

Loehr v New York State Unified Ct. Sys.

2013 NY Slip Op 34157(U)

May 17, 2013

Supreme Court, Westchester County

Docket Number: 13054/11

Judge: Donald F. Cerio, Jr.

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This opinion is uncorrected and not selected for official publication.

At the Supreme Court, State of New York, County of Westchester, held in Albany, NY, on the 20th day of March, 2013.

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STATE OF NEW YORK
SUPREME COURT COUNTY OF WESTCHESTER

SUSAN NEWMAN LOEHR,
Plaintiff/Petitioner,

-against-

THE NEW YORK STATE UNIFIED COURT SYSTEM,
Defendant,

and

ANNE PFAU, as Chief Administrative Judge of the
New York State Unified Court System,
Respondent.

**DECISION & ORDER TO
COMPEL DISCOVERY**

Index # 13054/11

FILED

MAY 23 2013
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER



The above-entitled matter comes before this Court upon the Plaintiff/Petitioner's (hereinafter, "Plaintiff") January 24, 2013, Motion to Compel Defendant and Respondent (hereinafter, "Defendants") to respond to certain discovery demands, or, in the alternative, for an Order precluding the Defendants from introducing or relying upon any evidence subject to the discovery demand. The Defendants filed an Attorney's Affirmation dated February 14, 2013, in opposition. Thereafter, the Plaintiff filed a Reply Affirmation in further support of the Motion to Compel and/or Preclude dated March 1, 2013.

On March 20, 2013, in Albany County Supreme Court, Attorney Robert A. Spolzino appeared and was heard on behalf of the Plaintiff in support of her motion. Also appearing at that time was Attorney John J. Sullivan who was heard on behalf of the Defendants in opposition to the motion to compel and/or preclude.

The following reflects the Decision and Order of this Court:

The instant action was commenced by Notice of Petition and Petition dated July 27, 2011, setting forth twelve causes of actions premised upon Plaintiff's allegations that her salary had been improperly and unlawfully deferred beyond April 1, 2011, as a result of the Chief Administrative Judge's determination that such compensation would be a salary increase not "warranted" nor "appropriate" in light of New York State's "fiscal crisis." On December 21,

2011, Plaintiff filed an Amended Verified Complaint and Petition asserting two additional causes of action. By Motion dated October 14, 2011, Defendants moved to dismiss Plaintiff's action, which was denied by Order dated July 2, 2012, except as to the Thirteenth Cause of Action which was dismissed.¹

The central issue presented in Plaintiff's action is whether or not the Defendants acted arbitrarily and capriciously in continuing to defer Plaintiff's salary increases beyond April 1, 2011, the date upon which the statutory deferral period was to end, and by refusing to pay retroactively the deferred salary which accrued during the three years preceding April 1, 2011. Defendants assert that they were justified in their actions and that extending Plaintiff's salary deferral was "warranted" and "appropriate" in light of the fiscal crisis and authorized by statute.

In furtherance of her action, Plaintiff served certain discovery demands upon the Defendants seeking any evidence relative to the basis upon which Judge Pfau's determination was made that 1) there was a fiscal crisis and 2) ending Plaintiff's salary deferral and compensating the Plaintiff for the retroactive salary increases were not "warranted" or "appropriate." Defendants have refused to answer such inquiries and/or demands for production of evidence underlying Judge Pfau's decision citing attorney-client privilege and "deliberative process" privilege. Defendants additionally allege that many of the demands were overly broad, vague, unduly burdensome and/or immaterial to the present action. Defendants further assert that the basis for the decision is irrelevant as such decision was statutorily discretionary and, therefore, not properly the subject of discovery.

Specifically, on August 30, 2012, plaintiff served a discovery demand consisting of interrogatories and demands for documents. By response dated November 20, 2012, the Defendants objected to every demand upon the grounds that the demands were vague, overbroad, unduly burdensome, irrelevant, and/or immaterial. Additionally, defendants asserted that Interrogatories 3 and 4, as well as Document demands 3, 4, 6, 7, 9, 10, 12, 13, 15, 16, 17, 18, 20, 21, 22, and 25, requested materials protected by the deliberative process privilege, and that Interrogatories 7 and 8 requested information protected by the attorney-client privilege.

The CPLR §3101(a) provides for broad discovery, directing that there be "full disclosure of all evidence material and necessary in the prosecution or defense of an action." (emphasis added) "Material and necessary" includes not only relevant evidence but also information "reasonably calculated to lead to the discovery of information bearing on the claims." Foster v. Herbert Slepoy Corp., 74 AD3d 1139, 1140 (2nd Dept., 2010)

The Defendants assert that the information requested in Interrogatories 7 and 8 is protected by the attorney-client privilege. However, Interrogatories 7 and 8 seek the

¹Much of Defendants Affirmation in Opposition is addressed to the issue of summary judgment. Such motion is not presently before the Court and therefore those arguments are not germane.

identification of persons involved in the preparation of discovery responses, not communications between an attorney and his or her client. As such, no privilege attaches. See Veras Inv.Partners, LLC v. Akin Gump Strauss Hauer & Feld, LLP, 52 AD3d 370, 372 (1st Dept., 2008); Priest v. Hennessy, 51 NY2d 62, 68 (1980). However, such information is neither relevant nor likely to lead to the discovery of information relative to the issues at bar. See Foster, *supra*. As such, Interrogatories 7 and 8 are not proper demands.

With respect to the remaining Interrogatories and Demands enumerated within Plaintiff's present application the Defendants object to production asserting "deliberative process privilege" as protection against disclosure. It is incumbent upon a party objecting to disclosure to establish that the material sought is, in fact, protected by privilege. Fernekes v. Catskill Regional Medical Center, 75 AD3d 959 (3rd Dept., 2010); Ross v. Northern Westchester Hosp. Assoc., 43 AD3d 1135 (2nd Dept., 2007). In support thereof Defendants argue that "an agency may refuse to produce material integral to the agency's deliberative process and which contains opinions, advice, evaluations, deliberations, policy formulations, proposals, conclusions, recommendations or other subjective matter." Mtr of Miracle Mile Assoc. v. Yudelson, 68 AD2d 176 (4th Dept., 1979). The Plaintiff sets forth a number of distinguishing factors in the cases relied upon by the Defendants, not the least of which is that the majority of those cases involved FOIL requests, not discovery demands. While this Court is not convinced that the deliberative process privilege is applicable to the case at bar, we need not resolve that issue in light of the factual position set forth by the Defendants at oral argument and in the underlying papers.²

The Defendants have taken the position that the sole basis for Judge Pfau's decision to extend Plaintiff's salary deferral and deny back pay is contained within the April 1, 2011 letter to Plaintiff. Defendants take the position that the decision rises or falls upon that basis and that basis alone. Thus, the Defendants' position taken in conjunction with the Plaintiff's alternate request for relief in the form of preclusion leads this Court to conclude that further discovery is unnecessary. However, Defendants will be held to their position and Plaintiff's request for the alternate relief of preclusion will be addressed further as is appropriate. Defendants are therefore precluded from utilizing any information or documentation not provided in response to Plaintiff's interrogatories and/or discovery demands as such relates to the basis upon which Judge Pfau issued her decision which asserts as the basis for such denial the state's "fiscal crisis."

THEREFORE, having considered all of the filings, arguments and relevant legal authority in this matter, and pursuant to CPLR 3124 and 3126, it is hereby

ORDERED that the Plaintiff's Motion for an Order to Compel Discovery is denied for the reasons set forth in the decision above; and it is further

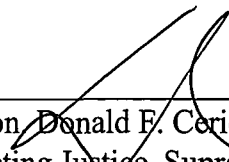
²The Court would note that if such privilege did in fact apply, a privilege log should have been submitted, subject to *in camera* examination, rather than a blanket statement asserting such privilege. See In Re Subpoena Duces Tecum to Jane Doe, Esq., 99 NY2d 434, 442 (2003).

ORDERED, that the Defendants are precluded from adducing evidence consisting of any materials not provided in response to Plaintiff's Interrogatories and Demands in support of Judge Pfau's decision as set forth in the letter to Plaintiff dated April 1, 2011; and it is further

ORDERED, that a copy of this Order with supporting papers shall be served upon the Defendants with notice of entry within seven days of entry.

Wampsville, New York

Dated: May 17, 2013



Hon. Donald F. Cerio, Jr.
Acting Justice, Supreme Court