

Simpson v Alter
2011 NY Slip Op 31765(U)
June 21, 2011
Supreme Court, Nassau County
Docket Number: 11095/09
Judge: Thomas P. Phelan
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SHORT FORM ORDER**SUPREME COURT - STATE OF NEW YORK****Present:****HON. THOMAS P. PHELAN,***Justice*TRIAL/IAS PART 2
NASSAU COUNTY

SHAWNDYA L. SIMPSON,

Plaintiff(s),

-against-

BERNARD M. ALTER, BERNARD M.
ALTER, ESQ., ALTER & BARBARO,
ESQS. and DIANA A. JOHNSON,

Defendant(s).

ORIGINAL RETURN DATE: 04/21/11

SUBMISSION DATE: 05/12/11

INDEX No.: 11095/09

MOTION SEQUENCE #8, 10

The following papers read on this motion:

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Defendants, Bernard M. Alter, Bernard M. Alter, Esq. and Alter & Barbaro, Esqs. (collectively the "Alter defendants"), move for an Order, pursuant to CPLR 2221(a), vacating the Order of this Court dated March 29, 2011, which "denied" their Order to Show Cause on the grounds of untimeliness and, upon such vacatur, granting them an extension of time to move for summary judgment 60 days after the conclusion of discovery. Defendant, Diana A. Johnson ("Johnson"), moves for an Order, pursuant to CPLR 3212, granting her summary judgment dismissal of plaintiff's complaint.

Plaintiff's complaint arises out of an election race for the Kings County Surrogate during 2007. Defendant Johnson is the successful candidate presently sitting as the Kings County Surrogate. Plaintiff lost the election. She is currently sitting as a Judge of the Civil Court of the City of New York in the County of Kings.

Plaintiff asserts causes of action for breach of fiduciary duty, breach of contract, legal malpractice, aiding and abetting, tortious interference with contractual relations, unjust enrichment and constitutional violations. Plaintiff alleges that Alter was her attorney in the year 2003, retained to establish a sufficient residency in the Borough of Brooklyn so as to allow her to run for judicial office in that county. Plaintiff testified during her sworn examination before trial that she became a candidate for the Kings County Surrogate Court seat in April 2007. Her husband, Jacob Walthour, Jr., was her campaign manager.

All causes of action asserted in the complaint are premised upon plaintiff's claim that the Alter defendants later revealed her confidences to defendant Johnson who was plaintiff's opponent in the 2007 judiciary primary campaign. Plaintiff alleges that the Alter defendants represented Johnson against her in the 2007 election law challenge regarding her residency in Brooklyn. She asserts that they violated her confidences by revealing confidential information to Johnson and to the press. Ultimately, plaintiff did not succeed in her application to disqualify the Alter defendants as Johnson's counsel in that proceeding. However, she ultimately prevailed for placement on the ballot.

The prior proceeding brought in the Supreme Court, Queens County, before Judge Peter O'Donoghue addressed two separate applications: (1) defendant Johnson's challenge of plaintiff's run on the basis of whether plaintiff resided in Brooklyn for a sufficient period of time to be placed on the ballot (election law challenge); and (2) Simpson's application to disqualify the Alter defendants as Johnson's counsel. The crux of plaintiff's claims herein are that defendants breached their confidential relationship with her.

On October 29, 2010, this Court certified this action for trial. The Certification Order required that motions for summary judgment be filed within 60 days after the Note of Issue. The Note of Issue in this action was filed on January 24, 2011. On March 24, 2011, defendant Johnson timely filed this motion for summary judgment.

Subsequently, on March 29, 2011, the Alter defendants submitted a proposed Order to Show Cause to extend the time allowed to file a motion for summary judgment. This Court refused to sign the Order to Show Cause on the grounds that the application was untimely.

The Alter defendants seek an Order, pursuant to CPLR 2221(a), to vacate the "Order" of this Court dated March 29, 2011. The "Order" that the Alter defendants seek to vacate was the refusal to sign the proposed Order to Show Cause.

A judge cannot be compelled to sign an Order to Show Cause (see, *Greenhaus v. Milano*, 242 AD2d 838 (2d Dept. 1997)). It is well settled that the Order to Show Cause qualifies as a species of *ex parte* application, at least at its outset. If the judge refuses to sign the Order to Show Cause, the proper recourse for the litigant is to make a motion to the appellate division (not an appeal) under CPLR 5704 which offers a special opportunity to a litigant aggrieved by the activity (or non-activity) of a trial level judge in respect to an *ex-parte* application.

The Alter defendants' application is improperly presented to this Court. Therefore, this Court is precluded from considering said application.

This Court, by Order dated March 3, 2010, *inter alia*, granted defendant Johnson's application, pursuant to CPLR 3211(a)(1), (5) and (7), for an Order dismissing plaintiff's unjust enrichment claim against her. Defendant Johnson seeks summary judgment dismissal of plaintiff's remaining causes of action as asserted against her.

Plaintiff claims that defendant Johnson, who was running against her for the same seat, and her campaign used plaintiff's confidential information (which was allegedly unlawfully disclosed by the Alter defendants) to her advantage in the 2007 Surrogate election in Kings County. She claims that defendant Johnson was fully aware, consented to and permitted unlawful disclosures of plaintiff's confidential information to the media and despite knowing that plaintiff's residency in Kings County was valid, defendant Johnson brought a petition against plaintiff in 2007 challenging plaintiff's residency, knowing the falsity of the allegations. Plaintiff further claims that defendant Johnson knew that the Alter defendants had plaintiff's confidential and secret information and sought out the Alter defendants for the express purpose to hurt and injure plaintiff and to make residency an issue to injure plaintiff's reputation and cause her to lose the Surrogate election.

In support of her motion, defendant Johnson points to the fact that Judge O'Donoghue has already examined and determined plaintiff's motion to disqualify the Alter defendants as Johnson's counsel. The determination of this motion requires a proper and close reading of Judge O'Donoghue's decision and order dated August 17, 2007. The text of said decision and order states, in full, as follows:

"Upon the foregoing papers and the record made in open court on August 13, 2007 it is hereby ORDERED, ADJUDGED AND DECREED, that an order pursuant to Article 16 of the election law declaring invalid a certain Designating Petition, which named respondent, Shawndya L. Simpson, as a candidate for the Public Office of Judge of the Surrogate's Court, Kings County, City of New York, is denied and the proceeding is dismissed. Clear and convincing evidence was adduced at trial establishing that respondent Shawndya L. Simpson, has lived at 275 Park Avenue, Apt. 5P, Brooklyn, N.Y. for the last three years.

Additionally, the Order to Show Cause for an Order permitting an open commission was granted by Order dated August 14, 2007.

The motion to disqualify attorney B. Mitchell Alter, Esq. and the firm of Alter and Barbaro, Esqs. as counsel for petitioner is denied. According to the testimony of respondent, the attorney/client relationship existing between respondent and attorney B. Mitchell Alter terminated in 2003. The Brooklyn residence which was the subject of the 2003 petition Challenge differs from the Brooklyn residence

which is the subject of the within petition challenge. The respondent assumed residency at 275 Park Avenue, Apt. 5P, Brooklyn, N.Y., which is the subject of this lawsuit, in 2004."

The lynchpin of the causes of action of the complaint by plaintiff against the Alter defendants and defendant Johnson is the repeating allegation of an unauthorized and improper breach of the 2003 attorney/client relationship between the Alter defendants and Simpson. The common denominator of all of the remaining causes of action against Johnson is that privileged and confidential residency issues in 2003 were divulged by the Alter defendants to Johnson for use by Johnson in defeating Simpson in the race for the Kings County Surrogate seat.

This Court notes that the pertinent issue before Judge O'Donoghue was whether the Alter defendants should be disqualified as counsel to represent Johnson in 2007 by virtue of the Alter defendants having represented plaintiff in 2003. In that regard, Judge O'Donoghue clearly ruled that Simpson's attorney/client relationship with the Alter defendants terminated in 2003. As a consequence, Judge O'Donoghue refused to disqualify the Alter defendants as counsel of record for movant Johnson and he further concluded (by denying Simpson's motion to disqualify) that there was a bona fide attorney/client relationship between the Alter defendants and Johnson in 2007.

The rules surrounding the law of the case doctrine are clear. The doctrine applies to various stages of the same action or proceeding (*McGrath v. Gold*, 36 NY2d 406 [1975]); its purpose is to avoid the re-injection of issues already determined within it (*Fadden v. Cambridge Mut. Fire Ins. Co.*, 51 Misc.2d 858 [Sup. Ct. Albany 1966], *aff'd* 27 AD2d 487 [3d Dept. 1967]). Once a point is decided within a case, the doctrine of the law of the case makes it binding not only on the parties but on the court as well; no other judge of coordinate jurisdiction may undo the decision (*State of New York Higher Educ. Svcs. Corp. v. Starr*, 158 AD2d 771 [3d Dept. 1990]). The order embodying the finding is, of course, open to appellate review, but it may not be negated by any other judge of the same court (*George W. Collins, Inc. v. Olsker-McLain Ind., Inc.*, 22 AD2d 485 [4th Dept. 1965]).

Here, it is the law of the case that based upon the determination of Judge O'Donoghue from Supreme Court, County of Queens, the 2007 attorney/client relationship between the Alter defendants and Johnson was a bona fide attorney/client relationship with regard to her candidacy for the Surrogate Court seat. This part of Judge O'Donoghue's holding was never appealed. His denial of the motion to disqualify the Alter defendants as the attorney for Judge Johnson is the law of the case. As a consequence of that ruling, the conversations Johnson had with the Alter defendants including written correspondence and attorney/client oral exchanges are all protected by the privilege of that relationship.

An attorney owes a unique fiduciary duty. Counsel is "imbued with ultimate trust and confidence" and an attorney's obligations "transcend those prevailing in the commercial market place" (*Schlanger v. Flaton*, 218 AD2d 597, 601 [1st Dept. 1995]). The duty "to deal fairly, honestly and

with undivided loyalty superimposes onto the attorney-client relationship a set of special and unique duties, including maintaining confidentiality, avoiding conflicts of interest, operating competently, safeguarding client property and honoring the clients' interests over the lawyer's" (*Id.*).

Based on the foregoing admissible evidence, including Judge O'Donoghue's Decision and Order and the deposition testimony transcripts of both plaintiff and defendant Johnson, this Court finds that defendant Johnson has made a prima facie showing of entitlement to judgment as a matter of law on all of the remaining causes of action. In light of Johnson's showing of entitlement to judgment as a matter of law, the burden shifts to plaintiff as the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]).

In opposing defendant Johnson's motion, plaintiff attempts to argue that the fact that Judge O'Donoghue denied plaintiff's motion to disqualify the Alter defendants does not affect plaintiff's instant action against Johnson (or the Alter defendants). Simpson argues that Judge O'Donoghue actually ruled that the Alter defendants were plaintiff's attorney in 2003 and that that is the law of the case. She submits that contrary to defendant Johnson's moving papers, Judge O'Donoghue's decision does not address the issue of whether or not the Alter defendants and Johnson have an attorney/client relationship.

While it is true that Judge O'Donoghue plainly held that the attorney/client relationship between Simpson and the Alter defendants ended in 2003, the fact is that by denying Simpson's motion to disqualify the Alter defendants as counsel for Simpson (and that part of the determination not being appealed), Judge O'Donoghue held and declared that Johnson's relationship with the Alter defendants was a proper attorney/client relationship. As stated above, this determination by a Judge of the Supreme Court, Queens County, a judge of coordinate jurisdiction, is the law of the case and binding upon this Court and the parties herein (*State of New York Higher Educ. Svcs. Corp. v. Starr*, supra).

In the absence of any admissible evidence (or argument) presented by plaintiff herein as to whether the 2003 attorney/client relationship between the Alter defendants and Simpson was unauthorized or improperly breached in 2007 when the Alter defendants and Johnson enjoyed a proper attorney/client relationship, this Court herewith grants Johnson's motion for summary judgment dismissal of the balance of plaintiff's complaint as against her.

The parties' remaining contentions have been considered by this Court and do not warrant discussion.

Accordingly, plaintiff's complaint is dismissed as against Johnson, and the caption is amended to read as follows:

RE: SIMPSON v. ALTER, et al.

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"SHAWN DYLA L. SIMPSON,

Plaintiff,

-against-

BERNARD M. ALTER, BERNARD M.
ALTER, ESQ., and ALTER & BARBARO,
ESQS.,

Defendants."

This decision constitutes the order of the court.

Dated: 6-21-11

HON THOMAS P. PHELAN

J.S.C.

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ENTERED

JUN 23 2011

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**