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EXT. 106
ADMITTED IN NY AND NJ

February 24, 2022

Honorable Judge Marybeth Rogers
New Jersey Superior Court
583 Newark Avenue
2d Floor
Jersey City, New Jersey 07302

Re: **Stacie Percella v. James M. Davis; City of Bayonne**
Docket No: HUD-L-177-18
BG&S File No.: NJ-21-3020

Dear Judge Rogers:

The undersigned represents Plaintiff Stacie Percella in the above captioned appeal. We write this Response (*Letter Brief under R. 4:23-1*) to the *Motion to Quash the Depositions of Allan Roth and Ellen Horn*. Foremost, this matter was already adjudicated as of December 17, 2021 when Judge Turula ORDERED their depositions (along with others) (Ex. A). Twenty (20) plus days passed and no motion for reconsideration was filed; R.4:49-2. Judge Turula's previous Order must stand. This should be an expedited decision.

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Further, it should be noted that Deponent Roth actually contacted the undersigned and worked out a convenient date and time for his deposition of March 1, 2022 (See Ex. B). Moreover, as set forth in our February 10, 2022 response to Mr. Sullivan's untimely motion to quash, Ms. Horn and Mr. Roth were scheduled as follows:

Ellen Horn --Monday, February 28, 2022, at 10:00 a.m.

Allan Roth --Tuesday, March 1, 2022, at 1:00 p.m.

These two (2) deponents¹ now seeking to quash have information concerning the allegations set forth in the above captioned complaint, i.e. Allan Roth was involved, per his billing to "terminate Percella" in May 2016 (a full seven months prior to an actual illegal termination). It is clear now that Mr. Roth solicited/suggested the Hearing Officer in Ms. Horn (Departmental Hearings are typically run by Directors within the building, on the Defendant City of Bayonne's payroll). Mr. Roth has a history being a responsible actor in civil rights and retaliation instances of civil servant employees with a Mr. Joseph Demarco (the then Business Administrator of Defendant Bayonne-a major actor in this case) as in OFAC Reports and settled one similar civil action for \$1.2 million by the West New York BOE; see: HUD-L-1367-13. Of further interest is Mr. Roth's role with the City of Bayonne, and what actions were taken concerning Plaintiff Percella.

Ellen Horn was the alleged unbiased Hearing Officer, not an attorney role, of the ginned up disciplinary actions. We now find out she works in the same law firm as Allan Roth. Over a three (3) day period Ms. Horn presided over a hearing, witness statements, and myriad of exhibits. However,

¹ Allan Roth previously worked under the Roth & D'Aquanni firm in 2016; he now works with Ellen Horn at Ruderman & Roth (formerly Ruderman & Glickman).

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Ms. Horn prohibited any type of recordation of the hearing procedure. Further, Ellen Horn compiled a report/recommended decision which apparently was supplemented and co-written by defendant.

The return date is now re-set Friday, March 4, 2022; Plaintiff does not believe oral argument is necessary- as these matters were **adjudicated on December 17, 2021** (see Ex. A). The depositions are Court Ordered, relevant, and necessary to the Plaintiff's case in chief. It is clear as day what the Defendants' counsel Sullivan (and now Ruderman & Roth) appears to be doing: delay, delay, delay then do not produce the Deponents (this worked for them in December, 2019, and they think it will again). As we have argued previously: "Concealment will not be countenanced."

As set forth herein the Plaintiff's arguments are as follows: 1). As did Attorney Sullivan, Allan Roth and Ellen Horn failed to file a motion of reconsideration IAW R.4:49-2 of the December 17, 2021 Order by Judge Turula mandating the Depositions take place; 2). It is now clear Attorney Nicholas Sullivan- and per Allan Roth's latest motion- did not, and does not, represent Allan Roth and Ellen Horn. Roth and Horn are uninterested deponents that were not and are not employees of the Defendant City of Bayonne.

Exhibits to Be Considered

Exhibit A: Judge Turula's Order of December 17, 2021

Exhibit B: Allan Roth's E-mail on availability for his deposition.

I.

Attorneys are Not Exempt from Depositions, Especially Their Actions in Non-Attorney Roles

Mr. Roth is under the mistaken impression that he is not subject to the court rules (even after agreeing to being deposed). When the assertion of privilege causes the exclusion of evidence, the privilege "runs counter to the fundamental theory of our judicial system that the fullest disclosure of the facts will best lead to the truth and ultimately to the triumph of justice." Selser, *supra*, 15 N.J. at 405, 105 A.2d 395. See also Wolosoff, *supra*, 196 N.J.Super. at 561-62, 483 A.2d 821.

Application of the privilege is therefore to be strictly construed to achieve its underlying purpose, in light of the reason for its assertion and the attorney's ethical obligations under the unique circumstances of each case. *In re Nackson*, 221 N.J.Super. 187, 197, 534 A.2d 65 (App.Div.1987), *aff'd*, 114 N.J. 527, 555 A.2d 1101 (1989); *Fellerman*, *supra*, 99 N.J. at 497, 502, 493 A.2d 1239.

The person asserting the privilege thus bears the burden to prove it applies to any given communication. *State v. Pavin*, 202 N.J.Super. 255, 260-61, 494 A.2d 834 (App.Div.1985) (noting that "[t]he burden of proof is on the person asserting the privilege to show that the consultation was a professional one"); *L.J. v. J.B.*, 150 N.J.Super. 373, 377, 375 A.2d 1202 (App.Div.), *certif. denied sub nom. Jacobson v. Balle*, 75 N.J. 24, 379 A.2d 255 (1977) (noting that "the *sine qua non* of the privilege is that the client has consulted the lawyer in the latter's capacity as an attorney"); *State v. Blacknall*, 335 N.J.Super. 52, 56, 760 A.2d 1151 (Law Div.2000). In this matter, no one consulted Ms. Horn as an attorney for the City of Bayonne; she was the hearing officer, paid for her time and effort in a

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position that typically a Department Director is appointed, i.e. Director of Public Safety; Director of DPW; Director a Municipal Services.

A communication is privileged only if it is expressed by an individual acting in his capacity as a client while seeking or receiving legal advice or services from an attorney while acting in his or her capacity as such. *Fellerman, supra, 99 N.J. at 499, 493 A.2d 1239; Wolosoff, supra, 196 N.J.Super. at 562, 483 A.2d 821 (noting that "the privilege accords the shield of secrecy only with respect to confidential communications made within the context of the strict relation of attorney and client")*.

This venerated privilege is not absolute, and must cede, for example, where legal services are sought or rendered in aid of committing a crime **or fraud**, N.J.S.A. 2A:84A-20(2)(a); N.J.R.E. 504(2)(a); *Fellerman, supra, 99 N.J. at 503-04, 493 A.2d 1239*, where it has been waived by its holder, N.J.S.A. 2A:84A-29; N.J.R.E. 530; *Kinsella v. Kinsella, 150 N.J. 276, 300-03, 696 A.2d 556 (1997); Wolosoff, supra, 196 N.J.Super. at 567 n. 3, 483 A.2d 821*, **or where the public interest demands that it give way because there is a legitimate need for the information sought, it is relevant to the issue before the court, and it cannot be obtained from any less intrusive source**, *In re Kozlov, 79 N.J. 232, 243-44, 398 A.2d 882 (1979); Wolosoff, supra, 196 N.J.Super. at 563-64, 483 A.2d 821. Horon Holding Corp. v. McKenzie, 341 N.J. Super. 117, 775 A.2d 111 (N.J. Super. 2001)*. Only Mr. Roth knows why, in government records, he states he was hired to terminate Plaintiff Percella in May 2016 when it took until December 2016 to effectuate the unlawful termination of Plaintiff Percella.

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It is deposition time for Mr. Roth and Ms. Horn. They have firsthand knowledge of the facts related herein, which does not touch upon any role as attorney for Defendant City of Bayonne and Defendant Davis.

II.

Order of December 17, 2021. No Reconsideration Filed

This Order by Judge Turula was very clear; gave a specific timeline for Discovery DED: April 16, 2022. Trial Date is July 5, 2022. The Order of December 17, 2021 (Ex. A) was specific and clear: **the depositions of: Allan Roth; Ellen Horn; Gary Chmielewski; Bernadette D'Angelo (Nestico); James Davis; Gary La Pelusa; Donna Russo; Deborah Falciani; and Joseph DeMarco** were Ordered.

Mr. Roth and Ms. Horn's law firm failed to file a Motion for Reconsideration under R.4:49-2 within the twenty (20) days of receipt of the subject December 17, 2021 Order (attached as Exhibit A). Mr. Roth's and Mr. Sullivan's motive is clear: the further delay of discovery.

III.

Motion to Quash Standard Not Met

The Discovery Rules provide "litigants with the opportunity of full discovery from non-parties," affords "notice of such inquiries to adversaries," and permits "adversaries an appropriate opportunity to challenge the propriety of such discovery." *Cavallaro, supra, 334 N.J.Super. at 566, 760 A.2d 353*. This frivolous motion is not it. Mr. Roth and Ms. Horn are fact witnesses (she presided

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over the departmental termination hearing). They both have intimate, personal, first-hand knowledge of Plaintiff Percella's allegations asserted.

Objections of the deponent, assert of privilege, a right of confidentiality may be made pursuant to R.4:14-3(c). Mr. Roth's, Ms. Horn's, and Mr. Sullivan's concerns, if any, can be addressed at the deposition.

IV.

Discovery is Mandated by New Jersey State Court Rules:

New Jersey's discovery rules are designed to eliminate the element of surprise by requiring litigants to disclose the facts underlying the claim or defense at issue. *See Saia v. Bellizio*, 103 N.J.Super.465, 468, (App.Div.), *aff'd*, 53 N.J.24 (1968); *McKenney v. Jersey City Medical Center*, 167 N.J.359 (2001).

The search for truth in the furtherance of justice is of paramount importance. *Caparella v. Bennett*, 85 N.J.Super.567, 571 (App.Div.1964). This constitutive proposition of our system of justice is fashioned to ensure that the results are grounded in the facts of the matter, and not skill of counsel or craftiness of the parties. *Lang v. Morgan's Home Equipment Corp.*, 6 N.J.333, 338 (1951); *Wymbys v. Township of Wayne*, 163 N.J.523, 543 (2000), quoting, *Evtush v. Hudson Bus Transp. Co.*, 7 N.J.167, 173 (1951).

Concealment, surprise, or trial by ambush will not be countenanced. *Plaza 12 Associates v. Carteret Borough*, 280 N.J.Super.471, 477 (App.Div.1995). Trial date is currently July 5, 2022.

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The relevance standard –that is, “evidence having a tendency in reason to prove or disprove any fact of consequence,” see, N.J.R.E.401, is broad enough on its own to encompass the materials sought. The discovery standard, which is broader still, encompasses anything that is not only relevant, but also that is reasonably calculated to lead to the discovery of admissible evidence. R.4:10-2(a); *Payton v. N.J. Tpk. Auth.*, 148 N.J.524, 535-36 (1997).

The depositions are relevant and necessary to the Plaintiff’s case in chief. It is clear as day what the Defendants’ counsel appears to be doing: delay, delay, delay then do not produce the Deponents (this worked for them in December, 2019, July 2021, and they think it will again). Concealment must not be countenanced.

Conclusion

A civil trial is the search for the truth. The trial court, not the parties, bears the ultimate responsibility for enduring fairness of the proceedings.” *Gonzales v. Safe & Sound Sec. Corp.*, 185 N.J. 100, 117 (2005). In this manner, we must insure that a case in which a Mayor admitted to “sexting” a subordinate long-time employee, Plaintiff Percella, is not short-changed for what appears to be a circumvention of the rules. The Defendants’ behavior in this case was premeditated and ultimately resulted in termination of 16 plus years of employment with the City of Bayonne, Deputy Register.

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The Plaintiff's Request for Relief is clear; it is warranted; and consistent with New Jersey State Court Rules and Case Law. DENY THE RELIEF SOUGHT. If the court wishes to sanction² Defendants' counsel for obstreperous actions, we will so move under R "comply with its provisions. Rule 1:4-8(b)(1) and would be more than happy to support an itemized bill for having to defend this frivolous motion, delaying the inevitable depositions which resulted in having to re-review the materials, etc.. Thank you for your attention herein.

Very truly yours,

Vincent F. Gerbino, Esq. /s/

Vincent F. Gerbino, Esq.

VFG/ks

² In assessing the propriety of a sanction, "apart from any specific provisions of the discovery rules, an inherent authority empowers our courts to impose sanctions for ... [blatant violations] of the spirit of those rules." Summit Trust Co. v. Baxt, 333 N.J. Super. 439, 450, 755 A.2d 1214 (App. Div.2000)...cited in Cavallaro v. Jamco Property Mgt., 334 N.J. Super. 557, 760 A.2d 353 (N.J. Super. 2000)

Exhibit A

FILED

DEC 17, 2021

JOSEPH A. TURULA, P.J. Cv.

BRUNO, GERBINO, SORIANO & AITKEN, LLP
 70 Hilltop Road, Suite 1005
 Ramsey, New Jersey 07446
 (201) 995-1394
 Attorneys for Plaintiff
 BG&S File No.: NJ-21-3020
 Attorney No.: 034231988

<p>STACIE PERCELLA, Plaintiff, vs. JAMES DAVIS, INDIVIDUALLY, CITY OF BAYONNE, XYZ CORP. 1-3 AND JOHN DOES 1-5 (THE LAST TWO NAMES BEING FICTITIOUS AND UNKNOWN), Defendants.</p>	<p>SUPERIOR COURT OF NEW JERSEY LAW DIVISION: HUDSON COUNTY Docket No. HUD-L-177-18 Civil Action ORDER</p>
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THIS MATTER having been opened to the Court by Bruno, Gerbino, Soriano & Aitken, LLP, attorneys for Plaintiff, Stacie Percella, and upon notice to the Superior Court of New Jersey, Hudson County, upon application for an Order to compel Defendants to provide more specific responses to Plaintiff's Demand for Production of Documents, compel the Depositions of Allan Roth, Esq., Ellen Horn, Esq., Joseph DeMarco, James M. Davis, Donna Russo, Gary Chmielewski, Bernadette Nestico, and Gary La Pelusa and extend discovery to March 4, 2022,

IT IS on this 17th day of December, 2021,

ORDERED that Defendants shall provide responses and documents to Plaintiff's more specific request for more specific responses to Plaintiff's demand for production of documents; and it is

FURTHER ORDERED that the depositions of Allan Roth, Esq., Ellen Horn, Esq., Joseph DeMarco, James M. Davis, Donna Russo, Deborah Falciani, Gary Chmielewski, Bernadette Nestico, and Gary La Pelusa shall be scheduled within ~~10~~ 20 days of this Order; and it is further

~~ORDERED that if defense counsel refuses to produce or schedule any of the depositions including the deposition of James M. Davis, sanctions and contempt of court will be set against the defendants; and it is further~~

ORDERED that the discovery end date is extended within 120 days from the date of this Order to March 4, 2022; and it is further

ORDERED that Plaintiff's discovery demands are to be responded to by January 5, 2022; and it is further

~~ORDERED that if Defendants do not produce and/or respond to Plaintiff's discovery demands within the time provided by Cour Rules, sanctions and contempt of Court will be set against the defendants; and it is further~~

~~ORDERED that Plaintiff may serve further discovery demands if Defendants' answers and/or responses are insufficient; and it is further~~

~~ORDERED that a copy of this Order will be served upon all parties via E Courts.~~

This Order has been uploaded by the Court to the eCourts case jacket. Counsel for the moving party shall serve a copy of this Order on any party who did not receive an electronic notice of this filing within 7 days of the date of this Order.


JOSEPH A. TURULA, P.J.Cv.

Opposed

Unopposed

All submissions to the Court shall be double-spaced per Rule 1:4-9. Movant's reply violated this Rule.

Statement of Reasons

Granted in part. The Court finds that the requested discovery and the information sought appears reasonably calculated to lead to the discovery of admissible evidence per R. 4:10-2. The Court is mindful of the opposition that seeks entry of a protective order and quashing subpoenas, but this is improper procedurally as opposing counsel has to file the appropriate motions with the Court. Furthermore, the Court finds exceptional circumstances to extend discovery, specifically the prolonged procedural history and the contentions over discovery requests. The new DED is April 16, 2022, at which point this case would have 1058 days of discovery. Opposing counsel may file the appropriate motions if other relief is sought.

Movant's language regarding this case being, "...politically explosive" has no relevance in documents submitted to this Court and are disregarded.

Further, the thirty plus year rule, R. 1:4-9 requires all documents submitted to the Court to be double spaced. Movant's submissions violated this rule.

Exhibit B

Christine Hirstius

From: Allan Roth <aroth@rrlaborlaw.com>
Sent: Friday, January 21, 2022 11:29 AM
To: Christine Hirstius; Vince Gerbino
Subject: [EXTERNAL Email] RE: Percella v. Bayonne - NJ-21-3020

Yes, I am available. Is this dep in-person or virtual? Is the City's defense counsel available?

s/Allan C. Roth, Esq.
Ruderman & Roth, LLC
150 Morris Avenue, Suite 303
Springfield, NJ 07081
(O) 973.258.1288
(C) 201.264.5998
(F) 973.258.1171

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----- Original message -----

From: Christine Hirstius <CHirstius@bgslaw-ny.com>
Date: 1/21/22 10:17 (GMT-05:00)
To: Vince Gerbino <VGerbino@bgslaw-ny.com>, Allan Roth <aroth@rrlaborlaw.com>
Subject: RE: Percella v. Bayonne - NJ-21-3020

Dear. Mr. Roth:

Are you available on Tuesday, March 1st, at 1:00 p.m.?

Christine A. Hirstius
ABA Certified Paralegal
Bruno, Gerbino, Soriano & Aitken, LLP
777 Terrace Avenue – Suite 601
Hasbrouck Heights, New Jersey 07604
E-Mail: CHirstius@bgslaw-ny.com
Phone: 631-390-0010 – Ext. 403
Fax: 201-995-1398

From: Allan Roth <aroth@rrlaborlaw.com>
Sent: Tuesday, January 18, 2022 5:40 PM
To: Vince Gerbino <VGerbino@bgslaw-ny.com>
Cc: Jay Coffey <JCoffey@baynj.org>; Ellen Horn <ehorn@rrlaborlaw.com>; Karen McLeanas

<kmcleanas@rrlaborlaw.com>

Subject: [EXTERNAL Email] Percella v. Bayonne

Mr. Gerbino:

Please be advised that the December 17, 2021 Order requiring my deposition was received in my office today, January 18, 2022. My deposition is currently scheduled for February 24, 2021. Please be advised that I have surgery scheduled for February 16, 2022. I am not certain if I will be recovered by the 24th, as my physician said I will be out of work between 6 and 10 days. Is it possible to move it to the following week (the week of the 28th), with the exception of March 2nd. Also, is this dep and the dep of Ellen Horn, Esq., of my office, being held in-person or virtual?

Thank you for your anticipated courtesies.

s/ Allan C. Roth, Esq.

Ruderman & Rot
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