

Hiller v Amella

2012 NY Slip Op 32440(U)

September 14, 2012

Supreme Court, Suffolk County

Docket Number: 36269/2009

Judge: William B. Rebolini

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Short Form Order

SUPREME COURT - STATE OF NEW YORK**I.A.S. PART 7 - SUFFOLK COUNTY****PRESENT:****WILLIAM B. REBOLINI**
Justice

Patricia Hiller,

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Plaintiff,

Attorneys [See Rider Annexed]

-against-

Motion Sequence No.: 009; MOT.D ✓Motion Date: 2/15/11

Joseph V. Amella and Michael J. Golde,

Submitted: 5/30/12

Defendants.

Motion Sequence No.: 010; MD ✓Motion Date: 3/10/11Submitted: 5/30/12Motion Sequence No.: 011; XMD ✓Motion Date: 3/10/11Submitted: 5/30/12Motion Sequence No.: 012; XMD ✓Motion Date: 3/10/11Submitted: 5/30/12Motion Sequence No.: 013; MOT.D ✓Motion Date: 6/9/11Submitted: 5/30/12Motion Sequence No.: 014; MD ✓Motion Date: 7/28/11Submitted: 5/30/12

Upon the following papers numbered 1 to 105 read upon these motions to compel, to produce, to quash and to seal records: Notice of Motion/Order to Show Cause and supporting papers, 1 - 13; Answering Affidavits and supporting papers, 14 - 15; Replying Affidavits and supporting papers, 15(a) - 15(b); Notice of Motion/Order to Show Cause (010) and supporting

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papers, 16 - 35; Answering Affidavits and supporting papers 36 - 37; Replying Affidavits and supporting papers, 38 - 39; Notice of Cross Motion (011) and supporting papers, 40 - 57; Answering Affidavits and supporting papers, 58 - 76; Replying Affidavits and supporting papers 77 - 80; Notice of Second Cross Motion (012) and supporting papers, 81 - 84; Answering Affidavits and supporting papers, 85 - 90; Notice of Motion/Order to Show Cause (013) and supporting papers, 91 - 97; Answering Affidavits and supporting papers, 98 - 99; Notice of Motion/Order to Show Cause (014) and supporting papers, 100 - 105; it is

ORDERED that the motion (009) by plaintiff for an order compelling the production of documents, the motion (010) by plaintiff for an order holding non-party Accretive Solutions, Inc. in contempt, the motion (013) by defendant Joseph V. Amella for an order staying the action and compelling the production of documents, and the motion (014) by non-party Accretive Solutions, Inc. for an order to seal records, are consolidated for the purposes of this determination and are decided together with the cross motion (011) by non-party Accretive Solutions, Inc. for an order quashing a subpoena duces tecum and the second cross motion (012) by defendant Michael J. Golde to stay the action; and, it is further

ORDERED that the motion numbered "010" by plaintiff for an order holding non-party Accretive Solutions, Inc. in contempt and directing the production of documents and the cross motion numbered "011" by non-party Accretive Solutions, Inc. for an order quashing a subpoena duces tecum are denied without prejudice as the parties have requested a ninety day adjournment of them to attempt to resolve the issues contained therein; and, it is further

ORDERED that the motion numbered "012" by defendant Michael J. Golde for an order staying the within action is denied as moot, the same having been withdrawn by the parties; and, it is further

ORDERED that the part of the motion numbered "013" by defendant Joseph V. Amella for an order staying the within action is denied as moot, the parties having withdrawn same; and, it is further

ORDERED that the unopposed motion by non-party Accretive Solutions, Inc. for an order pursuant to 22 NYCRR §216.1 sealing those portions of defendant Joseph V. Amella's motion numbered "014", including supporting affirmations or any opposition on file with the Court, disclosing the financial terms of the settlement agreement involving the non-party is denied as moot, the parties and the movant having entered into a stipulated protective order resolving the issues; and, it is further

ORDERED that the motion numbered "009", by plaintiff, for an order compelling defendant Joseph V. Amella to answer certain Interrogatories and to produce outstanding documents requested, and that the part of the motion numbered "013" by defendant Joseph V. Amella for an order compelling plaintiff to produce certain records are determined as follows.

FACTUAL INFORMATION

Plaintiff commenced the within action to recover damages she allegedly sustained as a result of fraud, conversion, unjust enrichment, intentional infliction of emotional harm, and money had and received by defendants. After issue was joined, on January 29, 2010, plaintiff served her "First Set of Interrogatories on Defendants" and her "First Demand for Production of Documents for Discovery and Inspection". Defendant Joseph V. Amella ("Amella") served responses thereto, however there remain issues with regard to document demands numbered "6", "8", "11", and "13" and Interrogatories numbered "19", "26", and "27". Thus, plaintiff brings the within motion to compel defendant Amella to answer the interrogatories and to produce the documents she requested.

DOCUMENT DEMANDS 6 & 11 and INTERROGATORIES 19 & 26

Insofar as the items numbered "6" and "11" of the documents demanded are concerned, the affirmation of defendant Amella's attorney indicates that defendant Amella does not possess the documents. Additionally, he affirms that with regard to interrogatory numbered "19", defendant Amella has previously responded by his attorneys' November 1, 2010 letter which indicated that defendant "Amella's banking for the years in question was conducted at Citibank", and that with regard to interrogatory numbered "26" the said letter detailed that, although the interrogatory was overly broad and burdensome, "any communications would be contained in [non-party] Accretive servers". Neither the response to the document demand numbered "6" and "11", nor the answers to the interrogatories numbered "19" and "26" are in proper form (*see* CPLR 3122 and 3133). Thus, defendant Amella is directed to serve a detailed affidavit as to these items explaining that he is not in possession of such documents or specifying the location of each document as well as full and complete answers to the numbered interrogatories within 20 days of the date of this order.

DOCUMENT DEMANDS 8 & 13 and INTERROGATORY 27

That portion of plaintiff's motion addressed to her document requests numbered "8" and "13" and interrogatory numbered "27", as well as defendant's motion to compel plaintiff to produce records of an earlier Equal Employment Opportunity Commission ("EEOC") action remain at issue. The documents requested in item "8" are "[c]opies of any and all of defendants' payments received, checks, bank or financial records or statements, or other documentation from the years 2002-2006", and in item "13" are "[c]opies of any and all records or documentation in defendants' possession that reflect Amella's termination from Accretive." Interrogatory numbered "27" asks "[w]ith regard to defendant Amella, identify all documents regarding Amella's termination from Accretive." In response to the latter two demands, defendant Amella asserts that the information requested is not relevant to plaintiff's action, that it is confidential in nature and that it is based upon plaintiff's

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premise that he was fired by Accretive, a fact which has not been proven. With regard to document request numbered “8”, defendant claims that it is overly broad and burdensome and palpably improper. Plaintiff objects to defendant Amella’s demand to produce records of her prior EEOC action on the grounds that the information sought is protected by the attorney/client privilege and the work product doctrine, and that it is privileged and confidential. Additionally, plaintiff maintains that the asserted claims therein were materially different and immaterial to this lawsuit.

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]). “If there is any possibility that the information is sought in good faith for possible use as evidence-in-chief or in rebuttal or for cross-examination, it should be considered ‘evidence material * * * in the prosecution or defense’” (*Allen v Crowell-Collier Publ. Co.*, *supra*, at 407, 288 NYS2d 449, quoting CPLR 3101). Nonetheless, litigants do not have *carte blanche* to demand production of any documents or other tangible items that they speculate might contain useful information (*see Beckles v Kingsbrook Jewish Med. Ctr.*, 36 AD3d 733, 830 NYS2d 203 [2d Dept 2007]; *Smith v Moore*, 31 AD3d 628, 818 NYS2d 603 [2d Dept 2006]; *Vyas v Campbell*, 4 AD3d 417, 771 NYS2d 375 [2d Dept 2004]). Thus, a party will not be compelled to comply with disclosure demands that are unduly burdensome, lack specificity, seek privileged material or irrelevant information, or are otherwise improper (*see e.g. Astudillo v St. Francis-Beacon Extended Care Facility, Inc.*, 12 AD3d 469, 784 NYS2d 645 [2d Dept 2004]; *Bettan v Geico Gen. Ins. Co.*, 296 AD2d 469, 745 NYS2d 545 [2d Dept], *lv dismissed* 99 NY2d 552, 754 NYS2d 204 [2002]; *Crazytown Furniture v Brooklyn Union Gas Co.*, 150 AD2d 420, 541 NYS2d 30 [2d Dept 1989]).

The sweeping demand for copies of “any and all of defendants’ payments received, checks, bank or financial records or statements, or other documentation from the years 2002-2006” is improper, as it is overly broad and unduly burdensome (*see Taji Communications, Inc. v Bronxville Towers Apts. Corp.*, 48 AD3d 551, 849 NYS2d 890 [2d Dept 2008]; *Law Offs. Binder & Binder, P.C. v O’Shea*, 44 AD3d 626, 848 NYS2d 178 [2d Dept 2007]; *Chang v SDI Intl. Inc.*, *supra*; *Latture v Smith*, 304 AD2d 534, 758 NYS2d 135 [2d Dept 2003]; *Bettan v Geico Gen. Ins. Co.*, *supra*; *Saratoga Harness Racing v Roemer*, 274 AD2d 887, 711 NYS2d 603 [3d Dept 2000]; *see also Benzenberg v Telecom Plus of Upstate N.Y.*, 119 AD2d 717, 501 NYS2d 131 [2d Dept 1986]). While the reply affirmation submitted by plaintiff’s counsel indicates that plaintiff offers to revise this disclosure demand by her Supplemental Demand for a complete set of defendant Amella’s personal federal and state income tax returns and forms W-2 for the years 2002-2006, compliance with an improper demand for disclosure will not be compelled (*see Bell v Cobble Hill Health Ctr.*, *supra*; *Lopez v Huntington Autohaus*, 150 AD2d 351, 540 NYS2d 874 [2d Dept 1989]). Thus, plaintiff’s motion to compel defendant Amella to respond to item numbered “8” of her document demand is denied.

DEFENDANT'S DOCUMENT DEMAND 27 and INTERROGATORY 13

As there is a strong public policy in favor of full disclosure, a party seeking to withhold discovery on the ground of privilege has the burden of proving each element of the privilege asserted (see *Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 575 NYS2d 809 [1991]; *Matter of Priest v Hennessy*, 51 NY2d 62, 431 NYS2d 511 [1980]; *Koump v Smith*, 25 NY2d 287, 303 NYS2d 858 [1968]). Thus, where a party alleges that documents sought for production and inspection are shielded from disclosure by the attorney-client privilege, the party seeking to withhold such documents has the burden of demonstrating that the information contained therein constitutes confidential communications between the attorney and the client for the purpose of securing legal services or advice (see *Rossi v Blue Cross & Blue Shield of Greater N. Y.*, 73 NY2d 588, 542 NYS2d 508 [1991]; *All Waste Sys. v Gulf Ins. Co.*, 295 AD2d 379, 743 NYS2d 535 [2d Dept 2002]; *Bertalo's Rest. v Exchange Ins. Co.*, 240 AD2d 452, 658 NYS2d 656 [2d Dept 1997]). Significantly, the attorney-client privilege applies only to confidential communications with counsel, not to information obtained from or communicated to third parties (see *Doe v Poe*, 92 NY2d 864, 677 NYS2d 770 [1998]; *People v Harris*, 57 NY2d 335, 456 NYS2d 694 [1982]; *Matter of Civil Serv. Empls. Assn. v Ontario County Health Facility*, 103 AD2d 1000, 478 NYS2d 380 [4th Dept 1984], *appeal dismissed* 64 NY2d 816, 486 NYS2d 926 [1985]) or to underlying factual information (see *Niesig v Team I*, 76 NY2d 363, 559 NYS2d 493 [1990]; *Spectrum Sys. Intl. Corp. v Chemical Bank*, 157 AD2d 444, 558 NYS2d 486 [1st Dept], *affid as modified* 78 NY2d 371, 575 NYS2d 809]). Furthermore, a client may not insulate information from disclosure by conveying it to an attorney when such information is not relevant to the rendering of legal services (*Spectrum Sys. Intl. Corp. v Chemical Bank*, *supra*; *Rossi v Blue Cross & Blue Shield of Greater N. Y.*, *supra*; *Matter of Grand Jury Subpoena [Bekins Record Storage Co.]*, 62 NY2d 324, 476 NYS2d 806 [1984]). Therefore, whether a particular document is shielded from disclosure necessarily is a fact-specific determination that most often requires an *in camera* inspection of the document (see *Spectrum Sys. Intl. Corp. v Chemical Bank*, *supra*).

Here, counsel's conclusory assertions that materials relating to the EEOC matter are shielded from disclosure under the attorney-client privilege are insufficient to meet plaintiff's burden as the party asserting such protection (see *Matter of Priest v Hennessey*, *supra*; *Miranda v Miranda*, 184 AD2d 286, 584 NYS2d 818 [1st Dept 1992]). However, inasmuch as relevancy and confidentiality claims remain in issue about the requested information, the plaintiff shall produce the records of the earlier EEOC action, including the records of the settlement with regard thereto, to the Court for an *in camera* inspection within 20 days of the date of this order. Thereafter, the Court will make a determination as to the disclosure of same (in part or in whole) to the parties to this action.

Similarly, with regard to plaintiff's demands concerning defendant Amella's "termination" from Accretive (*i.e.*, document demand numbered "27" and interrogatory numbered "13"), to the extent any are in the possession of defendant Amella, same shall be produced to the Court for an *in camera* inspection within 20 days of the date of this order. Thereafter, the Court will make a determination as to their relevance to this action and whether same will be subject to the disclosure

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(in part or in whole) to the parties in this action.

Dated: 9/14/2017

William B. Rebolini
HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION _____ X _____ NON-FINAL DISPOSITION

RIDER

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Clerk of the Court