

2 SUPREME COURT OF THE STATE OF NEW YORK
3 COUNTY OF NEW YORK - CIVIL TERM - PART 46

4 THEO CHINO,

5 Plaintiff, Index No.
6 101880/15

7 -against-

8 DEPARTMENT OF FINANCIAL SERVICES,
9 ANTHONY J. ALBANESE, IN HIS OFFICIAL CAPACITY
10 AS THE ACTING SUPERINTENDENT,

11 Defendants.

12 Application 71 Thomas Street
13 New York New York 10007
14 March 16, 2017

15 B E F O R E:

16 HONORABLE LUCY BILLINGS,

17 SUPREME COURT JUSTICE

18 A P P E A R A N C E S:

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CHERYL-LEE LORIENT
SENIOR COURT REPORTER

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2 THE COURT: Chino versus Department of
3 Financial Services.

4 THE COURT: I have a memorandum for
5 plaintiff petitioner's motion for limited disclosure.

6 MR. CIRIC: Yes.

7 THE COURT: Okay. I don't have any Notice of
8 Motion for that and I have no opposition.

9 MR. CIRIC: Okay. If I may, the return date
10 for the motion for the limited discovery, the 408
11 motion, was, in fact, the 14th which was the snow day.
12 So --

13 THE COURT: The return date in room 130?

14 MR. CIRIC: Not for the motion to dismiss,
15 for motion for limited discovery, yes. So, the motion
16 for limited discovery, that return date was at --

17 THE COURT: A little slower and louder.
18 Okay?

19 MR. CIRIC: Sorry about that, your Honor.
20 The motion for limited discovery return date, in the
21 calendar -- there's, in fact, two of them. The first
22 one was withdrawn. The second one, which was motion
23 number three on the calendar, the return date was, in
24 fact, for the 14th.

25 THE COURT: But, in room 130 at 60 Centre
26 Street?

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2 MR. CIRIC: It was all filed at room 130,
3 yes.

4 THE COURT: Right. Not here?

5 MR. CIRIC: It may not have made it, yes, to
6 you, exactly. That's probably what happened.

7 THE COURT: Okay. All right. So, you did
8 oppose that motion?

9 MR. CIRIC: They have opposed it.

10 MR. CONLEY: Yes, your Honor.

11 THE COURT: I'm sorry. Are you representing
12 the plaintiff, petitioner?

13 MR. CIRIC: I'm the petitioner, yes.

14 THE COURT: Okay. Sorry. You're on the
15 wrong side.

16 MR. CONLEY: Yes, your Honor. We opposed
17 the motion. I have a copy.

18 THE COURT: If the motion is coming, I'll
19 get it all.

20 MR. CONLEY: Okay.

21 THE COURT: I'm going to throw away this
22 duplicate -- what I'm assuming is a duplicate that I
23 have. So, do you still want to proceed with the motion
24 to dismiss today?

25 MR. CIRIC: Here is what our position is,
26 the motion to dismiss relies on a number of factual

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2 complex issues.

3 THE COURT: It does, but it may, for
4 purposes of standing not for purposes of -- I mean,
5 standing is, I believe, correctly categorized -- lack
6 of standing is failure to state a claim.

7 MR. CIRIC: Yes.

8 THE COURT: So, it does qualify as a CPLR
9 3211(a)(7) motion. But, insofar as the motion is based
10 on failure to state a claim as opposed to lack of
11 standing, you're right, it may not rely on facts
12 outside the complaint. I, actually, didn't -- I mean,
13 that was my first reaction to -- whose affidavit was
14 it, Mr. Dean, I believe.

15 MR. CONLEY: Yes.

16 THE COURT: Are you Mr. Dean?

17 MR. CONLEY: No, your Honor.

18 THE COURT: But, you know, then, I saw that
19 a lot of the affidavit was really just laying out what
20 the law was. So, I would consider it for that purpose.
21 But, yes, I would not consider any of the facts that
22 are in his affidavit except for purposes of standing.

23 But, quite honestly, I didn't need to read
24 respondent's motion. All I needed to read was
25 petitioner -- plaintiff's opposition to see that there
26 were problems with standing.

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2 MR. CIRIC: Okay. We're fine, your Honor,
3 dealing with standing today, if you would like. And --

4 THE COURT: Well, except that there is more
5 to the motion to dismiss --

6 MR. CIRIC: Right.

7 THE COURT: -- than just standing. And, I'm
8 assuming that's what you want disclosure for.

9 MR. CIRIC: Well, in fact, the --

10 THE COURT: To oppose.

11 MR. CIRIC: The purpose of the 408 motion
12 was, in fact, related to --

13 THE COURT: The purpose of the what?

14 MR. CIRIC: The purpose of the disclosure
15 motion, I'm sorry, the 408 motion, was, in fact, on the
16 other issue, is, it was not on standing, because
17 standing is for us to establish.

18 THE COURT: Right. But, the problem is that
19 the motion to dismiss I have is on both grounds as I
20 read it.

21 MR. CIRIC: Yes, absolutely.

22 THE COURT: So, I'm going to decide it
23 together. It's true that if you do get past standing,
24 I may deny the motion to dismiss and order respondents
25 to answer. But, that first hurdle is a big one.

26 MR. CIRIC: Yes. So, we're perfectly fine

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2 discussing standing today.

3 THE COURT: Right, but because the motion is
4 on both grounds and I'm going to decide the motion, we
5 can't really bifurcate it that way.

6 MR. CIRIC: Okay. I understand.

7 THE COURT: I mean, we could, but you're
8 going to have to come back anyway.

9 MR. CIRIC: Yes, absolutely. Definitely.

10 THE COURT: So, would it make sense to argue
11 everything at the same time including the disclosure.

12 MR. CIRIC: Well, yeah. I mean, for us, the
13 issue for purposes of the, actual, claims as far as the
14 ability of the State to regulate big clients is in fact
15 part of the disclosure. So, if you prefer to not
16 bifurcate, then we would have to, obviously, prepare
17 for an --

18 THE COURT: It looks to me like the motion
19 for disclosure is a form of opposition to the motion to
20 dismiss. Basically, you're saying you need disclosure.
21 It's sort of like a CPLR 3211D defense to a motion to
22 dismiss. You need disclosure to defeat the motion to
23 dismiss.

24 MR. CIRIC: Yes, absolutely. That's our
25 position, your Honor.

26 MR. CONLEY: And, your Honor, our position

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2 is that there is no basis to the motion for discovery
3 and that --

4 THE COURT: I would expect so.

5 MR. CONLEY: Lacking any basis, we
6 believe --

7 THE COURT: But, I don't have those papers.
8 So, I can't --

9 MR. CONLEY: Yes, I understand, your Honor.

10 THE COURT: I can't intelligently hear your
11 argument on that issue.

12 MR. CONLEY: So, again our position --

13 THE COURT: Motion number three is it?

14 MR. CONLEY: Yes.

15 MR. CIRIC: Yes.

16 THE COURT: You said it was just submitted
17 on the 14th?

18 MR. CIRIC: Yes. It was a snow day.

19 THE COURT: Off the record.

20 (Discussion off the record.)

21 (The discussion off the record concluded and
22 the following occurred in open court:)

23 THE COURT: We should be getting it by the
24 end of the week. We'll adjourn this one for the same
25 date?

26 MR. CONLEY: That's fine with us.

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MR. CIRIC: Fine.

THE COURT: I also have two letters dated October 29, 2016 from the Office of the Attorney General and November 9, 2016, from petitioner plaintiffs firm attorney. I don't have time to read letters. I can't decide a letter. Is there anything in these letters that I need to know at this point.

MR. CIRIC: If you want to stipulate to it, no.

MR. CONLEY: No, your Honor.

THE COURT: All right, the next day, at the earliest, will be at the end of the May. That's the reality.

MR. CONLEY: We understand, your Honor.

THE COURT: And, it may be later than that.

MR. CIRIC: Okay, we understand, your Honor.

THE COURT: All right. Thank you.

MR. CIRIC: Thanks very much, your Honor.

REPORTER'S CERTIFICATION

I hereby certify that the foregoing is a true and accurate transcript of the proceedings.

(Not certified unless signed in blue ink.)



Cheryl-Lee Lorient
Senior Court Reporter