

Weiss & Hiller, P.C. v Fershtadt

2013 NY Slip Op 32435(U)

October 7, 2013

Sup Ct, New York County

Docket Number: 106143/11

Judge: Paul Wooten

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

WEISS & HILLER, P.C.,
Plaintiffs,

INDEX NO. 106143/11

- against-

FILED

MOTION SEQ. NO. 002

DOV FERSHTADT,
Defendant.

OCT 11 2013

The following papers, numbered 1 to _____, were ready for distribution by the defendant for a protective order.

COUNTY CLERK'S OFFICE
NEW YORK

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

PAPERS NUMBERED

1

Answering Affidavits — Exhibits (Memo) _____

Replying Affidavits (Reply Memo) _____

Cross-Motion: Yes No

In this action the law firm of Weiss & Hiller, P.C. (plaintiff), seeks legal fees and reimbursement for expenses advanced from Dov Fershtadt (defendant), W&H's former client. W&H represented defendant for multiple years, pursuant to a retainer agreement, for the prosecution of defendant's claims for long-term disability benefits. This representation included three appeals, an ERISA lawsuit, legal work related to a summary judgment motion, negotiations with opposing counsel, mediation, and the successful results obtained for defendant wherein his long-term disability benefits were increased (see Verified Complaint ¶¶ 62).

Plaintiff's complaint asserts causes of action for breach of the retainer agreement, an affirmative injunction directing defendant to pay plaintiff future damages based upon its contingency fee for defendant's future receipt of disability payments, and an accounting based upon defendant's alleged breach of a fiduciary duty. Plaintiff also pleads alternative claims sounding in unjust enrichment and quantum meruit. In his answer, defendant asserted

counterclaims for breach of a fiduciary duty and legal malpractice.

On December 19, 2012, the parties appeared in Part 7 for a Preliminary Conference (PC). During the PC, plaintiff made an oral application for medical authorizations from the defendant, and after both sides were heard by the Court, "this court direct[ed] that the plaintiff is entitled to Authorizations for all medical treatment [and] records relating to injuries plaintiff allegedly suffered as a result of the terrorist attacks on 9/11/01" (PC Order dated December 19, 2012). The Court notes that the defendant did not appeal or move to vacate the Court's PC Order.

Subsequently, on March 7, 2013, the defendant brought the herein motion for a protective order against the production of the defendant's entire psychological and psychiatric records, citing medical privilege and in support submits affidavits from defendant's psychiatrist and psychologist claiming that producing the doctor's written notes is "work-product" and that the "memorialization of my thought processes" would be counter productive for the defendant's treatment (see Affirm. in Support 22-24; exhibits H and I).

Plaintiff responded in opposition to defendant's motion for a protective order on the basis that it is essentially an untimely motion to reargue the PC Order dated December 19, 2012. Plaintiff also cross-moves seeking, *inter alia*, to dismiss defendant's counterclaims, pursuant to CPLR 3126, to compel the production of the previously ordered medical records, and the production of outstanding written discovery requested, including the production of the defendant's tax returns for the years 2002 through 2009, which was previously ordered by the Court.

On September 4, 2013 the parties appeared for oral argument on the motion and cross-motion as well as for a Status Conference. During the conference, the parties executed a stipulation resolving portions of plaintiff's cross-motion, wherein defendant is to produce to plaintiff various outstanding written discovery, including defendant's 2002, 2004, 2005 tax

returns and all schedules, however the remainder of the motions were taken under advisement (see Status Conference Order dated September 4, 2013, ¶¶ 4, 5 and 11).

DISCUSSION

Generally, “because of their confidential and private nature, disclosure of tax returns is disfavored [and a] party seeking disclosure must make a strong showing of necessity and demonstrate that the information contained in the returns is unavailable from other sources.” (*Gordon v. Grossman*, 183 A.D.2d 669, 670 [1st Dept 1992] [citations omitted]; CPLR 3101[a]; see also *Williams v New York City Hous. Auth.*, 22 AD3d 315, 316 [1st Dept 2005]). However, the parties, particularly the defendant has placed his tax returns directly at issue (see Answer ¶¶ 95-99; Verified Complaint ¶ 62). Plaintiff puts defendant’s tax records at issue by alleging in its complaint that it is due monies from defendant as a result of its representation, which includes tax refunds (Verified Complaint ¶ 62). Furthermore, defendant also puts his tax records at issue by alleging in his counterclaims that he missed the deadline to file a tax refund request in April of 2009, due to plaintiffs’ faulty advice, and as such was unable to get tax refunds on his alleged overpayments to the IRS for his disability benefits (see Answer ¶¶ 95-99). Plaintiff argues that it is entitled to defendant’s tax returns to ensure that he was not given any refunds for his overpayment to the IRS, as said monies would be the subject of the retainer agreement between the parties. Plaintiff also proffers, and the Court agrees, that this information cannot be found from another source. Thus, notwithstanding the defendant’s consent to provide defendant’s 2002, 2004, 2005 tax returns and all schedules, the Court finds that consistent with its December 19, 2012 Order, defendant must provide the tax returns for years 2002 through 2009, and all schedules thereto.

However, defendant’s motion which seeks a protective order against the production of the defendant’s entire psychological and psychiatric records, is granted. Plaintiff fails to make the affirmative showing that defendant’s psychological and medical condition is “in controversy”

such that production of these records is material and necessary (CPLR 3121; *Lombardi v Hall*, 5 AD3d 739, 739-740 [2d Dept 2004] see also CPLR 3101). Specifically, in his counterclaims which sound in breach of fiduciary duty and legal malpractice, defendant does not allege any psychological injury as a result of the malpractice, but rather describes his psychological and medical disability and diagnoses in the factual background portion. Plaintiff maintains that the defendant has made false statements in his counterclaim and access to his medical records is necessary to assess whether making false statements is attributable "toward [defendant's] prevarication or his allegedly faulty memory" (see Notice of Cross-Motion ¶¶ 31). The Court finds plaintiff's arguments in support of this relief to be unpersuasive, and furthermore, any issue regarding defendant's credibility can be determined by the trier of fact at the time of trial. While all parties agree that redacted records have already been provided to the defendant's insurance company, contrary to the plaintiff's argument, this disclosure to the insurance provider does not waive the psychologist-client privilege (see CPLR 4507).

Additionally, the fact that communications took place and statements from Dr. Gilden and Dr. Stephens were provided to plaintiff in support of defendant's disability claim during the course of plaintiff's representation of defendant also does not waive the psychological-client privilege (Notice of Cross-Motion ¶¶ 33-35). Moreover, the Court finds this type of information is not probative and acknowledges the affirmations by the defendant's psychiatrist and psychologist against the release of the entire medical record because it could be counterproductive to his medical treatment (see Affirmation of Dr. Edward Stephens ¶¶ 5-11 and Dr. Lloyd Gilden ¶¶ 4-10).

CONCLUSION

Accordingly, it is

ORDERED that defendant's motion for a protective order is granted; and it is further,

ORDERED, that the portion of plaintiff's cross-motion seeking to strike the defendant's

counterclaims, pursuant to CPLR 3126, is denied; and it is further,

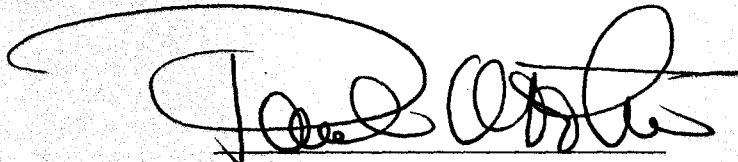
ORDERED that the portion of plaintiff's cross-motion seeking to compel defendant to provide written discovery material is granted pursuant to the parties stipulation and Preliminary Conference Order dated September 4, 2013, including the defendant's tax returns for years 2002 through 2009, including all schedules thereto; and it is further,

ORDERED that plaintiff is directed to serve a copy of this Order with Notice of Entry upon the defendant; and it is further,

ORDERED that all parties are directed to appear for a preliminary conference on October 30, 2013 at 11:00 A.M., in Part 7, 60 Centre Street, Room 341.

This constitutes the Decision and Order of the Court.

Dated: *Oct. 9, 2013*


Paul Wooten J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: 7 DO NOT POST

FILED

OCT 11 2013

COUNTY CLERK'S OFFICE
NEW YORK