

People v Toscano

2011 NY Slip Op 33021(U)

November 15, 2011

Sup Ct, NY County

Docket Number: 402286/10

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. JUDITH J. GISCHE

PRESENT: _____
Justice

PART 10

Index Number : 402286/2010
PEOPLE OF THE STATE
vs.
TOSCANO, THOMAS N.
SEQUENCE NUMBER : 001
ORDER OF PROTECTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

otion to/for _____
_____ | No(s). _____
_____ | No(s). _____
_____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

FILED

NOV 17 2011

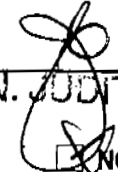
NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

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

*And status conference
Scheduled for 2/16/2012 at 9:30
Part 10
NOV 15 2011*

Dated: Nov 15, 2011


_____, J.S.C.
HON. JUDITH J. GISCHE

- 1. CHECK ONE: CASE DISPOSED
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10**

-----X
People of the State of New York, by
Eric Schneiderman, Attorney General of the
State of New York,

Plaintiff (s),

-against-

Thomas N. Toscano and Thomas N. Toscano
and Associates, LLC,

Defendant (s).
-----X

DECISION/ ORDER
Index No.: 402286/10
Seq. No.:001

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of
this (these) motion(s):

Papers	FILED	Numbered
Notice of Motion.....		1
REI affirm., exhibits.....		2
SF affd in opp., exhibits.....	NOV 17 2011	3
REI affirm. In further support, exhibit.....		4

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COUNTY CLERK'S OFFICE

Upon the foregoing papers the decision and order of the court is as follows:

The defendants move for a protective order pursuant to CPLR § 3013. Plaintiff,
the Attorney General of the State of New York ("AG") opposes the motion.

Defendant Thomas N. Toscano ("Toscano") is an attorney and managing partner
of co-defendant, Thomas N. Toscano and Associates, LLC ("law firm")(defendants are
collectively referred to as "TNT"). TNT provides immigration law services to its clients.
The AG has brought this action pursuant to Exec. Law § 63(12), GBL §§349, 350, 460
et seq.; AC 20-770; HRL § 296 and AC, title 8. The gravamen of the complaint is that
TNT engaged in "deceptive, fraudulent and illegal business practices and defraud[ed]

immigrants in connection with the operation of an illegal immigration services business in New York State." (Complaint ¶ 1.).

The complaint factually alleges that Ruth A. Shalom and Isaac Shalom (collectively the "Shaloms"), non-lawyers, had been improperly providing legal advice and representing individuals in immigration proceedings. On August 20, 2009, the Shaloms, while being represented by Toscana, entered into an Assurance of Discontinuance with the AG, requiring them to cease and desist operating an immigration services business. The AG now claims that Toscano created the Law firm as a front for the Shaloms to continue to operate their illegal immigration business, in violation of federal and State laws and also in violation of the Assurance of Discontinuance. The AG is seeking injunctive relief, restitution, damages, penalties and costs. TNT has put in an answer, denying the material allegations of the complaint and asserting nineteen affirmative defenses.

The instant motion involves a March 18, 2011 discovery demand ("demand") served upon TNT for production of the following information:

- a. The last known mailing address and telephone number for all individuals receiving immigration services from TNT
- b. all retainers, contracts or other written agreements signed by individuals receiving Immigrations Services from TNT
- c. all checks, invoices or receipts related to the payment of money to TNT for immigration services
- d. all documents submitted by TNT to any local, state, and/or federal government agency on behalf of individuals receiving immigration services from TNT and

e. all communications between defendants and any individuals receiving immigration services from defendants, including but not limited to, forms, correspondence, phone calls, e-mails and facsimiles.

In seeking a protective order, TNT argues that it should not be made to produce documents that are protected by the attorney-client privilege. It argues that the demand for all communications impedes upon this privilege.

TNT argues that the request for checks, contracts, retainer agreements and invoices impinges on the attorney client privilege and is irrelevant.

TNT also argues that the request for current addressees and phone numbers of clients is irrelevant and burdensome, because it will have a chilling effect on TNT's business.

TNT argues further that the documents filed on behalf of government agencies are a matter of public record. It argues that the AG should obtain such documents through the freedom of information laws.

Discussion

CPLR § 3101(a) provides for the "full disclosure of all matter material and necessary in the prosecution or defense of an action." Under this standard, disclosure is required "of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (Allen v. Crowell-Begin Collier Publ. Co., 21 N.Y.2d 403, 406 [1968]). The burden of showing that the disclosure sought is improper is upon the party seeking the protective order. (Roman Catholic Church of the Good Shepherd v. Tempco Systems, 202 A.D.2d 257, 258 [1st Dept 1994]; Volpicelli v. Westchester, 102 AD2d 853 [2nd Dept

1984)).

Here it cannot be credibly argued that the documents and information requested are not within the appropriate scope of disclosure. The underlying claims concern the methods and manner TNT employed to service clients coming to it for immigration services. The information requested is tailored to those particular clients and to the documents relevant to their representation. Therefore, All of the relevancy objections are rejected.

To the extent that TNT claims the publicly filed documents are available through FOIL requests, and therefore, not discoverable, that argument is rejected. Reported cases about whether the public availability of documents relieves a party of producing them go both ways. Thus, some cases hold that the public availability of a document may relieve a party of discovery (Cabellero v. City of New York, 48 AD3d 727 [2nd dept. 2008]; Matter of Beryl, 118 AD2d 705 [2nd dept. 1986]). Other cases hold to the contrary (Alfaro v. Schwartz, 233 AD2d 281 [2nd dept. 1996]; Long v. State, 33 AD2d 621 [3rd Dept. 1969]; Rooney v. Hunter, 26 AD2d 891 [4th Dept. 1966]; Weisel v. Provident Life and Cas Ins. Co., 2008 WL 4860163 [NY Sup. Ct. NY Co. 2008]). Public availability is one factor that should be considered in the context of an overall request.

Although the records are available through FOIL requests, because they involve many different clients, the FOIL requests would be much more burdensome than having TNT produce them. TNT's access to such information is much easier and more economically advantageous than individual FOIL requests, because the information is contained within TNT's business files.

TNT's arguments that the production of the names and addresses of its clients

will have a chilling effect on its business is not a sufficient basis to deny the requested discovery. This information should be provided.

That leaves only the claim of attorney client privilege to consider. The attorney client privilege is one of the oldest of common law privileges that is now embodied as a statute in CPLR §4503. (Spectrum Sys. Intl. Corp. v. Chemical Bank, 78 NY2d 371 [1991]). It requires that there be an attorney-client relationship. Not all communications between an attorney and a client, however, are privileged. The information must be of a confidential nature, made for the purpose of obtaining legal advice or services. (People v. Mitchell, 58 NY2d 368 [1983]; Matter of Priest v. Hennessy, 51 NY2d 62 [1980]). Communications relating solely to non-legal matters are not privileged. (People v. Belge, 59 AD3d 307 [4th dept. 1977]). The privilege may be waived by the client, either expressly or through conduct. Voluntary disclosure to a third party generally constitutes a waiver, as does communications made in the presence of a third party. (Doe v. Poe, 92 NY2d 864 [1998]; Huang v. NYCTA, 49 AD3d 308 [1st dept. 2010]). Since defendants claim the materials demanded by plaintiff are protected, they have the burden of establishing the immunity of that information from discovery (Volpicelli v. Westchester, 102 AD2d 853 [2nd Dept 1984]).

In general, the providing the address of a party is not either privileged or confidential. While there may be particular circumstances why the last known address of a particular client may be subject to confidentiality, no such circumstances have been presented here (See: CPLR §3118; 2103-a; Matter of Jacqueline F., 47 NY2d 215 [1979]). TNT's blunderbuss claim of privilege to withhold the address of its current and former clients is rejected.

Information about fees paid by or on behalf of the client generally does not fall within the scope of the attorney-client privilege. (Priest v. Hennessy, supra). Checks, which are necessarily disclosed to third parties, are discoverable. Receipts and invoices are not privileged if they are devoid of any information regarding legal advice or services provided by counsel. (Eric Trading Corp. v. Somerset Marine, Inc., 212 AD2d 451 [1st dept. 1995]). Information that is otherwise confidential contained in such documents, may be redacted.

Most problematic in this motion is the AG's request for all communications between TNT and its clients. In a prior request TNT identified approximately 600 clients. Some, but not necessarily all, communications between TNT and its clients may be privileged. TNT has not, however provided the court with a privilege log to ascertain what communication is subject to a privilege and what is not. In connection with a prior discovery demand, TNT submitted what the court believes is a wholly inadequate privilege log, because it did not properly identify any of the documents withheld nor provide the information required under CPLR §3122(b). In addition, since the AG is proceeding on behalf of some of these clients, there is a possibility that once the AG is able to contact these clients, they may waive their privilege. Taking all of these factors into account, the court resolves the motion as follows:

The information required in item a of the demand shall be provided by TNT to the AG within 30 days hereof.

The information required in items b, c, and d shall be provided by TNT to the AG within 60 days hereof. The documents may be redacted only to the extent that they contain information about legal advice and services that otherwise are protected by the

attorney-client privilege; all other information on such documents shall remain un-redacted. Any further disputes about the propriety of the redaction may be resolved by *in camera* review.

The information required in item e of the demand shall be provided within 90 days hereof. TNT may withhold production of any particular document only if it produces a privilege log identifying the withheld document and otherwise complies with the requirement of CPLR 3122(b).

Given the expectation that thousands of documents will be produced, the cost of reproduction shall be borne by the AG.

The motion is granted in part and denied in part as set forth herein. The court sets this matter for a **status conference on February 16, 2012 at 9:30**. No further notices will be sent. Any requested relief not expressly addressed herein is denied. This constitutes the decision and order of the court.

Dated: New York, NY
November 15, 2011

SO ORDERED:



J.G. J.S.C.

FILED

NOV 17 2011

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