

Chelli v Kelly Group, PC
2008 NY Slip Op 32254(U)
August 7, 2008
Supreme Court, New York County
Docket Number: 0102175/2008
Judge: Walter B. Tolub
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: TOLUB
Justice

PART 15

JAMES CHOLI

- v -

THE KELLY GROUP

INDEX NO.

102175/08

MOTION DATE

MOTION SEQ. NO.

001

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

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

AUG 13 2008

NEW YORK COUNTY CLERK'S OFFICE
IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 8/7/08

WALTER B. TOLUB 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: IAS PART 15

-----x
 JORGE CHELLI,

Plaintiff,

Index No. 102175/2008
 Mtn Seq. 001

-against-

THE KELLY GROUP, PC, KELLY MURRAY &
 BALBER, LLP, KELLY & BALBER, LLP, and
 JOHN Q. KELLY, ESQ.,

Defendants.

-----x

WALTER B. TOLUB, J.:

This is a motion pursuant to CPLR §2304, to quash the Defendants' Subpoena and Subpoena Duces Tecum dated June 6, 2008, served upon non-party attorney, Kieran J. Conlon.

Facts

Mr. Conlon was an associate with the Defendant's Firm for several years.¹ Plaintiff, Jorge Chelli, retained Defendant's Firm to represent him in a personal injury action. Mr. Conlon was an associate at Defendant's Firm when Mr. Chelli was taken on as a client and during a portion of the pre-trial proceedings in Plaintiff's underlying personal injury action.

Mr. Conlon was involved in the handling of Plaintiff's case,

¹Mr. Conlon was an associate for the Defendant Firms in their various forms and names over a period of several years through September 2002, when he left Defendants and started his own firm. Over the years of Mr. Conlon's employment, Mr. Kelly's partners Campo, Murray and Balber, each left the practice necessitating the firm's change in names. For simplicity, the court refers to the various firm names as "Defendant" or the "Defendant Firm".

he provided the Plaintiff with a retainer agreement, met with Plaintiff's family, his treating doctors and prepared court documents. However, in September 2002, while Plaintiff's action was on the trial calendar in Supreme Court, Queens County and while Plaintiff's motion for summary judgment on liability was pending, Mr. Conlon left the Defendant Firm.

In January of 2003, Plaintiff's action was tried by Mr. Kelly, resulting in a \$12 million verdict for the Plaintiff. On September 12, 2006, following post-trial motions and an appeal, and four years after Mr. Conlon left the Defendant Firm, the judgment was finalized.

In September of 2006, Plaintiff contacted Mr. Conlon seeking his assistance in contacting, what he claimed was an unresponsive and unreachable, Mr. Kelly to find out what was the status of his case. Plaintiff informed Mr. Conlon that since the January 2003 verdict, all attempts to check on the status of the case were fruitless.

Then, in August 2006, Plaintiff claims that he stopped receiving Worker's Compensation checks. Upon calling the Worker's Compensation insurance carrier, he was advised to contact his attorney, Mr. Kelly. Again, attempts to contact Mr. Kelly were of no avail and Plaintiff asked Mr. Conlon to contact Mr. Kelly. Mr. Conlon did in fact contact Mr. Kelly and it was determined that Mr. Kelly had received the Judgment proceeds.

Plaintiff later met with Mr. Kelly at the Firm and was provided with "closing documents". The \$2 million cash award was provided to the Plaintiff along with a cover letter dated September 28, 2006. Plaintiff was unable to decipher the distribution calculations set forth in the "closing documents" and contacted Mr. Conlon for assistance.

Mr. Conlon conducted an analysis of the distributions, including a review of the documentation provided by Mr. Kelly and also consulted with financial experts familiar with post-verdict 50-b distributions. Mr. Conlon determined that there were errors in the calculations and distribution schedules issued by Mr. Kelly to the Plaintiff. Mr. Conlon advised Mr. Kelly of this information and referred the Plaintiff to a different firm, which now represents Plaintiff in an action against the Defendant Firm.

In the action commenced by Plaintiff against the Defendant Firm, Plaintiff seeks a forfeiture of Mr. Kelly's legal fee (\$4 million) based on, inter alia, fraud, conversion, breach of fiduciary duty and legal malpractice.

On June 6, 2008, Mr. Conlon's office was served with the Defendant's subpoena directing that he deliver certain documents to the attorneys for the Defendant Firm in the action Plaintiff commenced against Defendant (Conlon, Ex. A). The list of documents includes; all written agreements with Plaintiff, all

documents taken from the Defendant's office, all documents relating to Mr. Conlon's 2002 bonus check, names of Defendant's former clients who have contacted Mr. Conlon since he left the Defendant Firm, a list of names and addressees of people whom Mr. Conlon sent announcements to for the formation of his firm Ryan & Conlon, and Ryan & Conlon partnership agreements. This list is by no means constitutes the entire request made by the Defendant on Schedule A which consists of 21 document demands.

Mr. Conlon seeks an order quashing the June 6, 2008 subpoena in its entirety arguing that it seeks the production of privileged documents, privileged communications, irrelevant documents and that it is overly burdensome.

Discussion

Pursuant to CPLR §3101(a)(4), disclosure from a non-party requires notice setting forth the reason why the disclosure is sought (DeStefano v. MT Health Clubs, Inc., 220 AD2d 331 [1st Dept 1995]). A subpoena duces tecum is facially defective when it fails to state the circumstances or reasons such disclosure is sought and required (Id. citing Rickicki v. Borden Chem., 195 AD2d 986 [4th Dept 1993]). Here, the Defendant failed to provide any notice setting forth the reasons why disclosure is sought from Mr. Conlon and why any information would be material and relevant to the underlying litigation (CPLR § 3101). Therefore, the subpoena is defective on its face.

Nonetheless, upon review of Schedule A, the requested documents seek irrelevant information regarding Mr. Conlon's law firm and its creation. There is no rational way to tie such information to the Plaintiff's action against the Defendant Firm. It follows that the Defendant is not entitled to any document requests regarding Ryan & Conlon, LLP's.

Additionally, a plain reading of the subpoena indicates that many of the documents Defendant demands are protected by the attorney-client privilege or attorney work product doctrine. The attorney-client privilege is a protection provided by statute to ensure that one seeking legal advice can expound freely to his attorney with confidence that the details provided will not later be exposed or used to his disadvantage (CPLR §4503[a]; Matter of Priest v. Hennessy, 51 NY2d 62 [1980]). Although not all communications between an attorney and client are privileged, the privilege is intended to foster openness between counsel and client so that legal problems can be thoroughly and accurately analyzed (Matter of Vanderbilt, 57 NY2d 66 [1982]). The privilege developed so that those individuals in need of professional advice, do not approach an attorney and disclose their problems in a manner tailored by "a fear that such facts will be made public to their disgrace or detriment" (Matter of Jacqueline F., 47 NY2d 215 [1979] citing Hurlburt v. Hurlburt, 128 NY420 [1891]; see also, Matter of Priest v Hennessy, 51 NY2d

62 [1980]). It follows that any confidential communication made to the attorney for the purpose of obtaining legal advice or service, in the course of a professional relationship, is protected by the privilege (Rossi v. Blue Cross & Blue Shield of Greater NY, 73 NY2d 588 [1989]).

The Defendant's subpoena encompasses documents concerning discussions that would have been conveyed by Mr. Conlon and his office solely for the purpose of advising Plaintiff. Furthermore, the subpoena encompasses material prepared which is protected by the work product doctrine (CPLR 3101 [c]). Therefore, documents relating to documents exchanged, drawn up or discussed between Mr. Conlon and Plaintiff, after his departure from the Defendant Firm in 2002, are protected by privilege.

Most importantly, the majority of the information requested by the Defendant is completely irrelevant to the action commenced by Plaintiff against the Defendant. At issue in that case is not the representation provided by the Defendant Firm or any of the attorneys in the Firm, rather the action specifically takes issue with the retainer agreement signed by the Defendant Firm and the Plaintiff and with the distribution of funds that Plaintiff was awarded. Mr. Conlon had left the Firm one year before any judgement was awarded and four years before any of the money was received, and therefore has no involvement whatsoever with the Defendant's distribution of the awarded judgment. However, since

Mr. Conlon was a member of the Defendant Firm at the time the retainer agreement was signed, and since Defendant claims that it was actually Mr. Conlon who presented the Plaintiff with the retainer agreement, Mr. Conlon is directed to comply only with #21 on Schedule A; "Any agreement between Nino Chelli [Plaintiff's brother] and/or Jorge Chelli and Kelly, Murray & Balber LLP and/or Kelly and Balber, LLP".


Accordingly, it is

ORDERED that Kieran J. Conlon's motion to quash the Defendants' Judicial Subpoena dated June 6, 2008 is granted as to Schedule A's items 1-20 and is denied as to item 21.

This memorandum opinion constitutes the decision and order of the Court.

Dated:

8/7/08



HON. WALTER B. TOLUB, J.S.C.