

Pecile v Titan Capital Group, LLC

2016 NY Slip Op 30658(U)

April 14, 2016

Supreme Court, New York County

Docket Number: 110490/2010

Judge: Arlene P. Bluth

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32**

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DANIELLE PECILE and CRISTINA CULICEA,

**Index No. 110490/2010
Motion Seq: 014**

Plaintiffs,

- against-

**TITAN CAPITAL GROUP, LLC; MARC ABRAMS in
his professional and personal capacity; RUSSELL
ABRAMS in his professional and personal capacity;
and SANDRA ABRAMS**

**DECISION/ORDER
ARLENE P. BLUTH, JSC**

Defendants.

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Plaintiffs Danielle Pecile and Cristina Culicea's (plaintiffs) motion to compel the deposition testimony of defendants Russell Abrams, Marc Abrams, and Sandra Abrams (defendants) is granted.

This matter arises out of plaintiffs' sexual harassment allegations against defendants during both plaintiffs' employment at Titan Capital Group, LLC (Titan). Both plaintiffs claim that while they were employed at Titan, they were subjected to degrading acts of sexual harassment by defendants Russell Abrams and Marc Abrams.

Plaintiffs bring the instant motion pursuant to CPLR 3115 and NYCRR 221.2 seeking an order compelling further deposition testimony from defendants Russell Abrams, Marc Abrams, and Sandra Abrams. Plaintiffs claim that further depositions are necessary because of the conduct of defendants' counsel at the depositions of Marc Abrams, Russell Abrams and Sandra Abrams. Plaintiffs insist that defendants' counsel improperly instructed his witnesses not to answer more

than 50 times during these depositions.

Plaintiffs claim that these instructions not to answer were in response to plaintiff's questions about Mark Abrams' resignation from Titan and about the basis for a lawsuit brought by Sandra Abrams against Danielle Pecile and Cristina Culicea (Related Action). In the Related Action, Ms. Abrams asserts claims of conversion, trespass to chattels, intentional infliction of emotional distress, prima facie tort, and replevin relating to an alleged theft of Ms. Abrams' topless honeymoon photographs (*see* Index No. 110329/2009). Plaintiffs claim that Ms. Abrams' husband, Russell Abrams, asked Ms. Pecile to have these photographs developed and Ms. Pecile 'inadvertently' kept a copy. Plaintiffs' claim that Russell Abrams' request to develop the photographs is further evidence of the sexual harassment suffered by plaintiffs.

Questions Concerning Financial Information and Investors' Identities

Plaintiffs dispute defendants' claim that Marc Abrams ceased working for Titan in January 2009. Plaintiffs argue that this fact is crucial because defendants insist that Marc Abrams was no longer employed by Titan when he allegedly committed certain discriminatory and retaliatory acts against plaintiffs. At the depositions of Russell and Marc Abrams, plaintiffs claim that they sought: 1) information regarding the potential existence of documents in which Marc Abrams would have likely disclosed his employment status with Titan, 2) information regarding whether the amount or manner of Marc Abrams' compensation had changed after the date he allegedly left Titan and 3) the identity of investors to whom Marc Abrams disclosed his alleged departure from Titan. Plaintiffs claim that these questions might reveal how Marc Abrams characterized the status of his employment with Titan during the beginning of 2009. Plaintiffs claim that defendants' counsel's instructions not to answer these relevant questions were

improper.

In opposition, defendants claim that the instructions not to answer were proper because plaintiffs were asking for confidential financial information from Marc Abrams. Defendants claim that discovery of personal financial information is not discoverable until a finding of liability has been made. Defendants also claim that plaintiffs' questions concerning which Titan investors were informed that Marc Abrams was leaving Titan were improper because these identities constitute a trade secret.

Uniform Rule 221.2 provides that:

“[a] deponent shall answer all questions at a deposition, except (i) to preserve a privilege or right of confidentiality, (ii) to enforce a limitation set forth in an order of a court, or (iii) when the question is plainly improper and would, if answered, cause significant prejudice to any person. An attorney shall not direct a deponent not to answer except as provided in CPLR Rule 3115 or this subdivision”

(22 NYCRR 221.2).

“No objections shall be made at a deposition except those which, pursuant to subdivision (b), (c) or (d) or Rule 3115 of the Civil Practice Law and Rules, would be waived if not interposed” (22 NYCRR 221.1[a]). Uniform Rule 221.1(a) also requires that “[a]ll objections made at a deposition shall be noted by the officer before whom the deposition is taken, **and the answer shall be given and the deposition shall proceed subject to the objections**” (*id.* [emphasis added]).

Here, defendants' counsel's conduct during the depositions of Marc Abrams and Russell Abrams was improper. Because defendants claim that Marc Abrams left Titan in January 2009, questions pertaining to mortgage or loan applications, or Marc Abrams' compensation clearly relate to whether Marc Abrams actually left Titan in January 2009.

Further, any responses to these inquiries would be protected by the parties' confidentiality agreement. During the deposition of Marc Abrams, defendants' counsel expressed concern that Mr. Abrams would be forced to disclose financial assets in a "public forum" (Marc Abrams tr at 22, lines 17-18). Plaintiffs' counsel then suggested that defendants' counsel could mark portions of the deposition transcript as confidential. (*id.* at 22-23, lines 23-1). Defendants' counsel rejected this offer. Even after defendants' counsel was informed that the parties had agreed to a confidentiality order, he refused to let Marc Abrams answer these questions (*id.* at 24, lines 13-19.).

Defendants' claim that personal financial information is not discoverable until after liability has been determined is unconvincing. In support of this claim, defendants cite cases where plaintiffs' requests for financial information were denied because this information was sought to bolster claims for punitive damages (*see e.g. Suozzi v Parente*, 161 AD2d 232, 554 NYS2d 617 [1st Dept 1990]; *Rupert v Sellers*, 48 AD2d 265, 368 NYS2d 904 [4d Dept 1975]; *Chilvers v New York Mag. Co., Inc.*, 114 Misc.2d 996, 453 NYS2d 153 [Sup Ct, NY County 1982]). Defendants also cite a case which held that "Tax returns and other financial information are generally not discoverable in the absence of a strong showing that the information is indispensable to the claim and cannot be obtained from other sources" (*Carnegie Hill Orthopedic Servs. P.C. v GEICO Ins. Co.*, 19 Misc3d 1111(A), *6, 862 NYS2d 813 [Sup Ct, Nassau County 2008]).

Here, plaintiffs seek this information to investigate defendants' claim that Marc Abrams ceased his employment with Titan in January 2009. This date is crucial given that certain improper acts allegedly committed by Marc Abrams purportedly took place after January 2009 in

Titan's offices. Plaintiffs are entitled to test that claim, *inter alia*, through questions at a deposition. Plaintiffs' counsel's questions concerning mortgage applications and Marc Abrams' compensation might elicit responses relating to whether Marc Abrams was employed with Titan throughout 2009. The Court is unwilling to deny plaintiffs an opportunity to ask relevant questions relating to the date of Marc Abrams's departure from Titan when defendants assert that Marc Abrams left Titan in January 2009.

Plaintiffs' questions about the identities of the investors were also proper. Marc Abrams claimed that he told certain investors about his departure from Titan. Because Marc Abrams could not recall the exact identities of the investors with whom he spoke, plaintiffs are entitled to ask questions that could help them identify these potential witnesses. Defendants cannot claim that Marc Abrams told investors that he was leaving Titan and then refuse to answer questions that might help identify which investors received this information.

Defendants' argument that the identities of these investors are trade secrets also fails. A trade secret is "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it" (*Ashland Mgt. v Janien*, 82 NY2d 395, 400, 604 NYS2d 912 [1993]). Here, Russell Abrams testified in his deposition that Titan no longer has any investors. Titan only invests the funds of Russell Abrams. Russell Abrams also testified that he had no plans to change Titan's current status. As Titan no longer has any investors, the identities of its former investors do not constitute a trade secret that would prohibit the disclosure of this information.

Marital Privilege

Plaintiffs argue that defendants' counsel's assertion of the marital privilege between

Russell Abrams and Sandra Abrams is improper. Plaintiffs claim that the marital privilege objection was asserted in response to questions during the depositions of both Sandra and Russell Abrams. Plaintiffs intended to pose questions concerning Russell Abrams' influence in filing the Related Action. Plaintiffs claim that the filing of the Related Action constitutes impermissible retaliatory conduct. Plaintiffs argue that Sandra Abrams waived the marital privilege by referencing conversations with her husband in the Related Action.

Defendants argue that the marital privilege was not waived by Sandra Abrams because both spouses did not consent. Defendants maintain that even if Sandra Abrams put her conversations with her husband at issue, the privilege cannot be waived without Russell Abrams' consent.

CPLR 4502(b) provides that "A husband or wife shall not be required, or, without consent of the other if living, allowed, to disclose a confidential communication made by one to the other during marriage" (CPLR 4502[b]). "At issue waiver of privilege occurs where a party affirmatively places the subject matter of its own privileged communication at issue in litigation" (*Deutsche Bank Trust Co. of Americas v Tri-Links Inv. Trust*, 43 AD3d 56, 63, 837 NYS2d 15 [1st Dept 2007] [internal quotations and citations omitted]). "A voluntary disclosure of privileged communications by deposition testimony in one case operates as an implied waiver as to all such communications concerning the particular matters addressed in the disclosed communications" (*Bowne of New York City, Inc. v AmBase Corp.*, 150 FRD 465, 483 [SD NY 1993] [holding that waiver of a privilege in one case operates as implied waiver of the privilege in another action]).

Here, Sandra Abrams put communications with her husband at issue by disclosing the

content of these conversations in the Related Action. At her deposition in the Related Action, Ms. Abrams explained that she found out about Ms. Pecile's alleged possession of Ms. Abrams' topless photographs from her husband. Later in the deposition, Ms. Abrams described a conversation with Russell Abrams about bringing the Related Action. Ms. Abrams' deposition testimony makes clear that Russell Abrams played an substantial role in bringing the Related Action. The Related Action is based on an alleged theft of Ms. Abrams' topless photographs, a fact that Ms. Abrams learned from her husband.

“[I]nvasion of the privilege is required to determine the validity of a claim or defense of the party asserting the privilege, and application of the privilege would deprive the adversary of vital information” (*Deutsche Bank*, 43 Ad3d at 63). Plaintiffs seek to pose questions about the Related Action in support of their claim that the filing of the Related Action constituted improper retaliatory conduct. The subject matter of these inquiries is necessary to help determine Sandra Abrams' motivations for bringing the Related Action. Defendants Sandra Abrams and Russell Abrams must answer questions relating to the filing of the Related Action at a further deposition.

The marital privilege “is designed to protect and strengthen the marital bond” (*People v Mills*, 1 NY3d 269, 276, 772 NYS2d 228 [2003]). It was not intended to allow a party to gain an advantage in litigation by selectively choosing to reveal certain marital communications while shielding other conversations.

Conclusion

In light of the foregoing, defendants must produce Marc Abrams, Russell Abrams, and Sandra Abrams for further depositions. Since plaintiffs claim that Marc and Russell Abrams are already subject to additional depositions in the Related Action, these additional questions may be

posed at these already-planned depositions.

Accordingly, it is hereby

ORDERED that Plaintiffs' motion to compel the deposition testimony from Russell Abrams, Marc Abrams, and Sandra Abrams is granted as set forth above.

This is the decision and order of the Court.

Dated: April 14, 2016
New York, New York,



HON. ARLENE P. BLUTH, JSC