

Scarola Ellis LLP v Padeh

2011 NY Slip Op 30799(U)

April 1, 2011

Supreme Court, New York County

Docket Number: 113781/09

Judge: Louis B. York

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

PRESENT: York Justice

PART 2

Index Number : 113781/2009

SCAROLA ELLIS LLP

vs.

PADEH, ELAN

SEQUENCE NUMBER : 004

QUASH SUBPOENA, FIX CONDITIONS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

n this 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 *is decided in accordance with the accompanying decision and order.*

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

FILED

APR 05 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 4/1/11

LOUIS B. YORK J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

-----X
SCAROLA ELLIS LLP,

Plaintiff,

-against-

ELAN PADEH,

Defendant.
-----X

Index No.: 113781/09

FILED

APR 05 2011

NEW YORK
COUNTY CLERK'S OFFICE

YORK, J.:

In this case, in which plaintiff Scarola Ellis LLP (plaintiff), alleges that defendant Elan Padeh (Padeh) breached a contract for the payment of legal fees, plaintiff, moves, presumably pursuant to CPLR 2304 and CPLR 3103 (a), to quash the subpoena which was served upon the law firm of Zetlin & DeChiara.

In June of 2003, Padeh filed a complaint against the Corcoran Group, Inc. (Corcoran), and other related entities, for breach of an employment agreement and for real estate brokerage commissions. Corcoran Group Brooklyn LLC, a co-defendant in the action, filed a third-party complaint against Padeh and The Developer's Group (TDG), a real estate development company which Padeh formed and serves as president. While Padeh initially retained the Law Offices of George Zelma to represent him in this lawsuit, in July of 2004, Padeh entered into an agreement with plaintiff to serve as co-counsel on a contingent fee basis. TDG was represented by Zetlin & DeChiara.

After the note of issue was filed, Corcoran filed an order to show cause, alleging that TDG was in possession of documents which were not produced during discovery, and that TDG had committed perjury. Following a perjury investigation which was monitored by the court,

Corcoran's counsel issued a report which alleged that, among other things, Padeh and TDG's general counsel committed perjury and that TDG committed discovery violations. After the report was provided to the court, a hearing was scheduled on the order to show cause. However, in October of 2007, and before the hearing for the order to show cause took place, Padeh settled the case with Corcoran. Plaintiff maintains that it was not involved in any discussions among the parties leading up to Padeh's decision to abandon his claims against Corcoran.

On November 20, 2009, plaintiff filed the complaint in this action, alleging causes of action against Padeh, for breach of contract, quantum meruit, and unjust enrichment. Plaintiff contends that it is entitled to fees based upon the actual time and disbursements that were incurred in prosecuting Padeh's claims before he settled the case, or alternatively, the value Padeh obtained by not pursuing his claims. Plaintiff also seeks \$62,281.35 for services it provided to Padeh.

In pursuing this action, plaintiff served subpoenas on several non-parties including on Zetlin & DeChiara, the law firm who represented TDG in the prior action. In the subpoena dated June 3, 2010, plaintiff requests:

1. All documents or communications concerning the Perjury Investigation, the Perjury Investigation Report and the allegations made by Corcoran in connection therewith, including concerning the truth or falsity of those allegations.
2. All documents or communications concerning any response or opposition, whether written or verbal, and including any drafts thereof, put together by you, Padeh or TDG relating to the Perjury Investigation and the Perjury Investigation Report.
3. All documents or communications concerning the findings, conclusions or recommendations, including any recommended penalties monetary or otherwise against Padeh or TDG, concerning the Perjury Investigation and the Perjury Investigation Report.
4. All documents concerning Padeh's decision made on or about October 11, 2007 not to pursue the Lawsuit further.

(Beck Reply Affirm., ex. B).

* 4]

Counsel for Padeh filed an order to show cause to quash this subpoena, and argued that the documents sought by plaintiff were protected by the attorney-client privilege. On July 23, 2010, this court granted the motion quashing the subpoena, and held that the attorney-client privilege protects any communication between Padeh and Zetlin & DeChiara concerning TDG's legal position, as well as TDG's communications regarding the legal outcome of the perjury investigation, penalties and the discontinuation of the case.

Plaintiff served a second subpoena on Zetlin & DeChiara dated October 13, 2010, which requests:

1. All documents or communications furnished to you by Corcoran, including-without limitation, by any counsel for Corcoran in the Lawsuit or by Kroll Ontrack or any agents or representatives of these entities -- concerning the Perjury Investigation, the Perjury Investigation Report and the allegations made by Corcoran in connection therewith, including, without limitation, such documents or communications concerning (i) the substance of those allegations; (ii) the truth or falsity of those allegations; and (iii) findings, conclusions or recommendations, including any recommended penalties, monetary or otherwise, against Padeh or TDG, stemming from the allegations, the Perjury Investigation or the Perjury Investigation Report.

(Beck Reply Affirm., ex. B). Padeh now moves to quash this subpoena and argues that the subpoena requests the same documents which this court previously held were protected by the attorney-client privilege. The Court of Appeals has held that "while information received from third persons may not itself be privileged, a lawyer's communication to a client that includes such information in its legal analysis and advice may stand on different footing. The critical inquiry is whether, viewing the lawyer's communications in its full content and context, it was made in order to render legal advice or services to the client." *Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 379 (1991) (citations omitted).

Here, the subpoena dated June 3, 2010, requests documents in the possession of Zetlin

& DeChiara, including communications between Padeh, the president of TDG, and Zetlin & DeChiara, concerning TDG's legal position and the outcome of the perjury investigation.

However, the subpoena dated October 13, 2010, requests documents which were furnished to Zetlin & DeChiara by another party or non-party, specifically Corcoran, counsel for Corcoran or by Kroll Ontrack, a forensic investigative company hired by counsel for Corcoran.

Therefore, because the subpoena requests information provided by other parties and non-parties, and does not request confidential communications made between the attorney and the client, such disclosure would not be covered by the attorney-client privilege.

Padeh also maintains that the subpoena is defective, because it does not comply with CPLR 3101 (a) (4), which requires that notice be served with the subpoena that specifies the reasons why the disclosure is required from the non-party. The First Department has held that, even if notice is not included with a non-party subpoena, a motion to quash may be denied if the documents which are sought are relevant and material to the case. *See Velez v Hunts Point Multi-Serv. Ctr., Inc.*, 29 AD3d 104, 111-112 (1st Dept 2006) (holding that although no notice was provided with the non-party subpoena, the papers submitted in opposition to the motion to quash sufficiently described the relevancy of the documents which were requested).

While the subpoena served on Zetlin & DeChiara does not include notice pursuant to CPLR 3101 (a) (4), plaintiff sets forth in its opposition papers the necessity for such disclosure. Plaintiff requests information regarding the amount of non-monetary and monetary consideration that Padeh received for not proceeding with the lawsuit in order to calculate what it claims to be owed in legal fees. In order to compute the damages, plaintiff seeks the amount of Corcoran's legal fees, including the fees of Kroll Ontrack, that Corcoran was seeking in perjury sanctions.

Alexander Zubatov, Esq., plaintiff's counsel, maintains that it has previously attempted to receive this information from Padeh, who has failed to supply the documents. Although Padeh maintains that plaintiff has received some of the documents, Mr. Zubatov affirms that plaintiff issued the subpoena because the documents which he has previously received, do not include those which are sought in the subpoena. Therefore, despite the lack of notice, the opposition papers submitted by plaintiff sufficiently articulate the need for the disclosure of the documents, and quashing of the subpoena would only serve to further delay this matter from proceeding.

Finally, although counsel for Padeh contends that there is no trial pending in this matter and that the subpoena is an "investigative ploy," the note of issue was filed on November 23, 2010, and the case is ready for trial.

CONCLUSION and ORDER

Accordingly, it is

ORDERED that defendant Elan Padeh's motion to quash the subpoena, dated October 13, 2010, which was served on Zetlin & DeChiara by plaintiff Scarola Ellis LLP, is denied.

Dated: April 1, 2011

FILED

ENTER:

APR 05 2011



J.S.C.

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