

**Wilner v Attias**

2011 NY Slip Op 33637(U)

May 4, 2011

Supreme Court, Suffolk County

Docket Number: 28779/2005

Judge: Paul J. Baisley

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SUPREME COURT - STATE OF NEW YORK  
CALENDAR CONTROL PART - SUFFOLK COUNTY

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**PRESENT:**

**HON. PAUL J. BAISLEY, JR., J.S.C.**

-----X  
MYRON WILNER,

Plaintiff,

-against-

HELENE ATTIAS,

Defendant.

-----X

CHRISTINE MALAFI

Suffolk County Attorney

By: William G. Holst, Esq.

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INDEX NO.: 28779/2005

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MOTION DATE: 4/20/2011

MOTION SEQ. NO.: 009 MG

010 MOT D

**PLAINTIFF'S ATTORNEY:**

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**DEFENDANT'S ATTORNEY:**

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Upon the following papers numbered 1 to 40 read on this motion and cross motion to quash subpoenas; Notice of Motion/ Order to Show Cause and supporting papers 1- 11; Notice of Cross Motion and supporting papers 12 - 20; Answering Affidavits and supporting papers 21 - 26; 27 - 35; Replying Affidavits and supporting papers 36 - 38; 39 - 40; ~~Other~~     ; (and after hearing counsel in support and opposed to the motion) it is.

**ORDERED** that the motion by the County of Suffolk for an order quashing a subpoena duces tecum issued by plaintiff to the Department of Social Services is granted; and it is

**ORDERED** that the cross motion by David Ardam, Esq., for an order quashing a subpoena duces tecum and ad testificandum issued by plaintiff is granted in part, and is otherwise denied.

In 2005, plaintiff Myron Wilner commenced this action seeking damages for malicious prosecution, abuse of process, and intentional infliction of emotional distress after criminal charges allegedly arising from a complaint made by defendant Helene Attias were dismissed in the interest of justice by the District Court, Suffolk County (Lozito, J.), on a motion by the District Attorney. By order of this Court dated August 24, 2009, plaintiff was granted leave to amend his complaint to include a cause of action under 42 USC §1893 alleging violation of his civil rights. Following a compliance conference conducted on November 5, 2009, plaintiff filed a note of issue and certificate of readiness in this action on December 19, 2009. Thereafter, by order issued March 10, 2010, this Court granted a motion by the law firm of Spada, Ardam & Sibener, PLLC, for leave to withdraw as counsel for defendant on the grounds that the attorney-client relationship had broken down and that defendant had repudiated the fee agreement. A written consent substituting Edward J. Grossman, Esq., as counsel for defendant was executed by plaintiff on May 5, 2010.

Subsequently, plaintiff's counsel served a subpoena duces tecum and ad testificandum on David Ardam, Esq., a member of the law firm Spada, Ardam & Sibener, who handled Attias's defense on behalf of the firm until it was relieved from representation. The subpoena directs Ardam

to appear at the Supreme Court, Suffolk County, on January 4, 2011, to give testimony at the trial of this action and to bring “[t]he complete case file for Helene Attias: 4 Steepbank Road, Nissequogue, NY.” Plaintiff’s counsel also served a subpoena duces tecum, so-ordered by this Court on January 14, 2011, directing the Adult Protective Services Unit of the Suffolk County Department of Social Services to appear on January 19, 2011 with the “complete case file for Myron Wilner, 3 Steepbank Road, Nissequogue, NY.” In response to such subpoena, the Department of Social Services produced for in camera review a certified redacted copy of the Adult Protective Services file for plaintiff and his wife. Pursuant to correspondence dated January 18, 2011, the Department of Social Services also advised the Court that it intended to maintain the confidentiality of the names of “referral sources” regarding plaintiff contained in its records, and that it was reserving its right to move to quash the subpoena duces tecum dated January 14, 2011.

Suffolk County now moves for an order quashing the January 14 subpoena duces tecum, arguing that it is authorized by statute and regulations to withhold the identity of a referral source if, as in this case, it determines the release of such information would be detrimental to the referring source. Ardam cross-moves for an order quashing the subpoena duces tecum and ad testificandum served on him by plaintiff, arguing that the documents and information sought by plaintiff are protected by the attorney-client privilege.

Plaintiff opposes both motions. As to the motion by Suffolk County, plaintiff asserts, in part, that “through independent investigation and comparison of that investigation with the deposition testimony of defendant . . . it was and remains our good faith belief that she was the referring source for the meritless complaint made to Adult Protective Services,” and that “in view of the nature of [defendant’s] conduct, she does not qualify for any confidentiality.” Plaintiff further argues that the Department of Social Services may, but is not obligated, to withhold the identity of a referring source, and that “the identity of the referral source is needed in support of the plaintiff’s contentions that the actions of defendant, Helene Attias, have been and continue to be a course of malicious prosecution, abuse of process, [and] an intentional and malicious violation of Mr. Wilner’s constitutional and civil rights.” Plaintiff’s submissions in opposition to Suffolk County’s motion include a copy of the Department of Social Service’s records related to the investigation of plaintiff that were provided to plaintiff’s counsel in December 2008 in response to a request made under the Freedom of Information Law (FOIL). The intake disposition sheet for the Department’s records states “Anonymous” as the referral source and uses the abbreviation “RS” in the description of the claim to be investigated.

As to the cross motion by Ardam, plaintiff asserts that defendant “proved to be a very difficult deposition witness,” and that “[i]f she continues in that modus operandi during trial, Ardam’s testimony with regard to the prior proceedings in this matter would be required, but would not violate the attorney/client privilege.” Plaintiff asserts that “the scope of any testimony . . . hinges in large measure upon the responsiveness and truthfulness of Ms. Attias and would relate, in any event, to matters with regard to the discovery proceeding and statements made by counsel during those proceedings, which are not privileged.” Plaintiff further argues the attorney-client privilege “was waived, in whole or part, by defendant Attias and Mr. Ardam in connection with two prior motions” seeking leave to withdraw as defendant’s counsel, and that issues to be litigated at trial involve the crime fraud exception to the attorney-client privilege. The Court notes the sur replies filed by plaintiff without prior approval were not considered in the determination of these motions (*see* CPLR 2214 [c]).

Parties to litigation are entitled to “full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof” (CPLR 3101[a]). This provision has been liberally construed to require disclosure “of any facts bearing on the controversy which will assist [the parties’] preparation for trial by sharpening the issues and reducing delay and prolixity” (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406, 288 NYS2d 449 [1968]). Although a party generally is free to select the discovery devices he or she wishes to use and the order in which to use them (*Edwards-Pitt v Doe*, 294 AD2d 395, 396, 741 NYS2d 909 [2d Dept 2002]), such freedom of choice is subject to judicial intervention by way of a protective order if the discovery request may cause “unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts” (CPLR 3103 [a]; *see Kooper v Kooper*, 74 AD3d 6, 901 NYS2d 312 [2d Dept 2010]; *Barouh Eaton Allen Corp. v International Bus. Machs. Corp.*, 76 AD2d 873, 429 NYS2d 33 [2d Dept 1980]; *Falk v Inzinna*, 299 AD2d 120, 749 NYS2d 259 [2d Dept 2002]; *cf. Samide v Roman Catholic Diocese of Brooklyn*, 16 AD3d 482, 791 NYS2d 643 [2d Dept], *lv dismissed* 5 NY2d 746, 800 NYS2d 375 [2005]). To withstand a challenge to a discovery request, a party seeking the discovery must show the information sought is both material and necessary, whether the demand is made of another party or a nonparty (*see Kooper v Kooper*, 74 AD3d 6, 901 NYS2d 312; *Mendelovitz v Cohen*, 49 AD3d 612, 852 NYS2d 795 [2d Dept 2008]).

In addition, a party who seeks discovery after the filing of the note of issue must move to vacate the note within 20 days after service of the note of issue and submit an affidavit demonstrating that the case is not ready for trial (22 NYCRR 202.21[e]). A party seeking additional discovery after expiration of the 20-day period provided in 22 NYCRR 202.21(e) must show “unusual or unanticipated circumstances develop[ed] subsequent to the filing of the note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice” (22 NYCRR 202.21[d]; *see Utica Mut. Ins. Co. v P.M.A. Corp.*, 34 AD3d 793, 826 NYS2d 138 [2d Dept 2006]; *Audiovox Corp. v Benyamini*, 265 AD2d 135, 707 NYS2d 137 [2d Dept 2000]). “A lack of diligence in seeking discovery does not constitute unusual or unanticipated circumstances warranting post-note of issue disclosure” (*Tirado v Miller*, 75 AD3d 153, 901 NYS2d 358 [2d Dept 2010]).

Suffolk County’s motion to quash the subpoena duces tecum served on the Department of Social Services is granted. Social Services Law § 473-e authorizes a social services official to withhold information which would “identify a person who made a referral . . . for protective services for adults,” and to move to quash a subpoena or seek a protective order when the identity of a referral source sought (Social Services Law § 473-e [3], [6]). Here, correspondence from the Department of Social Services submitted with the opposition papers shows plaintiff obtained the County’s redacted records with respect to the Department of Social Services’ investigation into the need for adult protective services for plaintiff or his wife, with such redaction limited to the identity of the referring source, in December 2008 pursuant to the FOIL request. Plaintiff, however, offers no explanation for waiting until the time of trial for seeking disclosure of the identity of the referring source (*see Tirado v Miller*, 75 AD3d 153, 901 NYS2d 358; *Tortola v NHT Owners, LLC*, 25 AD3d 600, 806 NYS2d 890 [2d Dept 2006]; *see also Audiovox Corp. v Benyamini*, 265 AD2d 135, 707 NYS2d 137). The use of a subpoena duces tecum to obtain discovery that a plaintiff failed to seek during the pretrial disclosure phase of a lawsuit or to compel disclosure of otherwise confidential information is improper (*see Matter of Terry D.*, 81 NY2d 1042, 601 NYS2d 452 [1993]; *Mestel & Co. v Smythe Masterson & Judd*, 215 AD2d 329, 627 NYS2d 37 [1st Dept 1995]; *see also Board of Educ. of City*

of *N.Y. v Hankins*, 294 AD2d 360, 741 NYS2d 717 [2d Dept 2002], *lv dismissed* 99 NY2d 610, 757 NYS2d 819 [2003]). In any event, plaintiff failed to demonstrate that the disclosure of the referring source's identity is material and necessary to the prosecution of his claims (*see Humphrey v Kulbaski*, 78 AD3d 786, 911 NYS2d 138 [2d Dept 2010]; *Mendelovitz v Cohen*, 49 AD3d 612, 852 NYS2d 795).

As to Ardam's cross motion to quash the subpoena duces tecum and ad testificandum issued by plaintiff, confidential communications between an attorney and a client deemed privileged under CPLR 4503 are shielded from disclosure (*see Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 575 NYS2d 809 [1991]; *Rossi v Blue Cross & Blue Shield of Greater N.Y.*, 73 NY2d 588, 542 NYS2d 508 [1989]). As with the records sought from the Department of Social Services, the issuance of a subpoena on the eve of trial demanding defendant's former counsel to produce at trial the "complete case file for Helene Attias" is an improper attempt to obtain documents that plaintiff, if he were so inclined, should have sought before the filing of the note of issue (*see Tirado v Miller*, 75 AD3d 153, 901 NYS2d 358; *Tortola v NHT Owners, LLC*, 25 AD3d 600, 806 NYS2d 890). However, Ardam's claim that the portion of the subpoena seeking oral testimony should be quashed, because his communications with Attias are protected by the attorney-client privilege, is rejected. A claim of privilege is not sufficient to avoid compliance with a subpoena ad testificandum; rather, such a claim must be asserted in response to questions actually propounded (*see Kalkstein v DiNapoli*, 228 AD2d 28, 653 NYS2d 710 [3d Dept], *appeal dismissed, lv denied* 89 NY2d 1008, 657 NYS2d 401 [1997]; *New York State Commn. on Govt. Integrity v Congel*, 156 AD2d 274, 548 NYS2d 663 [1st Dept 1989], *appeal dismissed* 75 NY2d 836, 552 NYS2d 922 [1990]; *see also Matter of Edge Ho Holding Corp.*, 256 NY 374, 176 NE 537 [1931]). Accordingly, the cross motion is granted to the extent that the subpoena issued to Ardam is quashed as to the demand for production of the movant's file, yet denied insofar as it seeks Ardam's testimony at trial.

Dated: May 4, 2011

**PAUL J. BAISLEY, JR.**

J.S.C.