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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. LELAND DEGRASSE PART 25

Justice

330 Acquisition Co, LLC

- v -

Regency Savings Bank, F.S.B.

INDEX NO. 109283/98

MOTION DATE JUL 14 2002

MOTION SEQ. NO. 010

MOTION CAL. NO. 120

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

SCANNED
SEP 23 2802

Motion is decided in accordance with accompanying Memorandum Decision.

SEP 11 2002

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: _____

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

[* 2]

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NEW YORK : I.A.S. PART 25

- X

330 ACQUISITION CO., LLC,

Plaintiff,

-against-

REGENCY SAVINGS BANK, F.S.B.

Defendant.

- X

Index No.: 109283/98

Cal. No.:120 Of 5/14/02

DeGrasse, J.:

Defendant moves pursuant to CPLR 3104(d) to "review" the decision and order dated March 19, 2002 of the Special Referee assigned to this action. Defendant wants this court to either 1) declare that certain statements made by the Special Referee in the March 19th order are dicta, or 2) issue a ruling reversing these statements.

FACTS AND PROCEDURAL HISTORY

The history of this dispute is discussed in Justice Lippman's February 5, 2001 unpublished decision in this case, and in Judge Scheindlin's decisions in a related federal action (see Regency Savings Bank, F.S.B. v Fours on Seventh, LLC, 251 BR 784) ana will be briefly summarized herein.

On March 15, 1989, the parties' two predecesscrs in interest entered into a Participation Agreement by which each party owned 50% of a $15 million loan secured by a mortgage on a commercial building located at 330 Seventh Avenue in Mannattan. Under the Participation Agreement, ncn-party Jchn Hancock Mutual Life Insurance Policy was the active participant, and American

Savings Bank, and later the FDIC, was the passive participant.

Plaintiff 330 Acquisition Corp. ("330 Corp.") has succeeded to Hancock's role as the active participant and defendant Regency Savings Bank, F.S.B. ("Regency") has succeeded the FDIC as the passive participant.

As the active participant, 330 Corp. is responsible for taking most "decisions and actions relating to the administration of the Loan.'' However, it must obtain the consent of the passive participant before it, inter alia, releases or substitutes any material portion of the security for the loan, extends the maturity date of the loan, or reduces the interest payable on the principal amount of the loan.

When the mortgagor defaulted in 1996, the passive participant in the Participation Agreement (at the time, the FDIC), apparently frustrated with what it perceived as Hancock's inaction, attempted to bring a foreclosure action in federal court. Soon thereafter 330 Corp. purchased the active participant's share in the Participation Agreement and brought a foreclosure action in state court. Thereafter the FDIC sold its interest in the Farticipaticn Agreement to Regency.

330 Corp. brought the instant action in 1998, arguing that the FDIC's transfer of its interest to Regency was void because the FDIC did not offer 330 Corp. a right of first refusal, which 330 Corp. argued was mandated by the Participation Agreement. Regency asserted counterclaims arising from 330 Corp.'s alleged breach of the Participation Agreement.

In January 2000, the mortgagor under the loan, an entity known as Fours on Seventh LLC ("Fours") filed for Chapter 11 protection in Bankruptcy Court. The initial plan of reorganization filed by the borrower included a settlement of its claims under the loan. 330 Corp. was in favor of this settlement plan. Regency was not in favor of the plan, and it filed its own proof of claim in the Bankruptcy action. Regency has consistently argued that 330 Corp. should not have agreed to any settlement plan that did not include a higher rate of interest and penalties. Ultimately Regency's claim in the Bankruptcy Court was rejected as untimely and dismissed as moot pursuant to In re Chateauqav Corp. (10 F3d 944). (See In Re Fours on Seventh, 251 BR 784.)

Meanwhile the instant action continued to move forward. In a decision dated February 5, 2001, Justice Lippman granted Regency's motion to dismiss the complaint, and denied 330 Corp.'s motion for summary judgment to dismiss Regency's counterclaims. This decision was reversed in part by the First Department in a decision entered April 11, 2002, which reinstated 330 Corp.'s claims for indemnification and tortious interference with contract.

The decision of the Special Referee that is at issue herein arose from Regency's motion to compel the production of documents by certain non-parties to this acticn, in particular Kevin Nash, who served as Fours' lawyer in its bankruptcy filing, and his firm Finkel Goldstein Berzow Rosenbloom & Nash, LLP (collectively referred to herein as "Nash"). Regency seeks certain documents regarding Fours and 330 Corp's interaction during the

certain provisions of the Participation Agreement nullified the privilege. These provisions state that in the event of default, the participants will "consult each other and keep each other advised of ail steps taken in connection therewith" and impose a duty upon 330 Corp. to keep Regency "informed" about any foreclosure proceedings.

While Regency approves of the Special Referee's decision to require Nash to provide a privilege log, it disagrees with the Referee's discussion of the ambit of the common interest privilege, and his finding that the Participation Agreement does not require production of the documents in question.

DISCUSSION

The common interest privilege as articulated in case law from this state is an extension of the attorney client privilege Normally, the known presence of a third party and/cr his counsel during an attorney-client conversation will cause a waiver of the privilege. However, an exception to this waiver may cccur where the third party is cooperating with the party in a joint legal strategy in actual or potential litigation. This common interest privilege will apply where the other requisites cf the attorney-client privilege obtain and where the common legal interest shared by tne parties impacts actual or potential litigation against all the participants. (Parisi v Leppard, 172 Misc2d 951, 955-56.)

> [A]ny "common interest" privilege must be limited to communication between counsel and parties with respect to legal advice in pending or reasonably anticipated

> litigation in which the joint consulting parties have a common legal interest. The attorney-client privilege, even as expanded by the "common interest" exception, may not be used to protect communications that are business oriented or of a personal nature.

(Aetna Casualty and Surety Co. v Certain Underwriters at Lloyd's London, 176 Misc2d 605.)

Regency argues that since 330 Corp. was a creditor in the bankruptcy proceeding, and had also brought a foreclosure action against Fours in state court, it per se could not share a common legal interest with Fours. It is true that these facts tend to disprove the existence of the privilege, but the Special Referee correctly found that they do not result in an automatic negation of the privilege. Rather, a more nuanced examination of 330 Corp.'s and Fours' relationship during the bankruptcy proceeding is required. Implicit in the Referee's decision is the recognition that the common interest privilege in this case may be asserted for certain periods and not others. 330 Corp. and Fours may have gone from adversaries to allies with a common legal interest as they tried to fend off challenges to the reorganization plan.

Whether the privilege applies at all, and, if so, for what documents and subject areas, is highly fact-dependent (see Parisi, sucra, 172 Misc2d at *956-7)* and should be determined in the first instance by the Special Referee after consideration of Nash's privilege log and examination of the evolving relationship of 330 Cor?. and Fours. The Special Referee was ccrrect in stating that there does not have to be a total identity of interest among the

parties for the privilege to apply. (In re Megan-Racine Assocs, 189 BR 562, 572.) While the purely common commercial interest between a debtor and creditor is insufficient to create a foundation for tne common interest privilege, a common legal strategy will give rise to the privilege. (Id.) It appears that this latter basis undergirds Nash's assertion of the common interest privilege. The Special Referee's decision correctly sets forth these precepts.

The Special Referee was also correct in stating that the provisions of the Participation Agreement that require 330 Corp. to keep Regency abreast of any default and subsequent foreclosure action does not constitute waiver of any privilege. The obligation to keep Regency informed is set forth in the most general terms in the Participation Agreement. It does not, by its terms, require 330 Corp. to provide Regency with any particular document.

CONCLUSION

The motion. of defendant Regency Savings Bank, FSB to review the decision of the Special Referee dated March 19, 2002, is denied. This constitutes the decision and order of the court.

DATE: 4/15

J.S.C.