

Morse v Fidessa Corp.
2018 NY Slip Op 32711(U)
October 22, 2018
Supreme Court, New York County
Docket Number: 158948/2016
Judge: Arlene P. Bluth
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 32

Justice

-----X

CHRISTOPHER MORSE,

Plaintiff,

- v -

FIDESSA CORPORATION, MARK AMES, MARIA MIKA,

Defendants.

DECISION AND ORDER

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 38, 39, 40, 41, 42, 43, 44, 45, 46, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 78, 79

were read on this motion to/for

QUASH SUBPOENA

The following e-filed documents, listed by NYSCEF document number (Motion 003) 53, 54, 75, 76, 77

were read on this motion to/for

SEAL

The following e-filed documents, listed by NYSCEF document number (Motion 004) 47, 48, 49, 50, 51, 52, 67, 68, 69, 70, 71, 72, 73, 74

were read on this motion to/for

QUASH SUBPOENA

Motion Sequence numbers 002, 003 and 004 are consolidated for disposition. The motion (MS002) by plaintiff to quash defendants' subpoena is granted in part and denied as moot in part. The motion (MS003) by non-party Ullink to seal certain documents is denied as moot. The motion (MS004) by plaintiff to quash another subpoena is granted.

Background

Plaintiff began working for defendant Fidessa Corporation ("Fidessa"), a financial services firm, around June 2001. Plaintiff continued his employment with Fidessa, except for a break between August 2006 and May 2007, until his termination on July 28, 2016.

Plaintiff claims that he was fired due to his perceived relationship with Lael Wakefield. Plaintiff began this relationship with Wakefield in December 2004 and eventually married Wakefield in November 2006. Plaintiff later divorced Wakefield in September 2011, but continued to reside with her and their children. Plaintiff claims that Fidessa thought he and Wakefield were married at the time plaintiff was terminated.

Wakefield was also employed by Fidessa. She worked at Fidessa from about January 2000 until May 2016, when she left Fidessa and began to work for another financial services firm (“Ullink”). Plaintiff claims that right after Wakefield left, he was suspended (on June 25, 2016) and later fired in July 2016.

Plaintiff alleges that defendant Ames told plaintiff that he was terminated due to plaintiff’s marriage to Wakefield and that plaintiff would be considered for future employment if he ended his marriage to Wakefield. Plaintiff contends that his termination was not based on his performance at work, any misconduct, or because of any specific action he took while working for Fidessa. Plaintiff argues that he was fired because he was married (or perceived to be married or in a partnership) to Wakefield.

Plaintiff moves to quash subpoenas issued to non-party Ullink (Wakefield’s employer), plaintiff’s psychologist (Dr. Chee Chan), non-party Goldman Sachs (plaintiff’s current employer), and Brooke Murphy (plaintiff’s ex-girlfriend).

Discussion

“An individual or entity who seeks a protective order bears the initial burden to show either that the discovery sought is irrelevant or that it is obvious the process will not lead to legitimate discovery. Once this burden is met, the subpoenaing party must establish that the discovery sought is material and necessary to the prosecution or defense of an action, i.e. that it

is relevant” (*Liberty Petroleum Realty, LLC v Gulf Oil, L.P.*, 164 AD3d 401, 403, 2018 NY SlipOp 05624 [1st Dept 2018] [internal quotations and citations omitted]). “[A] subpoena should be quashed when the subpoena is being used for a fishing expedition to ascertain the existence of evidence” (*Law Firm of Ravi Batra, P.C. v Rabinowich*, 77 AD3d 532, 533, 909 NYS2d 706 [1st Dept 2010] [citation omitted]).

Ullink

Plaintiff moves to quash defendants’ subpoena on Ullink on the ground that Wakefield’s employer has nothing to do with this litigation. Defendants point out that Ullink is in direct competition with Fidessa and they seek information about Wakefield’s potential disclosure of Fidessa’ confidential information. Defendants insinuate that such disclosure would violate an agreement she signed with Fidessa.

The Court grants this branch of plaintiff’s motion. This case is about why defendants fired plaintiff in July 2016. Defendants may not seek to justify that firing by gaining information more than two years after plaintiff’s termination. Defendants must rely on the knowledge they possessed *at the time* they fired plaintiff. Put another way, defendants cannot claim that they fired plaintiff based on information acquired during this litigation.

And if defendants believe that Wakefield breached a confidentiality agreement, then they can, of course, commence an action based on that contention. But they may not seek discovery about that issue in a case about plaintiff.

Goldman Sachs

At oral argument, the parties informed the Court that they had reached an agreement with respect to disclosure from Goldman Sachs.

Dr. Chan

Plaintiff seeks to quash a testimonial subpoena directed to plaintiff's psychologist. Plaintiff contends that it has named Dr. Chan as an expert witness and that it is inappropriate to hold a deposition of plaintiff's expert witness.

In opposition, defendants claim that Dr. Chan is the "sole individual with the ability to testify about plaintiff's statements regarding his separation from employment with Fidessa and its impact upon his pre-existing psychological issues creating special circumstances that require his testimony."

Pursuant to CPLR 3101(d)(1)(iii), a party must demonstrate that special circumstances exist to compel the deposition of an expert witness (*Fekete v GA Ins. Co. of New York*, 279 AD2d 300, 300, 719 NYS2d 52 [1st Dept 2001]). Special circumstances can include information that was inspected by one side's expert but was lost or destroyed before the other side had a chance to do its own expert investigation (*Generali Ins. Co. of Trieste and Venice v Honeywell, Inc.*, 194 AD2d 442, 442, 599 NYS2d 254 [1st Dept 1993]).

"It is not the norm to seek the deposition of a treating physician, and it should not generally be directed unless necessary to prove a fact unrelated to diagnosis and treatment" (*Ramsey v New York Univ. Hosp. Ctr.*, 14 AD3d 349, 350, 789 NYS2d 104, [1st Dept 2005] [quashing defendants' subpoena of plaintiff's treating psychiatrist]).

Here, the Court quashes the subpoena of Dr. Chan. Defendants have not demonstrated that special circumstances exist to warrant a deposition of Dr. Chan. Defendants can question plaintiff at his deposition about his psychological issues and his treatment with Dr. Chan. Questioning Dr. Chan is not the only way for defendants to explore plaintiff's purported emotional distress and mental anguish. And defendants acknowledge that they have already

received records from Dr. Chan's treatment of plaintiff. Defendants will also receive, pursuant to the CPLR, a report before trial summarizing the testimony to be offered by Dr. Chan. There are simply no special circumstances or unique facts that require this Court to order a deposition of Dr. Chan.

Brooke Murphy

The Court grants the motion to quash the subpoena served on Brooke Murphy, plaintiff's ex-girlfriend, because it was not served on Murphy. The subpoena states it was mailed to Murphy's attorney (*see* NYSCEF Doc. No. 71). That service is not appropriate here, where Murphy is not a party to this action and has not appeared by an attorney. Service of a testimonial subpoena is governed by CPLR 308, which requires personal service (Richard C. Reilly, Practice Commentaries, McKinney's Cons Laws of NY, C5224:2).

The Court observes that if the subpoena was correctly served, then defendants would be entitled to a deposition. Defendants contend that plaintiff was in a relationship with Murphy during part of the time he was employed by Fidessa and this fact might help refute the claim that defendants fired plaintiff because they perceived that he was in a relationship with Wakefield. And Murphy might have information about the emotional distress and mental anguish plaintiff allegedly suffered because of his termination.

Accordingly, it is hereby

ORDERED that the motion (MS002) for a protective order and to quash the subpoenas directed to Ullink, Dr. Chan, and Goldman Sachs is granted to the extent that it relates to Ullink and Dr. Chan and denied as moot to the extent it applies to Goldman Sachs (The parties informed the Court that they reached an agreement with respect to Goldman Sachs); and it is further

ORDERED that the motion (MS003) by non-party Ullink to seal certain documents is denied as moot; and it is further

ORDERED that the motion (MS004) by plaintiff for a protective order and to quash the subpoena is granted only to the extent that the subpoena is quashed for failure to effectuate proper service. *Claims for attorneys' fees are denied.*

Next Conference: 12-4-18 at 2:15 p.m.

10/22/18
DATE


ARLENE P. BLUTH, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	SUBMIT ORDER
<input type="checkbox"/>	FIDUCIARY APPOINTMENT

HON. ARLENE P. BLUTH

OTHER

CHECK IF APPROPRIATE:

REFERENCE