2015 IL App (4th) 140839-U

NO. 4-14-0839

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
August 26, 2015
Carla Bender
4th District Appellate
Court, IL

JAMES GRAHAM,	)	Appeal from
Plaintiff-Appellant,	)	Circuit Court of
v.	)	Sangamon County
RONALD J. STONE,	)	No. 11L202
Defendant-Appellee.	)	
	)	Honorable
	)	Patrick J. Londrigan,
	)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Harris and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed in part and vacated in part, concluding (1) defendant's interrogatory did not request information protected by attorney-client privilege, and (2) the information sought in the interrogatory was relevant. However, because plaintiff acted in good faith by refusing to comply with the trial court's discovery order, the contempt order and monetary penalty must be vacated.

¶ 2 In March 2012, plaintiff, James Graham, filed an amended legal-malpractice action against defendant, Ronald J. Stone, his former attorney. In May 2012, Stone filed an affirmative defense, alleging Graham failed to file his claims within the applicable statute-of-limitations period. In furtherance of this defense, Stone submitted a series of interrogatories to Graham, one of which requested the names of any attorneys Graham consulted with regarding the underlying claim in which Stone represented him. When Graham refused to answer the

interrogatory in contravention of a June 2014 court order, the trial court entered an August 2014 order finding him in contempt and imposing a $100 fine on both Graham and his attorney.

¶ 3 Graham appeals, asserting the trial court erred by holding him in contempt of court. Specifically, Graham asserts (1) his consultation with another attorney was protected by attorney-client privilege, (2) Stone's interrogatory asking Graham to disclose the names of attorneys with whom he consulted was irrelevant and not calculated to lead to the discovery of relevant or admissible evidence, and (3) the finding of contempt and subsequent sanctions should be vacated. We affirm in part and vacate in part.

¶ 4 I. BACKGROUND

¶ 5 A. Underlying Claim

¶ 6 In October 2006, Graham was terminated from his employment with the Springfield police department. As part of his membership with the Police Benevolent Protective Association Unit #5 (Association), Graham was entitled to the assistance of an attorney in any grievance proceeding against the police department. Stone, a representative of the Association, thereafter represented Graham during the grievance proceedings in which Graham challenged his termination.

¶ 7 As part of Stone's representation, he filed a grievance on behalf of Graham. However, Stone failed to follow the grievance procedure by submitting the claim to arbitration without first submitting it to the mayor. In January 2008, Graham's claim was deemed nonarbitrable because the claim was not first submitted to the mayor. Stone thereafter filed an application to vacate the arbitration award in the trial court, which the court denied in September 2008 (Sangamon County case No. 08-MR-194). In August 2009, this court affirmed the arbitrator's award. *Police Benevolent & Protective Ass'n Unit No. 5 v. City of Springfield*, 392

Ill. App. 3d 1147 (2009) (table) (unpublished order under Supreme Court Rule 23). The following month, we denied the petition for rehearing.

¶ 8 B. Present Claim

¶ 9 In August 2011, Graham filed a complaint, alleging Stone, during the course of representing Graham in the aforementioned legal proceeding, committed (1) professional negligence (count I) and (2) breach of contract and fiduciary duty (count II) (Sangamon County case No. 11-L-202). As to both claims, Graham alleged Stone failed to (1) follow the appropriate grievance procedure and (2) raise a timely argument that the City of Springfield and the Association routinely overlooked the proper procedure in arbitrating grievances. Graham argued, as a direct and proximate cause of Stone's actions, Graham was unable to proceed with the arbitration of his grievance. His prayer for relief included damages exceeding $50,000 and attorney fees.

¶ 10 In October 2011, Stone filed a motion to dismiss, alleging the two-year statute-of-limitations period for filing a legal-malpractice claim had expired.

¶ 11 In March 2012, Graham filed an amended complaint, adding language stating he was unaware the basis for the arbitrator deeming his grievance nonarbitrable in January 2008 was Stone's negligence in following the proper procedures. Rather, Graham alleged he first learned of Stone's negligence when this court denied his petition for rehearing in September 2009. Graham further contended his delay in learning of Stone's misconduct resulted from Stone making misrepresentations regarding the case throughout the review process.

¶ 12 In May 2012, Stone filed an answer to the amended complaint and raised the statute of limitations as an affirmative defense.

¶ 13 In August 2012, Stone served Graham with multiple interrogatories. Subsequently, in December 2013, Stone filed a motion to compel, asserting Graham failed to respond to two interrogatories, one of which asked Graham,

> "When was the first date you consulted an attorney other than [Stone] in regards to any aspect of your termination from the Springfield [p]olice [d]epartment? This includes, but is not limited to an attorney consulted formally or informally for 'second opinions' and/or relating to the conduct of [Stone]. Please state the name and addresses of said attorney or attorneys."

Graham responded,

> "Objection. [Graham] asserts the attorney[-]client privilege as to any discussions, exchanges, communications, information, consultations, or documents between he and any attorneys hired or consulted (except [Stone] herein).
>
> Furthermore, this interrogatory does not seek relevant information or information reasonably calculated to lead to the discovery of relevant information."

In his motion to compel, Stone contended, on information and belief, Graham consulted with another attorney during the statute-of-limitations period regarding the underlying case.

¶ 14 In January 2014, Graham filed a response to Stone's motion to compel, asserting he did not need to respond to the interrogatory question because the content of his answer was protected by attorney-client privilege. Graham also argued the interrogatory requested irrelevant information because his amended complaint alleged (1) he did not learn of Stone's misconduct

until this court denied his petition for rehearing in September 2009, and (2) Stone should be equitably estopped from raising a statute-of-limitations defense due to misrepresentations Stone allegedly made during the review proceedings. On the same date, Graham filed a motion for summary judgment as to Stone's statute-of-limitations defense.

¶ 15 In March 2014, Stone filed a reply to Graham's response to the motion to compel. Stone asserted Graham put his consultations with other attorneys at issue by claiming he had no knowledge of Stone's alleged malpractice until September 2009. Moreover, Stone asserted that just because Graham's amended complaint alleged Graham remained unaware of Stone's alleged malpractice until September 2009, it did not establish that allegation as an uncontradicted fact. The same day, Stone filed a response to Graham's motion for summary judgment, asserting Graham failed to demonstrate the clear, precise, and unequivocal evidence necessary to equitably estop Stone from raising a statute-of-limitations defense.

¶ 16 In June 2014, the trial court entered an order compelling Graham to answer the interrogatory regarding his consultation with other attorneys. The following month, Stone filed a rule to show cause after Graham failed to answer the interrogatory. Stone argued the interrogatory regarding Graham's consultations related to the statute of limitations, which remained an ongoing issue because Stone had reason to believe Graham knew or should have known about Stone's alleged malpractice well before September 2009. In support, Stone attached several documents, including (1) an affidavit from Stone stating Graham admitted in September 2008 to consulting with another attorney regarding the case, (2) an e-mail in which Stone recounted a conversation wherein he told Graham the chance of success on appeal was slim, and (3) a January 2009 e-mail in which Graham acknowledged he previously believed the merits of his case would never be heard.

¶ 17 In August 2014, the trial court entered an order finding Graham and his attorney willfully violated the court's June 2014 order compelling an answer to Stone's interrogatories. The court found Graham and his attorney in contempt of court and fined them $100 each.

¶ 18 This appeal followed.

¶ 19 II. ANALYSIS

¶ 20 On appeal, Graham contends the trial court erred by holding him in contempt of court. Specifically, Graham asserts (1) his consultation with another attorney was protected by attorney-client privilege, (2) Stone's interrogatory asking Graham to disclose the names of attorneys with whom he consulted was irrelevant and not calculated to lead to the discovery of relevant or admissible evidence, and (3) the finding of contempt and subsequent sanctions should be vacated. We begin by addressing the standard of review.

¶ 21 A. Standard of Review

¶ 22 A finding of contempt for failure to comply with a discovery order is immediately reviewable without the necessity of the trial court entering a special finding. Ill. S. Ct. R. 304(b)(5) (eff. Feb. 26, 2010); *Deprizio v. MacNeal Memorial Hospital Ass'n*, 2014 IL App (1st) 123206, ¶ 12, 12 N.E.3d 782. On appeal, we review the discovery order at issue in the contempt proceedings. *Deprizio*, 2014 IL App (1st) 123206, ¶ 12, 12 N.E.3d 782.

¶ 23 Discovery orders are typically reviewed under an abuse-of-discretion standard. *Janousek v. Slotky*, 2012 IL App (1st) 113432, ¶ 13, 980 N.E.2d 641. However, insofar as Graham claims the information sought in the discovery order was barred by the attorney-client privilege, our review is *de novo*. *Id.*

¶ 24 Illinois Supreme Court Rule 201 (eff. July 30, 2014) provides the guidelines for engaging in discovery. Subsection (b)(1) provides:

"Except as provided in these rules, a party may obtain by discovery full disclosure regarding any matter relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking disclosure or of any other party, including the existence, description, nature, custody, condition, and location of any documents or tangible things, and the identity and location of persons having knowledge of relevant facts." Ill. S. Ct. R. 201(b)(1) (eff. July 30, 2014).

¶ 25 In other words, to be discoverable, the information sought must be relevant; that is, the information must be admissible at trial or intended to lead to the discovery of admissible evidence. *Manns v. Briell*, 349 Ill. App. 3d 358, 361, 811 N.E.2d 349, 352 (2004). "A trial court does not have discretion to order discovery of information that does not meet the threshold requirement of relevance." *Id.*

¶ 26 B. Attorney-Client Privilege

¶ 27 Graham asserts he was not required to answer Stone's interrogatory regarding the attorneys with whom he consulted about his underlying case because that information is protected by attorney-client privilege under Illinois Supreme Court Rule 201(b)(2) (eff. July 30, 2014). Subsection (b)(2) provides, in relevant part,

"[a]ll matters that are privileged against disclosure on the trial, including privileged communications between a party or his agent and the attorney for the party, are privileged against disclosure through any discovery procedure. Material prepared by or for a party in preparation for trial is subject to discovery only if it does

> not contain or disclose the theories, mental impressions, or litigation plans of the party's attorney." Ill. S. Ct. R. 201(b)(2) (eff. July 30, 2014).

Further, "[w]hen information or documents are withheld from disclosure or discovery on a claim that they are privileged pursuant to a common law or statutory privilege, any such claim shall be made expressly and shall be supported by a description of the nature of the documents, communications or things not produced or disclosed and the exact privilege which is being claimed." Ill. S. Ct. R. 201(n) (eff. July 30, 2014).

¶ 28 In this case, Stone's interrogatory did not ask Graham to reveal the content of his communications with other attorneys but merely asked when and with whom those communications took place. The fact that a communication occurred is not protected by privilege. See *Hernandez v. Williams*, 258 Ill. App. 3d 318, 322, 632 N.E.2d 49, 53 (1994). Accordingly, we conclude the interrogatory, which merely requested (1) the date(s) in which he consulted with an attorney regarding the underlying case, (2) the name of any attorneys with whom he consulted, and (3) the address of those attorneys, did not require Graham to produce information protected by attorney-client privilege.

¶ 29 C. Relevance

¶ 30 Graham next asserts, even if the information sought by Stone was not protected by attorney-client privilege, the information Stone sought was irrelevant because his claim is not barred by the statute of limitations. Section 13-214.3(b) of the Code of Civil Procedure (Civil Code) provides that a legal-malpractice claim "must be commenced within [two] years from the time the person bringing the action knew or reasonably should have known of the injury for

which damages are sought." 735 ILCS 5/13-214.3(b) (West 2012). In asking this court to conclude his claim is not barred by the statute of limitations, Graham raises two arguments.

¶ 31 First, Graham contends Stone should be equitably estopped from raising a statute-of-limitations defense because his ongoing misrepresentations regarding the status of the case limited Graham's ability to learn of the alleged malpractice. Without the statute-of-limitations defense, Stone would be unable to demonstrate the relevance of asking for information regarding the attorneys with whom Graham consulted with respect to the underlying case. Second, Graham contends no factual issue exists regarding the statute-of-limitations period, thus rendering any inquiry into his consultations with other attorneys irrelevant.

¶ 32 In making these arguments, Graham asks us to consider the statute-of-limitations issue before the trial court has had an opportunity to render a decision on the matter. In fact, this very issue is presently before the court in Graham's motion for summary judgment. We are not inclined to resolve this issue before the trial court has had an opportunity to do so.

¶ 33 Illinois Supreme Court Rule 201(b)(1) (eff. July 30, 2014) specifically permits "full disclosure regarding any matter relevant to the subject matter involved in the pending action, whether it relates to the claim *or defense of the party seeking disclosure*." (Emphasis added.) The purpose of Stone's interrogatory was to obtain support for his statute-of-limitations defense, namely, that Graham's consultation with another attorney demonstrated he knew or reasonably should have known about Stone's alleged malpractice prior to October 2009. Because the trial court has not yet ruled on the statute-of-limitations issue, we conclude, for purposes of this appeal, the information sought in Stone's interrogatory is relevant and, therefore, subject to discovery.

¶ 34 D. Contempt Finding

¶ 35 Graham next asserts that his refusal to comply with the trial court's order was a good-faith effort to preserve this issue for appeal and we should therefore reverse the contempt order and monetary penalty. Stone does not address this issue in his brief.

¶ 36 Where a party's willful refusal to comply with a trial court order is a good-faith effort to preserve for appeal whether the discovery of certain information is protected by the attorney-client privilege, we should vacate the contempt order on appeal. *Cangelosi v. Capasso*, 366 Ill. App. 3d 225, 230, 851 N.E.2d 954, 959 (2006). Here, because Graham sought clarification as to whether the attorney-client privilege protected the disclosure of certain information, we conclude he engaged in a good-faith effort to preserve this issue for appeal. Accordingly, we vacate the court's order (1) finding Graham and his attorney in contempt and (2) assessing each with a $100 penalty.

¶ 37 III. CONCLUSION

¶ 38 For the foregoing reasons, we vacate the trial court's order finding Graham and his attorney in contempt and its $100 assessment against each. We otherwise affirm.

¶ 39 Affirmed in part and vacated in part.