Verdi v Jacoby & Meyers, LLP
2009 NY Slip Op 31541(U)
June 30, 2009
Supreme Court, Nassau County
Docket Number: 10674/07
Judge: Karen V. Murphy
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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 20 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

______________________________________x

MICHAEL C. VERDI,

Plaintiff(s),

-against-

JACOBY & MEYERS, LLP, JOHN F. DOWD, ESQ. and COLLEEN WILLIAMS,

Defendant(s).

______________________________________x

Index No. 10674/07

Motion Submitted: 4/15/09
Motion Sequence: 004, 006, 007

The following papers read on this motion:

Notice of Motion/Order to Show Cause........................XXX
Answering Papers...XX
Reply..XX
Briefs: Plaintiff's/Petitioner's......................................
Defendant's/Respondent's.................................

Non-parties State Farm Insurance Company, Aaron Muntner and Kelly, Rode & Kelly, LLP, move this Court for an order pursuant to CPLR §2221[e] granting leave to renew the motion to quash denied by this Court by Order dated September 8, 2008, which denied three separate orders to show cause previously submitted by the non-parties.

Jacoby & Meyers cross moves for an order compelling disclosure of those items demanded in the subpoenas, and moves this Court to compel discovery from plaintiff's counsel.

On April 21, 2005, the plaintiff was involved in a motor vehicle accident wherein the vehicle he was operating was struck by the vehicle operated by Aaron Muntner and owned by Volvo Financial of North America. As a result of said accident the plaintiff sustained various injuries. In or about May of 2005, the plaintiff retained the services of defendant law firm Jacoby & Meyers and their employees, John F. Dowd Esq. and Colleen Williams. Subsequently, in September of 2005, a consent to change attorney was executed whereby Jacoby & Meyers was substituted by Sobel, Ross, Fliegel & Suss. Plaintiff's new counsel commenced a personal injury entitled Verdi v. Muntner, bearing Index Number 15347/2005. In that action, non-party witness and moving party herein, Kelly, Rode & Kelly, represented Mr. Muntner. The personal injury action was settled on March 12, 2007.

Thereafter, the plaintiff commenced the within legal malpractice action against his former counsel contending that they failed to timely assert a claim against the owner of the offending vehicle. The plaintiff alleges that due to the enactment of the Graves Amendment, which became effective on August 10, 2005, and the failure of Jacoby & Meyers to file suit prior thereto, he is precluded from filing suit against Volvo Financial of North America. The Graves Amendment was enacted by Congress and preempts the imposition of vicarious liability on lessors of automobiles for injuries, which result from the negligent use and operation of a leased vehicle.

Within the context of the instant legal malpractice action, the defendants, in Answering the complaint, interposed various affirmative defenses including that the plaintiff failed to mitigate his damages. Additionally, the defendants served the following three Judicial Subpoenas Duces Tecum: a subpoena, which sought the production of the file maintained by State Farm Insurance Company [hereinafter State Farm] relative to the personal injury action; a subpoena, which sought the production of Aaron Muntner's tax returns for 2005, 2006 and 2007; and a subpoena, which sought the production of files maintained by Kelly, Rode & Kelly with respect to the underlying motor vehicle accident.

By Orders to Show Cause dated April 23, 2008 (sequence #001) State Farm moved to quash the subpoena served upon it. Additionally, Aaron Muntner and Kelly, Rode & Kelly each moved by Orders to Show Cause dated May 5, 2008 (Sequence # 002 and #003) to quash the respective subpoenas served upon them.

This Court, by order dated September 8, 2008 denied State Farm's application on the basis that the Order to Show Cause was not timely served and that the accompanying affirmation was signed by someone other than the individual affirming the document. The application interposed by Muntner, as well as that of Kelly, Rode & Kelly, were both denied with leave to renew on the basis that the movants failed to provide the attendant affidavits of service. The within application, which seeks leave to renew this Court's September 8, 2008 Order subsequently ensued.

With respect to State Farm's prior application, counsel argues that while the Order to Show Cause was served late, such service was effected only one business day after same was required and that there is a justifiable reason therefore. Specifically, counsel states that the time to serve the Order to Show Cause coincided with the Passover holidays and the death of a longtime employee of the firm. As to those applications previously submitted by Muntner and Kelly, Rode & Kelly, counsel contends that the original affidavits of service are annexed herein for the Court's review.

A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior decision (CPLR §2221[e][2]). The purpose of a motion to renew is "to draw the court's attention to new or additional facts, which, although in existence at the time of the original motion, were unknown to the party seeking leave to renew and therefore not brought to the court's attention (***Gomez v. Needham Capital Group, Inc.***, 7 A.D.3d 568, 775 N.Y.S.2d 903 (2d Dept., 2004) quoting ***Natale v. Samel & Assocs.***, 264 A.D.2d 384, 693 N.Y.S.2d 631 [2d Dept., 1999]). An application for renewal may also be based upon law, which was not previously considered by the court (***Caryl S v. Child & Adolescent Treatment Services, Inc.***, 238 A.D.2d 953, 661 N.Y.S.2d 168 [4th Dept., 1997]).

Applying the foregoing to the facts and circumstances extant, the defendant's motion for leave to renew the decision of this Court dated September, 2008 is hereby Denied. The instant matter before the Court is not a case involving the discovery of new facts, which were previously unavailable or of new law not heretofore considered. Rather, this is a situation, which involves a failure of the movants to serve an Order to Show Cause in accordance with the directives of this Court and an additional failure to include proper documentation therewith.

As noted above, the defendants have interposed an Affirmative Defense that the plaintiff has failed to mitigate his damages. It is in relation thereto that the defendants seek discovery and move for an order compelling same from Aaron Muntner and State Farm. The application is opposed by non-party witnesses, Muntner and State Farm, as well as by the plaintiff.

As to Muntner, the defendants contend that plaintiff's counsel settled the underlying personal injury action without fully exploring the assets of Mr. Muntner. They argue that as a result they are entitled to an additional deposition of Mr. Muntner as to his financial status and to examine his tax returns for the years 2005, 2006, 2007, as were demanded in the subpoena.

With regard to State Farm, the defendants argue that they are entitled to the production of "any and all no-fault exams, independent medical exam reports, surveillance videos,

statements of the plaintiff, and any and all information, which would serve to mitigate damages in the underlying personal injury action" as well as "any and all surveillance videos, surveillance notes . . . and any other factors, which lead to State Farm's decision to tender their policy."

When seeking the discovery and production of documents from a non-party, CPLR §3120 and the provisions therein embodied provide that such discovery must be obtained by way of a subpoena duces tecum. A subpoena duces tecum "shall be served in the same manner as a summons" and must recite the "circumstances or reasons such disclosure is sought or required" (***CPLR §2303[a]; CPLR §3101[a][4]***; ***De Stafano v. MT Health Clubs***, 220 A.D.2d 331, 632 N.Y.S.2d 569 (1st Dept., 1995); ***Knitwork Productions Corp. v. Helfat***, 234 A.D.2d 345, 651 N.Y.S.2d 99 [2d Dept., 1996]). With respect to the subpoena served upon Mr. Muntner, there is no evidence that such subpoena was served in accordance with CPLR §2303. Additionally, a review of the subpoena, a copy of which is annexed to the defendant's moving papers, reveals that it does not contain the requisite notice setting forth why the documents were demanded (***CPLR §3101[a][4]***; ***De Stafano v. MT Health Clubs, supra***; ***Knitwork Productions Corp. v. Helfat, supra***; ***Velez v. Hunts Point Service Multi-Service Center, Inc., supra***).

Moreover, as noted above, the defendants are demanding the production Mr. Muntner's tax returns for the years 2005, 2006, 2007. Due to their confidential character, disclosure of tax returns is strongly disfavored and the party who is seeking the production thereof is required to make a strong showing of necessity for such disclosure and that the information sought is unavailable from alternative sources (***Walter Karl, Inc. v. Wood***, 161 A.D.2d 704, 555 N.Y.S.2d 840 (2d Dept., 1990); ***Altidor v. State-Wide Ins. Co.***, 22 A.D.3d 435, 801 N.Y.S.2d 545 [2d Dept., 2005]). In the instant matter, the defendants have failed to demonstrate that such information is indispensable to proving their affirmative defense or that information as to Mr. Muntner's assets cannot be procured from other sources (***id.***). Thus, that branch of the defendants' motion which seeks an order compelling production of Mr. Muntner's tax returns is hereby Denied.

Addressing now the subpoena served upon State Farm, the Court finds that it too, is unenforceable as it does not contain the "circumstances or reasons such disclosure is sought or required" (***CPLR §3101[a][4]***; ***De Stafano v. MT Health Clubs, supra***; ***Knitwork Productions Corp. v. Helfat, supra***; ***Velez v. Hunts Point Service Multi-Service Center, Inc., supra***).

Additionally, the Court finds the subpoena to be overly broad. Inasmuch as a subpoena duces tecum may not be employed as part of a fishing expedition or as a vehicle through which to ascertain if evidence in fact exists, the party seeking the discovery must set forth

"some factual predicate", which demonstrates that the demanded documents are material and relevant to matter in issue (***Oak Beach Inn Corp. v. Town of Babylon***, 239 A.D.2d 568, 658 N.Y.S.2d 72 [2d Dept., 1997]). Here, the defendants have made no such showing. In this case, the subject subpoena demands production of "a copy of the file regarding the action **of *Michael Verdi v. Aaron J. Muntner*** , . . . ", the contents of which likely contain items that are subject to privilege or qualified privilege. However, the defendants, other than stating in a conclusory fashion that "we are entitled to any and all information which would mitigate damages" have failed to demonstrate how the entire file is relevant to the their ability to assert their affirmative defense. Therefore, as the defendants are attempting to engage in general discovery, that branch of their application, which seeks an order compelling production of State Farm's file is hereby Denied.

As to that branch of the defendants motion, which seeks an order compelling Mr. Muntner to appear for an additional deposition and to answer questions as to his subpoenaed tax records, given this Court's denial of the production of such documents the application is accordingly Denied.

The Court now addresses the motion interposed by the defendants and which seeks an order to compel the following: the asset search as to Mr. Muntner, which was conducted during the underlying personal injury action; and for a deposition of plaintiff's counsel, who is the same attorney who represented the plaintiff in the underlying personal injury action.

With regard to the asset search, the defendants argue that same is directly relevant to whether the plaintiff mitigated his damages and as such they are entitled to a copy thereof, together with the identity of the investigators who obtained such information. As to a deposition of plaintiff's counsel, the defendants argue that the advice given by counsel to the plaintiff with regard to the settlement of the underlying action is relevant to the issue of whether the plaintiff duly mitigated his damages. The defendants further posit that given that the plaintiff ". . . has specifically and deliberately placed at issue a claim which can only be proven by use of the privileged materials" he has waived attorney client privilege. Plaintiff's counsel opposes the motion contending that the entirety of information demanded by the defendants is attorney work product resulting from the firm's representation of the plaintiff in the underlying personal injury action and as such it is privileged and not discoverable. This Court agrees.

The asset search and resulting reports, which were conducted and prepared by an investigator on behest of plaintiff's counsel are protected as attorney work product and thus not discoverable (***Oakwood Realty Corp. v. HRH Construction Corporation***, 51 A.D.3d 747, 858 N.Y.S.2d 677 [2d Dept., 2008]). Further, such information would also be exempt from disclosure pursuant to CPLR§3101[d], which accords conditional immunity to materials

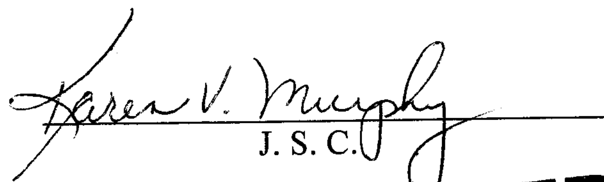
prepared in anticipation of litigation. Such statutory protection will only be precluded upon a showing by the demanding party of a substantial need of the requested information or that the substantial equivalent thereof could not be obtained via other means (*id.;* see also ***Daniels v. Armstrong,*** 42 A.D.3d 558, 840 N.Y.S.2d 409 [2d Dept., 2007]). Here, while defendants concede that the information sought was indeed prepared during the course of the underlying personal injury action, they have failed to demonstrate a substantial need for the asset search or that they could not have procured the "substantial equivalent" through resort to other means, such as having undertaken their own investigation and search (*id.*). Accordingly, that portion of the defendants' application, which seeks an order compelling the plaintiff to produce the asset search, is hereby Denied.

Finally, that branch of the defendants' application, which seeks an order compelling a deposition of plaintiff's counsel, is also Denied. The attorney client privilege protects communications between an attorney and his or her client, which is undertaken "in the course of professional employment" ***(CPLR§4503; Spectrum Systems International Corp. v. Chemical Bank***, 78 N.Y.2d 371, 581 N.E.2d 1055, 575 N.Y.S.2d 809 [1991]). In the instant matter, there is no dispute that the information sought by the defendants is subject to the attorney client privilege. Rather, the defendants claim the plaintiff has waived such privilege by placing at issue a claim, which can only be proven by use of the privileged materials. This argument it unavailing. Here the plaintiff's claim in the within legal malpractice action is that the defendant law firm failed to properly and timely sue Volvo Financial of North America. Accordingly, the plaintiff will be required to demonstrate that Volvo Financial of North America was in fact the owner of the offending vehicle in the underlying motor vehicle accident and that the defendants failed to timely file an action prior to the effective date of the Graves Amendment. Proof of such a claim, however, is clearly not dependant upon those communications that occurred between the plaintiff and his counsel relative to settling the underlying action as against Mr. Muntner. Accordingly, this branch of the is Denied.

All matters not specifically addressed herein are deemed denied.

The foregoing constitutes the Order of this Court.

Dated: June 30, 2009
Mineola, N.Y.



J. S. C.

ENTERED
JUL 10 2009
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