

Gandolfo v Gandolfo

2009 NY Slip Op 32944(U)

December 9, 2009

Supreme Court, Suffolk County

Docket Number: 13237-2007

Judge: Emily Pines

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SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present:

HON. EMILY PINES
J. S. C.

Original Motion Date: 09-09-2009
Motion Submit Date: 09-09-2009
Motion Sequence No's.: 002 MOTD
003 MD

JOSEPH E. GANDOLFO,

Plaintiff,

-against-

CELESTE GANDOLFO,

Defendant.

Attorney for Plaintiff
TOR JACOB WORSOE, JR., ESQ.
997 Waverly Avenue
Holtsville, New York 11742

Attorney for Defendant
ALAN R. BARR, ESQ.
98 South Ocean Avenue
Patchogue, New York 11772

ORDERED, that the motion (motion sequence number 002) by defendant compelling plaintiff to respond to the Notice for Supplemental Discovery and Inspection dated July 6, 2009 is granted to the extent indicated herein; and it is further

ORDERED, that the request for counsel fees is referred to the trial court; and it is further

ORDERED, that the cross-motion (motion sequence number 003) by plaintiff seeking to disqualify Alan Barr, Esq., as counsel for the defendant and for counsel fees is denied in its entirety; and it is further

ORDERED, that a compliance conference is scheduled for January 28, 2010 at 9:30 a.m. before the undersigned.

By prior Order of this Court (PINES, J.) dated January 7, 2009, this Court granted summary judgment dismissing several causes of action of the Complaint, leaving only a cause of action for abuse of process and counsel fees. The gravamen of the action is the defendant, former spouse of plaintiff, violated a certain Stipulation between the parties in their matrimonial action, wherein she agreed to make every effort to insure that certain criminal charges pending against plaintiff were either reduced or

dismissed. Plaintiff alleges that contrary to the agreement, placed on the record in open court before Justice Kent on December 6, 2004, defendant in fact contacted and demanded the District Attorney prosecute plaintiff. Plaintiff seeks lost wages and counsel fees.

By Order (PINES, J.) dated May 13, 2009, this Court required examinations before trial of both parties to be held on May 27, 2009 and further required "Plaintiff to provide document discovery regarding lost wages within 45 days." The submissions reflect that the examinations before trial of both parties were held on May 29, 2009 and certain documents were requested to be produced by plaintiff. Subsequently, on or about July 6, 2009, defendant served a Notice for Supplemental Discovery and Inspection on plaintiff.

Defendant now moves for an Order, *inter alia*, pursuant to CPLR §3101, 3120 and 3124, compelling plaintiff to respond to the Notice for Supplemental Discovery and Inspection dated July 6, 2009; and pursuant to CPLR §3126, that in the event plaintiff does not fully comply with the discovery demand by a date certain, that all issues regarding the information sought therein be deemed resolved in favor of the defendant and that plaintiff be precluded from offering certain information at the trial of this matter. Defendant states that plaintiff failed to respond to the July 6, 2009 Notice for Supplemental Discovery and Inspection despite sending further correspondence to plaintiff's counsel on July 27, 2009 and August 3, 2009. Plaintiff has not moved to vacate or modify the demand. Therefore, defendant seeks an Order compelling plaintiff to respond and if he fails to do so, precluding certain evidence and testimony at the trial of this matter. Defendant also seeks counsel fees on the motion in the amount of \$2,500.00.

Plaintiff opposes the motion and cross-moves for an Order, *inter alia*, disqualifying defendant's counsel from representing her on the ground that he is a necessary, material witness in the action. Plaintiff also seeks counsel fees on the motion. With regard to the failure to comply with discovery, plaintiff now attaches to the opposition papers a copy of a response to the Notice for Supplemental Discovery and Inspection, which he served simultaneously with the service of the cross-motion. Plaintiff states that he had requested certain documents from his employer but they had not yet been provided, resulting in a delay. Further, he states that he is unable to locate certain documents from his criminal defense attorney who handled the matter.

Turning to the request to disqualify defendant's counsel, plaintiff argues that counsel is going to be a necessary witness in this action. In support of such argument, plaintiff annexes a copy of defendant's deposition transcript wherein she is unable to specify what conversations she had with the District Attorney's office toward the end of having them reduce or dismiss the charges against plaintiff.

Plaintiff also annexes a correspondence from defendant's counsel to defendant's matrimonial counsel dated December 22, 2004. In that correspondence, after the settlement of the matrimonial action between the parties, defendant's counsel states that "Your client's conduct is the main reason why my client is now unwilling to cooperate in the criminal matter." Plaintiff notes that in the settlement of the divorce action, defendant's counsel stated on the record that both defendant and he would "make every reasonable effort" to have the District Attorney decrease or dismiss the charges and moreover, that defendant's counsel stated that he would "guide her accordingly". Instead of doing so, plaintiff argues that defendant promoted the criminal prosecution and believes that her counsel encouraged same as evidenced by the December 22, 2004 letter. Therefore, plaintiff argues that defendant's counsel is a necessary witness to testify regarding defendant's efforts to resolve the criminal matters, and the advice he gave her in such regard. Thus, plaintiff seeks disqualification of defendant's counsel.

Defendant submits opposition to the cross-motion wherein she states that she does not grant her attorney permission to disclose any conversations that they had or advice he gave while representing her in the divorce action. Defendant's counsel submits an affirmation in reply and in opposition to the motion. On the discovery issue, counsel states that the response annexed to the cross-motion still fails to comply with the demand in that plaintiff has merely stated that he has not obtained the requested documents and/or does not have copies of said documents. Defendant therefore urges the Court preclude plaintiff from testifying at the trial of this matter concerning the issues for which discovery has not been provided, to wit, employment records, income tax returns and W-2 statements.

Turning to the disqualification motion, defendant's counsel states that plaintiff has waited more than two years to make this motion did so only for the purpose of delay. Moreover, counsel argues that any advice or conversations he had with defendant are confidential, privileged and he cannot be compelled to testify regarding same without her permission, which she has not given. Thus, the motion to disqualify must be denied.

Initially, the Court agrees with defendant that plaintiff must comply with the July 6, 2009 Notice for Supplemental Discovery and Inspection. Plaintiff seeks damages for lost wages arising out of his criminal prosecution which he claims was as a result of defendant's failure to comply with the parties Stipulation of Settlement in the divorce again. Plaintiff has not provided any reasonable excuse for the failure to provide such documentation and thus, he is directed to provide all outstanding discovery responses within thirty (30) days from the date of this Order. Such shall include the employment records, tax returns and W-2 statements and to the extent any such records are not within plaintiff's possession, counsel for plaintiff should attempt to obtain same via appropriate subpoena. In the event plaintiff fails to comply with this Order, he shall be precluded from offering any evidence with regard

to his claim for lost wages and defendant shall be permitted to move to dismiss said claims. The request for counsel fees shall be considered at the trial of this action.

The application to disqualify defendant's counsel is more troubling. Rule 3.7 of Part 1200, the Rules of Professional Conduct (effective April 1, 2009) states:

Lawyer as Witness

- (a) A lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact unless:
- (1) The testimony relates solely to an uncontested issue;
 - (2) The testimony relates solely to the nature and value of legal services rendered in the matter;
 - (3) Disqualification of the lawyer would work substantial hardship on the client;
 - (4) The testimony will relate solely to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; or
 - (5) The testimony is authorized by the tribunal.

The Court of Appeals has explained that the "advocate-witness disqualification rules contained in the Code of Professional Responsibility provide guidance, not binding authority, for courts in determining whether a party's law firm, at its adversary's instance, should be disqualified during litigation. Courts must, in addition, consider such factors as the party's valued right to choose its own counsel, and the fairness and effect in the particular factual setting of granting disqualification or continuing representation." *S & S Hotel Ventures Limited Partnership v. 777 S.H. Corp.*, 69 N.Y.2d 437, 515 N.Y.S.2d 735, 508 N.E.2d 647 (1987).

The Second Department has recently reaffirmed that a party's right to be represented in ongoing litigation by counsel of its own choosing is a valued right which should "not be abridged absent a clear showing - -on which the party seeking disqualification carries the burden - that counsel's removal is warranted." *Goldstein v. Held*, 52 A.D.3d 471, 859 N.Y.S.2d 707 (2d Dept. 2008). *See also, Bentvena v. Edelman*, 47 A.D.3d 651, 849 N.Y.S.2d 626 (2d Dept. 2008) (burden of demonstrating necessity falls upon the party seeking disqualification); *Heim v. Merritt-Meridian Corp.*, 236 A.D.2d 367, 654 N.Y.S.2d 570 (2d Dept. 1997). The Court can also consider any delay in moving to disqualify opposing counsel. *See, e.g., Schonwit v. Schonwit*, 194 A.D.2d 780, 599 N.Y.S.2d 631 (2d Dept. 1993); *Plotkin v. Interco Development Corp.*, 137 A.D.2d 671, 524 N.Y.S.2d 763 (2d Dept. 1988).

In this case, the Court finds that defendant's right to counsel of her choosing should not be abridged, where plaintiff waited more than two years from commencement of this action to move to

disqualify defendant's counsel. While the Court is mindful of plaintiff's claims that defendant's counsel may have advised defendant regarding the criminal prosecution, the contents of any such communications are privileged and defendant has not waived any privilege. Plaintiff is able to fully examine defendant, as he did during the deposition, regarding the contents of any conversations with the District Attorney, and to obtain the transcript of the criminal proceedings for use in this action. At this stage, this case should almost be ready for trial, and the Court will not engender further delay by disqualifying defendant's counsel. The motion for disqualification is therefore denied in its entirety.

Counsel are reminded that a compliance conference is scheduled for January 28, 2010 at 9:30 a.m. before the undersigned.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: December 9, 2009
Riverhead, New York



EMILY PINES
J. S. C.