

Allen v Pasha Fashion Ltd
2019 NY Slip Op 33687(U)
December 17, 2019
Supreme Court, New York County
Docket Number: 154203/2017
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

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INDEX NO. 154203/2017

OMAR ALLEN,

Plaintiff,

MOTION SEQ. NO. 002

- v -

PASHA FASHION LTD, MOHAMED ELSAYAD, 2828
CHURCH AVE. APPAREL CORP. D/B/A BARGAIN LAND,
and IBRAHIM MOHAMMED SAFI,

DECISION + ORDER ON
MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 40, 41, 42, 43, 44,
45, 46, 47, 48, 49, 50, 51, 56

were read on this motion to/for

DISCOVERY

Omar Allen, the plaintiff, commenced this action pursuant to Labor Law Article 6,
section 190 et seq.; Article 19, section 663; and 12 NYCRR 142-2.1, 142-2.2, and 142-2.4
seeking to recover unpaid minimum wages, overtime, and spread of hours compensation for
work performed for defendant Pasha Fashion Ltd., d/b/a Pasha Fashion ("Pasha") and defendant
Mohamed Elsayad ("Elsayad") individually.¹ In addition, plaintiff claims that he is entitled to
damages from Pasha and Elsayad pursuant to Labor Law sections 195 and 198 arising from their
failure to provide him with wage statements and notifications. In this motion, plaintiff seeks an
order, pursuant to CPLR 3124,² compelling Pasha and Elsayad 1) to produce certain discovery
which has been withheld as privileged; 2) to produce underlying documents upon which

¹ This Court notes that, although the latter defendant's name is spelled "Elsayad" in the caption and in the answer
(Doc. 5), it is spelled "Elsayed" in an affidavit he submits in opposition to the motion. Doc. 52.

² Although the notice of motion refers to CPLR 3214, this is evidently a typographical error since that section is
unrelated to discovery.

defendants or their counsel relied in creating the discovery demanded; and 3) for such other relief as this Court deems just and proper. Pasha and Elsayad oppose the motion. After a review of the motion papers, as well as a review of the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff was employed by Pasha, a wholesale and retail men's clothing store, from approximately 2010 until May 2017. Doc. 1 at pars. 8-9. Elsayad was a principal, officer, president, director, and/or owner of Pasha. Doc. 1 at par. 5. From approximately 2010 through 2013, plaintiff was paid by commission only, earning 10% of every \$100 he sold. Doc. 1 at par. 12. From approximately 2013 through 2015, plaintiff was paid at a flat rate of \$50 per day. Doc. 1 at par. 13. From approximately 2015 through the end of his employment by Pasha in May 2017, he earned a flat rate of approximately \$65 per day. Doc. 1 at par. 14.

In his complaint, filed May 5, 2017, plaintiff alleged, inter alia, that Pasha and Elsayad willfully failed to pay him: 1) the lawful minimum wage (Doc. 1 at pars. 25-27); 2) the overtime to which he was entitled (Doc. 1 at pars. 31-33); and 3) spread of hours compensation. Doc. 1 at pars. 36-38. Pasha and Elsayad joined issue by their answer filed July 14, 2017, denying all substantive allegations of wrongdoing and asserting several affirmative defenses. Doc. 5.

On or about July 21, 2017, plaintiff served a demand on Pasha and Elsayad for documents relevant to, inter alia, the dates and hours plaintiff worked. Doc. 42 at pars. 4-9.

In November 2017, Pasha and Elsayad produced documents for plaintiff's inspection and copying. Doc. 41 at par. 4. Plaintiff copied the documents and returned the originals to Sirotkin Varacalli & Hamra, defendant's counsel at that time. Doc. 41 at par. 5.

On December 20, 2017, plaintiff moved to amend the complaint to add a cause of action for retaliation and to name as defendants 2828 Church Ave. Apparel Corp. d/b/a Bargain Land (“Church”) and Ibrahim “Mohammed” Safi (“Safi”), individually. Docs. 10-13. The motion was resolved by so-ordered stipulation, entered January 22, 2018, permitting plaintiff to make the proposed amendments. Doc. 14.

In the amended complaint, plaintiff reiterated the claims in the initial complaint and also alleged that, in 2017, he became employed by Church (Doc. 17 at par. 25), whose principal was Safi. Doc. 17 at par. 11. He claimed that, after working at Church for approximately 1 ½ months, he was terminated because of the lawsuit he had filed against Pasha and Safi’s friend Elsayad. Doc. 17 at pars. 27-28. He further alleged that Pasha, Elsayad, Church and Safi illegally retaliated against him pursuant to Labor Law section 215(1)(a). Doc. 17 at par. 66.

Church and Safi joined issue by their answer filed March 19, 2018. Doc. 25. Plaintiff thereafter stipulated to discontinue the action against Safi. Doc. 26.

On August 10, 2018, the Law Offices of Kareem El Nemr were substituted as counsel for Pasha and Elsayad. Doc. 30.

In December 2018, plaintiff’s counsel was reviewing documents in preparation for the deposition of Elsayad when she observed two pages of a 13 page notebook (“the notebook”) exchanged by prior counsel for Pasha and Elsayad which appeared to be attorney work product. Doc. 41 at par. 7. Counsel stopped reading and, at Elsayad’s deposition on December 10, 2018, she advised El Nemr, incoming counsel for Pasha and Elsayad, that, although the last two pages of the notebook appeared to be attorney work product, the first 11 pages (“the 11 pages”) did not appear to be. Doc. 41 at pars. 8-9; Doc. 46.³ Plaintiff’s attorney told counsel for Pasha and

³ Plaintiff admits that the final two pages of the notebook constitute attorney work product. Doc. 41 at par. 9, n 1.

Elsayad that she believed that the 11 pages were documents relating to “[p]laintiff’s dates worked and wages paid, such as calendars with notations about pay, and [p]laintiff’s W-2 forms-information that is highly relevant to [p]laintiff’s wage and hour claims.” Doc. 41 at par. 9.

At a compliance conference on June 27, 2019, the parties entered into a so-ordered stipulation filed July 1, 2019 pursuant to which Pasha agreed to “produce [a] privilege log by 7/24/19.” Doc. 37.⁴ The privilege log exchanged by El Nemr, dated July 24, 2019, represents that the 11 pages constituted a “[c]ommunication with counsel containing information prepared by or on behalf of an attorney in preparation of litigation” and that the materials were protected by attorney-client privilege and as attorney work product. Doc. 48.

On September 23, 2019, the parties had a telephone conference with this Court to discuss whether certain pages of the notebook produced by Pasha and Elsayad during discovery were subject to the attorney-client privilege, as asserted by said defendants. Doc. 39. Since the telephone conference failed to resolve the dispute, this Court granted plaintiff leave to move to compel production of the allegedly privileged material. Doc. 39. By so-ordered stipulation filed October 8, 2019, the parties agreed to file the disputed documents with NYSCEF under seal so as to allow this Court the opportunity to rule on the motion. Doc. 39.

Plaintiff now moves, pursuant to CPLR 3124, compelling Pasha and Elsayad 1) to produce certain pages from the notebook which have been withheld as privileged; 2) to produce underlying documents upon which defendants or their counsel relied in creating the notebook; and 3) for such other relief as this Court deems just and proper. In support of the motion, plaintiff argues that, although he demanded documents from Pasha and Elsayad relating to his wages and hours in 2017 (Doc. 42 at pars. 4-9), no evidence containing such information, other

⁴ The privilege log was intended to address the contents of the notebook, although this was not specifically noted in the stipulation.

than the notebook, was ever produced. Doc. 41 at par. 10. He asserts that Pasha and Elsayad must produce the 11 pages of the notebook or the documents upon which those pages were based. Plaintiff claims that Pasha and Elsayad failed to establish that the 11 pages of the notebook are protected by the attorney work product privilege and that, even if they were, they would still be discoverable because he has a substantial need to obtain them and could not get them elsewhere. He further asserts that the 11 pages are not protected by the attorney-client privilege since they are not of a legal character and relate solely to the underlying facts of the claim.

In an affidavit in opposition to the motion, Elsayad states that his prior attorney asked him to write the documents which are in the notebook and that that attorney's handwriting is also in the notebook. Doc. 52.

In opposition to the motion, Pasha and Elsayad argue that all of the 11 pages except plaintiff's W-2 forms are protected by the attorney-client and work product privileges. They maintain that the 11 pages (except the W-2s) are protected by the attorney-client and work product privileges because Elsayad's prior attorney asked him to write the documents while this action was pending. Doc. 54.

In reply, plaintiff argues that the 11 pages are not protected by either the work product or attorney-client privileges.

LEGAL CONCLUSIONS:

The CPLR establishes three categories of protected materials, also supported by policy considerations: privileged matter, absolutely immune from discovery (CPLR 3101 [b]); attorney's work product, also absolutely immune (CPLR 3101 [c]); and trial preparation materials, which are subject to disclosure only on a

showing of substantial need and undue hardship in obtaining the substantial equivalent of the materials by other means (CPLR 3101 [d] [2]).

Obvious tension exists between the policy favoring full disclosure and the policy permitting parties to withhold relevant evidence. Consequently, the burden of establishing any right to protection is on the party asserting it; the protection claimed must be narrowly construed; and its application must be consistent with the purposes underlying the immunity (*Matter of Priest v Hennessy*, 51 NY2d 62, 69; *Matter of Jacqueline F.*, 47 NY2d 215, 218-219; *Koump v Smith*, 25 NY2d 287, 294; see generally, Note, *The Attorney-Client Privilege and the Corporate Client: Where Do We Go After Upjohn?*, 81 Mich L Rev 665 [1983]).

Spectrum Sys. Intl. Corp. v Chem. Bank, 78 NY2d 371, 376-377 (1991).

Attorney-Client Privilege

The attorney-client privilege shields from disclosure any confidential communications between an attorney and his or her client made for the purpose of obtaining or facilitating legal advice in the course of a professional relationship (see CPLR 4503 [a] [1]). The oldest among the common-law evidentiary privileges, the attorney-client privilege "fosters the open dialogue between lawyer and client that is deemed essential to effective representation" [*Spectrum Sys.*, 78 NY2d at 377]). "It exists to ensure that one seeking legal advice will be able to confide fully and freely in his attorney, secure in the knowledge that his confidences will not later be exposed to public view to his embarrassment or legal detriment" (*Matter of Priest v Hennessy*, 51 NY2d 62, 67 [1980]).

Because the privilege shields from disclosure pertinent information and therefore "constitutes an 'obstacle' to the truth-finding process," it must be narrowly construed (*Matter of Jacqueline F.*, 47 NY2d 215, 219 [1979]; see *Spectrum*, 78 NY2d at 377). The party asserting the privilege bears the burden of establishing its entitlement to protection by showing that the communication at issue was between an attorney and a client "for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship," that the communication is predominantly of a legal character, that the communication was confidential and that the privilege was not waived (*Rossi v Blue Cross & Blue Shield*, 73 NY2d 588, 593-594 [1989]).

Ambac Assur. Corp. v Countrywide Home Loans, Inc., 27 NY3d 616, 623-624 (2016).

Even a cursory review of the notebook reveals that the entries therein consist of dates on which plaintiff worked and calculations regarding how much he earned. Since these notations are clearly not of a predominantly legal character, Pasha and Elsayad fail to meet their burden of establishing that the 11 pages are protected by the attorney-client privilege.

Additionally, the privilege is limited to communications between an attorney and a client and not underlying facts. *Spectrum Sys.*, 78 NY2d at 377. Thus, even though Elsayad may have written the 11 pages (except for the W-2s) at the direction of his attorney, the portions of the notebook which he wrote are not protected by the privilege, especially since there is no indication that the attorney assisted Elsayad in writing the same.

Work Product Privilege

“[A]ttorney work product applies only to documents prepared by counsel acting as such, and to materials uniquely the product of a lawyer's learning and professional skills, such as those reflecting an attorney's legal research, analysis, conclusions, legal theory or strategy” *Venture v Preferred Mut. Ins. Co.*, 153 AD3d 1155, 1159 (1st Dept 2017) (citation omitted). Since it is apparent that the notations made by Elsayad do not fall into any of the foregoing categories, Pasha and Elsayad have failed to establish that the 11 pages are protected by the attorney work product doctrine.

Material Prepared For Litigation

Pasha and Elsayad further assert that the 11 pages are privileged since they were prepared for the purpose of litigation. Materials prepared for trial enjoy the “conditional or qualified privilege protections of CPLR 3101(d)(2).” *Markel v Pure Power Boot Camp*, 171 AD3d 28, 31 (1st Dept 2019). “Materials prepared in anticipation of litigation and preparation for trial may be

obtained only upon a showing that the requesting party has a ‘substantial need’ for them in preparation of the case and that without ‘undue hardship’ the requesting party is unable to obtain the substantial equivalent by other means (CPLR 3101[d][2]; *Forman v Henkin*, 30 NY3d 656, 661-662 [2018]). *Markel*, 171 AD3d at 31.

Here, Elsayad asserts in his affidavit in opposition to the motion that his attorney asked him to write the 11 pages. Doc. 52. However, he does not specifically state that the attorney asked him to write the 11 pages in anticipation of litigation or in preparation for trial. However, even assuming, arguendo, that he established that he wrote the 11 pages for one of those purposes, plaintiff has established that he has a substantial need for the disclosure of the 11 pages in order to prove that he was not paid the wages to which he was entitled.

Therefore, in light of the foregoing, it is hereby:

ORDERED that plaintiff Omar Allen’s motion is granted in all respects; and it is further

ORDERED that within 20 days after this order is uploaded to NYSCEF, defendants Pasha Fashion Ltd. d/b/a Pasha Fashion and Mohamed Elsayad are to provide plaintiff with the portions of the notebook filed under seal as NYSCEF document number 39, as well as all documents upon which Elsayad relied in drafting those portions of the notebook; and it is further

ORDERED that if no documents exist upon which Elsayad relied in drafting those portions of the notebook, then Elsayad is to provide an affidavit to that effect within the same 20-day period; and it is further

ORDERED that within 20 days after receiving the aforementioned portions of the notebook from Elsayad, plaintiff may notice a further deposition of Elsayad limited to questions regarding such discoverable portions of the notebook, should he be so inclined; and it is further

ORDERED that the parties are to appear for a previously scheduled compliance conference on March 3, 2020 at 80 Centre Street, Room 280, at 2:15 p.m.; and it is further

ORDERED that this constitutes the decision and order of the court.

12/17/2019

DATE


KATHRYN E. FREED, 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