COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

2007-J-0062
(Hampden Superior Court
Case No. HDCV2005-00602

SPRINGFIELD ROMAN CATHOLIC BISHOP

vs.

TRAVELERS PROPERTY CASUALTY CO. & others.

MEMORANDUM AND ORDER

The defendant petitioners (insurers), seek relief pursuant to G.L. c. 231, § 118 (first par.), from an order of the Superior Court, issued in connection with their motion to compel production of certain documents by the plaintiff Roman Catholic Bishop of Springfield ("the Diocese"), that protects certain documents from discovery. The Diocese also petitioned for relief pursuant to G.L. c. 231, § 118 (first par.) from a provision of that order that compels it to produce certain documents.

After the insurers denied coverage, the Diocese sought a declaration in Superior Court of the insurers' obligations to provide coverage for various sexual abuse claims. During discovery the Diocese asserted various privileges as to many documents, and the insurers moved to compel production. The Superior Court motion judge ruled, inter alia, that the attorney-client and work product privileges shielded from discovery most of the documents as to which the Diocese had asserted privileges; and that the Diocese must produce the documents (and answer

interrogatories) that it asserted were not subject to discovery by reason of the State and Federal constitutional free exercise of religion clauses and the doctrine of religious autonomy.[1] The Diocese then moved for a protective order which was denied.

By agreement of the parties, the interlocutory appeals were consolidated; each party has filed an opposition to the other's appeal. For reasons discussed below, I will affirm the order.

I. Petition of insurers. The insurers argue in this appeal that the Diocese has a duty under Massachusetts law "to cooperate with its insurers," relying on language in Metlife Auto & Home v. Cunningham, 59 Mass. App. Ct. 583 (2003).[2] That case stands primarily for the proposition that "[t]he duty to cooperate, found in virtually every liability policy, required [the insured] to 'assist [MetLife] fully in its handling of the claim, its investigation and resolution of the claim, either by settlement or defense of the suit.'" Id. at 587, quoting from 14 Couch on Insurance § 199:7 (3d ed. 1999). Metlife had undertaken the defense of its insured who, invoking the Fifth Amendment, did not answer questions at deposition about his role in the death that was at issue in the civil suit against him. Metlife at that

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[1] The motion judge singled out four documents of those for which the Diocese asserted attorney-client or work-product privilege as not falling under the aegis of either privilege and ordered their production.

[2] It is not seriously contended that the policies at issue do not contain this provision.

point filed an action to obtain a declaratory judgment that it had no obligation to defend or indemnify its insured under the policy; the parties to this action were Metlife and the plaintiffs in the action against the insured. Addressing the argument that the insured had no duty to cooperate in the declaratory judgment action, the Appeals Court concluded that the insured's failure was in the prior action, prior to commencement of the declaratory judgment action, "and his continuing refusal to do so as the action progressed simply showed that he had not changed his mind on that score." Id. at 589. The Appeals Court then went on to make the statement upon which the insurers here rely: "[T]he better rule is that the duty to cooperate does include the obligation to provide accurate information bearing on coverage." Ibid. That comment is, however, qualified by the statement that follows: "At least that is the better rule where, as here, there is no hint of an insurer's anticipatory breach of its own contractual obligations." Id. at 590. This is consistent with the law as articulated by professor Windt: "It is a basic principle of contract law that once a party to a contract breaches the agreement, the other party is no longer obligated to continue performing his or her own contractual obligations. As a result, once the carrier has denied coverage, an insured is no longer bound by the insurance policy's provisions governing cooperation. . . ." A.D. Windt, Insurance Claims and Disputes §

3.10, at 222-223 (4th ed. 2001).

Here, unlike in Metlife, the insurers denied coverage (and at least one did not undertake the defense of the Diocese). The Appeals Court in Metlife contrasts the facts of its case to those of Remington Arms Co. v. Liberty Mut. Ins. Co., 142 F.R.D. 408, 417 (D. Del. 1992). In Remington Arms, the court held that the insurance company's "fail[ure] to commit itself to coverage," was an anticipatory breach, citing 8 Appelman, Insurance Law and Practice § 4786 (Supp. 1991) ("'upon the insurer's anticipatory breach of its duty to indemnify the insured, the insured is freed from its obligations under the cooperation clause to the extent necessary to reasonably protect itself against the breach'"). Ibid.

That the Diocese did not raise anticipatory breach as a defense against the insurer's claims here does not preclude me from affirming the decision of the motion judge, as I may do so on any available grounds. See Kelly v. Avon Tape, Inc., 417 Mass. 587, 590 (1994) ("a correct ruling of the trial court will be upheld, even if the appellate court relies on a different ground than the one relied on by the trial court"); Commonwealth v. Williams, 56 Mass. App. Ct. 337, 341 n.5 (2002) (when a general objection is made to the admission of evidence, trial judge's ruling is affirmed if supportable on any ground).

Based on the foregoing, the Diocese could arguably be

relieved of its duty to cooperate under the policy; however as the motion judge determined, "even assuming arguendo that such a duty to cooperate is applicable to the policies at issue, the [insurers]" failed to show that "the duty eviscerates the attorney-client privilege or work product immunity."[3]

The insurers' petition also seeks what it terms an "alternative" remedy, but their memorandum contains no argument as to why it would be appropriate at this stage for a single justice to grant the relief sought.

II. Petition of Diocese. The Diocese, in its petition, argues that documents pertaining to laicization[4] were protected from discovery by G. L. 233, § 20A (privileging communications of religious or spiritual advice) and by the First Amendment of the Federal Constitution, Art. 2 and Art. 46, § 1 of the Massachusetts Declaration of Rights.[5]

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[3] Not all documents to which the Diocese is claiming the attorney/client and work product privilege have been ordered produced. With respect to those documents that the insurers can produce for in camera inspection, the appeal is premature.

[4] Laicization is the returning of a priest to lay status. See http://dictionary.reference.com/browse/laicization (last visited February 22, 2007).

[5] Should this Court find the privileges unavailing, the Diocese requested that this Court impose a protective order, restricting dissemination of the materials to counsel and the parties, including the abuse claimants. Regarding the laicization documents, the Diocese also moved this Court to accept under seal a previous, impounded Superior Court order, which the Diocese contends flatly contradicts the order at hand.

1. Claim of privilege. I reject the Diocese's agreement that the statutory priest-penitent exception, G. L. c. 233, § 20A[6], applies to protect from discovery the documents at issue here.

Whether documents at issue concern communications of the sort protected by § 20A is a "factual" question, meaning that a trial judge's determination of this question is entitled to deference. See Commonwealth v. Zezima, 365 Mass. 238, 242 n.4 (1974) ("it is the judge who must make the determination whether a communication occurred in circumstances described in § 20A"), and compare Ryan v. Ryan, 419 Mass. 86, 95 (1994). The motion judge here found that the Diocese's descriptions of the laicization documents either indicated that the privilege is not applicable to the described document or were not specific enough to allow the judge to conclude that the privilege applied.

Even if the privilege were applicable generally to the laicization documents, not all communications in the documents

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[6] Chapter 233, § 20A, provides:

"A priest . . . shall not, without the consent of the person making the confession, be allowed to disclose a confession made to him in his professional character, in the course of discipline enjoined by the rules or practice of the religious body to which he belongs; nor shall a priest . . . testify as to any communication made to him by any person in seeking religious or spiritual advice or comfort, or as to his advice given thereon in the course of his professional duties or in his professional character, without the consent of such person."

are necessarily privileged. See Commonwealth v. Zezima, supra at 242 n.4 ("A nonprivileged communication from a person to a clergyman could, of course, be made at about the same time as other communications which are granted statutory privilege"). The statutory language makes clear that the availability of the privilege hinges on the purpose for which the speaker issued the communication at issue -- the privilege only protects communications to a priest made for purposes of eliciting spiritual guidance or comfort. See ibid.

The Diocese argues that the motion judge committed an error of law by requiring production of the laicization petition documents without engaging in the balancing test required by Society of Jesus. My review of the judge's order reflects that he did engage in the type of balancing discussed in Society of Jesus, and specific citation to Society of Jesus was not required. There was no abuse of discretion.

2. Claim of freedom of religion. "The party claiming an unconstitutional burden on the free exercise of religion must show (1) a sincerely held religious belief, which (2) conflicts with, and thus is burdened by, the State requirement. Once the claimant has made that showing, the burden shifts to the State. The State can prevail only by demonstrating both that (3) the requirement pursues an unusually important governmental goal, and that (4) an exemption would substantially hinder the fulfillment

of the goal." Society of Jesus of New England v. Commonwealth, 441 Mass. 662, 669-670 (2004).

As the motion judge found, the Diocese did not demonstrate that complying with discovery would burden its religious beliefs at all. Society of Jesus does not, as the Diocese argues, stand for the proposition that disclosure of internal church documents relating to the treatment of priests accused of sexual molestation is a per se violation of the free exercise clause. In that case, the Church proffered affirmative evidence "that [the] confidentiality [sought] helps ensure that a priest will make honest disclosures to his superiors (as required by the tenets of their religious beliefs) and to his treatment providers (who are in turn keeping the priest's superiors informed of his treatment progress)." Id. at 670. The Diocese here proffered no such evidence.[7]

3. Church autonomy doctrine. "[T]he First Amendment prohibits civil courts from intervening in disputes concerning religious doctrine, discipline, faith, or internal organization." Alberts v. Devine, 395 Mass. 59, 72 (1985). It "permits

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[7] Even assuming that disclosure of the laicization documents burdens the Diocese's free exercise rights, by proffering the accused priests' personnel files the Diocese undercut its argument that the disclosure would burden its religious beliefs. See Society of Jesus, supra at 670 n.8 ("the strength of the asserted need for complete confidentiality is somewhat weakened by the production of documents that, equally with those still being withheld, reflect communications between [a priest] and his superiors on the subject of [the priest's] fitness").

hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters." Wheeler v. Roman Catholic Archdiocese of Boston, 378 Mass. 58, 61 (1979). "State governments . . . are required to refrain from involving themselves in ecclesiastical affairs or controversies." Id. at 61-62. As a result, courts lack jurisdiction to adjudicate "church disputes touching on matters of doctrine, canon law, polity, discipline, and ministerial relationships." Williams v. Episcopal Diocese of Mass., 436 Mass. 574, 579 (2002).

The order compelling the discovery of the laicization documents does not offend the doctrine of autonomy. "The mere examination of the [Diocese's laicization] documents . . . does not infringe on the [Diocese's] autonomous decision-making with respect to [its priests'] fitness, discipline, assignments, or any other aspect of [their] relationship with the [Diocese]." Society of Jesus, supra at 668.

III. Other matters. 1. Motion to accept impounded order. The Diocese's contention that, in order to decide the matter before me, I must accept for filing and consider an impounded order[8], is advanced without citation to relevant authority, and I

[8] It is claimed that the order, issued in In Re: Grand Jury Proceedings, (2004), upheld the Diocese's assertion of privilege as to the same laicization petitions.

therefore deny the motion. In any event, I am not bound by the conclusions of the Superior Court judge.[9] See Chase Precast Corp. v. John J. Paonessa Co., Inc., 409 Mass. 371, 379 (1991). Cf. J. C. Hillary's v. Massachusetts Commn. Against Discrimination, 27 Mass. App. Ct. 204, 207 (1989).

2. Motion to strike. The insurers have moved to strike certain portions of the Diocese's opposition on the grounds that (1) the Diocese has raised an argument for the first time in this appeal that was not raised in the trial court; and (2) the Diocese seeks review of an order that issued after the within cross-petitions were filed (and was not properly appealed).

As to the first claim, see my discussion, supra at pp. 4-5. As to the second, the Diocese moved in the trial court for a protective order after the motion judge had issued its order to compel; the record before me does not reflect that it has appealed from the denial of the later motion. Its request (raised in the Diocese's opposition to the insurer's petition)

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[9] Even if the "law of the case" doctrine were applicable here (and I do not conclude that it is), it does not compel consideration of an unrelated lower court decision. Under that doctrine, "[w]here there has been no change of circumstances, a court or judge is not bound to reconsider a case, an issue, or a question or fact of law [in the same case], once decided." Peterson v. Hopson, 306 Mass. 597, 599 (1940). There has been no showing that the circumstances in this case and the impounded case are the same; even if they were, "the law of the case doctrine does not bind an appellate court to a ruling of law made in a lower court in another case, even though that case may have been considered by the lower court judge who decided the case being appealed." Chase Precast Corp., supra at 379.

that I now grant such relief is in effect a collateral attack on the trial court's denial of its motion. See also G. L. c. 231, § 118 (first par.), and subparagraph (b) of Standing Order Concerning Petitions to the Single Justice Pursuant to G. L. c. 231, § 118(First Paragraph) (single justice should only consider those materials that were before the judge who entered the appealed order). The motion to strike this portion of the Diocese's opposition is allowed.[10]

3. Other motions. The Diocese's motion to stay discovery is denied. The motion captioned as one by the "Claimants. . . to File Late an Opposition to Plaintiff's Motion to File Under Seal an Impounded Order of the Superior Court" is allowed to accept the opposition for filing.

The order of the Superior Court is affirmed.

By the Court (Duffly, J.)

Assistant Clerk

Entered: March 20, 2007

[10] If I were to address the request, I would be inclined to deny it for substantially the reasons stated in the motion judge's order.