IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

and

DIANE CANTU,

Plaintiff-Intervenor,

v.

INTOWN SUITES MANAGEMENT, INC.,

Defendant.

CIVIL ACTION FILE
NO. 1:03-CV-1494-RLV

ORDER

Before the Court is Defendant's Motion for a Protective Order & Sanctions [26]. For the reasons explained below, said Motion is **GRANTED**.

I. Background

Counsel for defendant, InTown Suites Management, Inc. ("InTown"), apparently learned in October 2003 that counsel for plaintiff-intervenor Diane Cantu, Douglas R. Kertscher, had contacted current InTown management employees directly. In an October 28, 2003, letter from Suzanne J. Mulliken, Esq., to Mr.

Kertscher, defense counsel wrote: "Please do not contact any management employees directly in the future. Please contact me or Dan Shea to set up any meetings or depositions of current InTown Suites management employees." Def.'s Mot. [26] Ex. 1.

According to defense counsel, Mr. Kertscher did not respond to that letter. Mem. Supp. Def.'s Mot. [26] at 2. Therefore, when Ms. Mulliken raised the issue in person with Mr. Kertscher at the November 3, 2003, deposition of Mr. Rick Fee, he asserted that he had the right to make ex parte contacts and provided authority which he claimed supported that right. Id.

On November 5, 2003, defense counsel Daniel Shea, Esq., sent a letter to Mr. Kertscher enclosing a draft of the instant Motion. Def.'s Mot. [26] Ex. 2. In that letter defense counsel stated that he had studied the authority that Mr. Kertscher had provided and determined that it did not allow ex parte communications with management employees. Mr. Shea asked Mr. Kertscher to contact the State Bar of Georgia if he had doubts as to the interpretation of the law. Mr. Shea represented that he had contacted the State Bar, which had reaffirmed that ex parte contact was prohibited. Id. The letter closed with the request that Mr. Kertscher advise defense

counsel immediately of his position so that the Motion could be filed if it was his intention to continue contacting current InTown managers. Id. at 2.[1]

In a November 6, 2003, e-mail sent in response to one sent by Mr. Shea, Mr. Kertscher defended himself and asserted that he knew when a managerial employee could and could not be contacted on an ex parte basis, but then wrote the following statement: "Regardless, its [sic] a moot point[;] we are not and have no need to contact your client's managers." Def.'s Mot. [26] Ex. 4.

The above-quoted statement speaks both to past and future ex parte contacts. One can reasonably interpret Mr. Kertscher as asserting that any dispute over past ex parte contacts was moot because he was "not . . . contact[ing] your client's managers."[2] Additionally, one can reasonably interpret Mr. Kertscher as asserting that any future dispute would be moot because ex parte contacts with current InTown managers would not occur.

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[1] On that same date, Mr. Shea notified Mr. Kertscher by e-mail of the information stated above and advised that the draft Motion was being mailed. Def.'s Mot. [26] Ex. 3.

[2] Any such assertion would have been false because, as discussed infra, by November 6, 2003, Mr. Kertscher had already spoken with current InTown managerial employee Joyce C. Wright and had unsuccessfully attempted to contact current InTown managerial employees Scott Horner and Maria Eldred.

On November 13, 2003, Mr. Kertscher deposed InTown managerial employee Scott Horner. The transcript of Mr. Horner's deposition shows that Mr. Kertscher's questioning mentioned former manager Rick Fee and current manager Bill Mark. He also questioned Mr. Horner whether he had heard any InTown manager refer to blacks as "French Canadians." Def.'s Reply [50] Ex. 1. Defense counsel represents that, following Mr. Horner's deposition, Mr. Kertscher orally admitted an attempted ex parte contact with the deponent, but "assured Defendant's counsel that he would not contact Defendant's managers in the future." Def.'s Reply [50] at 5.

Despite the above-listed written and oral assurances that he would not contact InTown's current managerial employees on an ex parte basis, Mr. Kertscher did so. On November 20, 2003, he telephoned Mr. David G. Maurer, who works as a property manager for InTown. Def.'s Mot. [26] Ex. 5 (Maurer Aff.) at 2. According to Mr. Maurer's Affidavit, Mr. Kertscher informed him that he represented "somebody" against InTown and asked him if he was a manager for InTown. When Mr. Maurer replied that he was, Mr. Kertscher did not terminate the call. According to Mr. Maurer, the ensuing conversation was as follows:

> He then said that my brother [who is a lawyer at Mr. Kertscher's firm] had given him my number. He told me that he had talked to Jason Jarrar and Rick Fee (former managers at the company) and that Rick

> Fee had made damning statements against InTown Suites. He then asked me if Bill Mark was my Area Manager. I said "Yes." He then asked me if Jason Jarrar had been my District Manager. Again, I indicated "Yes." He then asked me if I had ever heard the term "French Canadian" used to describe minorities; I told him I had heard that term. He then asked me if I had ever heard Bill Mark use that term in the presence of Jason and I [sic] at Roswell[,] which I replied, "No, I had not."

Id. at 2-3.

In response to defendant's Motion [26], Mr. Kertscher filed a Declaration admitting that he had talked to Mr. Maurer, but claiming that he had contacted him on behalf of another client who was not yet in litigation with defendant. He asserted that he had asked nothing about Ms. Cantu's case. Pl.'s Resp. [39] at Ex. A. Mr. Kertscher also stated: "Mr. Maurer is the only current Intown Suites employee that the undersigned counsel (or anyone from his office) has spoken with." Id. ¶ 6.

In Reply, defendant contests Mr. Kertscher's explanation of his conversation with Mr. Maurer, and asserts that he did question Mr. Maurer about Ms. Cantu's case. Moreover, in contradiction of the above-quoted assertion from Mr. Kertscher's Declaration that he had spoken only with Mr. Maurer, defendant attached to its Reply the Affidavits of Joyce C. Wright, Angela P. Horner, and Maria C. Eldred. Def.'s Reply [50] at Exs. 2-4.

Ms. Wright is a managerial employee of defendant. Her affidavit states in relevant part as follows:

> In approximately early October 2003, Douglas R. Kertscher telephoned me. He called me after work hours on either my home telephone or my cell phone. He told me that he represented Diane Cantu in a lawsuit that she has filed against InTown Suites. Ms. Cantu is aware that I am currently a Property Manager for InTown Suites. Mr. Kertscher questioned me, among other things, about Ms. Cantu's performance and asked me if she had ever been demoted from her position of Area Manager or State Manager while she was employed by InTown Suites. My conversation with Mr. Kertscher lasted approximately ten minutes.

Def.'s Reply [50] at Ex. 2.

Ms. Horner is the wife of InTown Suites managerial employee Scott Horner. She avers that Mr. Kertscher called their home, discussed the litigation, and asked to speak to Mr. Horner. He left his telephone number and asked that Mr. Horner return his call (which he did not do). Def.'s Reply [50] at Ex. 3.[3] Mrs. Eldred, who is an InTown manager, avers that she found a note and business card from Mr. Kertscher (attached to her Affidavit as Ex. A) in her mailbox. The note asked that she call Mr. Kertscher about his investigation of InTown Suites. Id. at Ex. 4.

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[3] This ex parte communication was the one disclosed by Mr. Kertscher following the Horner deposition. See supra p. 4.

After reviewing those Affidavits, this Court entered an Order on January 29, 2004 [55], noting that Mr. Kertscher's assertion that Mr. Maurer was the only current InTown Suites employee to whom he had spoken might be false. That Order directed Mr. Kertscher to file a response advising whether he admitted or denied the assertions made in the Affidavits attached to defendant's Reply. Id.

Mr. Kertscher filed a "Response to Court Order of January 28, 2004, Regarding Defendant's Motion for a Protective Order and Sanctions" [58]. In that Response and supporting Declaration, Mr. Kertscher states that he has interviewed or spoken with at least twenty people who were former InTown employees or unsuccessful applicants for employment. Pl.'s Resp. to Ct. Order [58] at 2. With regard to his attempts to contact Mr. Horner (through his wife) and Ms. Eldred, Mr. Kertscher states that he was informed that they had both left InTown's employment and might have relevant information. He admits to the accuracy of the statements made by Ms. Horner and Ms. Eldred in their Affidavits. However, because he never actually talked to Ms. Horner's husband (who was the InTown manager) or to Ms. Eldred, he argues that no communication occurred. Id. Shortly thereafter, he learned from conversations with defense counsel that these individuals were still

employed by InTown; thus, their depositions were scheduled and no further ex parte contacts were attempted. Id.

With regard to Joyce Wright, Mr. Kertscher admits that he spoke with her on August 14, 2003, but he claims that their conversation was not related to Ms. Cantu's case. Pl.'s Resp. to Ct. Order [58] at 3. Mr. Kertscher asserts that he learned nothing relevant to Ms. Cantu's claims. Id. He thus considered the interview with her inconsequential and uninformative. Given the number of interviews he had conducted since August 2003 concerning InTown, Mr. Kertscher states that he "simply forgot" his interview with Ms. Wright had occurred when he prepared his December 24, 2003, Declaration. Id. at 4 (citing Kertscher Decl.). He concludes as follows: "Thus, the undersigned's Declaration that he had no other conversations with employed individuals other than Mr. Maurer was in error, though *not intentionally so*, and certainly not knowingly or willingly so." Id.

II. Analysis

A. Mr. Kertscher's December 24, 2003, Declaration

The first issue concerns the assertion in Mr. Kertscher's Declaration that "Mr. Maurer is the only current Intown Suites employee that the undersigned counsel (or anyone from his office) has spoken with." Pl.'s Resp. [39] Ex. A ¶ 6. It is

undisputed that this is a false statement. When he submitted his Declaration on December 24, 2003, Mr. Kertscher had also spoken with Ms. Wright. The issue is whether he made that false statement intentionally. Mr. Kertscher asserts that he simply forgot about the interview with Ms. Wright because no information of any consequence had been garnered. Thus, he claims that it was an unintentional oversight, not a knowing or wilful one.

The Court would be inclined to accept that claim without question and move on but for Mr. Kertscher's failure to abide by the written and oral assurances he gave to defendant's counsel.[4] As noted above, although Mr. Kertscher represented that he would not engage in ex parte communications with current InTown managerial employees, he did so. A lawyer has an obligation to be truthful in statements made to others. Ga. Rules of Prof'l Conduct R. 4.1.[5] Unfortunately, Mr. Kertscher was not truthful. He said one thing and did something else. Mr. Kertscher's failure to abide by assurances he gave to defense counsel makes it more difficult for the Court

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[4] Although he has had ample opportunities to do so, Mr. Kertscher has not denied that he gave these assurances to defendant's counsel.

[5] Attorneys practicing before this Court must comply with the Local Rules, with the Georgia Rules of Professional Conduct contained in the rules and regulations of the State Bar of Georgia, and with the decisions of this Court interpreting those rules and standards. L.R. 83.1C (N.D. Ga.).

to accept his assertion that the false statement he made in his December 24, 2003, Declaration was an oversight.

Nevertheless, the Court is constrained to accept Mr. Kertscher's explanation. He may have simply forgotten about his earlier interview with Ms. Wright. Without ordering the deposition of Mr. Kertscher and/or holding a hearing on the issue, neither of which the Court is inclined to do, little can be gained by continued inquiry into this matter. The Court does not wish to besmirch Mr. Kertscher's reputation. He avers that he has never had a bar complaint lodged against him or been sanctioned by any court. Pl.'s Resp. to Ct. Order [58] Ex. B (Kertscher Decl.) at 1. However, his admitted failure to include an important fact in his December 24, 2003, Declaration, coupled with an obvious failure to abide by representations that he made to opposing counsel, invited the foregoing discussion.

B. Defendant's Motion for Protective Order

Defendant contends that Mr. Kertscher should be sanctioned for his prior ex parte communications with its current managerial employees and seeks, inter alia, a protective order to bar future communications. An analysis of defendant's Motion begins with Rule 4.2 of the Georgia Rules of Professional Conduct, entitled

"Communication with Person Represented by Counsel," which provides in relevant part as follows:

> (a) A lawyer who is representing a client in a matter shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by constitutional law or statute.

The "Comment" explains how that Rule applies to organizations:

> In the case of an organization, this Rule prohibits communications by a lawyer for another person or entity concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

Ga. Rules of Prof'l Conduct R. 4.2 cmt. 4A (emphasis added).

The Georgia Supreme Court adopted the Rules of Professional Conduct effective January 1, 2001, to replace Part IV, Discipline, of the Rules of the State Bar of Georgia. Well before that time, however, that Court issued the following Formal Advisory Opinion on the issue raised here:

> **Ethical Propriety of a Lawyer Interviewing the Officers and Employees of an Organization When That Organization is The Opposing Party in Litigation Without Consent of Organization**

> An attorney may not ethically interview an employee of a corporation which is an opposing party in pending litigation without the consent of the corporation or the corporation's counsel where the employee is either:
>
> (1) an officer or director or other employee with authority to bind the corporation; or
>
> (2) an employee whose acts or omissions may be imputed to the corporation in relation to the subject matter of the case.

Correspondent asks when it is ethically proper for a lawyer to interview the officers and employees of an organization, when that organization is the opposing party in litigation, without the consent of the organization's counsel.

This question involves, among other things, an interpretation of Standard 47 of Rule 4-102 of the Rules and Regulations of the State Bar of Georgia [Georgia Code of Professional Responsibility DR 7-104(A)(1)], and the State Bar of Georgia Proposed Rules of Professional Conduct Rule 4.2.

Standard 47 of Rule 4-102 of the Rules and Regulations of the State Bar of Georgia provides as follows:

> During the course of his representation of a client, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior written consent of the lawyer representing such other party or is authorized by law to do so. A violation of this standard may be punished by a public reprimand.

> The American Bar Association has implied that the foregoing prohibition applies only to certain employees of the organization. ABA Informal Opinion 1410 (1978) concluded that no communication with an officer or employee of a corporation with the power to commit the corporation in the particular situation may be made by opposing counsel unless he has the prior consent of the designated counsel of the corporation or unless he is authorized by law to do so.
>
> The consensus view in other jurisdictions seems to be that an attorney may interview an employee of a corporate defendant without the consent of either the corporation or its counsel if the employee is not the person for whose acts or omissions the corporation is being sued and if the person is not an officer or director or other employee with authority to bind the corporation. On the other hand, an attorney may not ethically interview an employee of a corporation which is an opposing party in pending litigation without the consent of the corporation or the corporation's counsel where the employee is either:
>
> (1) An officer or director or other employee with authority to bind the corporation;
>
> (2) An employee whose acts or omissions may be imputed to the corporation in relation to subject matter of the case.
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> If the employee does not fall into either of the foregoing categories, an attorney may contact and interview the employee without the prior consent of the corporation or its counsel.

Formal Advisory Opinion No. 87-6 (87-R2), issued July 12, 1989 (footnotes omitted); see also Sanifill of Ga., Inc. v. Roberts, 502 S.E.2d 343, 344 (Ga. Ct. App. 1998) ("In State Bar of Georgia Formal Advisory Opinion 87-6 (1989), the Supreme

Court of Georgia, adopting the consensus view of other jurisdictions, concluded that when a corporation is an opposing party in pending litigation, Standard 47 applies to an employee whose acts or omissions may be imputed to the corporation in relation to the subject matter of the case, as well as to an officer or director or other employee with authority to bind the corporation.") (emphasis added).

At issue here are the ex parte contacts that Mr. Kertscher made with current InTown managers Joyce Wright and David Maurer. Mr. Kertscher argues at length that the "developing law" in this area allows his ex parte communication with Ms. Wright because she had no authority to bind the corporation. Resp. to Ct. Order [58] at 4-14. Mr. Kertscher argues that his ex parte communications with Mr. Maurer were acceptable because he was discussing matters outside of his representation of Ms. Cantu, i.e., his investigation of possible discrimination claims by former InTown manager Earl Shelton. Pl.'s Resp. to Def.'s Mot. for Protec. Order [39] at 2-3.

With regard to Mr. Kertscher's ex parte communications with Ms. Wright, the Court is not at liberty to apply the law supposedly developing in other jurisdictions when the Georgia Rules of Professional Conduct and the Georgia Supreme Court have clearly spoken about the ethics of ex parte communications with current

managerial employees of a corporate party. This Court will thus apply Rule 4.2 and the Supreme Court's interpretation of the similar, predecessor Rule.[6]

Rule 4.2 and its Comment clearly prohibit communications by a lawyer for another person concerning the matter in representation with persons having a managerial responsibility on behalf of the organization. Mr. Kertscher made an ex parte communication concerning the Cantu matter with Ms. Wright, who had a managerial responsibility on behalf of InTown. The Supreme Court's Advisory Opinion prohibits ex parte communications with a corporate employee who, inter alia, has authority to bind the corporation. Ms. Wright had such authority. Although Mr. Kertscher represents that he forgot about his conversation with Ms. Wright because he learned nothing of substance from her, "[t]he content or result of the communication is irrelevant to determining whether plaintiff's counsel violated the rule that bans such communication altogether." Wiggins v. Waffle House, Inc., No. 1:01-CV-0035-MHS, slip op. at 7 (N.D. Ga. filed Mar. 25, 2003).

With regard to Mr. Kertscher's ex parte communications with Mr. Maurer, the Court rejects the argument that the questioning was about an unrelated matter. Mr.

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[6] On the issue of ex parte communications with former employees of a party, see Roberts, 502 S.E.2d at 345.

Kertscher's questions of Mr. Maurer one week after the Horner deposition taken in Ms. Cantu's case concerned the same persons (Messrs. Mark and Fee) discussed in that deposition, and repeated the same question, i.e., whether managers called minorities French Canadians. Mr. Mark was Mr. Maurer's boss. Moreover, if Mr. Kertscher had not discussed Ms. Cantu's case with Mr. Maurer, he could not have know that Mr. Fee had allegedly made "damning" statements against InTown.

The remaining question is one of the appropriate remedy.[7] According to the Georgia Court of Appeals, Rule 4.2 "is designed to protect a represented party's right to effective representation of counsel by preventing adverse counsel from taking advantage of such party through undisclosed contact. The rule also promotes ethical behavior on the part of attorneys." Roberts, 502 S.E.2d at 344 (footnote omitted). Mr. Kertscher's ex parte communications interfered with InTown's right to effective representation of counsel because he took advantage of undisclosed contacts. The Court is committed to preserving the integrity of the attorney-client relationship and to ethical behavior on the part of attorneys practicing before it.

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[7] Defendant sought, inter alia, the depositions of Mr. Kertscher and those he contacted at Mr. Kertscher's expense, as well the dismissal of plaintiff-intervenor's claims. Def.'s Reply [50] at 7. The Court finds that the prejudice to defendant is not sufficiently great to require such extraordinary remedies.

After weighing the seriousness of Mr. Kertscher's ethical violation and the extent to which that violation prejudiced defendant, the Court **ORDERS** plaintiff's counsel to reimburse defendant for the reasonable expenses, including attorney's fees, incurred in filing the instant Motion to Compel [26]. Counsel for defendant are **DIRECTED** to submit to the Court within fifteen days of the date of entry of this Order an Affidavit outlining the reasonable costs incurred in bringing this Motion. Mr. Kertscher has ten days from the date that Affidavit is filed to respond if he so desires. The Clerk is **DIRECTED** to re-submit this matter when Mr. Kertscher's opportunity to respond has expired.

Further, entry of a **PROTECTIVE ORDER** is appropriate in these circumstances. Counsel for Ms. Cantu, Douglas R. Kertscher, Esq., and any other representative of Ms. Cantu, are prohibited from contacting current managerial employees of Intown regarding the instant litigation or other potential discrimination claims against InTown, unless they first receive written consent from InTown's counsel, or unless such contact is made in the presence of InTown's counsel. This Protective Order does not, however, prohibit Mr. Kertscher from speaking on an ex parte basis with any current InTown manager who contacts him first for advice and/or counsel.

III. Conclusion

For the reasons stated above, Defendant's Motion for a Protective Order & Sanctions [26] is **GRANTED** as provided herein.

SO ORDERED, this 18th day of February, 2004.

WALTER E. JOHNSON
UNITED STATES MAGISTRATE JUDGE

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