Lutzner v Kramer
2006 NY Slip Op 30867(U)
July 31, 2006
Supreme Court, New York County
Docket Number: 115012/2004
Judge: Rosalyn H. Richter

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 24

Erika Lutzner,

Plaintiff,

-against-

Decision & Order
Index No. 115012/2004

Barbara Kramer,

Defendant.

Richter, J.:

Defendant's motion to strike the note of issue is granted and plaintiff is directed to provide any outstanding discovery in her possession within fifteen days of this order and to appear for a continued deposition within 45 days of this Order. The parties shall appear in Part 24 on August 16 at 10 am for a conference to determine whether any further discovery, other than that being ordered in this decision, is required.[1] The defendant shall serve a copy of this order, with notice on entry on the Clerk of the Trial Support Office, which shall restore this matter to pre-note status.

The note of issue in this case was filed even though plaintiff's deposition had not concluded. The deposition, which began on April 6 and was continued on May 2, was stopped when plaintiff's counsel advised plaintiff not to answer defendant's questions as to the documents she had reviewed between the April and May deposition dates. Counsel contended that this information was protected by attorney-client privilege because the plaintiff stated that she had reviewed documents with her attorney. As the Court noted in *Lewis v. Brunswick Hospital*, 2001 WL 856434 (Sup. Ct. Queens County

[1] It is noteworthy that no preliminary conference was ever held in this matter. Indeed, had either party requested such a conference, the Court might have been able to resolve some of the discovery disputes that are set forth in this motion.

2001), "there is no authority in the CPLR to direct one's witness not to answer a question. Rather, plaintiff's remedy was to interpose an objection and seek a protective order from the court." Neither party contends that they contacted the Court for a telephone ruling, which might have obviated the need for this motion and allowed the deposition to go forward. Rather, when defendant's attorney could not obtain an answer to this line of questioning, the deposition ended. Plaintiff's attorney did not file a motion for a protective order, but simply filed the note of issue.

Although *Sporck v. Peil*, 759 F.2d 312 (3d Cir. 1985), cited by defendant, holds that questions as to the documents selected by counsel for review with a client prior to a deposition may involve the work product doctrine, the holding of that case has been questioned by other courts or distinguished. In any event, as the Second Circuit noted in *In re. Grand Jury Subpoenas*, 318 F.3d 379, 386 (2d Cir. 2003), "the party asserting the privilege must show a 'real, rather than speculative, concern' that counsel's thought processes 'in relation to pending or anticipated litigation' will be exposed through disclosure of the compiled documents. (internal citation omitted). Here, plaintiff's counsel has not made such a detailed showing, but simply relies on the fact that plaintiff mentioned that she reviewed documents at a meeting with her attorney. For example, when defendant's attorney asked plaintiff whether she had "reviewed any of the documents pertaining to the contract in this case?", plaintiff's counsel raised the privilege objection. This Court cannot see how this question, which does not seek to elicit any information about counsel's thought processes or to ask plaintiff to identify the documents her attorney thought were critical to this case, could be privileged.

Plaintiff's discovery responses to date have been extremely limited and this is not a case such as *Sporck* in which counsel, prior to the deposition, picked out certain documents from hundreds or thousands of pages of materials that already had been produced in the case. Indeed, plaintiff's counsel does not argue that any such selection occurred here and that plaintiff's response to the question might have revealed the mental processes of her counsel.

Moreover, the plaintiff's first deposition was interrupted repeatedly by objections and plaintiff often answered that she did not recall the information that was being sought. Thus, it can hardly be said that despite two deposition appearances, defendant has had an adequate opportunity to depose the plaintiff.

Plaintiff also has not provided discovery in response to defendant's requests 6 and 7 on the ground that they are overly broad. The requests were specific enough to apprise plaintiff of what was being sought, *Home & City Savings Bank v. Rose Assoc.*, 175 A.D.2d 386 (3d Dept. 1991), and since plaintiff has not moved for a protective order, she must respond. At a minimum, plaintiff must provide, to the extent not already provided, any documents, memos, letters or correspondence in her possession or control which she contends show defendant's fraudulent actions, documents relating to the Board approval process, and documents concerning the elevator and the door. Plaintiff's objection to providing documents which she believes defendant had prior to the commencement of this proceeding is rejected. Plaintiff cites no case to support her position that this is a reason not to provide relevant material in discovery.

The Court declines to order sanctions in this case. First, the Court notes that the question of whether the material sought was protected by the work privilege required

research by the Court and cannot be characterized as frivolous. Furthermore, as noted above, this motion might not have necessary had defendant contacted the Court during the deposition or filed an RJI requesting a discovery conference prior to the filing of the note of issue.

This constitutes the decision and order of the Court.

July 31, 2006

Justice Rosalyn Richter