

**Moore v Kronick**

2017 NY Slip Op 33325(U)

February 10, 2017

Supreme Court, Westchester County

Docket Number: 68782/2015

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  
AVA CHAPMAN MOORE,

Plaintiff,

**DECISION & ORDER**

-against-

Index No. 68782/2015  
Motion Date: January 23, 2017

ARNOLD KRONICK, ARNOLD KRONICK LP,  
and John Does 1-10,

Seq. No. 5

Defendants.  
-----X

LEFKOWITZ, J.

The following papers were read on this motion by defendants Arnold Kronick and Arnold Kronick LP for an order compelling nonparty Peter Cattano to appear for a further deposition to answer a question posed on page 11, lines 15-17 of his deposition transcript related to Mr. Cattano's conversations with plaintiff's counsel and to answer any reasonable follow up questions.

- Order to Show Cause - Affirmation in Support - Affidavit of Good Faith - Exhibits
- Memorandum of Law in Support
- Affidavit of Service on Peter Cattano
- Moore Affidavit - Exhibits - Pu Affirmation in Opposition
- Memorandum of Law in Opposition

Upon the foregoing papers and the proceedings held on January 23, 2017, this motion is determined as follows:

In this legal malpractice action, plaintiff Ava Moore alleges Arnold Kronick failed to properly represent her in an underlying partition action commenced by her brother Eugene Moore. Plaintiff alleges Mr. Kronick failed to assert an affirmative defense of constructive trust and had the defense been interposed, Eugene Moore's efforts to force a sale of the property would not have succeeded.<sup>1</sup>

Plaintiff's boyfriend Peter Cattano appeared for a nonparty deposition on October 25,

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<sup>1</sup> By order dated October 6, 2016 (Ecker, J.), the Court granted defendants' motion to dismiss to the extent that plaintiff's second, third, fourth, and fifth causes of action were dismissed. The branch of the motion seeking to dismiss the first cause of action for legal malpractice was denied (Defendants' Exhibit C).

2016. Plaintiff's counsel stated on the record that he was representing the witness for purposes of the deposition (Defendants' Exhibit E, p. 6). Counsel stated Mr. Cattano was a representative of the plaintiff and he was the principal contact throughout the underlying partition action and this lawsuit. Plaintiff's counsel objected to questioning Mr. Cattano about his conversations with counsel, asserting the attorney client privilege (Defendants' Exhibit E, pp. 6-7). Mr. Cattano was asked the sum and substance of his conversation with counsel regarding the partition action. Plaintiff's counsel blocked this line of questioning (Defendants' Exhibit E, p. 11).

Defendants Arnold Kronick and Arnold Kronick LP (hereinafter defendants) now seek an order compelling Mr. Cattano to appear for a further deposition to answer the question that was blocked and any follow up questions. Defendants argue that plaintiff's counsel asserted for the first time at Mr. Cattano's deposition that he was representing Mr. Cattano and that all communications he had with Mr. Cattano regarding plaintiff's representation were privileged (Defendants' Exhibit E, deposition transcript of Peter Cattano, pp. 6-11). Defendants argue Mr. Cattano is not a party to this action, his communications with plaintiff's counsel are not privileged, and these communications demonstrate he is biased.

In opposition, plaintiff submits an affidavit stating she appointed her boyfriend, Mr. Cattano, to be her agent for purposes of communicating with her attorney. She appointed Mr. Cattano to communicate with counsel because he has a better grasp of legal and business matters. Plaintiff has had relatively few one-on-one communications with her attorney and a large number of communications about the action have been between Mr. Cattano and counsel. Plaintiff argues that both she and Mr. Cattano had an expectation that his communications with counsel were protected by the attorney client relationship.

Plaintiff's counsel submits an affirmation stating he is the attorney for plaintiff and her boyfriend and agent, Mr. Cattano. Counsel states plaintiff has a poor grasp of business and legal issues and Mr. Cattano has a superior grasp of business and legal issues. Counsel has communicated with Mr. Cattano to facilitate communications with the plaintiff (Pu Affirmation, p. 2). Counsel avers that he communicated with Mr. Cattano about topics he assumed would not be subject to disclosure, such as trial strategy, counsel's theory of the case, and the prospects for success. Counsel has had very few one-on-one dealings with plaintiff, but he typically copied her on his e-mails with Mr. Cattano.

At oral argument on January 23, 2017, plaintiff's counsel stated on the record that Mr. Cattano acted as plaintiff's agent in the underlying action and this arrangement continued in this matter.<sup>2</sup> With respect to the current action, the agency arrangement was not in writing, but it was a course of dealing from the date he was retained. Plaintiff's counsel stated Mr. Cattano's involvement was necessary to facilitate communications between plaintiff and counsel because plaintiff does not have a grasp of business or legal matters. Counsel stated he has spoken with Mr. Cattano regarding litigation strategy and it is impossible to have the dialogue with plaintiff.

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<sup>2</sup> On October 28, 2016, defendant Arnold Kronick testified that in the underlying partition action, he had a letter of authorization from plaintiff to let Mr. Cattano serve as her agent in the matter (Plaintiff's Exhibit 2, p. 87).

Counsel directed the overwhelming majority of verbal and written communication in this case to Mr. Cattano and Mr. Cattano relayed counsel's verbal communications to plaintiff.

Pursuant to the Uniform Rules of the Trial Courts 22 NYCRR 221.2, a deponent shall answer all questions at a deposition except to preserve a privilege or right of confidentiality, to enforce a court ordered limitation, or when the question is plainly improper and would, if answered, cause significant prejudice to any person. An attorney shall not direct a witness not to answer except under these limited circumstances or pursuant to an objection set forth in CPLR 3115 (see *Parker v Ollivierre*, 60 AD3d 1023 [2d Dept 2009]). Additionally, Uniform Rules of the Trial Courts 22 NYCRR 221.1(b) provides that "[s]peaking objections [are] restricted. Every objection raised during a deposition shall be stated succinctly and framed so as not to suggest an answer to the deponent... Except to the extent permitted by CPLR Rule 3115 or by this rule, during the course of the examination persons in attendance shall not make statements or comments that interfere with the questioning." "[G]enerally, the proper procedure is to allow a witness to answer all questions subject to objections which are reserved for trial in accordance with CPLR 3115" (*Walter Karl, Inc. v Wood*, 161 AD2d 704 [2d Dept 1990]).

At Mr. Cattano's deposition plaintiff's counsel objected to questions regarding communications between Mr. Cattano and counsel, as privileged attorney client communications. The attorney client privilege, codified in CPLR 4503(a), is intended to foster an open dialogue between lawyer and client and is essential to effective representation. The scope of the privilege is determined on a case by case basis and the burden of proving each element of the privilege rests on the party asserting it (*Willis v Willis*, 79 AD3d 1029 [2d Dept 2010]). The party asserting the attorney client privilege must show that the communications at issue were "made for the purpose of facilitating the rendition of legal advice or services in the course of a professional relationship and have been primarily or predominantly of a legal rather than a commercial nature" (*Hyatt v State of Cal. Franchise Tax Bd.*, 105 AD3d 186 [2d Dept 2013]; *North State Autobahn, Inc. v Progressive Ins. Group*, 84 AD3d 1329 [2d Dept 2011]).

Generally, disclosure of attorney client communications to a third party will constitute a waiver of the attorney client relationship. However, as with any rule, there are exceptions. Communications made to an agent or employee of the attorney or the client are privileged, where the presence of the third party is deemed necessary to enable the attorney client communication and the client has a reasonable expectation of confidentiality (*Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 27 NY3d 616 [2016]). Statements made to counsel through a hired interpreter, or one serving as an agent of either attorney or client to facilitate communication will generally be privileged (*Kagan v Minkowitz*, 2016 NY Slip Op 32429[U] [Sup Ct, Kings County 2016]). "The scope of the privilege is not to be defined by a third party's employment or function, it rather depends upon whether the client had a reasonable expectation of confidentiality under the circumstances" (*Stroh v General Motors Corp.*, 213 AD2d 267 [1st Dept 1995]).

Here, the communications at issue between plaintiff's counsel and Mr. Cattano are privileged. Plaintiff submits an affidavit stating she appointed her boyfriend, Mr. Cattano, to be her agent for purposes of communicating with her attorney. From the beginning of the attorney client relationship a course of dealing was established for plaintiff's counsel to communicate

information to Mr. Cattano, who relayed the information to the plaintiff. While this arrangement was not documented, Arnold Kronick's own deposition testimony supports a finding that plaintiff considered Mr. Cattano to be her agent for legal purposes. It is clear that plaintiff's counsel routinely communicated with Mr. Cattano to facilitate communications with the plaintiff. Plaintiff and Mr. Cattano had a reasonable expectation that these communications were protected by the attorney client privilege. Furthermore, plaintiff's counsel indicated at oral argument that such an arrangement was necessary to enable attorney client communication (*See Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 27 NY3d 616 [2016]).

In view of the foregoing, it is

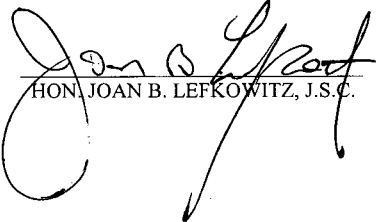
ORDERED that defendants' motion is denied; and it is further

ORDERED that all parties are directed to appear for a conference in the Compliance Part, Courtroom 800, on February 24, 2017 at 9:30 a.m., at which time it is anticipated that a trial readiness order will be issued; and it is further

ORDERED that defendants' counsel shall serve a copy of the order with notice of entry upon counsel for all parties within ten days of entry.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York  
February 10, 2017

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

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cc: Compliance Part Clerk