

Coscia v El Jamal

2013 NY Slip Op 32714(U)

May 6, 2013

Supreme Court, Westchester County

Docket Number: 60236/11

Judge: Joan B. Lefkowitz

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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
BRENT COSCIA,

Plaintiff,

-against-

SAMMY EL JAMAL and BRYAN ORSER,

Defendants.

-----X
LEFKOWITZ, J.

DECISION & ORDER

Index No.: 60236/11
Motion Date: May 6, 2013

Seq. No. 4

The following papers were read on this motion by defendant Bryan Orser for an order, pursuant to CPLR 3124 and 3126, compelling plaintiff to comply with his disclosure obligations and produce or make available documents and information responsive to defendant Bryan Orser's Supplemental Demand for Discovery, dated February 18, 2013, and for further relief deemed just and proper by the court, including fees, costs and equitable relief if plaintiff fails to provide such evidence, including precluding plaintiff from using such evidence.

- Order to Show Cause-Affirmation in Support of Bruno V. Gioffre, Esq. on behalf of defendant Orser- Exhibits A-B
- Affirmation in Opposition of Marc S. Oxman, Esq. on behalf of plaintiff - Exhibit 1
- Affidavits of Service
- Filed Papers (Complaint, Preliminary Conference Order, Compliance Conference Order, Decision & Order dated March 11, 2013)

Upon the foregoing papers and upon oral argument heard on May 6, 2013, this motion is determined as follows:

Plaintiff commenced this action alleging claims for malicious prosecution, abuse of process, prima facie tort and interference with property. In the malicious prosecution and abuse of process claims, plaintiff seeks damages against defendants Sammy El Jamal (hereinafter "defendant El Jamal") and Bryan Orser (hereinafter "defendant Orser"), for allegedly filing false criminal complaints against him, giving perjurious testimony against him in the criminal action, and applying for and obtaining a Temporary Order of Protection, which prevented plaintiff from entering the business office where he worked. Defendants filed sworn depositions with the Harrison Police Department accusing plaintiff of having made threatening telephone calls to defendant El Jamal. As a result of those complaints plaintiff was arrested and charged with Aggravated Harassment in the

Second Degree pursuant to §240.30(1)(a) of the New York State Penal Law. Plaintiff appeared in the criminal action before Town of Harrison Justice Ronald Bianchi and entered a plea of not guilty. On October 12th and 13th, 2011, the case was tried before Justice Bianchi (non-jury) and a verdict of not guilty was rendered. The criminal complaint was dismissed.

Plaintiff's prima facie tort claim alleges that defendant engaged in various intentional and malicious conduct "for the sole purpose of causing plaintiff to suffer from inconvenience, emotional distress and physical and financial harm." Plaintiff alleges that this conduct included "spoofing" communications to third-parties, including plaintiff's business associates, as if they were from plaintiff and included ordering flowers and porn which were sent to plaintiff's business associates. Plaintiff also alleges that defendants issued defamatory communications to plaintiff's business associates, conspired to have plaintiff arrested, and threatened and stalked plaintiff and his family. Finally, plaintiff alleges that, on September 24, 2011, an unknown assailant came to plaintiff's front door and punched him in the face, causing physical injury.

In his final claim for interference with property, plaintiff alleges that defendants damaged his personal and business property at his business premises.

The parties executed a Preliminary Conference Stipulation on May 15, 2012, which was "so ordered" by this court. The Preliminary Conference Stipulation/Order provided, inter alia: Plaintiff's deposition would take place on July 19, 2012, followed by defendants' depositions on July 20, 2012. All demands for discovery would be served on or before May 18, 2012, with responses served within 30 days. All disclosure would be completed by February 12, 2013.

Thereafter, this court issued a Compliance Part Order on December 5, 2012, which extended the time to conduct depositions and directed that all depositions be completed on or before January 18, 2013. Defendant Orser, on this motion, alleges that plaintiff appeared for a deposition on January 16th and 18th, 2013.¹ Defendant Orser also alleges that, at his deposition, plaintiff refused to identify the individual who he alleges in his complaint assaulted him at his residence.

On or about January 24, 2013, defendant Orser served subpoenas duces tecum upon six nonparties, including James A. Weil and Leon Silverman, business partners of defendant El Jamal in the company which employs plaintiff. The subpoenas demanded the appearance of the nonparties at depositions to be held on dates certain between February 26, 2013 and March 12, 2013. As to Mr. Weil and Mr. Silverman, the subpoenas demanded, inter alia, the production of documents regarding communications with plaintiff concerning defendant El Jamal, any legal fees, expert fees and investigative fees expended on behalf of plaintiff regarding the present action.

Defendant Orser also served a Supplemental Demand for Discovery on plaintiff dated February 18, 2013. Therein, defendant Orser sought copies of documents, including email/text communications, as follows: (1) relating to the work of Simon Ragona III, an investigator from T &

¹ Defendant Orser, however, in opposition to plaintiff's prior motion for a protective order and to quash defendant Orser's subpoenas duces tecum served on nonparties alleged that plaintiff's deposition was held on January 22nd and 24th, 2013.

M Protection, who was hired by plaintiff to analyze telephone records, prepare a report and testify in plaintiff's criminal action with regard to his findings the plaintiff was "spoofed" by defendants; (2) as to all legal fees paid by or on behalf of plaintiff associated with his criminal case and the instant action; (3) relating to all investigative or expert costs paid by or on behalf of plaintiff in his criminal action and the instant action; (4) as to any loans to plaintiff to cover any legal fees and costs associated with his criminal case and the instant action; (5) communications to or from James Weil relating to plaintiff's criminal case or the instant action; (6) communications to or from Leon Silverman relating to plaintiff's criminal case or the instant action; (7) communications to or from James Martino relating to plaintiff's criminal case or the instant action; (8) records/communications relating to defendant Orser's Mount Pleasant criminal case; (9) the identity of the perpetrator who allegedly assaulted plaintiff at his residence; (10) the name and address of the perpetrator who allegedly assaulted plaintiff at his residence; (11) telephone records from plaintiff's home residence from June 12, 2011; (12) telephone records from plaintiff's cellular telephone from June 12, 2011; (13) all telephone records in plaintiff's possession from James Martino's cellular telephone from June 12, 2011; (14) relating to plaintiff's criminal case; (15) relating to defendant Orser from January 1, 2011 to present, excluding privileged communications or attorney work product; and (16) relating to defendant El Jamal from January 1, 2011 to present, excluding privileged communications or attorney work product.

Plaintiff served a response to the supplemental demand dated February 25, 2013, objecting to the demands as, inter alia, untimely, seeking information subject to the attorney-client privilege, seeking irrelevant information, seeking information not within the possession of plaintiff, seeking information already in the possession of defendant Orser, seeking materials prepared in anticipation of litigation, seeking information and documents already provided by plaintiff, and seeking information which is subject to a police investigation.

By order dated March 11, 2013, this court granted plaintiff's motion seeking a protective order and quashed the subpoenas served by defendant Orser on the nonparties. In addition to finding that the subpoenas were procedurally defective, this court held that, contrary to defendant Orser's contention, the motives of the nonparties in financing and advising plaintiff in the criminal matter were not relevant to the issues in the present action.

Defendant Orser now moves for an order compelling plaintiff to provide responses to the Supplemental Demand for Discovery or preclude him from using the demanded documents and information. Defendant Orser generally contends that the discovery demanded is relevant to the issues in the present action and discoverable.

Plaintiff opposes the motion and contends that the supplemental demand was untimely since it was served months after the May 18, 2012 deadline set forth by the court for the completion of discovery. Plaintiff also asserts that defendant Orser failed to demonstrate how the discovery sought is relevant or reasonably calculated to lead to the discovery of information bearing on the claims. Plaintiff notes that defendant Orser failed to annex to the motion papers the pleadings or plaintiff's deposition transcript, upon which defendant Orser relied upon to establish the relevancy of the subject discovery demands. Accordingly, plaintiff contends that defendant Orser has failed to meet his burden on the present motion.

Initially the court finds that demands were not untimely since the court, in the exercise of its discretion, extended the time for discovery in the Compliance Conference Order dated December 5, 2012, and allowed the parties until January 18, 2013 to complete depositions. After plaintiff's deposition, defendant Orser was entitled to serve a supplement demand for discovery.

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]).

With respect to the specific demands of defendant Orser's Supplemental Demand for Discovery, the court finds as follow:

Demand No. 1

Defendant Orser's demand no. 1 seeks materials prepared by Simon Ragona III of T & M Protection regarding his analysis of the "spoofing" of plaintiff's telephone lines in plaintiff's criminal action. With respect to demand no. 1, defendant Orser contends that the materials prepared by Mr. Ragona for plaintiff's criminal case are discoverable since they were not prepared in anticipation of the present litigation and are relevant to damages in the present action. Moreover, defendant Orser contends that plaintiff's defenses in the criminal action are relevant to the issues in the present action. Defendant Orser further asserts that defendants have a substantial need for the materials in order to prepare their defense that they were not involved in "spoofing" plaintiff by demonstrating that Mr. Ragona's analysis was incorrect. Plaintiff objects to the demand on the ground that the materials were prepared in anticipation of litigation or for trial and are protected from discovery pursuant to CPLR 3101(d)(1)(iii) and 3101(d)(2).

CPLR 3101(d)(1)(iii) provides that disclosure of the expected testimony of any expert beyond the subject matter on which the expert is expected to testify, the substance of the facts and opinions on which each expert is expect to testify, the qualifications of the expert, and a summary of the grounds for each expert's opinion (CPLR 3101[d][1]), "may only be obtained only by court order upon a showing of special circumstances and subject to restrictions as to scope and provisions concerning fees and expenses as the court may deem appropriate." CPLR 3101(d)(2) provides that materials otherwise discoverable and prepared in anticipation of litigation or for trial by a party's representative, including an attorney, consultant or agent, may be obtained only upon a showing that the party seeking discovery has a substantial need for the materials in the preparation of the case and is unable to obtain the substantial equivalent without undue hardship.

Initially, the court notes that information compiled by an expert for litigation generally falls within the conditional privilege of CPLR 3101(d)(2) as material prepared in anticipation of litigation (*Santariga v McCann*, 161 AD2d 320 [1st Dept 1990]). However, in the present action, it

is unclear from the record as to whether plaintiff intends to call Mr. Ragona as an expert in the present action.

In any event, although material prepared in anticipation of a prior litigation is generally not protected by CPLR 3101(d)(2) from discovery in a subsequent litigation (*Marten v Eden Park Health Svcs.*, 250 AD2d 44 [3d Dept 1998]; *Matter of McCrory v Village of Mamaroneck*, 34 Misc3d 603 [Sup Ct, Westchester County 2011]), such material may be conditionally privileged where “the pending litigation arose from the prior case” (6-3101 Weinstein-Korn-Miller, NY Civ Prac CPLR ¶ 3101.51; see *Bennett v Troy Records Co.*, 25 AD2d 799 [3d Dept 1966]). Therefore, material prepared in a prior litigation from which a subsequent action arises, such as a legal malpractice action or an action by the insured against his insurer for failure to settle a case, may be treated as material prepared in anticipation of litigation under CPLR 3101(d)(2) in the subsequent action and entitled to a conditional privilege from disclosure (6-3101 Weinstein-Korn-Miller, N Y Civ Prac CPLR ¶ 3101.51; see *Cataldo v County of Monroe*, 42 Misc2d 15 [Sup Ct, Monroe County 1963], *affd* 20 AD3d 755 [4th Dept 1964], *lv denied* __ AD2d __, 251 NYS2d 422 [4th Dept 1964]). Accordingly, in *Cataldo v County of Monroe (Id.)*, the court held that plaintiff’s statement taken by plaintiff’s insurance carrier in a prior personal injury action against plaintiff, as the driver/owner of a motor vehicle, were immune from disclosure under CPLR 3101(d)(2) in the subsequent action by plaintiff against defendant County for negligent maintenance of a highway.

The present action by plaintiff alleging claims for, inter alia, malicious prosecution and abuse of process against defendants necessarily arise from the prior criminal proceeding against plaintiff which was commenced based upon the complaint and sworn depositions of defendants. Therefore, Mr. Ragona’s analysis and report regarding “spoofing” in plaintiff’s criminal action is conditionally privileged pursuant to CPLR 3101(d)(2) in the present action as material prepared in anticipation of litigation.

To overcome the conditional privilege, it is defendant Orser’s burden to demonstrate that he has a substantial need for the material in the preparation of the defense of the present case and is unable to obtain the substantial equivalent without undue hardship. Defendant Orser has failed to meet this burden. Notably, as defendant Orser now concedes on this motion, plaintiff has provided defendant Orser with all of his telephone records. Accordingly, defendant Orser is free to retain his own expert to conduct an analysis with respect to the “spoofing” of plaintiff’s telephone lines and cross-examine Mr. Ragona with respect to his analysis in the criminal matter, in the event plaintiff calls Mr. Ragona as an expert witness.

In view of the foregoing, that branch of the motion seeking to compel plaintiff to produce the materials prepared by Simon Ragona regarding his analysis of the “spoofing” of plaintiff’s telephone lines in plaintiff’s criminal action is denied.

Demands No. 2-4

Defendant Orser’s demands no. 2-4 seek records and communications relating to the payment of fees, investigative costs and expert costs paid by or on behalf of plaintiff in the criminal action and the present action, or any loans to plaintiff to cover legal fees and costs. Defendant Orser

contends that the demanded materials are relevant to the damages aspect of plaintiff's case and are discoverable. Defendant contends that plaintiff waived any attorney-client privilege with respect to documents by seeking to recover the fees and costs as damages in the present action. Alternatively, defendant Orser contends that the demanded materials be produced to the court for an in camera review.

Plaintiff objected to the demands on the grounds of attorney-client privilege. In opposition to the motion, plaintiff generally asserts that defendant Orser has failed to establish that the demanded material is relevant and notes that defendant Orser failed to submit the pleadings in support of the motion.

Although defendant Orser failed to submit the complaint in support of the present motion, this court, in the interest of judicial economy, has reviewed the complaint filed with the court on the NYSCEF website. Plaintiff has not sought to recover his legal fees, investigative costs or expert costs in the present action. Those fees and costs, therefore, are not relevant or discoverable. Plaintiff, however, does seek to recover legal fees, investigative costs and expert costs paid by plaintiff in the criminal action. Defendant Orser, therefore, correctly contends that the amount of legal fees and costs paid or owed by plaintiff in the criminal action are relevant with respect to the issue of damages. Accordingly, the amount of fees and costs paid or owed by plaintiff in the criminal action is relevant and discoverable in the present action absent any privilege which would protect the information from discovery.

The burden of establishing that certain documents are privileged and protected from discovery is on the party asserting the privilege, and the protection claimed must be narrowly construed (*Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 377 [1991]; *148 Magnolia, LLC v Merrimack Mut. Fire Ins. Co.*, 62 AD3d 486, 487 [1st Dept 2009]). For a document to be privileged as an attorney-client communication pursuant to CPLR 4503 (a), the document must be primarily or predominantly a communication of a legal character, for the purpose of obtaining or rendering legal advice or services, and intended to be confidential (*Spectrum Sys.*, 78 NY2d at 379; *Rossi v Blue Cross & Blue Shield of Greater New York*, 73 NY2d 588, 594 [1989]; *People v Osorio*, 75 NY2d 80, 84 [1989]). Counsel's billing statements, however, are not privileged if they are devoid of information regarding the nature of the legal services provided by counsel (*Eisic Trading Corp. v Somerset Marine, Inc.*, 212 AD2d 451 [1st Dept 1995]; CPLR 4503).

Accordingly, any documents, including billing statements, and communications regarding the payment of legal fees and litigation costs in plaintiff's criminal action are not subject to the attorney-client privilege as long as the document does not contain information regarding the nature of the legal services. That branch of defendant Orser's motion seeking an order compelling plaintiff to provide responses to demands no. 2-4 of the Supplemental Demand for Discovery is, therefore, granted to the extent that plaintiff shall produce all documents and communications regarding any legal fees, investigative costs and expert costs in his criminal action which plaintiff has paid or still owes to either his counsel in the criminal action or a third party. Any reference in the documents and communications with respect to the nature of the legal services provided by counsel shall be redacted.

Demands No. 5-7

Demands no. 5-7 of the Supplemental Demand for Discovery seek records, papers, notes, memoranda, writings, documents, email/test communications and materials to/from nonparties James Weil, Leon Silverman and James Martino, respectively, that relate to plaintiff's criminal case and the present action. Plaintiff objected to the demands with respect to James Weil and Leon Silverman on the grounds of attorney-client privilege. As to the demand with respect to James Martino, plaintiff asserted that documents were previously provided in response to Defendant's First Demand for Document Production.

In support of the present motion, defendant Orser contends that the communications sought are not subject to the attorney-client privilege since, even if plaintiff's counsel was privy to the communications, the privilege is waived if the communication is also made to a third-party. As to the documents and communications between plaintiff and nonparty James Martino, defendant Orser contends that a review of the prior responses were conducted by counsel and responsive documents could not be located. Plaintiff, in opposition of the motion, generally objects to the demands as seeking irrelevant information.

Although defendant Orser correctly contends that the attorney-client privilege is waived if communications between an attorney and a client are shared with third-parties (*People v Osorio*, 75 NY2d at 84; *People v Harris*, 57 NY2d 335, 343 [1982]; *Sieger v Zak*, 60 AD3d 661, 662 [2d Dept 2009]), defendant Orser has failed to demonstrate that the demanded documents and communications are relevant to the issues in this action. It is unclear from the claims alleged in the complaint and the record on this motion how the demanded documents and communications between plaintiff and the nonparties are relevant to the issues in this action. Notably, plaintiff's claims allege that conduct on the part of the defendants caused him emotional distress, loss to his reputation, economic damage and damage to his personal and business property. The involvement of the nonparties is not indicated in the complaint. Moreover, the motion papers fail to indicate how the documents and communications between plaintiff and the nonparties is relevant to plaintiff's claims regarding defendants' conduct or with respect to the damages alleged. Notably, defendant Orser failed to submit the parties' deposition transcripts or any party affidavits in support of the present motion.²

In view of the foregoing, defendant Orser's motion to compel is denied with respect demands no. 5-6 of his Supplemental Demand for Discovery, which sought documents and communications between plaintiff and nonparties James Weil and Leon Silverman. To the extent, however, that plaintiff asserted in his response to the supplemental demand that documents

² In this court's prior order deciding plaintiff's motion to quash subpoenas served on nonparties by defendant Orser, this court noted that although counsel for defendant Orser contended that plaintiff testified at his deposition as to "the involvement of the nonparties in the underlying events and the various disputes between the parties," defendant Orser did not submit the transcript of plaintiff's deposition in opposition to the motion.

responsive to demand no. 7, which seeks communications between plaintiff and nonparty James Martino, had previously been provided, plaintiff shall again provide those documents to defendant Orser and specifically identify those documents/communications as plaintiff's response to demand no. 7.

Demands No. 8

Demand no. 8 of the Supplemental Demand for Discovery seeks copies of any records, papers, notes, memoranda, writings, documents, email/text communications that relate to Defendant Orser's Mount Pleasant criminal case. In response to the demand, plaintiff asserted that information and documents were previously provided in response to Defendant's First Demand for Document Production.

Defendant Orser on the present motion contends that, after a review, his counsel is unable to locate any documents responsive to the demand. Accordingly, defendant Orser seeks an order compelling plaintiff to provide the demanded documents under separate cover. Plaintiff generally opposes the motion as untimely and seeking irrelevant material.

Defendant Orser has not established how the demanded documents and communications are relevant to the present action. However, insofar as plaintiff did not originally object to the demand and asserted that documents responsive to demand no. 8 had previously been provided, plaintiff shall again provide those documents to defendant Orser and specifically identify those documents/communications as plaintiff's response to demand no. 8.

Demands No. 9-10

Demands no. 9-10 seek copies of any documents and email/text communications that relate to the identity of the perpetrator who allegedly assaulted plaintiff at his residence and the name and address of the perpetrator. In response to the demands, plaintiff objected to the demands on the ground that the information sought is presently the subject of an investigation by the West New Haven Connecticut Police Department and plaintiff responded that he would not disclose same absent an order of the court.

In support of the present order, defendant Orser contends that the information is entirely relevant to plaintiff's claim that an unknown individual conspired with defendants to assault plaintiff. In view of the claim, defendant Orser asserts that the identity of the perpetrator is relevant and should be disclosed since it could assist defendants' investigation and defense of this matter. Defendant Orser further contends that although law enforcement entities are generally prohibited from disclosing information during a criminal investigation, no prohibition attaches to private citizens.

Plaintiff does not specifically oppose the branch of the motion with respect to demands no. 9-10, and only generally objects to the motion on the grounds that it is untimely and defendant Orser has not demonstrated that the demanded information is relevant.

The information as to the identity of the perpetrator, if known by plaintiff, is clearly relevant to the claims alleged by plaintiff in his complaint with respect to the alleged assault by the perpetrator, apparently in furtherance of a conspiracy by defendants against plaintiff. Moreover, plaintiff has failed to demonstrate that any privilege attaches to the information which would protect it from disclosure. Accordingly, the motion is granted to the extent that plaintiff shall provide responses to demands no. 9-10 of the supplemental demand as follows: (1) plaintiff shall provide defendant Orser with any documents and communications in his possession which reference the identity of the perpetrator, with the exception of any documents and communications solely between plaintiff and counsel and attorney work product; and (2) provide the name and address of the perpetrator, if known by plaintiff, or a response that the information is not known by plaintiff.

Demands No. 11-14

The motion with respect to demands no. 11-14 is denied as moot. Defendant Orser has now asserted that counsel, after a review of plaintiff's responses, has located documents provided by plaintiff which are responsive to the demands.

Demands No. 15-16

Demands no. 15-16 seek copies of documents and email/text communications that relate to defendants Orser and El Jamal, respectively, from January 1, 2011 to the present, excluding privileged communications or attorney work product. In response to the demands, plaintiff responded that the demanded documents had previously been provided.

On the present motion, defendant Orser contends that counsel, after a review of the documents provided by plaintiff, has been unable to locate documents responsive to demands no. 15-16. Plaintiff does not specifically oppose the motion with respect to these documents.

Insofar as plaintiff did not originally object to the demands and asserted that documents responsive to demands no. 15-16 had previously been provided, plaintiff shall again provide those documents to defendant Orser and specifically identify those documents/communications as plaintiff's response to demands no. 15-16.

In view of the foregoing, it is

ORDERED that the motion is granted only to the extent that, on or before May 17, 2013, plaintiff is directed to provide responses and responsive documents/communications to demands no. 2-4, 7-10, 15-16 of defendant Orser's Supplemental Demand for Discovery, as set forth above; and it is further

ORDERED that the conference in the Compliance Part scheduled for May 16, 2013 is adjourned to May 21, 2013. Counsel for all parties and any parties appearing pro se shall appear for the conference in the Compliance Part, Courtroom 800, on that date at 9:30 A.M.

ORDERED that defendant Orser is directed to serve a copy of this order with notice of entry upon plaintiff and defendant El Jamal within seven (7) days of entry.

The foregoing constitutes the decision and order of this court.

Dated: White Plains, New York
May 6, 2013


HON. JOAN B. LEFKOWITZ, J.S.C.

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