

Lewis v Pierce Bainbridge Beck Price Hecht LLP

2020 NY Slip Op 31316(U)

May 11, 2020

Supreme Court, New York County

Docket Number: 155686/2019

Judge: Andrea Masley

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ANDREA MASLEY
Justice

PART IAS MOTION 48EFM

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DONALD LEWIS,

Plaintiff,

- v -

PIERCE BAINBRIDGE BECK PRICE HECHT LLP,
JOHN PIERCE, DENVER EDWARDS, CAROLYNN K.
BECK, LITTLER MENDELSON, P.C., SYLVIA
JEANINE CONLEY, PUTNEY TWOMBLY HALL &
HIRSON LLP, MICHAEL YIM, and JANE DOE,

Defendants.

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INDEX NO. 155686/2019

MOTION DATE N/A

**MOTION SEQ.
NO. 005**

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 005) 74-89 and 95-125

were read on this motion to/for Compel Discovery.

Upon the foregoing documents, it is

Plaintiff Donald Lewis moves by order to show cause pursuant to CPLR 3211(d) to produce a report (the Report) prepared by defendant Putney Twombly Hall & Hirson, LLP (Putney) which was hired by defendant Pierce Bainbridge Beck Price & Hecht LLP (PB) to investigate an employee's claim of harassment against plaintiff.¹

¹ Plaintiff also moves to unseal the pleadings in an action commenced in May 2019 by PB. (*PB v Lewis*, Index No. 154910/2019.) At argument on this motion the court denied this part of the motion as this court does not have authority over an action pending before a different justice in the same court. Accordingly, plaintiff filed a motion on January 30, 2020 to unseal that action. (NYSCEF 9 in *PB v Lewis*, Index No. 154910/2019.)

Plaintiff initiated this action on June 7, 2019 with a 28-page complaint with 101 paragraphs against PB, John Mark Pierce, and Denver G. Edwards, and three causes of action for defamation, breach of Judiciary Law §487, and intentional infliction of emotional distress. (NYSCEF Doc. No. [NYSCEF] 2, Complaint). Plaintiff filed an amended complaint on July 26, 2019 with 286 paragraphs, and three additional causes of action: aiding and abetting defamation and intentional infliction of emotional distress; and prima facie tort. (NYSCEF 9). Plaintiff also added defendants Carolyn K. Beck, Littler Mendelson, PC (LM), Sylvia Jeanine Conley, Putney, Michael Yim, and Jane Doe. (*Id.*)

On October 2, 2019, all defendants filed motions, 01 (PB), 02 (Putney), 03 (LM and Conley), to dismiss pursuant to CPRL 3211(a)(7). Plaintiff filed opposition to all motions to dismiss on October 25, 2019.

On October 21, 2019, plaintiff filed a motion 04 for leave to amend the complaint.

On January 3, 2020, the court signed an OSC brought by nonparty Jane Doe, designated motion 06, to (1) maintain the seal in Index No. 154910/19 (154910/19 Action); (2) enjoin the parties in this action to refrain from publishing Jane Doe's true identity; (3) maintain the seal on the Report; (4) alternatively, limit plaintiff's view of the Report so as to maintain confidentiality; and (5) seal all documents on this motion.

On January 21, 2020, nonparty Jane Doe filed motion 07 by OSC returnable February 10, 2020 to seal two documents filed in this action as 135 and 136 which was resolved after an in camera review by order dated February 27, 2020. (NYSCEF 175.)

On January 28, 2020, PB filed a motion 08 to compel arbitration which was granted on the record at argument on February 10, 2020. (NYSCEF 187, Tr. 34:16-36:9)

On March 13, 2020, counsel to PB filed a motion pursuant to CPLR 321 to be relieved as counsel which was granted on April 15, 2020. (NYSCEF 186.)

On August 26, 2019, the court denied plaintiff's letter request for the Report (NYSCEF 62) as premature since motions to dismiss were already briefed.² (NYSCEF 72.) Nevertheless, on November 6, 2019, plaintiff filed this motion 05 by OSC signed on November 13, 2019 and returnable December 5, 2019. Plaintiff filed opposition to the motions to dismiss on October 25 and November 1, 2019. Replies were filed on the motions to dismiss on November 13 and 15, 2019.

To the extent that plaintiff's argument can be discerned, he seems to contend that PB should be required to produce the Report pursuant to CPLR 3211(d) because without it, he is "unfairly handicapped in responding" to PB's motion to dismiss. (NYSCEF 89, PI. Memo of Law at 4.) Plaintiff claims that he is entitled to production of the Report because PB used the report's "credible" finding "as an anchor" to defame him and because "the purported content of the Report is a centerpiece" of the PB Motion to Dismiss. (*Id.* at 3-4.) However, PB's 3211(a)(7) motion is based on the inadequacies of the amended complaint as a matter of law. (See NYSCEF 32, PB Memo of Law.) The court is limited to the four corners of the complaint. On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994].) The court is not called upon to

² Motion 01 in action 652931/2019 was fully submitted on August 26, 2019. Motion 02, Putney's motion to dismiss, was fully submitted on August 21, 2019.

determine the truth of the allegations. (See *Campaign for Fiscal Equity v State of New York*, 86 NY2d 307, 318 [1995].) The court is required to “afford the pleadings a liberal construction.” (*Major League Soccer, L.L.C. v Fed. Ins. Co.*, 45 Misc 3d 1211(A), 2014 NY Slip Op 51538[U], *2 [Sup Ct, NY County 2014].) “The court’s role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action.” (*Id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977].) In addition, plaintiff fails to explain how discovery would salvage his claims. Finally, the timing of this motion undermines plaintiff’s request.

Alternatively, defendants argue privilege. Specifically, defendants rely on *Spectrum Sys. Intl. Corp. v Chem. Bank*, 78 NY2d 371, 379 (1991), to assert privilege based on PB’s internal investigation. In *Spectrum*, a law firm was hired by Chemical Bank “to perform an investigation and render legal advice to Chemical regarding possible fraud by its employees and outside vendors, and to counsel Chemical with respect to litigation options.” (*Id.* at 375.) The Court of Appeals found that the firm’s final report was privileged, concluding that factual investigations conducted by law firms are privileged if the facts form the basis of legal advice:

“That nonprivileged information is included in an otherwise privileged lawyer’s communication to its client – while influencing whether the document would be protected in whole or only in part – does not destroy the immunity. In transmitting legal advice and furnishing legal services it will often be necessary for a lawyer to refer to nonprivileged matter Here we conclude that facts were selected and presented in the [firm’s] report as the foundation for the law firm’s legal advice, and that the communication was primarily and predominantly of a legal character.” (*Id.* at 378-79.)

To the extent it can be discerned, plaintiff seems to argue that any privilege attached to the Report was waived by the PB’s disclosure that the report contains a “credible” finding and by the Firm’s inclusion of certain limited aspects of the report in the Edwards Affidavit, that was never publicly filed in an action that was commenced but almost immediately

discontinued and abandoned. That is the subject of a motion before Justice Saunders in the 154910/19 Action. Accordingly, the court denies the motion as premature, and without prejudice, pending a decision in the 154910/19 Action.

In an order dated February 27, 2020, regarding motion 09 by Jane Doe, after an in camera review of the Report, the court held that privilege issues are reserved for the arbitrator. The motion is denied without prejudice to renewal after the motions to dismiss are resolved as to the non-arbitration defendants.

Accordingly, it is

ORDERED that plaintiff's motion is denied without prejudice to renewal after decision on the motions to dismiss upon submission of an attorney affirmation submitted to SFC-Part48@nycourts.gov. on notice to all parties including the attorney for Jane Doe, if any. Otherwise, plaintiff shall request service instructions from the court.

5/11/2020
DATE



CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
		<input type="checkbox"/>	FIDUCIARY APPOINTMENT
		<input type="checkbox"/>	OTHER
		<input type="checkbox"/>	REFERENCE

APPLICATION:
CHECK IF APPROPRIATE: