Lerner v Testa
2017 NY Slip Op 32945(U)
September 6, 2017
Supreme Court, Nassau County
Docket Number: 604991-15
Judge: Jerome C. Murphy

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. JEROME C. MURPHY,
Justice.

SHERYL & PAUL LERNER,

Plaintiff,

- against -

DANIEL A. TESTA III d/b/a TESTA LAW OFFICES,

Defendant.

TRIAL/IAS PART 18
Index No.: 604991-15
Motion Date: 6/30/17
Sequence No.: 001, 002
MD, MG
DECISION AND ORDER

The following papers were read on this motion:

Sequence No. 001:
Notice of Motion, Affirmation of Good Faith, Affirmation and Exhibits.....1

Sequence No. 002:
Notice of Cross-Motion.....2

Affirmation in Opposition to Motion and in Support of Cross-Motion.....3
Affirmation in Opposition and Reply.....4
Reply Affirmation in Opposition and in Support of Cross-Motion.....5

PRELIMINARY STATEMENT

In Sequence No. 001, defendant brings this application for an order pursuant to CPLR §§ 3124 and 3126, compelling plaintiff, Sheryl Lerner, to appear at a further deposition by a date certain; and compelling plaintiffs to provide the financial documents demanded by defendants or an affidavit that the records do not exist by a date certain; and, authorizations for the non-privileged legal files of attorneys that represented plaintiffs in an underlying legal matter by a date certain;

together with such other and further relief as this Court deems proper.

In Sequence No. 002, plaintiffs bring this application for an order denying in its entirety defendant's motion and issuing a protective order pursuant to CPLR § 3103(a) denying the discovery and inspection sought by defendant in defendant's third Notice for Discovery & Inspection; and for such other and further relief as may be just, proper and equitable, together with the costs of this motion.

BACKGROUND

This is an action for the alleged legal malpractice and Judiciary Law §487 violations by the defendant Daniel A. Testa III d/b/a Testa Law Offices. Briefly, defendant, an attorney represented the plaintiffs, Sheryl and Paul Lerner ("the Lerners") and other individual members of a limited liability company (non-party herein) known as Northeastern Realty Investors, LLC ("Northeastern"). Northeastern had defaulted on certain real property mortgages held by Valley National Bank ("VNB"). Plaintiffs and the other individual members of Northeastern were guarantors of these mortgages. VNB brought a foreclosure action against the Northeastern defendants, including the Lerners in their capacity as guarantors of the mortgage. It is alleged that defendant, Testa, was supposed to arrange for the sale of the subject real property and resolve VNB's foreclosure action against the plaintiffs and other Northeastern members.

Plaintiffs submit herein that the defendant was engaged specifically because he is an attorney practicing in Onondaga and Cayuga counties where the subject real property is located. Plaintiffs claim that while the defendant assisted in the sale of the underlying real property, he failed the plaintiffs in all other respects. VNB eventually obtained a judgment against the plaintiffs of approximately $1,071,000.

Specifically, plaintiffs' claim that the defendant's transgressions included concealing from them that he had failed to oppose VNB's motion for a monetary judgment against them, never advised them that he would be ignoring VNB's motion or that they should engage another attorney to handle the motion, and failed to notify them that VNB had been awarded a million dollar plus judgment against them (after VNB's unopposed motion was granted). Plaintiffs claim that instead the defendant continued to assure them that the matter was ~~at hand~~ under control, that they had viable defenses, and that he would work to obtain a resolution. Plaintiffs claim that they were unaware that these "reassurances" were without legal foundation and, critically, that VNB had already prevailed. In the end, plaintiffs claim that they learned of VNB's judgment from VNB – not from the defendant, who never communicated to them that he was not going to oppose VNB's motion, that the motion had been granted, or that VNB consequently had a seven-figure judgment against each of them.

Plaintiffs thereafter engaged another attorney – Joseph L. Lucchesi – who was able to reach a settlement with VNB and satisfy VNB's judgment.

Following the commencement of this suit, discovery ensued including depositions and document discovery – including, initial Notice of Discovery and Inspection dated 9/17/15; a Demand for Authorizations for the "non-privileged portions of the legal file of Joseph L. Lucchesi" dated 10/28/15; a request for "Supplementation as to Plaintiffs' Bill of Particulars, paragraph No. 16, with respect to claimed damages in this case" and itemizing eight (8) different requests including "[a]ny documentation to support these alleged damages" dated 1/26/16; a second Notice for Discovery and Inspection dated 5/12/16; and a third Notice for Discovery and Inspection dated 5/4/17.

Plaintiffs submit that they have duly responded to each of these discovery requests save defendant's third Notice for Discovery and Inspection – which forms the basis for their instant cross

motion. Plaintiffs claim that "[a]t this late stage of discovery – when all that remains is expert discovery – defendant's post deposition efforts to obtain additional documents and materials appears intended to prolong the discovery process and delay progress of this action" (Krellenstein Aff., ¶12). Plaintiffs also point out that, on November 20, 2015, the defendant also served a document subpoena on VNB (a copy of which they neglected to provide the plaintiffs) and has, in response, received relevant documents from VNB. In support of their instant cross-motion, plaintiffs claim that the defendants' persistence in seeking materials to which he is not entitled either because the information sought is privileged, not relevant, has already been provided, is equally available to the defendant, or doesn't exist, should not be permitted at this juncture.

The defendant opposes the cross motion, and in support of his motion to compel the plaintiff Sheryl Lerner to appear at a further deposition, and to provide financial documents demanded by the defendants (or an affidavit that the records do not exist) and authorizations for the legal files of attorneys that represented the plaintiffs in the underling legal matter, principally advances the following three arguments.

One, the demanded discovery – including the financial documents requested – is relevant because it goes directly to the issue of whether or not the defendant caused the plaintiffs actual and ascertainable damages - a critical element of a legal malpractice claim. Defendant argues that this information goes directly to the plaintiffs claims of damages from lost opportunities, harm to credit, costs repairing their credit and alleged increased costs resulting from the loss of credit. Two, it remains unclear when subsequent attorneys – including Howard Herschberg[1] and Joseph Lucchesi

[1]Howard Herschberg is the attorney who represented the Northeastern Defendants before this defendant was engaged on the VNB litigation.

– were retained, the scope of the retention, the actions taken by each attorney on behalf of the plaintiffs; defendant argues that this information goes directly to the efforts taken by these attorneys to settle the plaintiffs dispute with VNB and whether plaintiff could have obtained a more favorable result/settlement but for defendant's representation. Lastly, the "at-issue" doctrine precludes the plaintiff from asserting that the attorney-client privilege (sought to prevent her from testifying as to relevant facts regarding the retention and work done by her prior attorneys, and sought to avoid providing authorizations for her prior attorney's legal files). According to the defendant, the requested information/documents are not subject to privilege as they have been placed at issue in this case.

DISCUSSION

The law is clear. CPLR 3101(a) provides, in pertinent part, that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." "The words 'material and necessary' as used in section 3101 must 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" (*Matter of Kapon v. Koch*, 23 NY3d 32, 38 [2014] [internal quotation marks omitted]; *see*, *Gould v. Decolator*, 131 AD3d 445, 447 [2nd Dept. 2015]). "However, unlimited disclosure is not mandated, and the court may deny, limit, condition, or regulate the use of any disclosure device to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts" (*Diaz v. City of New York*, 117 AD3d 777, 777 [2nd Dept. 2014]; see CPLR 3103[a]; *Berkowitz v. 29 Woodmere Blvd. Owners', Inc.*, 135 AD3d 798, 799 [2nd Dept. 2016]). "The supervision of disclosure and the setting of reasonable terms and conditions therefor rests within the sound discretion of the trial court and,

absent an improvident exercise of that discretion, its determination will not be disturbed" (*Berkowitz v. 29 Woodmere Blvd. Owners', Inc.*, *supra* at 799 [internal quotation marks omitted]; *Gould v. Decolator*, *supra* at 447).

Here, inasmuch as the plaintiff seeks the further deposition of plaintiff, Sheryl Lerner – specifically for answering questions about Howard Herschberg (the attorney who represented Northeastern defendants before this defendant as engaged on the VNB litigation) and about Joseph Lucchesi (the attorney who the plaintiffs retained after terminating this defendant), such application is denied. Indeed, there is no legal basis on which to permit the defendant herein to further depose the plaintiff as to her communications with her other attorneys.

Defendant's contention herein that by suing him the plaintiffs have waived the privilege with respect to communications with all counsel – including before and after his retention – is meritless (*Jackobleff v. Cerrrato, Sweeney & Cohn*, 97 AD2d 834 [2nd Dept. 1983]). Without more, the fact that the defendant is being sued does not give him the license to invade the privilege applicable to plaintiffs' discussions with other lawyers.

"[T]hat a privileged communication contains information relevant to issues the parties are litigating does not, without more, place the contents of the privileged communication itself 'at issue' in the lawsuit"*** (*Veras Inv. Partners, LLC v. Akin Gump Strauss Hauer & Feld LLP*, 52 AD3d 370, 374 [1st Dept. 2008] *citing Deutsche Bank Trust Co. of Ams. v. Tri-Links Inv. Trust*, 43 AD3d 56 [1st Dept. 2007]. Instead, an "[a]t issue" waiver of privilege occurs where a party affirmatively places the subject matter of its own privileged communication at issue in litigation, so that invasion 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 (*Credit*

Suisse First Boston v Utrecht-America Fin. Co., 27 AD3d 253, 254 [1st Dept. 2006] *citing Jakobleff v Cerrato, Sweeney & Cohn*, *supra* at 835; *see also, Arkwright Mut. Ins. Co. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 1994 WL 510043, *11 [SDNY 1994]). An example of an affirmative act that does constitute "at issue" waiver of privilege is a party's "assert[ing] as an affirmative defense [its] reliance upon the advice of counsel" (*Village Bd. of Vil. of Pleasantville v Rattner*, 130 AD2d 654, 655 [2nd Dept. 1987]).

Here, the defendant has failed to establish that the plaintiff "affirmatively" placed the counsel and advice it received from Herschberg in connection with the underlying action, its attorneys' work product, or their private mental impressions, conclusions, opinions or legal theories, at issue in this case (*East Ramapo Cent. Sch. Dist. v New York Schs. Ins. Reciprocal*, 150 AD3d 683, 689 [2nd Dept. 2017]). Indeed, the defendant does not even claim that Herschberg's work affected his own or that Herschberg's advice contributed to his non-feasance (*Corrieri v. Schwartz & Fang, P.C.*, 2012 NY Slip Op. 30120[U] [Sup. Ct. New York 2012]; *Deutsche Bank Trust Co. of Americas v. Tri-Links Investment Trust*, 43 AD3d 56, 64 [1st Dept. 2007]).

In any event, this Court cannot overlook the fact that this suit involves the defendant's work. The allegations against the defendant are not whether they could have obtained a better settlement – in fact, defendant obtained no settlement – but whether he did his job. Plaintiff's discussions with Herschberg, if any, are unrelated to, *inter alia*, the question of why this defendant never bothered to answer VNB's motion for a money judgment, or why he neglected to mention this judgment to his clients, *supra*.

Moreover, the defendant herein fails to explain why "disclosure of privileged correspondence is vital to their defense in light of the broad range of materials already supplied by the plaintiff

(*Raphael v. Clune White & Nelson*, 146 AD2d 762, 763 [2nd Dept. 1989]).

Having failed to put Herschberg's advice at issue in this case, the fact that Herschberg may have been retained to work on the same dispute, alone, is insufficient to entitle the defendants to a further deposition of Sheryl Lerner (*Nomura Asset Capital Corp. v. Cadwalader, Wickersham & Taft, LLP*, 62 AD3d 581, 582 [1st Dept. 2009]). The fact is that there is no basis from which to conclude that Herschberg's work influenced the scope of defendant's engagement, his lack of contact with the plaintiffs or his failure to discharge the basic functions of counsel.

The case with respect to Lucchesi's counsel is even more tenuous. Indeed, the fact that the plaintiffs made Lucchesi aware of the VNB proceedings so that he could obtain a settlement does not place their communications with him "at issue" (*Corrieri v. Schwartz & Fang*, *supra* at *2). Defendant's wish to "to inquire about the handling of the [subject VNB action] after [he was] replaced" is not a basis "for setting aside the privilege" (*TIG Ins. Co. v. Yules & Yules*, 1999 WL 1029712 [SDNY 1999]).

Defendant's motion seeking the production of authorizations for the non-privileged portions of attorney files – including the legal files of Howard Herschberg and Lucchesi – is also denied as overbroad and not appropriately directed to the plaintiffs. Separate and apart from the fact that the defendant fails to set forth a coherent theory as how the files of attorneys with whom he had no contact explain his work, *supra*, and separate and apart from the fact that the defendant does not attempt to explain why non-privileged information – all that is apparently being sought – is needed to advance his arguments or is only obtainable through plaintiffs, this Court cannot overlook the fact that neither Herschberg nor Lucchesi are under the plaintiff's control and these attorneys cannot disclose information relating to clients who are not involved in this malpractice action.

Finally, inasmuch as defendant moves to compel the production of "financial documents" as itemized in its May 4, 2017 Notice for Discovery and Inspection, such application is also denied as the defendant has failed to establish that such documents are either relevant to the instant claims, unavailable through sources to which the defendant has access, not privileged, and/or have not already been furnished through VNB (in response to the defendant's subpoena) or by the plaintiffs. Notably, the defendant, in opposing the plaintiff's cross motion for a protective order denying this discovery and inspection, only disputes the plaintiff's arguments to the extent that they claim that such documents are relevant and essential for a determination of plaintiffs' damages, if any. According to the defendant, they go directly to the plaintiffs' claims of damages from lost opportunities, harm to credit, costs repairing their credit and alleged increased costs resulting from the loss of credit.

Yet, the defendant makes no effort to explain why he needs these documents or why they cannot be obtained form other sources (or that they have already been produced).

Therefore, the defendant's motion, for an order pursuant to CPLR §§ 3124 and 3126, compelling plaintiff, Sheryl Lerner, to appear at a further deposition by a date certain, compelling plaintiffs to provide the financial documents demanded by defendants or an affidavit that the records do not exist by a date certain; and compelling the production of authorizations for the non-privileged legal files of attorneys that represented plaintiffs in an underlying legal matter by a date certain, is denied in its entirety.

The plaintiff's cross motion for an order pursuant to CPLR § 3103(a) issuing a protective order denying the discovery and inspection sought by defendant in defendant's third Notice for Discovery & Inspection is granted in its entirety.

The parties' remaining contentions have been considered and do not warrant discussion.

To the extent that requested relief has not been granted, it is expressly denied.

This shall constitute the Decision and Order of the Court.

Dated: Mineola, New York
September 6, 2017

ENTER:

Jerome C. Murphy

JEROME C. MURPHY
J.S.C.

ENTERED

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