Carr v Hoshyla
2014 NY Slip Op 30557(U)
February 26, 2014
Supreme Court, Suffolk County
Docket Number: 23718/2010
Judge: Joseph Farneti

[* 1]

SHORT FORM ORDER INDEX NO. 23718/2010

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

ERIC CARR and MARYANN GITTERS, Individually and as Trustees of the ANNA C. CARR FAMILY TRUST,

Plaintiffs,

-against-

PETER PAUL HOSHYLA,

Defendants.

ORIG. RETURN DATE: JULY 11, 2013
FINAL SUBMISSION DATE: AUGUST 1, 2013
MTN. SEQ. #: 002
MOTION: MD

PLTF'S/PET'S ATTORNEY:
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516-433-4220

DEFT'S/RESP ATTORNEY:
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Upon the following papers numbered 1 to 7 read on this motion TO QUASH SUBPOENAS.
Notice of Motion and supporting papers 1-3; Affirmation in Opposition and supporting papers 4, 5; Replying Affidavits and supporting papers 6, 7; it is,

ORDERED that this motion by plaintiffs, ERIC CARR and MARYANN GITTERS, Individually and as Trustees of the ANNA C. CARR FAMILY TRUST ("plaintiffs"), for an Order:

(1) pursuant to CPLR 2304, 3101 (a), 3101 (a) (4), and 4503, quashing a certain Judicial Subpoena Duces Tecum, dated June 24, 2013, served by defendant's counsel on non-party witnesses, Davidow & Davidow, a law firm that previously rendered services on behalf of plaintiffs and/or plaintiffs' now deceased mother, Anna C. Carr, upon the grounds that it is defective, overbroad, seeks irrelevant and/or immaterial information and/or documents, and/or information and materials which are protected by the attorney/client privilege, and is intended to annoy and harass; and

(2) pursuant to CPLR 2304, 3101 (a), 3101 (a) (4), and 4503, quashing a certain Judicial Subpoena, dated June 24, 2013, served by defendant's counsel on non-party witness, Martin Glass, Esq., a lawyer that previously rendered services on behalf of plaintiffs and/or plaintiffs' now deceased mother, Anna C. Carr, upon the grounds that it is defective, overbroad, seeks irrelevant and/or immaterial testimony, and/or testimony which is protected by the attorney/client privilege, and is intended to annoy and/or harass,

is hereby **DENIED** in its entirety for the reasons set forth hereinafter. The Court has received opposition hereto from defendant PETER PAUL HOSHYLA.

This action seeks partition of certain real property consisting of seven tax lots which formerly comprised the Hoshyla Family Farm on South Street in Manorville, New York, and rescission of a certain contract of sale dated February, 2007, between defendant and his now deceased sister, Anna Hoshyla Carr, relating to two of the tax lots.

Plaintiffs have now filed the instant application to quash two subpoenas, both dated June 24, 2013, served by defendant upon plaintiffs' and/or Anna C. Carr's previous attorneys, to wit: the law firm of Davidow & Davidow, and Martin Glass, Esq. With respect to the subpoena served upon Davidow & Davidow, plaintiffs argue that the subpoena calls for documents that do not pertain to issues in this action, and that such production would violate the attorney/client privilege. Regarding the subpoena served upon Martin Glass, Esq., plaintiffs similarly argue that it calls for Mr. Glass' testimony concerning matters that are protected by the attorney/client privilege, which has not been waived by plaintiffs.

In opposition, defendant alleges that in light of the fact that one of the parties to the contract, Anna Carr, is now deceased, she cannot be deposed. Therefore, defendant argues that the testimony of Martin Glass, Esq. is relevant as he was the decedent's attorney and presumably has knowledge that cannot be obtained elsewhere. Further, defendant claims that Mr. Glass' testimony may contradict plaintiffs' allegations made in opposition to defendant's counterclaim. In addition, defendant argues that the documents sought from Davidow & Davidow are necessary to effectively depose Mr. Glass, and that the testimony and documents sought are "critical" for trial preparation purposes.

CPLR 3101 (a) (4) provides that there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action by a non-party "upon notice stating the circumstances or reasons such disclosure is sought or required" (CPLR 3101 [a] [4]). What is material and necessary is in the "sound discretion" of the trial court and includes "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" (*Andon ex rel. Andon v 302-304 Mott Street Assocs.*, 94 NY2d 740 [2000], quoting *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403 [1968]). The Second Department has previously equated the catch-all provision of CPLR 3101 (a) (4) with the more stringent requirements of CPLR 3101 (d) (1) (iii), by requiring that the moving party show adequate special circumstances to warrant disclosure (*see Attinello v DeFilippis,* 22 AD3d 514 [2005]; *Lanzello v Lakritz*, 287 AD2d 601 [2001]; *Dioguardi v St. John's Riverside Hosp.*, 144 AD2d 333 [1988]). Special circumstances are shown by establishing that the information sought is not only relevant, but also cannot be obtained through other sources (*see Tannenbaum v Tenenbaum*, 8 AD3d 360 [2004]; *Murphy v Macarthur Holding B.*, 269 AD2d 507 [2000]). Whether "special circumstances" have been shown to exist in a particular case is a question committed to the sound discretion of the court to which the application for discovery is made (*see Brady v Ottaway Newspapers*, 63 NY2d 1031 [1984]; *Dioguardi v St. John's Riverside Hosp.*, 144 AD2d 333 [1988]).

Notwithstanding the foregoing, the Second Department has held that although many of its decisions continued to apply the "special circumstances" standard to obtain discovery from a non-party despite the 1984 amendment to CPLR 3101 (a) (4) eliminating such language, "[w]e hereby disapprove the further application of the 'special circumstances' standard in this context. We, nevertheless, look behind that language in our cases and find underlying considerations which are appropriate and relevant to the trial court's exercise of its discretion in determining whether a request for discovery from a nonparty should go forward or be quashed" (*Kooper v Kooper*, 74 AD3d 6, 8 [2010]). The Second Department further held that "[w]e decline, here, to set forth a comprehensive list of circumstances or reasons which would be deemed sufficient to warrant discovery from a nonparty in every case. Circumstances necessarily vary from case to case" (*id.* at 17). However, the Second Department emphasized that "[i]nclusion of the language 'circumstances or reasons such disclosure is sought or required' from a nonparty indicates that something more than mere relevance is required if the discovery request is challenged" (*id.* at 18).

Nonetheless, an application to quash a subpoena should be granted only "where the futility of the process to uncover anything legitimate is inevitable or obvious" . . . "or where the information sought is utterly irrelevant to any proper inquiry" (*Anheuser-Busch, Inc. v Abrams*, 71 NY2d 327 [1988] [citations omitted]; *see Tech. Multi Sources v Stack Global Holdings, Inc.*, 44 AD3d 931 [2007]; *Myrie v Shelley*, 237 AD2d 337 [1997]; *Ayubo v Eastman Kodak, Co.*, 158 AD2d 641 [1990]).

Furthermore, a subpoena served on a non-party is facially defective and unenforceable if it neither contains, nor is accompanied by a notice stating the circumstances or reasons such disclosure is sought or required (*see Needleman v Tornheim*, 88 AD3d 773 [2011]; *Kooper v Kooper,* 74 AD3d 6, *supra*; *Matter of American Express Prop. Cas. Co. v Vinci*, 63 AD3d 1055 [2009]; *Wolf v Wolf*, 300 AD2d 473 [2002]; *Knitwork Prods. Corp. v Helfat*, 234 AD2d 345 [1996]). Here, the Court finds that defendant's subpoenas contain the circumstances and reasons such disclosure is sought or required, and are therefore proper on their face.

Plaintiffs primary objection to the subpoenas is that they seek testimony and information that are protected by the attorney/client privilege. Attorneys owe fiduciary duties of both confidentiality and loyalty to their clients (*Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d 123 [1996]; *Solow v Grace & Co.*, 83 NY2d 303 [1994]). The Rules of Professional Conduct thus impose a continuing obligation on attorneys to protect their clients' confidences and secrets. Even after representation has concluded, a lawyer may not reveal information confided by a former client, or use such information to the disadvantage of the former client or to the advantage of a third party (*Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d 123, *supra*; Rules of Professional Conduct [22 NYCRR 1200.0] rules 1.6; 1.9).

New York's attorney-client privilege provides that unless a client waives the privilege, an attorney shall not disclose, or be allowed to disclose, a confidential communication made from client to attorney or attorney to client, provided they are made for the purpose of facilitating the rendition of legal advice or services (CPLR 4503 [a]; *Rossi v Blue Cross and Blue Shield of Greater New York*, 73 NY2d 588 [1989]). However, the privilege does not immunize the underlying factual information that the client may have communicated to the attorney (*Spectrum Systems Int'l Corp. v Chemical Bank*, 78 NY2d 371 [1991]; *Miranda v Miranda*, 184 AD2d 286 [1992]). An attorney's work product is not

obtainable during the discovery process (CPLR 3101 [c]), but this exemption is limited to those materials which are uniquely the product of a lawyer's learning and professional skills, such as materials which reflect his or her legal research, analysis, conclusions, legal theory or strategy (*Brooklyn Union Gas Co. v American Home Assur. Co.*, 23 AD3d 190 [2005]; *Durio v MacKechnie*, 202 AD2d 667 [1994]; *Hoffman v Ro-San Manor*, 73 AD2d 207 [1980]).

Here, the Court finds that the information and testimony sought by defendant in his subpoenas are material and relevant to the claims and defenses asserted by the parties herein, and that the circumstances presented in this matter warrant discovery from the non-parties. Moreover, the subpoenas expressly state that "no documents and materials which are privileged are requested to be produced," and that defendant only seeks "nonprivileged documents and communications with the decedent in connection with a real estate contract . . . and nonprivileged communications of intent to perform it and nonprivileged reasons for the fact that it was not performed during the decedent's lifetime." Of course, if the information sought is privileged, then it is not subject to disclosure, no matter how strong the showing of need or relevancy (*see* CPLR 3101 [b]; *see also Cirale v 80 Pine Street Corp.*, 35 NY2d 113 [1974]; *Vozzo v Cheruku*, 23 Misc 3d 1133[A] [Sup Ct, Kings County]).

Accordingly, plaintiffs' motion to quash the subpoenas served by defendant, both dated June 24, 2013, is **DENIED**.

The foregoing constitutes the decision and Order of the Court.

Dated: February 26, 2014

HON. JOSEPH FARNETI
Acting Justice Supreme Court

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**