

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. GEOFFREY J. O'CONNELL

Justice

TRIAL/IAS, PART 6
NASSAU COUNTY

SIDNEY M. SEGALL,

Plaintiff(s),

INDEX No. 15138/05

-against-

MOTION DATE: 6/16/06

INEZ CAIN and ROBERT BARSCH,

Defendant(s).

MOTION SEQ. No. 2-MD

The following papers read on this motion:

- Notice of Motion/Affirmation/Exhibits
- Affirmation in Opposition
- Reply

Plaintiff, an attorney and former employer of defendant INEZ CAIN, seeks an Order directing ROBERT BARSCH, CAIN's former attorney to answer certain questions regarding conversations taking place between CAIN and BARSCH. Both Plaintiff and BARSCH are representing themselves in this action.

In this action plaintiff seeks damages from the defendants for malicious prosecution. In the underlying action CAIN alleged that SEGAL assaulted her. On May 26, 2005 that action was dismissed at the close of plaintiff's case at trial, the Justice presiding finding that CAIN had failed to demonstrate the requisite intent.

In this action defendant BARSCH refused to answer certain questions at his deposition claiming that attorney-client privilege and attorney work product privileges prevented him from answering. Plaintiff brings this application directing that BARSCH respond to the questions.

Defendant CAIN did not oppose this motion.

Segall v. Cain

In most of the questions at issue, plaintiff seeks the source of information for INEZ CAIN's underlying allegations of assault. In support of the application SEGAL provides a transcript of what he claims was a telephone conversation between himself and defendant CAIN on September 25, 2005. This action was commenced prior to that date, on September 23, 2005.

SEGAL never informed CAIN that he had brought this action against her in this transcript.

In opposition to this motion to compel defendant BARSCH claims that this action should be dismissed as the plaintiff's request for costs and sanctions in the underlying action was denied. He does not address any specific claims of privilege.

A review of the deposition of BARSCH which is the subject of this suit reveals that the questions objected to were seeking the names of individuals who provided BARSCH with the information he claims to have relied upon in forming the claims against SEGAL.

CPLR § 3101(b) absolutely prohibits disclosure of confidential communications between an attorney and his or her client CPLR § 4503. CPLR § 3101(c) specifically exempts an attorney's work product from discovery by the other side. In addition, CPLR § 3101(d)(iii)(2) protects materials or information gathered and prepared for litigation purposes only.

It is clear from the questions by plaintiff to BARSCH at his deposition that he is seeking to discover the sources of information BARSCH relied upon in pursuing the earlier action. (Motion, p. 6, lines 13-25, p.7 lines 2-3, p.8, lines 17-19, p.13-14, lines 15-25, 2-6, pp. 15-16, lines 23-25, 2-6, pp. 17-18, lines 21-25, 2-4, pp. 24-25, lines 20-25, 2-3, pp. 26-29, lines 7-25, 2-25, 3-25, 2-18, pp. 40, lines 15-18, pp. 41-42, lines 23-25, 3, pp. 57-58, lines 4-25, 2-14, pp. 61-62, lines 7-25, 2-18, pp. 64-66, pp. 67-70, pp. 91-92, lines 16-25, 2-6)

A review of the alleged telephone call between SEGAL and CAIN, made without her knowing that it was taped, and without her knowing that SEGAL had commenced this action against her, does not open the door to all of the conversations between CAIN and BARSCH regarding the earlier action, nor does it require disclosure, by BARSCH of all of his work product or sources of information regarding that matter. The mere existence of a cross claim by CAIN against BARSCH, does not do so either. *Jakobleff v. Cerrato, Sweeney & Cohn*, 97 AD2d 834 (2nd Dept. 1983).

Segall v. Cain

There is absolutely no indication by Ms. CAIN that she was waiving any right to confidentiality to all of her conversations with BARSCH regarding the other action. *Charter One Bank FSB v. Midtwon Rochester, LLC, supra*. A review of the evidence presented does not result in a total waiver as plaintiff claims. *Eigenheim Bank v. Halpern*, 598 F.Supp. 988 (SDNY 1984). A disclosure of even a document protected by the attorney work product rule does not result in a waiver of the privilege as to other documents. *Charter One Bank FSB v. Midtwon Rochester, LLC, supra*.

Whether or not privileged, a record may qualify in whole or in part as attorney work product or trial preparation. *Charter One Bank FSB v. Midtwon Rochester, LLC*, 191 Misc.2d 154 (2002). The question of whether documents or information fall into those categories is fact specific. Attorney's work product exemption is limited to those materials which are uniquely the product of a lawyer's learning and professional skill, such as materials which reflect his legal research, analysis, conclusions, theory or strategy. *Matter of Berkin's Storage Co.*, 118 Misc2d 173 amended 94 AD2d 643, dismissal den. 59 NY2d 996 (1983). This can also include a defendant's investigative reports and witnesses' statements. *Carhart v. Relmar Operating Corp.*, 66 AD2d 680 (1st Dept. 1978). This also can include names of witnesses, other than eye witnesses. *Valet v. American Motors, Inc.*, 105 AD2d 645 (1st Dept. 1984). Generally, statements by non-party witnesses obtained in an investigation are immune from disclosure under material prepared for litigation. *Yasnogordsky v. City of New York*, 281 AD2d 541 (2nd Dept. 2001)

CPLR § 3101's privilege for materials obtained or prepared in preparation for litigation does not prohibit discovery of materials relating to previous claims.

However, absolute privilege protecting attorney's work product from disclosure, CPLR § 3101(c), extends not only to materials prepared for the litigation then in progress, but also to work product prepared for other litigation.

The statute granting the privilege does not contain any language restricting its application. The purpose of the privilege would be frustrated if work product of an attorney prepared for prior litigation could be used against a client in a subsequent action. The privilege is designed to permit the attorney to communicate freely and candidly with his client uninhibited by any concern that his communications will be available to his

Segall v. Cain

client's adversaries. "[The] attorney may not properly perform, and the client may not seek his due, if candid professional opinions prepared for a client in one case may be used against the client in subsequent litigation." *Duplan Corp. v Moulinage et Retorderie*, 509 F2d 730, 736, cert denied 420 U.S. 997 (1975); *Federal Trade Commn. v Grolier, Inc.*, 462 U.S. 19 (1983); *Hickman v Taylor*, 329 U.S. 495, 510-511 (1947).

The cases of *Milone v General Motors Corp.* (84 AD2d 921) and *Bennett v Troy Record Co.* (25 AD2d 799), cited by plaintiff, are not to the contrary. Both construed CPLR § 3101 (d), relating to "material prepared for litigation", and not Subdivision (c), as which provides that "[the] work product of an attorney shall not be obtainable."


As to the series of questions regarding the veracity of information contained in plaintiff's transcript of a purported telephone conversation with CAIN, the Court agrees with BARSCH that the questions posed were improper, and that any responses would violate attorney client privilege. The questions to BARSCH sought his opinion as to the veracity of CAIN's purported statements regarding events occurring while she was represented by BARSCH.

Thus, based on the proof presented, the motion to compel the defendant to answer the questions at issue at his deposition, is Denied.

It is, SO ORDERED.

Dated:

July 21, 2006


HON. GEOFFREY J. O'CONNELL, J.S.C.

ENTERED
AUG 04 2006
NASSAU COUNTY
COUNTY CLERK'S OFFICE