

Bonina v City of New York

2010 NY Slip Op 30203(U)

January 27, 2010

Supreme Court, New York County

Docket Number: 107009/2008

Judge: Saliann Scarpulla

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

PRESENT: SALIANN SCARPULLA
Justica

PART 52

Index Number : 107009/2008

BONINA, ELIZABETH

vs

CITY OF NEW YORK

Sequence Number : 001

COMPEL

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

his motion to/for _____

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

FILED

JAN 29 2010

NEW YORK
COUNTY CLERK'S OFFICE

decided per the memorandum decision dated 1/27/10
which disposes of motion sequence(s) nos 1-2.

Dated: Jan. 27, 2010

Saliann Scarpulla
SALIANN SCARPULLA *J.S.C.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52

----- X
ELIZABETH BONINA and
THOMAS COYNE,

Plaintiffs,

- against-

Index No.:107009/2008
Submission Date:
11/14/2009

CITY OF NEW YORK and NEW YORK CITY
TAXI AND LIMOUSINE COMMISSION,

DECISION AND ORDER

Defendants.

----- X
For Plaintiffs: Kaiser Sauborn & Mair, P.C.
111 Broadway
New York, NY 10006
For Defendants: Michael A. Cardozo, Corporation Counsel
100 Church Street, 4th Floor
New York, NY 10007

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JAN 29 2010
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Papers considered in review of this motion to compel and motion for protective order:

Notice of Motion 1
Aff in Support 2
Aff in Opp 3
Notice of Motion 4
Aff in Support 5
Aff in Opp 6
Reply Aff 7

HON. SALIANN SCARPULLA, J.:

In this whistleblower action, plaintiffs Elizabeth Bonina (“Bonina”) and Thomas Coyne (“Coyne”) (collectively the “plaintiffs”) move to compel the production of certain documents by defendants the City of New York (the “City”) and the New York City Taxi and Limousine Commission (the “TLC”) (collectively the “City defendants”).

Bonina and Coyne commenced this action by service of a summons with notice. Subsequently, the City defendants demanded a complaint. On July 14, 2008, Bonina and Coyne served City defendants with a complaint alleging causes of action against the City defendants for violations of Civil Service Law § 75-b and New York City Administrative Code § 12-113. The complaint alleges that Bonina and Coyne, Administrative Law Judges (“ALJs”) at the Taxi and Limousine Commission (“TLC”) were denied promotions to Chief and Deputy Chief ALJ at the TLC because they were whistleblowers, having complained of public corruption.

In their motion to compel, Coyne and Bonina assert that on December 22, 2008 they served the City defendants with a Plaintiffs’ First Set of Interrogatories, First Request for the Production of Documents and Demand for Expert Witness Information (“Plaintiffs’ First Request”), as well as Notices of Deposition.¹ The City defendants contend that the Plaintiffs’ First Request and Notices of Deposition were served by facsimile, that the City defendants did not consent to service by this method, and that they were not formally served with either the Plaintiffs’ First Request or the Notices of Deposition.

Coyne and Bonina’s motion to compel includes an “Affirmation of Good Faith” by their attorney. However, the Affirmation fails to indicate any efforts taken by the attorney to confer with opposing counsel in a good faith effort to resolve the discovery disputes. It

¹ The plaintiffs fail to annex copies of the affidavits of service for either their First Request or the Notices of Deposition.

merely states that discovery demands were served and that plaintiffs did not receive a response.

In opposition, the City defendants assert that, despite the lack of proper service, counsel for the City defendants contacted plaintiffs' counsel via telephone on or about January 21, 2009 to request an extension of time to respond to the Plaintiffs' First Request and to schedule depositions, and that plaintiffs' counsel consented. The City defendants state that there was no further communication between the parties until they received service of plaintiffs' motion to compel on or around March 13, 2009. Along with their opposition to the motion to compel, the City defendants annexed their Responses and Objections to the Plaintiffs' First Request.

While the motion to compel was pending, the City defendants moved for a protective order. In the motion, the City defendants assert their objection to the documents requested in Request Nos. 1 and 4 - 12 on the grounds that the documents sought are "privileged, private and/or confidential." The City defendants assert that the documents requested are exempt from disclosure under Public Officers Law ("POL") § 87(2)(b), (e) and (g), and under the public interest privilege. The City defendants, despite asserting that the requested documents are privileged and exempt from disclosure, offer to produce the requested documents, subject to a protective order. In opposition, plaintiffs challenge the asserted privileges and assert that because this action involves allegations of public corruption the disclosure should be open to a public airing. In addition, plaintiffs argue that the City

defendants fail to submit sufficient support for a protective order. After participating in a conference before the Court, the City defendants submitted the documents at issue to the court for an *in camera* inspection and review.

Discussion

CPLR 3101(a) requires “full disclosure of all matter material and necessary in the prosecution or defense of an action.” It is well settled that a “trial court is vested with broad discretion to regulate pretrial discovery.” *Boutique Fabrice, Inc. v. Bergdorf Goodman, Inc.*, 129 A.D.2d 529, 530 (1st Dep’t 1987). Accordingly, “the supervision of disclosure and the setting of reasonable terms and conditions therefor rests within the sound discretion of the trial court, which has broad power to regulate discovery to prevent abuse.” *Merkos L’Inyonei Church, Inc. v. Sharf*, 59 A.D.3d 408, 410 (2d Dep’t 2009) (internal citations omitted).

Summary denial of a motion to compel is “mandated when it is made without a proper affirmation of good faith as required by 22 NYCRR 202.7(a).” *Sixty-Six Crosby Assocs. v. Berger & Kramer, L.L.P.*, 256 A.D.2d 26 (1st Dep’t 1998). Here, plaintiffs fail to include a proper good faith affirmation. As discussed above, the so-called “Affirmation of Good Faith” submitted in support of plaintiffs’ motion to compel fails to detail any efforts taken by plaintiffs’ counsel to confer with his adversary in a good faith effort to resolve the discovery issues. Lacking that, the motion to compel must be denied. *See Fulton v. Allstate Ins. Co.*, 14 A.D.3d 380, 382 (1st Dep’t 2005).

[* 6]

In support of the motion for a protective order, the City defendants submit only an attorney affirmation, containing mostly legal arguments as to why the documents sought are protected by POL §87 and the public interest privilege. Plaintiffs argue that this is insufficient, as the party seeking a protective order must submit an affidavit of someone with knowledge, and not just an attorney affirmation containing conclusory allegations.²

However, “[o]n its own initiative or on motion of any party or witness, a court may issue a protective order denying or regulating document production. . . .” *Matter of Farbman v. New York City Health and Hospitals Corp.*, 62 N.Y.2d 75, 80 (1984) (citing CPLR 3103). In addition, “the court may use sound discretion to regulate and prevent abuse of the discovery process by protective orders.” *Church & Dwight Co. v. UDDO & Assoc., Inc.*, 159 A.D.2d 275, 276 (1st Dep’t 1990). “In exercising its discretion regarding whether and to what degree a protective order under CPLR 3103 should issue, . . . [the Court] must strike a balance by weighing the[] [parties’] conflicting interests in light of the facts of the

² The Court notes, however, that the cases relied on by plaintiffs all deal with protective orders over claimed trade secrets. See *Bristol, Litynski, Wojcik, P.C. v. Town of Queensbury*, 166 A.D.2d 772 (3d Dep’t 1990) (“The statements of its attorney, made on information and belief, that the contents of a document were trade secrets is legally insufficient to establish such fact”); *Matter of Sevioli*, 6 Misc. 3d 1029A (Surrogate’s Ct. Nassau Co. 2005) (“A confidentiality order may be entered where a party demonstrates a legitimate concern for exposure of trade secrets An affidavit from a person knowledgeable about the business which contains non-conclusory assertions giving rise to a genuine concern that the company may lose some competitive advantage as a result of discovery of specific documents related to secret business procedures and information is required.) (citations omitted).

particular case before it.” *Mahoney v. Turner Constr. Co.*, 61 A.D.3d 101, 106 (1st Dep’t 2009) (citing *Cynthia B. v New Rochelle Hosp. Med. Ctr.*, 60 N.Y.2d 452, 461 (1983)).

The City defendants provided the following categories of documents for *in camera* review:

1. Department of Investigation (“DOI”) summary interviews;
2. Candidate applications, resumes, employment histories, job references, and all interview notes for the positions of Chief and Deputy Chief ALJ at the TLC;
3. Email communications between former Assistant Commissioner for the TLC Joseph Eckstein (“Eckstein”), and various managerial personnel regarding the Chief and Deputy Chief ALJ positions and interviews for those positions, TLC operations and procedures;
4. Email communications between Eckstein and DOI Julie Block concerning whistleblower allegations and the Chief and Deputy Chief ALJ interview and selection process; and
5. The personnel file of Phillip Elliot, Director of Operational Support and Programs for the TLC.

After reviewing the documents, the Court finds that the documents are material and necessary, *see* CPLR 3101(a), but also of such a sensitive nature that they should only be produced subject to a protective order. The DOI summary interviews and email communications constitute intra-agency “‘deliberative material,’ i.e. communications exchanged for discussion purposes not constituting final policy decisions.” *Matter of New York Times Co. v. City of New York Fire Department*, 4, N.Y.3d 477, 487 (2005) (quoting *Matter of Russo v. Nassau County Community Coll.*, 81 N.Y.T.2d 690, 699 (1993)). The candidate applications, resumes, employment histories, job references and interview notes

as well as the personnel file contain personal information, which must be protected from an unwarranted invasion of personal privacy. See POL §89(2)(b).

In accordance with the foregoing, it is

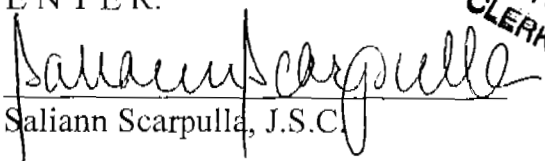
ORDERED that the motion to compel the production of certain documents and the examination before trial of certain witnesses by plaintiffs Elizabeth Bonina and Thomas Coyne is denied; and it is further

ORDERED that the motion for a protective order by defendants City of New York and New York City Taxi and Limousine Commission is granted to the extent that within twenty (20) days of the date of entry of this order, both parties will execute the Stipulation and Protective Order in the form annexed to the defendants' motion for protective order at Exhibit C, with paragraph 6 omitted, and submit it to the Court to be So-Ordered; and it is further

ORDERED that within twenty (20) days of entry of the Protective Order, defendants City of New York and New York City Taxi and Limousine Commission will produce to plaintiffs Elizabeth Bonina and Thomas Coyne copies of all documents produced to the Court for *in camera* review.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
January 27, 2010

ENTER:

Saliann Scarpulla, J.S.C.

FILED
JAN 29 2010
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