[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: PART 16

SHIRLEY MILLER, by YEHUDA MILLER and MALKA MILLER, Guardians of the Person and Property of SHIRLEY MILLER Pursuant to the Laws of the State of Israel,

Plaintiffs,

- against -

HENRY F. LEWIS, DUANE READE SHAREHOLDERS, LLC, DUANE READE INC., & DUANE READE GENERAL PARTNERSHIP,

Defendants,

Decision and order

Index No. 11358/09

September 12, 2013

PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved seeking to strike the defendant's answer or for some other relief based upon an alleged ethical violation committed by a representative of the insurance company insuring the defendants in this lawsuit. The defendants have opposed the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

On December 19, 2008 the plaintiff Shirley Miller was hit by a truck driven by defendant Henry Lewis at the intersection of Ninth Avenue and West 48th Street in New York County. On April 30, 2013 the court convened a conference in efforts to settle this lawsuit. Thus, the plaintiff herself as well as her parents and plaintiff's counsel Evan Torgan Esq. were present. Likewise, Eric Berger Esq. of Cozen O'Connor on behalf of the defendants attended along with Richard Mastronardo a senior claims officer for ACE

[* 2]

America Insurance Company, Miriam Mosseri a claims director for ACE insurance, Kathryn Criswell a structured settlement expert and Jeff Roberts an assistant vice president of Liberty Underwriters an excess carrier in the case. The settlement negotiations proceeded with the judge conferring with each side, privately upon consent, to discuss the strengths and weaknesses of the case. There is no dispute that at some point when plaintiff's counsel was speaking with the judge in the judge's chambers that Miriam Mosseri approached Yehuda and Malka Miller, the parents of Shirley Miller, and had a conversation with them in their native language of Hebrew. The contents of the conversation and its length are disputed, however, the defendants conceded that a conversation took place and that it was initiated by Ms. Mosseri. This motion has now been filed. The plaintiff argues that the communication violated Rule 4.2 of the Rules of Professional Conduct since a communication was undertaken between Ms. Mosseri and people represented by counsel. Consequently, the plaintiff argues the defendants should be sanctioned. The defendants counter that no such improper or unethical communication occurred.

Conclusions of Law

The rule prohibiting an attorney from communicating with a person or party known to be represented by counsel has been part of the legal fabric of our jurisprudence since at least 1836. In that

year, David Hoffman of the Baltimore Bar published a book entitled *A Course of Legal Study Addressed to Students and the Profession Generally* wherein he included various 'resolutions' he believed should be adopted by all practicing attorneys. Resolution XLIII states "I will never enter into any conversation with my opponent's client, relative to his claim or defense, except with the consent and in the presence of his counsel" (id., 2d Ed., page 771). The first formal inclusion of these ideals took place in 1908 when the American Bar Association adopted a Canon of Professional Ethics and included Canon 9 which stated "a lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel" (id). More recently, the New York State Bar Association has adopted Rule 4.2 of New York's Rules of Professional Conduct which is identical to DR 7-104, save certain non-material changes not relevant here. The rule, commonly known as the 'no-contact rule' provides that a "lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in that matter" (id).

The defendants present essentially two reasons why they argue no violation occurred. First, they maintain that Ms. Mosseri was not acting as an attorney at the time the communication was made and that therefore Rule 4.2 does not apply to her. Second, they maintain that the communication did "not address any matters of

substance, and caused no harm or prejudice" to the plaintiff (see, Affirmation in Opposition, ¶4) and was thus not a communication concerning the "subject of the representation" prohibited by the rule. Each of these arguments will be considered in turn.

The Restatement (Third) of the Law Governing Lawyers (§99(1)) reformulates Rule 4.2 and except for exceptions not applicable here is virtually identical. Comment f states that "under the anti-contact rule of this Section, a lawyer ordinarily is not authorized to communicate with a represented nonclient even by letter with a copy to the opposite lawyer or even if the opposite lawyer wrongfully fails to convey important information to that lawyer's client (see §20), such as a settlement offer. The rule prohibits all forms of communication, such as sending a represented nonclient a copy of a letter to the nonclient's lawyer or causing communication through someone acting as the agent of the lawyer (see §5(2) & Comment f thereto) (prohibition against violation of duties through agents). The anti-contact rule applies to any communication relating to the lawyer's representation in the matter, whoever initiates the contact and regardless of the content of the ensuing communication" (id). A nonclient is defined in the following section (§100(1)) as "any natural person represented by a lawyer" (id). Furthermore, comment d states that "this Section does not prohibit communications with a represented nonclient in the course of social, business, or other relationships or

communications that do not relate to the matter involved in the representation. What matter or matters are involved in a representation depends on the circumstances. For example, a lawyer might know that a witness at a deposition was represented by a lawyer for an opposing party only for purposes of attending the deposition. The lawyer may contact that nonclient following the deposition when representation has ended" (id).

Thus, for purposes of resolving this motion and only crediting the affidavits provided by Mr. Mastronardo and Ms. Mosseri no other conclusion can be reached but that Rule 4.2 was violated.

Ms. Mosseri states in her affidavit that at some point during the settlement negotiations taking place that day she found herself alone in the courtroom with Shirley Miller's parents. She then states that she introduced herself and said 'hello' in Hebrew. Whereupon the parents asked her if she was an interpreter. She responded that she was not and that she was an employee of ACE. This is consistent with the affidavit of Mr. Mastronardo which states that he informed Ms. Mosseri that "if the opportunity arose for her to speak to the Millers, she should say hello and introduce herself in Hebrew" (see, Affidavit of Richard Mastronardo, § 7). While greetings and pleasantries are always welcome and cannot alone form the basis of any violation, in this case they are curious indeed. Mr. Mastronardo states that Ms. Mosseri attended the settlement conference since her fluency in Hebrew, the native

language of the Millers, might make them feel more comfortable and thus "help humanize the defendants" (Affidavit of Richard Mastronardo, § 6). Ms. Mosseri states that she "was asked to participate in discussions with the plaintiff's parents if and when it was necessary" (Affidavit of Miriam Mosseri, § 4). Thus, Ms. Mosseri's encounter with the Millers, initiated by her, was not merely done to act in a courteous and friendly manner, but was done with a specific and definitive goal and purpose. The ensuing conversation only confirms this conclusion. Ms. Mosseri states that following the introduction the Millers asked her numerous questions about her background and "not wanting to be rude" she answered them all. Inevitably, the conversation turned to the case at hand and the settlement negotiations taking place as they spoke. According to Mosseri she told the Millers that ACE was present to resolve the case and that Mr. Mastronardo had traveled from Atlanta with "the best intentions to settle the case" and that ACE had already made settlement offers. She concluded by informing the Millers that it was good their counsel had communicated past settlement offers and she was "glad that they had a good attorney and that he was taking care of them" (id. at § 8). For purposes of completing the record, it must be noted that the Millers dispute the extent of the conversation as portrayed by Ms. Mosseri. According to the Millers, Ms. Mosseri specifically mentioned the amount that had been offered to settle the case, that a payout

schedule was recommended so that Shirley would be taken care of for the rest of her life and that plaintiff's counsel had rejected the previous settlement offers because he was chiefly interested in the publicity of the case. According to the Millers she further stated that if the settlement would not be reached the case would be litigated and appealed for years depriving Shirley of any award. As noted, it is not necessary to resolve the factual discrepancies since based upon Mosseri's own record, a violation of Rule 4.2 occurred.

The contents of the conversation between Mosseri and the Millers was surely a communication about the "subject of the representation" and should have been avoided. In fact, the defendants do not really argue in their opposition papers that the communication was anything else. Rather, they argue that Mr. Mosseri was not acting as an attorney and that as a non-attorney Rule 4.2 is inapplicable. The court will now address this argument.

First, it must be emphasized that there is no evidence presented and no conclusion reached by this court that defense counsel is somehow responsible as someone with "supervisory authority over the nonlawyer and knows of such conduct at a time when it could be prevented or its consequences avoided or mitigated but fails to take reasonable remedial action" (see, Rule 5.3(b)(2)(i) Lawyer's Responsibility for Conduct of Nonlawyers).

Thus, any finding of impropriety on the part of ACE employees will be based upon their own independent conduct as part of a broader extension of the no contact rule.

Indeed, other ancillary individuals related to a pending matter, beyond attorneys, are prohibited from contacting anyone known to be represented by counsel. For example, 15 USC §1692(c)(a)(2) bars debt collectors from speaking directly with consumers known to be represented by counsel and are required to only contact counsel (see, Rosario v. American Collective Counseling Services Inc., Middle District Florida, [2001] 2001 WL 1045585). In addition, the New York City Bar Association (The Association of the Bar of the City of New York Commission on Professional Judicial Ethics, Formal Opinion 04-05 [2005]) applied the ex parte prohibition even to communications initiated by a "sophisticated non-lawyer insurance adjuster" (id). Earlier ethics opinions likewise prohibited such contacts. In fact, American Bar Association Informal Opinion 1149 [1970] mentions that insurance companies or their representatives "will not deal directly with any claimant represented by an attorney without the consent of the attorney" (id).

The inescapable conclusion, then, is that ACE employees violated the above mentioned rules when they continued to speak with the Millers about the facts of the case. There is no standard enunciated that evaluates the level of harm caused by the

communication because by its very nature the communication is harmful (see, Miano v. AC & R Advertising Inc., 834 F.Supp 632 and 148 FRD 68 [SDNY 1993]). Likewise, a hearing is not necessary since as noted, these conclusions are reached even crediting the version of events presented by the ACE employees.

Furthermore, Ms. Mosseri stated in her affidavit that she was not at all familiar with this case and was specifically invited to attend the conference because of her fluency in Hebrew (Affidavit of Mirian Mosseri, ¶¶ 3,4). Therefore, the conclusions reached in this decision are not directed at Ms. Mosseri at all but rather at ACE America Insurance Company.

Considering the nature of the violation and all the surrounding facts and circumstances the court hereby orders Ace to pay $10,000 as follows: $3,000 to plaintiff's counsel to defray some of the costs of filing and arguing this motion and the remaining $7,000 to the Lawyer's Fund for Client Protection located in Albany, New York. The others reliefs sought are denied.

So ordered.

ENTER:

DATED: September 12, 2013
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC

FILED
KINGS COUNTY CLERK
2013 SEP 19 AM 8:12