

Corrieri v Schwartz & Fang, P.C.

2012 NY Slip Op 30120(U)

January 11, 2012

Sup Ct, NY County

Docket Number: 118251/2009

Judge: Louis B. York

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

PRESENT: YORK
Justice

PART 2

CORRIERI, JOHN P., ET AL.

INDEX NO. 118251/09

MOTION DATE _____

- v -
SCHWARTZ & FAUG, P.C.,
ET AL.

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DENIED WITH ACCOMPANYING MEMORANDUM DECISION

FILED

JAN 18 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/11/12

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.

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

-----X
JOHN P. CORRIERI and PAUL CORRIERI,
Individually and as Co-Executors of the Estate of
JOHN A. CORRIERI,

Plaintiffs,

Index No. 118251/2009

-against-

DECISION/ORDER

SCHWARTZ & FANG, P.C., STEPHEN
SCHWARTZ, ESQ. and NEIL B. FANG, ESQ.,

Defendants.

FILED

JAN 18 2012

NEW YORK
COUNTY CLERK'S OFFICE

-----X
LOUIS B. YORK, J.S.C.:

Currently, defendants move for an order: 1) compelling plaintiffs to respond to certain outstanding discovery demands, including communications with their current counsel and attorney work product; 2) disqualifying plaintiff's current counsel; and 3) staying discovery in this matter. The Court notes, at the outset, that the requests numbered 1 and 3 are inconsistent on their face. However, it will proceed to the case and motion at hand and clarify matters in this order.

Plaintiffs John P. Corrieri and Paul Corrieri ("plaintiffs") are the sons of John A. Corrieri ("the decedent"), who passed away on August 16, 2001. Together, plaintiffs served as the co-executors of their father's estate. The primary asset in the estate – and the asset at issue here – consisted of a piece of property at 47-33 5th Street, Long Island City ("the Building"). Under the will, plaintiffs each were to receive 1/5 of the estate; Tamela Corrieri, Victoria Corrieri and Roxanna Marsala were to receive the other 3/5 of the estate, in equal measure. Shortly after

decedent's death plaintiffs retained defendants as counsel; defendants also served as accountants during the period of employment. At defendants' suggestion the property was appraised by MGM Appraisers and Consultants. Its valuation at the time was \$1,025,000.

Under the will in addition to their share of the Building, plaintiffs were to receive "the largest amount that could pass free of estate tax," or \$675,000. In addition to \$124,000 which plaintiffs obtained from their father's company, John A. Corrieri, Inc., the only property available to fund plaintiffs' bequest was the Building – which, as stated, was owned by all five siblings. In order to receive the remaining \$551,000 bequeathed to plaintiffs under the will, and at the advice of defendants, plaintiffs signed a contract for sale of the property to plaintiffs in their capacity as executors. Around May 13, 2003, plaintiffs sold the property to another buyer for \$2,250,000.

In January 2007, defendants prepared and filed an amended petition for judicial settlement of the account in the Surrogate's Court Queens. Plaintiffs' sibling Tamela Corrieri objected formally to the accounting in June of 2007. Defendants represented plaintiffs in connection with the post-objection discovery related to the accounting. The complaint does not state that plaintiffs discharged defendants or retained new counsel, Michael F. Mongelli, Esquire and Michael F. Mongelli II, P.C. ("Mongelli"); and it also does not indicate when the termination of defendants occurred. However, it does state that defendants failed to deliver the file to the new counsel until January 2008, and that they only delivered a complete file in September 2008. Thus, it appears the change in counsel occurred prior to January 2008.

The parties continued to litigate the issue of the accounting in 2008, presumably with Mongelli as counsel for plaintiffs. As a result of the litigation, the Queens County Surrogate's Court issued an order and judgment which required plaintiffs to return \$516,000 to the estate.

Currently, in this malpractice action, plaintiffs state that, with statutory interest they owed around \$750,000 under the ruling.

Plaintiffs apparently challenged the Surrogate's Court ruling. However, while the appeal was pending, they settled the proceeding. Pursuant to the settlement plaintiffs agreed to pay \$177,500 to Tamala Corrieri and Roxanne Masala. Now, in this lawsuit, plaintiffs argue that defendants were negligent because they did not advise plaintiffs to deed only the percentage of the property equivalent to \$551,000 to them, and to leave the rest of the property in trust for the remaining legatees. They also accuse defendants of malpractice with respect to the accounting, and state that this caused them to suffer losses in the litigation and settlement described above. Plaintiffs assert that as a result of defendants' negligence they had to pay capital gain taxes and litigate the challenge to the probating of the estate.

At the deposition of plaintiff Paul Corrieri and in their documentary discovery demands, defendants sought information about those of plaintiffs' discussions with Mr. Mongelli that led to the institution of a lawsuit against defendants; they also seek information relating to the discussions between plaintiffs and Mr. Mongelli preceding their settlement of their appeal of the Surrogate Court's ruling. Plaintiffs consistently have objected to the discovery on the ground of attorney-client privilege. Now, defendants move to compel plaintiffs to respond in full to the discovery demands; and to disqualify Mr. Mongelli, whom they claim they must depose in connection with their discovery in this case. For the reasons below, the Court denies the motion in its entirety.

The attorney-client privilege, which protects "communications . . . between the attorney and client in the course of professional employment for the purpose of obtaining legal advice," Jakobleff v. Cerrato, Sweeney and Cohn, 97 A.D.2d 834, 835, 468 N.Y.S.2d 895, 897 (2nd Dept.

* 5]
1983), exists unless waived. See id.; IMO Ind., Inc. v. Anderson Kill & Olick, P.C., 192 Misc. 2d 605, 609, 746 N.Y.S.2d 572, 575 (Sup. Ct. N.Y. County 2002). A waiver exists if the client voluntarily provides discovery or testimony regarding the privileged matter, publicly discloses the privileged information or allows his attorney to provide discovery or testify.

Defendants are correct that the privileged materials are relevant to the current lawsuit, as the new attorney and the clients presumably have discussed defendants' alleged malpractice in connection with both plaintiffs' siblings' challenge to the probate and the current lawsuit. However, the relevance of a communication "does not, without more, place [its] contents . . . 'at issue' in the lawsuit." Deutsche Bank Trust Co. of Americas v. Tri-Links Investment Trust, 43 A.D.3d 56, 64, 837 N.Y.S.2d 15, 23 (1st Dept. 2007)("Deutsche Bank"). Otherwise, the privilege would be too easily subject to waiver, "render[ing] the privilege illusory in all legal malpractice actions" Jakobleff, 97 A.D.2d at 835, 468 N.Y.S.2d at 897. In the context of a litigation, discovery is required only if the material or testimony is at issue. This "'at issue' waiver occurs when a party has asserted a claim or defense [it] intends to prove by use of the privileged material." Veras Investment Partners, LLC. v. Akin Gump Strauss Hauer & Feld LLP, 52 A.D.3d 370, 372, 860 N.Y.S.2d 78, 82 (1st Dept. 2008)(citing Deutsche Bank); see Nomura Asset Capital Corp. v. Cadwalader, Wickersham & Taft LLP, 62 A.D.3d 581, 582, 880 N.Y.S.2d 617, 618 (1st Dept. 2009). The privilege is deemed to be waived only if "application of the privilege would deprive the adversary of vital information." Deutsche Bank, 43 A.D.3d at 63, 837 N.Y.S.2d at 23.

In the current lawsuit plaintiffs assert they are entitled to damages arising out of the settlement. According to defendants, this places the privileged material at issue. In particular, they contend that to evaluate the soundness of the settlement and/or the possibility that plaintiffs

would have prevailed in an appeal, they must have access to the privileged matter and be allowed to ask questions about counsel’s conversations with plaintiffs on these subjects.

However, their argument is not persuasive. See Veras Investment Partners, LLC. v. Akin Gump Strauss Hauer & Feld LLP, 52 A.D.3d 370, 372, 860 N.Y.S.2d 78, 83 (1st Dept. 2008). These questions do not place at issue the legal advice they received from Mongelli, Mongelli’s work product, or counsel’s “private mental impressions, conclusions, opinions or legal theories.” Deutsche Bank, 43 A.D.3d at 65, 837 N.Y.S.2d at 24. Plaintiffs do not base their claims on Mr. Mongelli’s legal advice but on defendants’ alleged malpractice, and they do not claim that they will use the privileged material or work product in the current lawsuit. See id. Therefore, the material is not discoverable. See Jakobleff, 97 A.D.2d at 835, 468 N.Y.S.2d at 897; Raphael v. Clune White & Nelson, 146 A.D.2d 762, 763, 537 N.Y.S.2d 246, 247 (2nd Dept. 1989).

As stated, defendants alternatively can obtain the privileged material if they can show that the communications are necessary to support one or more of their defenses. See Nomura, 62 A.D.3d 581, 582, 880 N.Y.S.2d 617, 618 (1st Dept. 2009). According to defendants, they have shown that the material is critical. In particular, defendants argue that “[d]efendants’ defense . . . will include establishing that the valuation of the plaintiffs’ bequest was properly done and the [p]laintiffs would have succeeding *{sic}* in the Appeal of the Order, but chose to forego the Appeal, and enter the Agreement, as a financial expedient to avoid costs.” Defendants’ Mem. of Law in Support, at p. 3. This argument is not persuasive. To support their position that they are not guilty of malpractice and that plaintiffs would have prevailed on their appeal, defendants do not need to know whether plaintiffs, their new counsel, plaintiffs’ siblings or any other individuals or entities thought defendants acted negligently. Instead, defendants must present

the legal and factual basis for their position by arguing the merits of the accounting and of the appeal – and, in short, showing they were not guilty of malpractice.

For the reasons above the Court denies the prong of the motion which seeks to compel discovery. Moreover, the justification for disqualifying plaintiffs' counsel is that defendants need to depose him and obtain discovery in connection with his representation of plaintiffs in Surrogate's Court. Therefore, for the same reasons that the Court denies this discovery, it denies the prong of the motion seeking to disqualify counsel.

Finally, the Court noticed, to its great surprise, that defendants have never filed an Answer in the County Clerk file for this action. Moreover, based on the submissions in connection with this motion, it appears they may not have prepared or filed an Answer at any time. Also, despite the great lapse of time since service of the complaint, and the amount of discovery and conferences in this case, plaintiffs have not moved for default judgment. See CPLR § 3215 (procedure for default judgment, and rule that plaintiffs must move for default judgment within one year of default, absent showing of good cause). Obviously, this problem must be resolved before the case can proceed to trial. The lack of an Answer also make defendants' arguments seem even more conjectural, as defendants have yet to set forth the defenses on which they base their current motion.

Therefore, it is

ORDERED that the motion is denied.

ENTER:

Dated: 1/11/12

FILED

JAN 18 2012

**NEW YORK
COUNTY CLERK'S OFFICE**

[Signature]

Louis B. York, J.S.C.

**LOUIS B. YORK
J.S.C.**