Bottomly v. Leucadia Nat'l Corp.

United States District Court for the District of Utah, Central Division

July 2, 1996, Decided

Case No. 94-C-590 B

Reporter
1996 U.S. Dist. LEXIS 14760 *; 71 Fair Empl. Prac. Cas. (BNA) 960; 24 Media L. Rep. 2118

JENNIFER S. BOTTOMLY, Plaintiff(s), v. LEUCADIA NATIONAL CORP., et al., Defendant(s).

Disposition: [*1] Movant's, reporters and Kearns-Tribune Corporation's motion to quash subpoenas to Sheila McCann and Mike Carter granted.

Counsel: For JENNIFER S. BOTTOMLY, plaintiff: Stanley J. Preston, Ryan E. Tibbitts, Mr., Max D Wheeler, Mr., Camille N. Johnson, SNOW CHRISTENSEN & MARTINEAU, SALT LAKE CITY, UT.

For PARSONS, BEHLE & LATIMER, GORDON L. ROBERTS, RAYMOND J. ETCHEVERRY, JAMES B. LEE, movants: Lois A. Baar, Ms., PARSONS BEHLE & LATIMER, ONE UTAH CENTER, SALT LAKE CITY, UT. For CYNTHIA BRANDT, movant: Paul C Droz, Mr., BLACKBURN & STOLL, LC, Salt Lake City, UT. For PATRICIA E. DAVIS, movant: James W Stewart, Mr., JONES WALDO HOLBROOK & MCDONOUGH, SALT LAKE CITY, UT. For KEARNS-TRIBUNE CORP, SHEILA R. MCCANN, MIKE CARTER, ASSOCIATED PRESS, movants: Michael P O'Brien, Mr., JONES WALDO HOLBROOK & MCDONOUGH, SALT LAKE CITY, UT. Sharon E. Sonnenreich, Ms., KEARNS-TRIBUNE CORPORATION, Salt Lake City, UT.

For LEUCADIA NATIONAL CORPORATION, defendant: Patricia M Leith, Ms., Alan L Sullivan, Mr., Matthew M. Durham, Todd M. Shaughnessy, Andrew G Deiss, VAN COTT BAGLEY CORNWALL & MCCARTHY, SALT LAKE CITY, UT. Raymond Fitzgerald, BUTLER FITZGERALD & POTTER, P.C., New York, NY. For AMERICAN INVESSTMENT **[*2]** FINANCIAL, AMERICAN INVESTMENT BANK N.A., defendants: Patricia M Leith, Ms., Alan L Sullivan, Mr., Melyssa, D. Davidson, Matthew M. Durham, Todd M. Shaughnessy, Andrew G Deiss, VAN COTT BAGLEY CORNWALL & MCCARTHY, SALT LAKE CITY, UT. Raymond Fitzgerald, BUTLER FITZGERALD & POTTER, P.C., New York, NY. For THOMAS L. MONSON, defendant: Ellen Maycock, David C. Wright, KRUSE, LANDA & MAYCOCK, SALT LAKE CITY, UT.

For LEUCADIA NATIONAL CORPORATION, intervenor-defendant: Patricia M Leith, Ms., Todd M. Shaughnessy, VAN COTT BAGLEY CORNWALL & MCCARTHY, SALT LAKE CITY, UT. Raymond Fitzgerald, BUTLER FITZGERALD & POTTER, P.C., New York, NY. For AMERICAN INVESSTMENT FINANCIAL, AMERICAN INVESTMENT BANK N.A., intervenor-defendants: Patricia M Leith, Ms., Melyssa D. Davidson, Todd M. Shaughnessy, VAN COTT BAGLEY CORNWALL & MCCARTHY, SALT LAKE CITY, UT. Raymond Fitzgerald, BUTLER FITZGERALD & POTTER, P.C., New York, NY. For THOMAS L. MONSON, intervenor-defendant: Ellen Maycock, David C. Wright, KRUSE, LANDA & MAYCOCK, SALT LAKE CITY, UT.

For EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, intervenor-plaintiff: Carlie Christensen, Ms., David J Schwendiman, Mr., US ATTORNEYS OFFICE - UTAH, Richard **[*3]** R Trujillo, Richard L. Green, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PHOENIX DISTRICT OFFICE, PHOENIX, AZ.

Judges: Ronald N. Boyce, United States Magistrate Judge

Opinion by: Ronald N. Boyce

Opinion

ORDER

The above entitled matter came on for hearing on June 25, 1996 on a motion to quash by reporters who were subpoenaed by defendants to give a deposition about information they may have received from attorneys for plaintiff and the intervenor Equal Employment Opportunity Commission (EEOC) attorneys.

The issue of the significance of the area about which defendants seek to make inquiry of the reporters came up in this matter on November 30, 1995 when, at a point, after the EEOC had sought to intervene, an article by reporter Mike Carter of the Associate Press appeared in the Salt Lake Tribune. Other articles on this case had appeared in the Tribune and in a Provo paper written by reporter Sheila R. McCann. Counsel for defendants was concerned about whether this court's protective order had been violated by plaintiff or her counsel or counsel for the EEOC. Counsel for defendants also raised the possibility of disclosure of privileged or confidential information, which could arguably be a waiver **[*4]** of privileged material. The dispute centered around EEOC counsel O'Neil and Trujillo and conversations they may have had with the reporters. Of concern to the court was defendants' desire to depose EEOC counsel in this case about their comments to the press. This raised the propriety of such action and problems of intruding into any attorney/client privilege or joint counsel work product relationship. The court suggested the journalists were a direct source of any real information, beyond what had been printed, which might be pertinent to the issue. The court did assert that defendants' argument did not present matter that appeared directly involved with privileged matter.

Counsel for defendants suggested a subpoena to the media and the court indicated preliminarily that there was no objection to that effort. Journalists, reporters and news persons do not enjoy an absolute privilege from giving evidence in judicial proceedings. *Branzburg v. Hayes, 408 U.S. 665, 681, 33 L. Ed. 2d 626, 92 S. Ct. 2646 (1972)*; *Journal Publishing Co. v. Mechem, 801 F.2d 1233 (10th Cir. 1986)*. Generally, they must give evidence and appear at depositions and invoke any privilege they may have. Counsel **[*5]** for defendants proceeded to issue the subpoenas to the movants. That resulted in the instant motion to quash.

This is not a case involving a reporter's sources. The court has evidence from O'Neill and Trujillo which support the conclusion that they did not reveal privileged or confidential matter nor violate the court's protective order. In addition, representations from plaintiff's private counsel have been made which support the same conclusion. On hearing of this matter, the court asked for additional affidavits of plaintiff's attorneys that would confirm the same representations and conclusion. Therefore, the threshold evidence before the court is to the effect that no waiver of any privileged or confidential source material occurred in any conversation by EEOC attorneys with the moving journalists nor did plaintiff's attorneys or plaintiff act in any such way. No violation of the court's protective order is indicated.

In this case, there are competing interests that must be balanced. First, there is the strong interest of the attorney/client relationship, the attorney/client privilege, and attorney work product. There is also the need to insure the court's protective order is **[*6]** obeyed and that counsel's conduct was of a professional nature and that the case not be tried in the media or the potential for a fair trial undermined. [1] There is also the interest of protecting *First Amendment* and common law privileges and interests of the journalists and reporters and not subjecting them to inappropriate or unnecessary inquiry as to their reporting inquiries.

At hearing on this matter, the arguments and evidence presented by the movant's seeking to quash the subpoenas demonstrated that the information in the articles written by the reporters came from court records, witnesses, and pleadings open to the public. There has been no waiver of any attorney/client or work product privilege, nor has confidential medical information about Ms. Bottomly **[*7]** been disclosed or the court's protective order shown to have been abridged. Therefore, the likelihood of admissible evidence being obtained from the depositions of the reporters is remote and at best problematical. *Rule 26(b)(1) F.R.C.P.*

The standard for determining the motion to quash requires the court to balance the various interests and to give attention to the relevant criteria set forth in *Silkwood v. Kerr-McGee, 563 F.2d 433 (10th Cir. 1977)*. See also *Grandbouche v. Clancy, 825 F.2d 1463, 1466 (10th Cir. 1987)*.

Although defendants have essentially exhausted other sources of information there is no indication that defendants' inquiries have been or will be successful in leading to the discovery of admissible evidence. The inquiry and possible evidence from the depositions of movants is not of central importance or

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[1] The court has previously expressed to counsel for the EEOC its concern about the role of counsel in commenting to the media about the case. The court expects the highest level of integrity and professionalism from counsel as well as vigorous advocacy.

crucial to the case. *Zerilli v. Smith, 211 U.S. App. D.C. 116, 656 F.2d 705 (D.C.Cir.1981)*. Although there is logical probativeness to the case in what might possibly develop from the depositions, it is peripheral and not "clearly relevant." *Shoen v. Shoen, 48 F.3d 412 (9th Cir.1995)*. It is not central or core to the litigation. *Silkwood, supra.* **[*8]** Therefore, in balancing the interests involved, the court finds the motion to quash should be granted. Therefore,

IT IS HEREBY ORDERED the movant's, reporters and Kearns-Tribune Corporation's motion to quash subpoenas to Sheila McCann and Mike Carter is granted.

DATED this 2d day of July, 1996.

BY THE COURT:

Ronald N. Boyce

United States Magistrate Judge
