

Bedi v Browde

2013 NY Slip Op 32525(U)

April 1, 2013

Supreme Court, New York County

Docket Number: 59744/2011

Judge: Francesca E. Connolly

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

-----X
VICKRAM A. BEDI,

Plaintiff,

-against-

DAVID A. BROWDE, ESQ. and DAVID A. BROWDE, P.C.,

Defendants.

-----X
DAVID A. BROWDE, P.C. and DAVID A. BROWDE,

Third-Party Plaintiffs,

-against-

VICKRAM A. BEDI, CHHAYA BEDI, DCP II, INC.,
DATALINK COMPUTER PRODUCTS, INC., VIGA REALTY
MANAGEMENT, LLC, 59 WEST MAIN STREET, LLC,
139 EAST MAIN STREET, LLC, 141 MAIN STREET, LLC,
VIGA 19 MAIN, LLC, 165 EAST MAIN STREET, LLC,
70 SPRING ST, LLC, ANTHONY GIORDANO, BRUCE M.
STERN, and GIORDANO & STERN, LLP,

Third-Party Defendants.

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CONNOLLY, J.

The following papers were read on this motion by plaintiff for an order quashing the proposed non-party subpoena directed to Kevin Cheverko, Commissioner of Corrections, Westchester County.

- Order to Show Cause-Affirmations in Support - Exhibits
- Memoranda of Law
- Affirmation in Opposition - Exhibits

Upon the foregoing papers and upon oral argument heard on April 1, 2013, this motion is determined as follows:

Plaintiff, Vickram A. Bedi, commenced this action on or about December 12, 2011. Plaintiff allegedly retained defendants to represent him in connection with a matter entitled *Davidson et al v Wachovia et al*, Index No. 50786/2011 (the “Davidson Litigation”). Plaintiff, who is currently serving a nine year prison sentence in New York State prison, alleges that defendants pressured him to sign settlement agreements in connection with the Davidson Litigation while plaintiff was in prison.

On or about February 2, 2012, defendants filed a third party action against plaintiff and others. Among other claims, defendants allege that plaintiff failed to pay defendants’ legal bills in the amount of \$100,135.51. Defendants also allege that plaintiff, along with defendants Anthony Giordano and Giordano & Stern LLP, had secretly agreed and decided in a series of telephone conversations and meetings that they would not honor the terms of any settlement in the Davidson Litigation and would instead seek to void such settlement agreements.

On or about February 27, 2012, plaintiff filed an amended verified complaint in this action. In the amended complaint, plaintiff alleges that defendants charged plaintiff fees for preparing amended tax returns.

Pursuant to the preliminary conference stipulation that was so-ordered and filed on or about August 1, 2012, the parties were directed to serve discovery demands on or before September 15, 2012. Also pursuant to the preliminary conference stipulation and order, responses to the discovery demands were to be served within 45 days of receipt of such demands.

On or about September 12, 2012, defendants served on plaintiff a first set of interrogatories. Plaintiff served responses to defendants’ first set of interrogatories on or about February 5, 2013.

On or about February 8, 2013, defendants served on the Westchester County Attorney a notice of a proposed subpoena duces tecum to non-party Kevin Cheverko, Westchester County Commissioner of Corrections. The subpoena requests, among other things, production of recordings of phone calls between plaintiff and defendants during plaintiff’s incarceration at the Westchester County Jail. The subpoena also requests copies of any video, recording or documentation of any visit by defendants to the Westchester County Jail.

Plaintiff served supplemental responses to defendants’ first set of interrogatories on or about March 1, 2013.

On this motion to quash the non-party subpoena of the Westchester County Commissioner of Corrections, plaintiff argues that the subpoena is overly broad. With respect to the relevant time period, plaintiff argues that the subpoena seeks records beginning on November 4, 2010, even though plaintiff’s current counsel, Anthony Giordano, Esq., who is also a defendant in this matter, only commenced representing plaintiff at the end of 2011, and defendant was terminated approximately five weeks later. In addition, plaintiff avers that defendants are required to first seek discovery from the parties before seeking discovery from non-parties. Plaintiff also asserts that the jailhouse communications being sought by defendants are protected as attorney-client communications.

In opposition to this motion, defendants argue that the documents requested pursuant to the proposed non-party subpoena are directly relevant to the claims and counterclaims asserted in the main action as well as the third-party action. Defendants assert that plaintiff disputes the amount he currently owes to defendants in legal fees. Defendants state that in plaintiff's supplemental responses to defendants' first set of interrogatories, plaintiff asserts that some of the legal billing was "excessive and exaggerated," and that the actual billing was not for a single meeting but rather for multiple meetings, e-mails, and phone calls. Thus, defendants argue that the audio and video recordings of meetings and phone calls between plaintiff and others during his incarceration at the Westchester County Jail will confirm, for example, the specific nature of the legal work performed by defendants, and the length of the calls between plaintiff and defendants. In addition, defendants argue the documents requested are not protected by the attorney-client privilege since the privilege is waived when one of the parties knows or should have known that a third party would be able to access recordings of the conversations. Furthermore, defendants aver that to the extent the conversations are privileged, plaintiff has placed the communications "at issue" by filing the instant lawsuit against defendants. Defendants further aver that additional documents and statements requested in the subpoena go to plaintiff's credibility.

Pursuant to CPLR 3101(a), a party is entitled to "full disclosure of all matter material and necessary in the prosecution or defense of an action." The phrase "material and necessary" is "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968] [internal quotation marks omitted]; see *Kooper v Kooper*, 74 AD3d 6 [2d Dept 2010]). A party seeking disclosure from a nonparty pursuant to CPLR 3101(a)(4) must demonstrate the nonparty discovery sought is material and necessary and must state the circumstances or reasons warranting discovery from such nonparty witness (*Kondratick v Orthodox Church in America*, 73 AD3d 708 [2d Dept 2010]; *Tenore v Tenore*, 45 AD3d 571 [2d Dept 2007]; *Smith v Moore*, 31 AD3d 628 [2d Dept 2006]; *Matter of Lutz v Goldstone*, 31 AD3d 449 [2d Dept 2006]).

"A motion to quash is properly granted where the party issuing the subpoena has failed to show that the disclosure sought cannot be obtained from sources other than the nonparty" (*Kooper*, 74 AD3d at 6). "As a matter of policy, nonparties ordinarily should not be burdened with responding to subpoenas for lawsuits in which they have no stake or interest unless the particular circumstances of the case require their involvement" (*Kooper*, 74 AD3d at 6). Whether a discovery demand is appropriate is a matter within the sound discretion of the court, which must balance competing interests (*Kavanagh v Ogden Allied Maintenance Corp.*, 92 NY2d 952, 954 [1998]; *Kooper*, 74 AD3d at 6).

Here, the proposed subpoena seeks audio and video recordings made between plaintiff and defendants while plaintiff was incarcerated (items 1 and 3), as well as statements made by plaintiff to any employee or agent of the Westchester County Department of Corrections, except for medical care (item 2), and a copy of any record relating to discipline of plaintiff or any complaint by plaintiff not related to medical care (item 4). With respect to items 1 and 3, defendants have made a sufficient showing that documents responsive to those requests are material and necessary to the claims or counterclaims in the actions, and that the material is unavailable from any other source.

Since plaintiff disputes the amount of the legal bills at issue, and has stated that the bills are excessive and exaggerated, discovery as to the legal work performed by counsel while plaintiff has been incarcerated is necessary, and the records are unavailable from any source other than the Westchester County Commissioner of Corrections. In addition, these records are not protected by the attorney-client privilege since plaintiff has disputed the legal bills and nature of the legal work that was performed. However, the non-party subpoena shall be quashed with respect to items 2 and 4.

The subpoena at issue also is subject to the requirements of CPLR 2307, which states that a subpoena duces tecum to be served upon a department or bureau of a municipal corporation or of the state, or an officer thereof, shall be issued by a justice of the supreme court in the district in which the book, paper, or other thing is located or by a judge of the court in which an action for which it is required. CPLR 2307 further requires that a motion for such subpoena shall be made on at least one day's notice to the department or bureau of the municipal corporation. Defendants have fulfilled the requirements under CPLR 2307.

A revised subpoena duces tecum in accordance with this decision and order shall be submitted to this court to be so ordered upon notice to the Westchester County Commissioner of Corrections on or before April 12, 2013.

In view of the foregoing, it is

ORDERED that plaintiff's motion to quash the non-party subpoena is granted to the limited extent that on or before April 12, 2013, defendants shall submit to this court a revised subpoena duces tecum limited to items 1 and 3 on the proposed subpoena, upon notice to non-party witness Kevin Cheverko in his capacity as Westchester County Commissioner of Corrections; and it is further

ORDERED that movant shall serve a copy of this order with notice of entry on the parties within ten (10) days of entry; and it is further

ORDERED that counsel for all parties shall appear for a conference in the Compliance Part, Courtroom 800, on April 23, 2013, at 9:30 A.M.

The foregoing constitutes the decision and order of this court.

Dated: White Plains, New York
April 1, 2013


HON. FRANCESCA E. CONNOLLY, J.S.C.

TO:

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cc: Compliance Part Clerk