

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMIL BLACKMON : CIVIL ACTION
: :
: :
V. : :
: :
: :
ALLEN IVERSON : NO. 01-CV-6429

ORDER

McLaughlin, J.

September 26, 2002

The plaintiff, Jamil Blackmon, has sued the defendant, basketball player Allen Iverson, for idea misappropriation, breach of contract and quantum meruit, all arising out of the defendant's use of the "The Answer," both as a nickname and as a logo or slogan. The plaintiff, who describes himself as Mr. Iverson's "surrogate father," alleges that he came up with the idea that Mr. Iverson should use "The Answer" as his nickname one evening in the summer of 1994, which was the summer before Mr. Iverson went to college, and that, later that same evening, Mr. Iverson promised that if he became a professional basketball player and was able to sell merchandise using his new nickname, he would pay Mr. Blackmon 25% of the proceeds.

Mr. Blackmon alleges that, in reliance on Mr. Iverson's promise to pay him, he invested time and money into developing and refining his "The Answer" idea; he also supported Mr. Iverson and his family, both financially and otherwise. Over the years, both before and after he began playing professional basketball and using "The Answer" slogan to sell merchandise, Mr. Iverson repeated his promise to pay Mr. Blackmon for his idea.

Presently before the Court is the plaintiff's motion for immediate injunction, for disqualification of defense counsel and for sanctions. The plaintiff argues that defense counsel violated various ethical rules in telling the defendant the name of a potential third-party witness and in then contacting that witness. The plaintiff's motion is denied.

Facts

The Court held a hearing on the motion on September 5, 2002, at which the lawyers gave their respective recollections of the facts that form the basis of the motion. The Court found all the attorneys credible and accepts each one's statement of what occurred. Following is a summary of the facts as set forth at the hearing.

Mr. Iverson is represented by two sets of counsel, Joseph J. Serritella and Kathleen A. Johnson of Pepper Hamilton

LLP in Philadelphia, Pennsylvania, and Thomas B. Shuttleworth, II and Lawrence H. Woodward, Jr. of Shuttleworth, Ruloff, Giordano & Swain, P.C. in Virginia Beach, Virginia.'

In February 2002, Frederick A. Tecce, counsel for the plaintiff, had a conversation with Mr. Serritella, during which Mr. Tecce told Mr. Serritella that he had certain declarations made by individuals who had witnessed conversations between the plaintiff and the defendant. In an attempt to start settlement negotiations, Mr. Tecce explained that he had withheld these declarations from the complaint to spare the defendant embarrassment but that he was going to add them to the amended complaint. Mr. Tecce said that he did not want the declarations to be given to Mr. Iverson. Mr. Serritella responded that disclosure of the declarations to Mr. Iverson was necessary to properly counsel his client. The attorneys never reached any agreement as to whether the identities of the witnesses or content of the declarations would be kept secret. They agreed that Mr. Tecce would send them to Mr. Serritella with a cover letter, setting forth the limitations that Mr. Tecce would like placed on the disclosure of the declarations. Tr. 8-10, 14.

One of the declarations was made by Terry C. Royster,

¹Mr. Shuttleworth and Mr. Woodward are admitted to practice before this Court pro hac vice.

who had in the past provided security services to Mr. Iverson. Mr. Woodward represented Mr. Iverson at the time that Mr. Iverson entered into a written agreement with Mr. Royster regarding the security services.

Mr. Tecce sent the declarations to Mr. Serritella with a cover letter that stated:

Although we have marked these documents as "Attorneys Eyes Only," please feel free to discuss with your client the factual allegations set forth in the declarations. The designation is more to protect temporarily, the witnesses' identity. This is particularly true with respect to Mr. Royster who is currently negotiating with the Sixers organization and Reebok' in an attempt to be rehired.

Plaintiff's Brief, Exhibit A.

Upon receipt of the declarations, Mr. Serritella called Mr. Tecce and told him that defense counsel could not properly counsel their client regarding the declarations without revealing Mr. Royster's identity. Mr. Serritella also told Mr. Tecce that revealing Mr. Royster's identity would not cause additional harm to Mr. Royster, because Mr. Royster had already alienated Mr. Iverson by siding with Mr. Blackmon. Tr. 14. Mr. Tecce has no recollection of this conversation, but he did not deny that it occurred. Tr. 16.

After this conversation, Mr. Serritella sent the declarations to Mr. Woodward, who discussed them, including who

authored them, with Mr. Iverson. In addition, on or about March 5, 2002, Mr. Woodward called Mr. Royster and left a number of voicemail messages for him. In one of those messages, Mr.

Woodward stated the following:

Hey, Terry, this is Woodie. It's a little after 3 o'clock on March 5th. I need to send you some correspondence reference confidential provisions of the contract that you signed with Allen and I would just like to get an address where you need me to send that. If you're represented by a lawyer, please send me the lawyer's address or name and let me know so that I can send it to the lawyer. If you're not, if you could call me at 757-671-6047 and let me know where you want this stuff sent. We're going to be filing this injunction and lawsuit papers, I believe, down here in Hampton in reference to what I think is a breach of the confidentiality agreement on your part and that which you agreed to in the contract. So, if you could, please just let me know where I should, you know, send the papers, I'd appreciate it. Thanks.

Defendant's Brief in Opposition, at 5-6.

On March 6, 2002, Mr. Tecce wrote a letter to Mr. Serritella. In the letter, he complained about the fact that "Mr. Woodward told Mr. Iverson that Terry Royster had provided a sworn statement." Plaintiff's Brief, Exhibit C. Mr. Tecce also accused Mr. Serritella of breaching the terms of an agreement between the two attorneys.

Mr. Serritella responded to Mr. Tecce's letter with a letter of his own, in which he explained his understanding of the agreement. Mr. Serritella said that his understanding was that

although defense counsel could not show Mr. Iverson the declarations, they were permitted to "communicate the fact that the declarations had been proffered by various witnesses, albeit not their contents, as we could not possibly counsel our client with regard to them without doing so." Plaintiff's Brief, Exhibit D.

The plaintiff claims that Mr. Royster was in negotiations with the 76ers and Reebok to provide security services to the defendant again, and that these negotiations broke off as a result of defense counsel's breach of the agreement not to disclose the identity of the declarants.² The plaintiff also argues that Mr. Woodward's actions constituted the crime of witness tampering and violated several ethical rules.

²The defendant denies Mr. Royster's claim that he was in negotiations with Reebok and the 76ers and that these negotiations broke off when Mr. Iverson learned that he had given the plaintiff a declaration. Attached to the defendant's opposition is a declaration of Billy King, the general manager of the 76ers, who states both that the 76ers organization does not provide security for its players and that neither Mr. Iverson nor anyone representing him ever contacted the 76ers to request that Mr. Royster not be hired. Defendant's Brief in Opposition, Exhibit A. Also attached is a declaration of Thomas Shine, an executive at Reebok International Ltd. who handles Mr. Iverson's account. Mr. Shine states that neither Mr. Iverson nor Mr. Woodward ever spoke to him regarding Mr. Royster, that Reebok never agreed to hire Mr. Royster, and that no one at Reebok ever told Mr. Royster, the 76ers, Mr. Iverson or any of Mr. Iverson's representatives that Reebok was going to hire Mr. Royster. Defendant's Brief in Opposition, Exhibit B. -

Finally, the plaintiff argues that Mr. Woodward should be disqualified because he will be called as a witness at the trial of this case, and because he would be called upon to cross-examine Mr. Royster who is, according to the plaintiff, Mr. Woodward's client or former client. The plaintiff asks, among other things, that the Court issue an order vacating its prior order admitting Mr. Shuttleworth and Mr. Woodward pro hac vice, that Pepper Hamilton be disqualified, and that the Court refer this matter to the United States Attorney's office for investigation and possible prosecution.

Discussion

The plaintiff's motion presents three main questions: (1) did defense counsel agree not to disclose Mr. Royster's name to Mr. Iverson; (2) did Mr. Woodward engage in witness tampering when he left the message for Mr. Royster; and (3) should Mr. Woodward be disqualified either because he is likely to be a necessary witness at trial or because he will be called upon to cross-examine one of his clients or former clients.

First, the Court finds that counsel for the parties did not agree that defense counsel could not tell the defendant the names of the declarants. Mr. Tecce admitted that the attorneys had not come to an agreement prior to the declarations being

sent. Mr. Serritella stated that he called Mr. Tecce immediately upon receipt of the letter to make Mr. Tecce aware that the agreement proposed by Mr. Tecce was unacceptable.³ Based on that conversation, Mr. Serritella believed that Mr. Royster's name could be revealed.

Second, the Court will not disqualify Mr. Woodward for alleged witness tampering. The plaintiff argues that Mr. Woodward violated the federal witness tampering statute, in particular, 18 U.S.C. Sections 1512(b)(1) and 1512(c)(1). The plaintiff argues that Mr. Woodward violated Section 1512(b)(1) by threatening and/or corruptly persuading Mr. Royster, "with intent to . . . influence, delay, or prevent the testimony of any person in an official proceeding." 18 U.S.C. § 1512(b)(1). The plaintiff also argues that Mr. Woodward violated Section 1512(c)(1), which makes it a crime to harass another person with the intent to hinder, delay, prevent or dissuade any person from attending or testifying in an official proceeding.

The witness tampering statute does not define "corruptly persuade." The Third Circuit has held that corrupt persuasion must mean something more than mere persuasion with the

³ The Court notes that Mr. Serritella did not send a letter following up on this conversation. Ideally, Mr. Serritella would have sent a letter memorializing his conversation with Mr. Tecce. However, his failure to do so is not an ethical violation.

intent to influence, delay or prevent a witness' testimony, because such an interpretation would make the word "corrupt" superfluous. See United States v. Davis, 183 F.3d 231, 249 (3d Cir. 1999) (quoting United States v. Farrell, 126 F.3d 484, 487 (3d Cir. 1997)). More than an improper motive is required for persuasion to be considered "corrupt." For example, bribing a prospective witness, or persuading them to testify falsely would be corrupt persuasion. The Third Circuit has left open the question of whether merely discouraging a witness to testify, when that witness does not possess a Fifth Amendment privilege, would violate the witness tampering statute. Id. n. 5.

Turning to what constitutes a threat for purposes of the statute, several district courts have held that a threat to sue does not constitute a threat for purposes of Section 1512. See G-I Holdings, Inc. v. Baron & Budd, 179 F.Supp.2d 233, 266-267 (S.D.N.Y. 2001); Philadelphia Reserve Supply Co. v. Nowalk & Assocs., No. 91-0449, 1992 WL 210590, at *6 (E.D. Pa. Aug. 25, 1992); Aamco Transmissions, Inc. v. Marino, Nos. 88-5522 and 88-6197, 1990 WL 106760, at *2 (E.D. Pa. July 18, 1990).

The witness tampering statute "does not prohibit or punish the providing of lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding." 18 U.S.C. § 1515(c). Section 1515(c), which is

known as the safe harbor provision, "provides a complete defense to the statute because one who is performing bona fide legal representation does not have an improper purpose. His purpose - to zealously represent his client - is fully protected by the law," United States v. Kloess, 251 F.3d 941, 948 (11th Cir. 2001). See also United States v. Kellington, 217 F.3d 1084, 1098-1099 (9th Cir. 2000) (reversible error where attorney was not permitted to argue to the jury that he acted not with criminal intent but within the legitimate bounds of legal representation).

In this case, the parties agree that Mr. Woodward told Mr. Royster that he would be filing suit against him on behalf of Mr. Iverson for violation of the confidentiality provision of the security services agreement between Mr. Iverson and Mr. Royster. As an initial matter, the plaintiff does not argue that such a lawsuit would be frivolous⁴. The security services agreement does provide that Mr. Royster will keep Mr. Iverson's business and personal information confidential, and that his duty to do so will survive the termination of the agreement. Defendant's Brief

⁴At the hearing on the motion, counsel for the plaintiff did argue that, because Mr. Royster spoke with Mr. Woodward several times about making a declaration before doing so and was told not to worry about it, Mr. Woodward waived Mr. Iverson's rights under the security services agreement. Mr. Woodward denies having such conversations. This potential waiver defense does not make the lawsuit frivolous.

in Opposition, Exhibit C.

Nor does Mr. Woodward's statement alone appear to be "corrupt persuasion" within the meaning of the statute. See Davis, 183 F.3d at 249 (requiring more than mere persuasion not to testify). It is arguably not even a threat. Mr. Woodward does not say that if Mr. Royster testified, we would file suit. He states as a fact that the defendant planned to file suit because of a violation of the confidentiality provision that had already occurred. Even if the Court were to construe this as a threat to sue, it does not amount to a threat within the meaning of the witness tampering statute. See G-I Holdings, 179 F. Supp.2d at 266-267. Finally, Mr. Woodward's conduct appears to come within the safe harbor provision of the statute. He made the call in the course of his representation of Mr. Iverson "in connection with or in anticipation of an official proceeding." For all of these reasons, the Court cannot find that Mr. Woodward violated the witness tampering statute.

Third, the plaintiff argues that Mr. Woodward should be disqualified because he will be required to testify in this case, and because he will be called upon to cross-examine Mr. Royster, who is his client or former client.

Pennsylvania Rule of Professional Conduct 3.7 provides that, with certain exceptions: 'A lawyer shall not act as

advocate at a trial in which the lawyer is likely to be a necessary witness." Pa. R. Prof'l Conduct 3.7. The plain language of the rule suggests that it does not ban a lawyer from acting as an advocate prior to trial. "While there is no binding and clear decision as to when Rule 3.7 may be applied, the consensus in Pennsylvania is that an attorney-witness is permitted to participate in pre-trial activity and may not be disqualified under Rule 3.7 until trial." First Republic Bank v. Brand, 2001 WL 1112972, *8 (Pa. Ct. Com. Pl. Apr. 30, 2001). It is premature to decide this issue now; the plaintiff may raise it later if necessary.

The plaintiff also argues that Mr. Woodward should be disqualified because he might be called upon to cross-examine Mr. Royster, which would violate either Pennsylvania Rule of Professional Conduct 1.7 or 1.9, depending on whether Mr. Royster is Mr. Woodward's client or former client. See Pa. R. of Prof'l Conduct 1.7 (an attorney may not represent a client if the representation would be directly adverse to another client); Pa. R. of Prof'l Conduct 1.9 (an attorney may not use confidential information gained in the course of representing a former client to that client's disadvantage). The Court declines to disqualify Mr. Woodward on this ground. First, the plaintiff has not established that he has standing to raise issues arising out of

an alleged attorney-client relationship between Mr. Woodward and Mr. Royster. In addition, Mr. Royster at this early stage is only a potential witness; the content of any testimony he might give is unknown. As a result, the Court is unable to evaluate the plaintiff's arguments.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMIL BLACKMON

:
:
:
:
:
:
:

CIVIL ACTION

v.

ALLEN IVERSON

NO. 01-CV-6429

ORDER

AND NOW, this 26th day of September, 2002, upon consideration of the plaintiff's motion for immediate injunction, disqualification and sanctions (Document #10), all responses and replies thereto, and after a hearing on the motion on September 5, 2002, IT IS HEREBY ORDERED and DECREED that the motion is DENIED for the reasons given in a memorandum of today's date.

BY THE COURT:


Mary A. McLaughlin, J.