

3 Haw.App. 130

Intermediate Court of Appeals of Hawai'i.

Muneo SAMESHIMA, Individually and as
Councilman, County of Hawaii, and on
behalf of the Concerned Taxpayers of
Hawaii, Plaintiff,

v.

Stephen K. YAMASHIRO, Individually
and as Councilman and Chairman of the
Council, County of Hawaii, Defendant-
Appellee.

No. 8053.

|
March 23, 1982.

Synopsis

The First Circuit Court, Honolulu County, Arthur S. K. Fong, J., adjudged plaintiff's counsel in contempt for failure to answer deposition questions, and counsel appealed. The Intermediate Court of Appeals, Padgett, J., held that: (1) although charge that there had been secret meetings allegedly attended by defendant councilman to discuss interfering with task force investigation had been deleted from amended complaint sources of counsel's information as to the alleged meeting was still relevant to remaining charges of malfeasance in office; (2) by filing suit and testifying the client had waived the attorney-client privilege; and (3) the work product privilege did not shield discovery.

Affirmed.

West Headnotes (9)

[1] **Pretrial Procedure** — Relevancy and materiality

Although charge that defendant councilman attended secret meetings to discuss interfering with task force investigation was omitted from amended complaint, deposition questions of plaintiff's counsel, who had informed plaintiff as to the meetings, as to source of his information were relevant as there remained

broad gauged charges of official malfeasance and it could not be said that information sought was not reasonably calculated to lead to admissible evidence and thus inquiry could be made as to the source, notwithstanding the dropping of the charge. [Rules Civ.Proc., Rules 26\(b\)\(1\), 37\(a\)\(2\), \(b\)\(1\)](#).

[2] **Pretrial Procedure** — Identity and location of witnesses or others

Although deponent stated that he initially was told of existence of secret meetings allegedly attended by defendant councilman, charged with official malfeasance, but that when he checked back he was told by the informant either that there had been no such meetings or that fact of such meetings could not be verified, names of deponent's sources were relevant and discoverable as their testimony could conceivably and reasonably lead to admissible evidence supporting or refuting the charges. [Rules Civ.Proc., Rules 26\(b\)\(1\), 37\(a\)\(2\)](#).

[3] **Privileged Communications and Confidentiality** — Waiver of privilege

By filing lawsuit charging defendant councilman with conflict of interest based on alleged interference with task force investigation and by testifying the plaintiff had waived attorney-client privilege thus, plaintiff's counsel was under a duty, at deposition, to reveal sources of information which he had imparted to plaintiff concerning defendant's alleged attendance at secret meetings to discuss interfering with the investigation.

[4] **Privileged Communications and**

Confidentiality → Persons entitled to assert privilege

Attorney-client privilege is not the attorney's to assert.

refuse to answer the questions.

[5] **Pretrial Procedure** → Work product privilege; trial preparation materials

Work product privilege did not preclude discovery of plaintiff's counsel as to source of information concerning meetings allegedly attended by defendant councilman, charged with conflict of interest, to discuss interfering with task force investigation where such information was known to counsel alone and there were no other reasonable means of obtaining it and information sought concerned conversations which counsel had before the lawsuit was filed and, hence, was not the product of work in connection with the suit and, as being partially cause of initiation of suit, the conversations were discoverable. [Rules Civ.Proc., Rules 26\(b\)\(1, 3\), 37\(a\)\(2\)](#).

[8] **Pretrial Procedure** → Scope of Examination

A witness may be asked questions which are reasonably calculated to lead to admissible evidence absent an exemption or privilege, the witness answer the same.

[9] **Pretrial Procedure** → Scope of Examination

Where a complaint charges malfeasance on the part of an elected public official on broad general grounds, the dropping of an evidentiary allegation with respect to alleged meetings does not prevent inquiry, during discovery, as to the persons giving information with the respect to those meetings.

[6] **Pretrial Procedure** → Persons Who May Be Examined

A witness subpoenaed to answer questions at a deposition taken under [Rule 26, Hawaii Rules of Civil Procedure](#), is required to attend and give his testimony unless specially exempted or privileged.

****545 Syllabus by the Court**

1. ***130** A witness subpoenaed to answer questions at a deposition taken under [Rule 26, Hawaii Rules of Civil Procedure](#), is required to attend and give his testimony unless specially exempted or privileged.

2. A witness, as distinguished from a party, is not entitled to urge objections of incompetency or irrelevancy at a deposition and on that basis, refuse to answer the questions.

3. A witness may be asked questions which are reasonably calculated to lead to admissible evidence absent an exemption or privilege, the witness answer the same.

4. Where it can be said that a question could be

[7] **Pretrial Procedure** → Objections and waiver thereof

A witness, as distinguished from a party, is not entitled to urge objections of incompetency or irrelevancy at a deposition and on that basis,

considered likely enough to lead to the discovery of sufficiently important admissible evidence to warrant the trial court's permitting it to be asked, a witness is not privileged to refuse to answer on the ground of relevancy.

5. Where a complaint charges malfeasance on the part of an elected public official on broad general grounds, the dropping of an evidentiary allegation with respect to alleged meetings does not prevent inquiry, during discovery, as to the persons giving information with respect to those meetings.

6. Where a client has waived the privilege by filing a complaint and by answering questions with respect to his communications with an attorney, inquiry may be made of the attorney with respect to those communications upon a properly noticed deposition.

7. *131 Where an attorney appears to be the only person having the names, addresses, etc. of persons supplying information which may be the basis of charges of official malfeasance so that there is a necessity of obtaining such information from the attorney, **546 that information is not within the scope of the work product privilege.

8. Where information is obtained by an attorney prior to filing suit and is used as a partial basis for the filing of the suit, that information is not within the scope of a work product privilege.

Attorneys and Law Firms

*135 Fred Paul Benco, Honolulu (E. Cooper Brown, Honolulu, on the briefs), for plaintiff.

Christopher P. McKenzie and Benjamin L. Carroll, III, Honolulu (McKenzie, Trecker & Fritz and Albert Gould, Honolulu, of counsel), for defendant-appellee.

Before HAYASHI, C. J., and PADGETT and BURNS, JJ.

Opinion

PADGETT, Judge.

This is an appeal from an order adjudging appellant of contempt. We affirm.

Appellant, acting as attorney for the plaintiff, filed an action against Appellee Stephen K. Yamashiro, a councilman and chairman of the council in the County of Hawaii. The complaint charged Yamashiro with

violations of the Code of Professional Responsibility, the Hawaii Constitution, the Hawaii Revised Statutes, and the Hawaii County Charter, by reason of conflicts of interest in connection with the Kohala Task Force investigation.

Specific allegations in the original complaint charged Yamashiro with attending meetings to discuss interfering with the investigation. Subsequently, the deposition of Plaintiff Muneo Sameshima was taken and it developed that his information with respect to the alleged meetings had come to him from the appellant. Appellant's deposition was therefore scheduled. Inquiry was made of him as to the source of his information with respect to the allegations about the meetings. He revealed that he had heard about the meetings from credible and reliable persons but he refused to name those persons or give the details of his conversations with them.

Appellee attempted to get an order to compel the appellant to answer in the Third Circuit but since the deposition had been taken in the First Circuit, the court ruled that the First Circuit was the proper place for the appellee to seek to compel appellant to answer the questions. Appellee, thereupon, brought the present proceedings in the First Circuit. After an order to show cause had been issued in the First Circuit, the original complaint in the Third Circuit, was amended and the allegations with respect to the meetings were omitted.

*132 A hearing was held on the order to show cause and on December 31, 1979, an order was entered that appellant should appear at a deposition and answer questions concerning the name, address, identity, information received from and circumstances surrounding the source or sources who alleged the secret meeting between defendant and other government officials. The issues of contempt and liability for attorney's fees and costs were held in abeyance, pending the deposition. Eventually, the deposition was taken and appellant again refused to answer the questions. Thereafter, the court below entered the order appealed from, adjudging appellant to be in contempt of court.

Appellant essentially raises three issues. He contends first, that because the allegations concerning the meetings had been omitted in the amended complaint which was filed before he was ordered by the court to answer the questions, that the questions thereupon became irrelevant. Secondly, he urges that the questions would require him to violate the attorney-client privilege and thirdly, he urges that the questions would violate his work product privilege.

Rule 26(b)(1), Hawaii Rules of Civil Procedure, provides

in part:

It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Rule 37(a)(2) provides in part:

If a deponent fails to answer a question propounded ... the discovering party **547 may move for an order compelling an answer ...

Rule 37(b)(1) provides:

If a deponent fails ... to answer a question after being directed to do so by the court in the circuit in which the deposition is being taken, the failure may be considered a contempt of that court.

The Supreme Court of Hawaii in *In Re Goodfader*, 45 Haw. 317, 367 P.2d 472 (1961) stated:

In *Blair v. United States*, 250 U.S. 273 (39 S.Ct. 468, 63 L.Ed. 979 (1919)), at p. 281 (39 S.Ct. at 471), the Court elaborates on the subject, as follows:

“In all of these provisions, as in the general law upon the subject, it is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction *133 of the Government is bound to perform upon being properly summoned, and for performance of which he is entitled to no further compensation than that which the statutes provide. The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public. The duty, so onerous at times, yet so necessary to the administration of justice according to the forms and modes established in our system of government (*Wilson v. United States*, 221 U.S. 361, 372 (31 S.Ct. 538, 541, 55 L.Ed. 771 (1911)), quoting Lord Ellenborough), is subject to mitigation in exceptional circumstances; there is a constitutional exemption from being compelled in any criminal case to be a witness against oneself, entitling the witness to be excused from answering anything that will tend to incriminate him (see *Brown v. Walker*, 161 U.S. 591 (16 S.Ct. 644, 40 L.Ed. 819 (1896))); some confidential matters are shielded from considerations of policy, and perhaps in other cases for special reasons a witness may be excused from telling all that he knows.

“But, aside from exceptions and qualifications-and none such is asserted in the present case-the witness

is bound not only to attend but to tell what he knows in answer to questions framed for the purpose of bringing out the truth of the matter under inquiry.

“He is not entitled to urge objections of incompetency or irrelevancy, such as a party might raise, for this is no concern of his. *Nelson v. United States*, 201 U.S. 92, 115 (26 S.Ct. 358, 365, 50 L.Ed. 673 (1906)).”

45 Haw. at 325-6, 367 P.2d 472.

The above statement alone might well dispose of appellant’s argument with respect to relevancy since appellant was a witness, not a party, in the action in which the deposition was taken. However, in this case, because appellant is an attorney and, therefore, an officer of the court, we think more needs to be said. Both parties agree that the test really is not relevancy but whether the answers sought appear reasonably calculated to lead to the discovery of admissible evidence. Here, when the appellant refused to answer the questions at the deposition, they were clearly and directly relevant to the specified charges about the meetings made in the complaint. Appellant’s conduct at that time in refusing to answer the questions was reprehensible and unbecoming of an officer of the court.

[1] [2] Appellant contends that by the time the court ordered him to *134 answer the questions as to the identity, etc. of his informants, the charge that there had been meetings had been omitted from the amended complaint and that, therefore, the court below lacked power to order him to answer. Nevertheless, the amended complaint still charged in paragraph 16:

By his refusal to refrain from participation in the Kohala Task Force investigation and in light of the foregoing actions, Defendant has violated and does continue to violate the Code of Professional Responsibility.

Paragraph 19 charges:

Defendant’s actions have been and continue to be in violation of **548 Article XIV, Section 5 of the Hawaii State Constitution and Chapter 84, Hawaii Revised Statutes, in that Defendant’s actions constitute a conflict of interest as defined under Section 84-14, H.R.S.

Paragraph 22 charges:

Defendant has violated and does continue to violate Article XIV of the Hawaii County Charter in that Defendant Yamashiro’s actions have constituted (sic) and do continue to constitute a conflict of interest, within the meaning of Section 14-2 and the Hawaii

County Ordinance enacted pursuant thereto.
Paragraph 23 charges:

Defendant Yamashiro has violated and does continue to violate his fiduciary duties as a councilman and elected public official.

These are broad gauged charges of official malfeasance against an elected public official. We cannot say that the information which appellee sought and which the court ordered appellant to divulge was not reasonably calculated to lead to admissible evidence in connection with appellee's defense against those charges. Appellant states that he first was told the meetings had occurred but that when he checked back, was told by his informants that either there had been no such meetings or that the fact of such meetings could not be verified. What appellant's sources might testify to under oath, however, no one can say, but obviously, their names could lead to their depositions and their testimony could conceivably and reasonably lead to admissible evidence supporting or refuting the charges of malfeasance.

As the Supreme Court of Hawaii said in *In Re Goodfader*, supra :

As stated in *Miller v. Sun Chemical Corp., D.N.J., 12 F.R.D. 181 (1952)*, at p. 182: "The language (of Rule 26) is broad. It cannot be said that the matters inquired into were not relevant to the subject matter or that they would not 'lead to the discovery of admissible evidence.' Would that judges had the means of divination to forecast the former resulting in the latter with unfailing accuracy. We can only be as accurate as a weather forecaster. Need I say more?" In the same mood, we can only say that it is our best judgment that the inquiry desired to be made by plaintiff in this case could be considered likely enough to lead to the discovery of sufficiently important admissible evidence to warrant the trial court's permitting her to pursue it ...

[45 Haw. at 338, 367 P.2d 472.](#)

Accordingly, the contention with respect to relevance is without merit.

^[3] ^[4] Equally without merit is the claim of attorney-client privilege. Clearly, both by filing the suit and by testifying, the client had waived the privilege. The privilege was not the attorney's to assert. Once the client had waived the privilege, the attorney was under a duty to reveal what the court ordered him to reveal.

^[5] Without merit also, is the work product privilege claim. Since the information as to who the persons were and what they said is known to appellant alone and there is obviously no other reasonable means of obtaining that information, this case does not fall within the parameters of the work product privilege. Compare *Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947)* and *Rule 26(b)(3), Hawaii Rules of Civil Procedure.*

Moreover, the information sought concerned conversations which appellant had before the instant lawsuit was filed. It, therefore, is clearly not the product of work in connection with the suit in which the deposition was taken. Since those conversations were, in part, at least, the cause of the initiation of the suit, they certainly were discoverable.

Finding none of appellant's points to have merit, we affirm the order below.

All Citations

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