

Chin v Chin
2016 NY Slip Op 30884(U)
May 12, 2016
Supreme Court, New York County
Docket Number: 156604/2012
Judge: Manuel J. Mendez
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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. MANUEL J. MENDEZ PART 13
Justice

HARRY CHIN and 124-126 MOTT CORP.,
Plaintiffs,

INDEX NO. 156604/2012
MOTION DATE 03-23-2016

-against-

MOTION SEQ. NO. 008
MOTION CAL. NO.

JAMES CHIN, YING WEE CORP., KENT MEE
MUI CHIN, LLC., CHAPPAQUA REALTY &
MANAGEMENT CO., OPUS CONSTRUCTION INC.,
EDWARD CHIN and JOHN CHIN,

Defendants.

The following papers, numbered 1 to 8 were read on this motion to compel discovery and cross-motion for a protective order.

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...
Answering Affidavits – Exhibits cross motion
Replying Affidavits

PAPERS NUMBERED

Table with 2 columns: Paper Number, Range. Row 1: 1-3. Row 2: 4-6. Row 3: 7-8.

Cross-Motion: X Yes [] No

Upon a reading of the foregoing cited papers, it is Ordered that the Defendants' motion to compel discovery is denied, and plaintiffs' cross-motion for a protective order is granted.

Kent and Mary Chin, deceased, purchased three apartment buildings and created various corporate entities for the purposes of acquiring and operating the three buildings (herein "Chin Properties"). After their death, the Chin Properties were left to their four children: Harry Chin, James Chin, Edward Chin and John Chin, and divided equally. A dispute arose among the Chin brothers about the operation and management of the Chin Properties.

Harry Chin (herein "Harry") commenced this action on behalf of himself and 124-126 Mott. Corp. (herein "Plaintiffs") in September of 2012 by Summons and Complaint and alleges that the Defendants misappropriated the Deposits and funds from the Savings Account. In June of 2013, the Defendants moved for a pre-answer dismissal of the complaint, which this Court granted on default. In October of 2013, the Plaintiffs moved to vacate their default and restore this action to the calendar, which was granted. The parties have since engaged in exchange of some discovery.

Defendants now move for an Order directing the Examination Before Trial of non-party witness, Benjamin Mellors, Esq., before any further discovery, pursuant to CPLR

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

2218. Defendants' rationale is that Mr. Mellors' testimony has the potential to end the Plaintiffs' litigation and Defendants will prevail on their counterclaims. Mr. Mellors represented Plaintiffs in a prior action between the same parties in which a General Release, Stipulation of Settlement and additional agreement were executed. It was Mr. Mellors who drafted these three documents together with Defendants' attorneys. Defendants contend that Mr. Mellors testimony to and interpretation of the ambiguous term "operating account" as meant by the parties in the Stipulation of Settlement, would settle this issue that is at the heart of Plaintiffs' case. Further, Defendants' argue that Mr. Mellors' testimony would not violate attorney/client privilege. According to Defendants, the attorney/client privilege has been waived because (1) prior to finalization of the Stipulation of Settlement, the content was discussed by both parties' attorneys, CPAs, and an arbitrator, and (2) one issue discussed among these individuals was the phrase "operating account".

CPLR 2218 states: "The court may order that an issue of fact raised on a motion shall be separately tried by the court or a referee...An order under this rule shall specify the issue to be tried."

Defendants' motion to direct Mr. Mellors to appear for an examination before trial is, therefore, defective.

Plaintiffs oppose this motion and cross-move for a protective order pursuant to CPLR 3103, precluding Mr. Mellors from having to respond to Defendants' examination and striking said discovery demand which seeks privileged information, confidential information, and/or information protected by the work product doctrine.

Plaintiffs attach a prior Subpoena served by Defendants on Mr. Mellors, on March 12, 2014. (Cross-Mot. Exh. D). This Subpoena demands that Mr. Mellors appear at Oral Argument before This Court to testify and give evidence as a witness on behalf of the plaintiffs. (Id.)

CPLR 3106(b) states: " Where the person to be examined is not a party...he shall be served with a subpoena..." Under CPLR 3101, full disclosure shall be made of all material and necessary matter of a non party upon notice stating the circumstances or reasons such disclosure is sought or required. (CPLR 3101(a)(4)).

Defendants' March 12, 2014, Subpoena of Mr. Mellors is also defective.

Plaintiffs argue that regardless of any defect in Defendants' motion, a protective order should be issued barring Defendants from seeking any discovery from Mr. Mellors because, as former clients of Mr. Mellors, this discovery is protected by the attorney client privilege.

Rule 1.9 of the Rules of Professional Conduct states:

(c) a lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

- (1) use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or**
- (2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.**

Rule 1.6 provides that an attorney shall not reveal confidential information unless the client gives informed consent. Confidential information is defined as " information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential." (Section 1200.0, Rules of Professional Conduct, Rule 1.6(a)). "Confidential Information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates." (Id.)

CPLR § 3103(a) states, in part, that the court may "make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts."

Plaintiffs contend that they have not waived the attorney-client privilege, that Defendants inappropriately seek to depose their former attorney to give his opinion as to what the term "operating account" meant during the parties' settlement discussions, and directing their former attorney to appear would result in a violation of their rights and disadvantage.

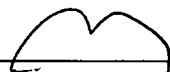
Defendants' requesting an Order directing Plaintiffs' former attorney to testify at an Examination Before Trial is defective, and Plaintiffs have shown sufficient reasoning warranting a protective order against such discovery.

Accordingly, it is ORDERED that Defendants' motion to compel the deposition of non-party witness and former attorney for Plaintiffs, Benjamin Mellors, Esq., is denied, and it is further,

ORDERED, that Plaintiffs' cross-motion for a protective order relieving Benjamin Mellors, Esq., from having to respond to Defendants' Subpoena is granted.

ENTER:

Dated: May 12, 2016



MANUEL J. MENDEZ
J.S.C. **MANUEL J. MENDEZ**
J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE