected her opinion. Mr. Shames never asked Ms. Bukchin for legal advice, nor did he tell her that he considered her to be his lawyer in this matter.

In support of their motion to dismiss this action, or disqualify plaintiff's law firm, defendants argue that Mr. Shames made statements to Ms. Bukchin about the *bona fides* of Ms. Alter's case. They contend that Mr. Shames shared his mental impressions with Ms. Bukchin, unaware that she was Ms. Alter's lawyer. They contend further that after Ms. Alter began this action, Ms. Bukchin continued to act as a "double agent," allowing Mr. Shames to confide in her, and then telling Ms. Alter and her lawyers of what she had learned. What information was actually shared is not described with specificity. Defendants argue that Ms. Bukchin violated her duty to Mr. Shames and Oppenheimer by remaining friendly with Ms. Alter and talking to her about what Mr. Shames was sharing with her in confidence.

In the *Bertoline* action Justice Braun has ruled that certain notes Ms. Bukchin took of her meetings and conversations with Mr. Shames are discoverable. Justice Braun found that because the defendants could not demonstrate that Ms. Bukchin was acting the attorney for either Oppenheimer or Mr. Shames in this matter, her notes were discoverable. Order, Braun J., 4/19/06. As more fully discussed below, without even reaching the further issue of whether Justice Braun's decision has collateral estoppel effect in this action, the court agrees with Justice Braun's conclusion, that no attorney-client privileges were available to protect the materials and conversations Ms. Bukchin disclosed to Ms. Alter and her attorneys, the firm of Storch Amini. Consequently, the drastic relief of dismissing this action or, alternatively, disqualifying plaintiff's chosen counsel is not available, because the information they obtained (whether by improper means or not) was otherwise discoverable.

Discussion

An attorney will be disqualified where the party seeking disqualification meets its burden of establishing a substantial relationship between the issues in the litigation and the subject matter of prior representation, or where the counsel had access to *confidential* material subsequently related to the litigation. Nesenoff v. Dinerstein & Lesser, 12 AD2d 427 (2nd dept. 2004). Where a party seeks the disqualification of an attorney on the ground that there is a conflict between the current representation and that of a former client, the movant must establish not only the existence of the prior attorney-client relationship but also that "the former and current representations are both adverse and substantially related." Nomura v. Hu, 240 AD2d 249 (1st dept. 1997);

Solow v. W.R. Grace, 83 NY2d 303 (1994). The formation of an attorney-client relationship hinges upon the client's manifested intention to seek professional legal advice. Knigge v. Corvese, 2001 WL 830669, 8/2/01, NYLJ, p. 23, col. 1 (S.D.N.Y. Cote J.) [citations omitted]. However, a party's unilateral or unreasonable belief that there is an attorney-client relationship does not make it so. Rather, an attorney-client relationship is established where there is an explicit undertaking to perform a specific task. Wei Cheng Chang v. Pi, 288 AD2d 378 *app den* 99 NY2d 501 (2002).

Canon 4 of the Professional Code of Conduct provides that "[a] lawyer should preserve the confidences and secrets of his client." A confidence is any information that is protected by the attorney-client privilege. This privilege is triggered when someone seeks legal advice from an attorney because the person is an attorney and the person (the client) makes the revelation in confidence. It exists to ensure that one seeking legal advice will be able to confide fully without fear that such confidences will later be publically disclosed. Priest v. Hennessy, 51 NY2d 62 (1980).

Dismissal is an even more drastic remedy. As more fully set forth below because defendants cannot show a basis for disqualification of Storch Amini, they are not entitled to either disqualification or the more drastic remedy of dismissal.

Ms. Alter and Ms. Bukchin each testified that at some point before this action was commenced they had a lawyer client relationship and that Ms. Bukchin agreed to keep what Ms. Alter told her about sexual harassment in the workplace confidential. Whether Ms. Bukchin should have agreed to such an arrangement in the first place, because she was employed by Oppenheimer at the time, does not have to be decided by the court. Nor does the court have to decide whether information confided by Ms. Alter

to Ms. Bukchin is privileged. They have already conceded that such information will be fully available to Oppenheimer in connection with its defense of this action. It is also important to clarify that this court is not deciding whether Ms. Bukchin should be disqualified because she does not represent anyone in this action.

The only issue before the court is whether the Storch Amini firm should be disqualified or the case dismissed because it gained some improper advantage (or information not otherwise available to them) from its dealings with Ms. Bukchin. This court holds that no such improper advantage was gained.

Defendants' argument that Ms. Bukchin was Mr. Shames' lawyer, or that she owed him a duty to protect their conversations as privileged because they were both employed by Oppenheimer, is unfounded. Ms. Bukchin did not agree to undertake representation of Mr. Shames in this matter, either before or after it was filed. Mr. Shames did not ask Ms. Bukchin for her legal advice or ask her to be his lawyer in this matter. Mr. Shames never approached Ms. Bukchin about representing him in this action. Sucese v. Kirsch, 199 AD2d 718 (3rd dept. 1993). The fact that both of them worked for the same employer at the time he confided in her does not mandate a different result. Oppenheimer did not request that Ms. Bukchin consult with Mr. Shames (or vice versa) to develop its legal position in this case.

While Mr. Shames may have confided in Ms. Bukchin, and told her things privately that he expected (or hoped) she would not tell others (especially not Ms. Alter), he did so because they worked together and he believed Ms. Bukchin to be a sympathetic ear on account of their interactions on other occasions. Thus, anything Mr. Shames discussed with Ms. Bukchin about this case, even his private impression of

whether it had merit or not, is not related to legal advice and, therefore, not privileged information.

Defendants argue, alternatively, that the Storch Amini firm obtained "inside" information about what was going on at Oppenheimer from Ms. Bukchin after this action was commenced because Ms. Alter and Ms. Bukchin maintained contact even after Ms. Alter was terminated. This argument fails as well because it is not the "contact" that is a problem, it is the alleged disclosure of otherwise confidential information that defendants assert is the basis for the firm's disqualification. There is, however, no indication that Ms. Alter herself obtained any information from Ms. Bukchin that could not have otherwise been elicited during or subject to discovery. *For example: Lipin v. Bender, Jr.*, 84 NY2d 562 (1994) (*information stolen from counsel's table, copied, then replaced*); *Matter of Beiny*, 129 AD2d 126 (1st dept. 1987) (*information obtained by serving improper subpoenas*). Moreover there is no specificity about what information was even imparted.

Defendants also contend that Storch Amini should never have met with both Ms. Alter and Ms. Bukchin in the first place because of their adversarial positions. The court disagrees and finds there is no conflict, or reason to disqualify Storch Amini because it initially met with Ms. Bukchin before this action was commenced. When Ms. Alter and Ms. Bukchin came to Storch Amini, both of them were seeking legal advice. At that meeting, both women were potential clients, notwithstanding their different and possibly opposite (or adverse), legal concerns. *Priest v. Hennessy, supra*. Again, the fact that defendants have failed to express with any specificity what it was that Ms. Bukchin revealed that was confidential to either defendant completely undercuts this

position. Defendants have not shown that Storch Amini acted unethically by meeting with both Ms. Bukchin and Ms. Alter at that time or that such meeting put them at any disadvantage in this action.

The parties disagree about whether the doctrine of collateral estoppel applies to this motion, in light of Justice Braun's decision in the *Bertoline* action. Whether or not Justice Braun's decision warrants the application of the doctrine of collateral estoppel becomes academic, because this court arrives at the same legal conclusion that Justice Braun did. The information Mr. Shames imparted to Ms. Bukchin was not privileged. Fleissler v. Bayroff, 266 AD2d 34 (1st dept. 1999). Thus, the information Mr. Shames imparted to Ms. Bukchin is discoverable. CPLR § 3101.

Based upon the foregoing, the court denies that portion of defendants' motion to dismiss this action, or in the alternative, to have plaintiff's law firm disqualified.

A separate branch of defendants' motion is to have the record and documents in connection with these motions sealed. The Uniform Rules for Trial Courts (22 NYCRR Rule 216.1) provides that all documents and records filed with the Court are "court records," presumptively open to the public. The court shall not seal a court file, except where there is "good cause" to do so. Danco Laboratories Limited v. Chemical Works of Gedeon Richter, Ltd., 274 AD2d 1 (1st dept. 2000). In determining whether there is good cause to seal the file, the court must balance the public's right to access against the competing interest of the party seeking the requested order. Danco Laboratories Limited v. Chemical Works of Gedeon Richter, Ltd., *supra*. A limited exception to this broad rule is where documents are subject to a protective order but were obtained in discovery. See: In re World Trade Center Bombing Litigation: Nash v. The Port

Authority of New York and New Jersey, 298 AD2d 72 (1st dept. 2002).

Defendants' motion for a sealing order is denied. They have not met their burden of proving that their interest in keeping this file confidential should be exalted over the public's right to have access to it. Nor are any of the documents they have filed in connection with this motion privileged. Thus, whether under 22 NYCRR 216 .1 (a) or (b), there is no basis to seal this file.

The court also denies plaintiff's cross-motion for sanctions. The court may impose financial sanctions or costs for frivolous conduct in civil litigation. Part 130, §130-1.1 (a). Conduct is "frivolous" when it completely is without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law or it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another. 22 NYCRR §130-1.1 (c) (1), (2). Though plaintiff disagrees with defendants' position on this motion, that alone does not make the position defendant has taken frivolous. There is otherwise no evidence that it was undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously the plaintiff.

Conclusion

In accordance with this decision the court denies both the motion and cross-motion in their entirety.

Since discovery was stayed pending the court's decision on these motions, a **status conference will be held on September 14, 2006 at 9:30 a.m.** so that the remaining discovery can be scheduled.

Any relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
August 1, 2006

So Ordered



HON. JUDITH J. GISCHE, J.S.C.

FILED
AUG 08 2006
NEW YORK
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