

Scarola Ellis, LLP v Padeh

2010 NY Slip Op 32009(U)

July 23, 2010

Supreme Court, New York County

Docket Number: 113781/2009

Judge: Louis B. York

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

PRESENT: LOUIS B. YORK
J.S.C Justice

PART 2

Scarola & Ellis

INDEX NO. 113781/09

MOTION DATE _____

MOTION SEQ. NO. 02

MOTION CAL. NO. _____

- v -
Padalk

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

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.

JUL 29 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/23/10

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LOUIS B. YORK
J.S.C.
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: IAS PART 2**

Index No: 113781/2009

SCAROLA ELLIS, LLP,

Plaintiff,

-against-

ETHN PADEH

Defendant

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LOUIS B. YORK, J.:

Scarola Ellis LLP brought this action against Elan Padeh for breach of contract for nonpayment of legal fees. Defendant filed this motion to (1) quash Notice of Depositions and Subpoenas Duces Tecum and served on two members of the law firm of Zetlin & DeChiara, LLP; (2) order the Plaintiff to respond fully to a Notice for Discovery and Inspection and (3) prohibit Plaintiff from appearing *pro se*. Defendant argues all branches of this motion are supported under 22 NYCRR § 1200.0, the *Rules of Professional Responsibility*.

The basis for the immediate action occurred when the Corcoran Group terminated a contractual employment agreement with Elan Padeh. Shortly thereafter Padeh founded and was president of The Developer's Group, LLC (TDG), a real estate development company. Padeh retained the law firm of George Zelma to represent him in a breach of an employment agreement action against his former employers and authorized Zelma to retain Scarola & Ellis LLP on a contingency basis.

One of the defendants in the action, Corcoran Group Brooklyn Landmark, LLC, brought a third-party complaint against TDG which is represented by Zetlin & DeChiara I.L.P. During the trial the judge allowed the Corcoran Group to investigate charges of perjury and discovery abuses against both Padeh and TDG. On April 25, 2007 Corcoran's counsel issued a "Perjury Investigation Report." Mr. Zelma negotiated a settlement with Padeh and Corcoran in October 11, 2007. Plaintiff did not participate in these negotiations or in the defense of TDG.

CPLR §4503

Scarola Ellis served a Notice of Deposition and Subpoena Dues Tecum on two members of the law firm Zetlin & DeChiara, corporate counsel for TDG. Each subpoena requests all documents or communications concerning and relating to the Perjury Investigation, the Perjury Investigation Report and the allegations made by Corcoran as well as the recommended penalties against Padeh or TDG. Further it requests all documents concerning Padeh's decision not to pursue the lawsuit. Plaintiff argues it is entitled to these documents because there is no "blanket privilege" which protects these materials under client confidentiality. Further, Plaintiff maintains that many of these items, which are essential to its case, are not privileged because they came into Zetlin & DeChiara's possession.

Defendant argues the subpoenaed information is protected under 22 *NYCRR* § 1200.0 Rules of Professional Conduct, Rule 1.6(a) which specifically prohibits a lawyer from knowingly revealing confidential information to the "disadvantage of a client or for the advantage of the lawyer or a third person unless the client consents." Both Padeh and PDG object to the release of this information.

CPLR § 4503 states communication between an attorney and client is confidential and the client can not be compelled to disclose it. All communications between clients and their attorneys are “absolutely immune from discovery” when, in the course of their professional relationship, the client consults the attorney to obtain legal advice. (*See: New York Times Newspaper Div. v. Lehrer McGovern Bovis, Inc.*, 300 A.D.2d 169, 171 752 N.Y.S.2d 642, 643 (1st Dep't 2002)).

Zetlin & DeChiara represented TDG and Padeh was its president during the period covered by the subpoena. Attorney-client privilege protects any communication between Padeh and Zetlin & DeChiara about TDG’s legal position. These discussions and documents include meetings between TDG’s executive staff and its attorneys to develop legal strategies to defend TDG against The Perjury Investigation and the Perjury Report. Attorney-client privilege also protects TDG’s communications concerning the legal outcome of the perjury investigation, including possible penalties and discussions about discontinuing the law suit. Thus, the documents Plaintiff requests are privileged.

CPLR §3101(c)

Padeh served a Notice for Discovery and Inspection on the Plaintiff requesting any written agreements between the Plaintiff firm and the firm of George Zelma as well as copies of all pleadings, memoranda, briefs, motion papers, correspondence, disbursements, ledger sheets, copies of all e-mails to or from the Defendant or the firm of George Zelma relating to services rendered on behalf of the Defendant. Padeh claims that the documents were prepared for him. Plaintiff asserts the subpoena is too broad.

Although *CPLR § 3101(a)* requires “full disclosure of all matter material and necessary in the prosecution or defense of an action” *CPLR 3101(c)* limits the scope of

disclosure by excluding an attorney's work product. In *Sage Realty*, however, the New York Court of Appeals found that when the client-attorney relationship is terminated the client has an "expansive general right" to the contents of its file. The only exception is when the "documents might violate a duty of disclosure owed to a third party or otherwise imposed by law" or the documents were "recorded primarily for the purpose of giving internal direction to facilitate performance of the legal services entailed in that representation." In these instances, former counsel must make a "substantial showing" of good cause to refuse client access to this information. *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn, LLP*, 91 N.Y.2d 30, 37-38 689 N.E.2d 879, 883 666 N.Y.S.2d 985, 989 (Ct. App. 1997).

Beck & Srauss, which currently represents Padeh, seeks files created by Defendant's former counsel, Scarota Ellis for the Plaintiff. When the client requests a work product created by a former law firm the burden for denying access to that information shifts to the former firm. Scarota Ellis must identify and make a "substantial showing" that each item it wants to protect qualifies as one of the exceptions identified in *Sage*. Many of the requested documents, such as the pleadings, briefs, memoranda, are part of the public record and thus there is no privilege. The Plaintiff's claim that the subpoena is too broad fails because the Defendant is entitled to have access to all the requested information.

CPLR §321

Defendant cites 22 *NYCRR § 1200.0* Rules of Professional Conduct, Rule 3.7(a) (2) to support its objection to Plaintiff's *pro se* representation. Case law and *CPLR §321* clarify the definition of an attorney's role. It is well established that a "*pro se* appearance

by a professional corporation such as plaintiff is clearly proper and supported by established legal authority.” See: *Bronstein v. Taylor* 161 A.D.2d 328; 329 555 N.Y.S.2d 93, 94 (1st Dep’t. 1990). In a breach of contract action involving legal fees and disbursements, the court in *Toren* found that “a professional corporation of attorneys can appear by its member lawyers.” *Toren v Anderson, Kill & Olick, P.C.* 185 Misc. 2d 23; 26, 710 N.Y.S.2d 799, 801 (Sup Ct, N.Y. County 2000).

Accordingly, it is

ORDERED that branch one of the motion of Élan Padeh to quash a subpoena issued by Scarola & Ellis, LLP is granted.

ORDERED that branch two of the motion, which requires Plaintiff to respond further to a Notice for Discovery and Inspection, is granted.

ORDERED that the third branch of the motion is denied; Scarola & Ellis, LLP can appear *pro se* in this action.

Dated: 7/23/10

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