

Pacelli v Peter L. Cedeno & Assoc., P.C.

2018 NY Slip Op 32133(U)

August 22, 2018

Supreme Court, New York County

Docket Number: 158224/2016

Judge: Margaret A. Chan

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

PRESENT: HON. MARGARET A. CHAN PART IAS MOTION 33EFM

Justice

-----X

INDEX NO. 158224/2016

ATESA PACELLI, ANTHONY PACELLI,

MOTION DATE

Plaintiffs,

001; 002; 003;

- v -

MOTION SEQ. NO. 004

PETER L. CEDENO & ASSOCIATES, P.C., PETER CEDENO,

Defendants.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 56, 57, 58, 59, 60, 61, 62, 63

were read on this motion to/for DISMISSAL/STRIKE COMPLAINT

The following e-filed documents, listed by NYSCEF document number (Motion 002) 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 64, 65, 66, 67, 68, 69, 70, 71, 72

were read on this motion to/for PROTECTION ORDER/DISCOVERY

The following e-filed documents, listed by NYSCEF document number (Motion 003) 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89

were read on this motion to/for DISCOVERY

The following e-filed documents, listed by NYSCEF document number (Motion 004) 91, 92, 93, 94, 95, 96, 97, 98, 99, 100

were read on this motion to/for PROTECTION ORDER/STRIKE NOTICE TO ADMIT

Plaintiffs Atesa and Anthony Pacelli are wife and husband who were going through a highly contentious divorce. Defendants Peter Cedeno (Cedeno) and his firm, Peter L. Cedeno & Associates (PCA), represented Atesa Pacelli (Atesa). Atesa and Anthony Pacelli now bring an action against Atesa's divorce attorney claiming that Cedeno instigated and pursued an improper personal relationship with Atesa during the divorce proceedings. Atesa claims that during a period of attempted reconciliation with her husband, Cedeno raped her. Consequently, the reconciliation failed. Atesa now bring an action for civil sexual assault, breach of contract and fiduciary duty, and legal malpractice, among other claims. Anthony brings an action for loss of consortium. Defendants strenuously dispute the claims and counterclaim for defamation. The parties are at loggerheads on a variety of discovery issues, as reflected in motion sequences (MS) 1 through 4.

Defendants' Motion to Strike (MS 1); Plaintiffs' Motion for a Protective Order (MS 2)

The issues in MS 1 and 2 are interrelated and will be addressed together. In MS 1, defendants move to strike the complaint because plaintiffs failed to provide outstanding discovery. In the alternative, defendants seek to preclude plaintiffs from presenting any evidence at trial that relates to the outstanding discovery. Short of that, defendants request that the court compel plaintiffs to provide complete responses to the defendants' May 2, 2017 Interrogatory and Demand for Documents. For their part, plaintiffs, in MS 2, seek a protective order establishing a procedure for identifying confidential documents and preventing those documents from becoming public during discovery.

Defendants claim that plaintiffs failed to answer numerous interrogatory questions. Plaintiffs do not dispute the claim explaining that they are withholding answers to those questions until a confidentiality agreement is established between the parties. The omitted answers concern plaintiffs' sensitive medical information, and defendants refused to sign the confidentiality agreement. Plaintiffs seek a court order for a confidentiality agreement and indicate that they will answer the outstanding discovery requests as soon as it is ordered.

A protective order is warranted in this case.

The court may at any time... on motion of any party or of any person from whom or about whom discovery is sought, make a protective order... regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.

(CPLR § 3103[a]).

Plaintiffs' requested procedure for ensuring confidentiality will not stifle defendants' discovery; instead it will provide a process for allowing both parties to designate documents as confidential and prevent pretrial disclosure of the records to those outside this litigation. This will not prejudice defendants as they will have access to all documents necessary to defend themselves.

In turn, defendants' motion is granted conditionally to the extent that plaintiffs are required to comply with all outstanding discovery demands pursuant to CPLR §3124 or face the appropriate consequence pursuant to CPLR §3126. Striking the pleadings, as defendants want, is not justified at this juncture. Plaintiffs have not refused to comply but were waiting to have the confidentiality agreement dispute resolved before they continue discovery (*see Christian v City of New York*, 269 AD2d 135, 137 [1st Dept 2000] [*citing* Siegel, Practice Commentary, McKinney's Cons. Laws of New York, Book 7B, CPLR 3126, C3126:8, at 758]). The confidentiality agreement

protects the parties' sensitive documents, and as such, it will help to facilitate the flow of information between them.

Plaintiffs' Motion to Compel (MS 2)

The remainder of plaintiffs' MS 2 seeks an order compelling defendants to respond to: Interrogatory #1 for a detailed account of Cedeno's sexual history for the past ten years and identify those who were clients; Document Request #10 related to complaints or allegations of sexual misconduct; and Document Request #11 for financial documents relevant to defendants' counterclaim for defamation. Plaintiffs' requests as to Interrogatory #1, and Document Requests #10 and #11 are denied.

Plaintiffs' Interrogatory #1 for defendant Cedeno to detail his sexual history is denied. "Plaintiff is entitled to reasonable discovery, consistent with the underlying scope of disclosure to ascertain facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity" (*Petty v Riverbay Corp.*, 92 AD2d 525, 526 [1st Dept 1983]). Plaintiffs' request does not sharpen the issues for trial. Defendants do not dispute that a sexual relationship occurred. The dispute is over whether the sexual relationship was consensual and whether the relationship occurred during defendants' representation of Atesa. Plaintiffs' questions do not shed light on this issue or show possible motive, intent, modus operandi, or common scheme by the defendants. The type of evidence sought is propensity evidence which is unusable at trial (*accord, People v Bailey*, 2018 WL2974417 at 6 [Ct of App, June 14, 2018] [evidence of uncharged crimes is inadmissible to show criminal propensity]).

Plaintiffs' Document Request #10 asks for: "[a]ll documents and communications concerning any complaint or allegation, formal or informal, by any client or other person alleging that Mr. Cedeno engaged in sexual relations with any client, any prospective client, or any relative (by blood or marriage) or friend of any client or prospective client" (NYSCEF Doc. No. 48 p. 7). Plaintiffs' request is overly broad.

Plaintiffs' Document Request #11 for financial records is related to defendants' counterclaim for defamation. However, defendants' allegation is libel per se, which does not require proof of actual or special damages before defendant may recover (*see James v Gannet Co., Inc.*, 40 NY2d 415, 419 [1976]; *Nolan v State*, 158 AD3d 186, 193-195 [1st Dept 2018]). Defendants financial records are therefore not material to the counterclaim as defendants are not asking for actual damages.

While plaintiffs are entitled to reasonable discovery, they are again limited to that which sharpens the issues and does not add to the prolixity of the case (*see Petty*, 92 AD2d at 526). Additionally, defendants' response on this point indicated that it provided plaintiffs with hundreds of responsive documents. If further discovery is

required, the parties may address the outstanding issues at the next compliance conference previously scheduled for October 31, 2018.

Plaintiffs' Motion to Compel (MS 3)

Plaintiffs' motion to compel defendants to produce all documents related to negative online reviews of defendants' practice that defendants have acquired from Google, Inc. and Birdeye, Inc. in an unrelated defamation lawsuit that Cedeno brought against Google, Inc. and Birdeye, Inc. (*see Cedeno v Google, Inc. and Birdeye, Inc.*, Sup Ct, Bx Cty, Oct. 2, 2017, Index No. 29227/17) is granted. Pursuant to CPLR §3101(a), plaintiffs are entitled to the discovery sought to defend against defendants' assertion of damage to his and his law firm's reputation caused by plaintiffs' allegedly defamatory statements (*see Rivera v NYP Holdings Inc.*, 63 AD3d 469 [1st Dept 2009]). Defendants' argument that the documents at issue here are protected by the attorney-work product doctrine is unavailing as all the documents were produced by third parties.

Plaintiff's Motion to Strike Defendants' Notice to Admit (MS 4)

In MS 4, plaintiffs move to strike defendants' May 2, 2018 Notice to Admit wherein it seeks plaintiffs' acknowledgement that they were behind the negative online reviews at issue. Plaintiffs correctly argue that defendants' Notice to Admit is an improper vehicle to obtain this information.

A notice to admit is an improper vehicle for additional discovery where it seeks to learn information that could be obtained by other discovery devices (*see Ahroner v Israel Discount Bank of New York*, 79 AD3d 481, 483 [1st Dept 2010]). Pursuant to CPLR §3123, a notice to admit is not meant to be a discovery shortcut. "[T]he purpose of a notice to admit is to crystalize issues and to eliminate from trial those that are easily provable or not really in dispute" (*Hodes v City of New York*, 165 AD2d 168, 171 [1st Dept 1991]). A notice to admit is appropriate for issues that are not in reasonable dispute between the parties. Plaintiffs dispute defendants' allegation that plaintiffs control certain email addresses that were used to post the negative online comments. Thus, defendants may not use a notice to admit to obtain plaintiffs' acknowledgement regarding the alleged defamatory online comments.

Accordingly, it is hereby ORDERED that the branch of plaintiffs' motion (MS 2) seeking a protective order regarding the dissemination of confidential information throughout the discovery process is granted; it is further

ORDERED that the parties shall be governed by an order labeled "Annex A" and titled "ORDER FOR THE PRODUCTION AND EXCHANGE OF CONFIDENTIAL INFORMATION" dated today, filed separately and in conjunction with the instant decision and order; it is further

ORDERED that the branch of defendants' motion (MS 1) to strike plaintiff's complaint or, in the alternative, preclude plaintiffs from presenting any evidence at trial that relates to the outstanding discovery is granted to the extent that plaintiffs shall provide answers to the unanswered questions in defendants' interrogatory within 30 days after entry of this order and the order labeled "Annex A" or be subjected to sanctions pursuant to CPLR § 3126; it is further

ORDERED that the branches of plaintiffs' motion (MS 2) to compel defendants to answer Interrogatory #1, and Document Requests #10 and #11 are denied; it is further

ORDERED that plaintiffs' motion (MS 3) for the disclosure of online reviewers obtained by defendants is granted, and defendants must provide the documents within 30 days after entry of this order; it is further

ORDERED that plaintiffs' motion (MS 4) to strike defendants' notice to admit is granted, and it is further

ORDERED that the parties are to appear in Part 33 for a compliance conference on October 31, 2018, at 11 AM.

This constitutes the decisions and orders of the court.

8/22/2018

DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE