

**330 Acquisition Co., LLC v Regency Savings Bank,
F.S.B.**

2005 NY Slip Op 30020(U)

March 7, 2005

Supreme Court, New York County

Docket Number: _300109/2831

Judge: Leland G. DeGrasse

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. LELAND DEGRASSE

DECENT.

PART 25

0109283/1998

330 ACQUISITION

VS

REGENCY SAVINGS BANK

INDEX NO.

NOV 08 2004

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

SEQ 30

MODIFY ORDER/JUDGMENT

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

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

FILED in accordance with
adoption of Memorandum Decision.

MAR 16 2005

NEW YORK
COUNTY CLERK'S OFFICE

MAR 07 2005

Dated: _____

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

-----X
330 ACQUISITION CO., LLC,

Plaintiff,

-against-

Index No. 109283/98

REGENCY SAVINGS BANK, F.S.B.,

Defendants.
-----X

DeGrasse, J.:

Motion sequences 30 and 31 are consolidated. Nonparty the Federal Deposit Insurance Corporation (FDIC) moves pursuant to CPLR 3104 (d) for a review of an order of Special Referee Nicholas Doyle and for an extension of its time to make the motion. This action stems from the purchase by defendant, Regency Savings Bank, FSB, of the FDIC's one-half participation interest in a mortgage. The transaction was part of the FDIC's disposition of the assets of failed savings and loan associations. The interest sold by the FDIC was covered by a mortgage participation agreement that required each of the two equal owners to offer its interest to the other before transferring or otherwise disposing of it. The FDIC acquired the interest of one owner; plaintiff is the assignee of the other. Prior to the asset sale, plaintiff wrote to the FDIC in an attempt to exercise its right of first refusal. The FDIC then requested that Regency permit it to offer the participation interest to plaintiff. Regency declined to give its permission. By letter agreement dated December 15, 1997, Regency acknowledged its refusal and confirmed its willingness "to respond to any litigation that might be commenced with respect to the asset." The letter agreement was drafted and signed on behalf of the FDIC by John J. Mandler, its then

outside attorney. It is alleged in the complaint that Regency tortiously interfered with the mortgage participation agreement.

The special referee ordered further depositions of Mandler and Cynthia Shaughnessy, the FDIC's in-house Counsel, regarding the letter agreement. Areas of inquiry authorized by the special referee's order include instructions given by the FDIC to Mandler, modifications to the letter, if any, and the FDIC's reason for sending the letter to Regency. The special referee further directed the FDIC to produce drafts of the letter agreement as well as communications concerning it and its drafts. The FDIC argued before the special referee that the said depositions and documents are protected by the attorney-client privilege. The agency now asserts that the special referee incorrectly found that it had waived the privilege by putting its communications with Mandler into issue. The attorney-client privilege can be waived by operation of the at-issue doctrine (*see Searle & Co. v Pennie & Edmonds LLP*, 308 AD2d 404 [2003] *citing Bank Brussels Lambert v Credit Lyonnais (Suisse)*, US Dist Ct, SD NY, Francis, USMJ, 94 Civ 1317, 1995 WL 598971). The privilege is waived where: (1) assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his defense (*Bank Brussels Lambert, supra*).

Mandler testified at his deposition that the letter was reviewed by Shaughnessy before it was sent to Regency. He further testified that the FDIC did not object to the letter's form. Karen L. Williams, a supervisor in the FDIC's Asset Marketing Division, swore by affidavit that the letter was sent "[T]o confirm, among other things, Regency's refusal of the FDIC's request to honor

the right of first refusal and Regency's assumption of litigation responsibility." Nevertheless, in opposition to plaintiff's motion for summary judgment, the FDIC argued in its memorandum of law that the letter is contrary to the FDIC's policies and intentions. The FDIC further argued that "[f]ar from intending the right of first refusal contained in the participation agreement, it was at all times the FDIC's intent, relying on federal statutory and regulatory authority, to transfer the asset, notwithstanding the contractual provision." The FDIC further argued that any suggestion that it did not fully intend to transfer the asset, whether in the letter or Mandler's recollection, is "*beyond the scope of Mandler's representation of the FDIC* [emphasis added]." The FDIC buttressed the contention with an affidavit by which Sandra L. Thompson, its Deputy Director, swore that "the FDIC did not seek, nor had Mandler been authorized, to exact from Regency any sort of assurance that Regency would indemnify the FDIC in the event of litigation in connection with [plaintiff's] assertion of a right of first refusal." The intentional procurement of a contractual breach without justification is an element of tortious interference with contract (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]). By its submissions to this court, the FDIC has challenged plaintiff's claim that its breach of the participation agreement was procured by Regency's assurance of indemnification. The FDIC cannot shield itself from discovery relevant to Mandler's authority to seek Regency's said assurance after placing the matter in issue (*see e. g. Am. Reliance Ins. Co. v Natl. Gen. Ins. Co.*, 149 AD2d 554 [1989]). Accordingly, the special referee properly determined that the FDIC waived the attorney-client privilege.

In its reply memorandum of law the FDIC argues for the first time that the subject discovery is now irrelevant because this court has issued an order granting plaintiff's motion for summary judgment on its tortious interference with contract claim. The order was issued after the FDIC

made the instant motion. Nevertheless, the function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of the motion (*Ritt v Lenox Hill Hosp.*, 182 AD2d 560, 562 [1992]). In this case, plaintiff has had no opportunity to answer the FDIC's argument that the subject discovery is now irrelevant. Moreover, the effect of the order was not addressed before the special referee. An attorney's work product encompasses "materials which are uniquely the product of a lawyer's learning and professional skills, such as materials which reflect his legal research, analysis, conclusions, legal theory or strategy (*Ackwool Intl. Steel Corp. v Frenkel & Co.*, 165 AD2d 752, 753 [1990]). The court has conducted an in camera inspection of copies of six pages of handwritten notes and two e-mails which have been submitted by the FDIC. Two references in the notes qualify as attorney work product and should be redacted.¹ In all other respects, the court agrees with the referee's conclusion that the submitted documents do not constitute attorney work product. For the foregoing reasons, the FDIC's motion for review is granted only to the extent of the aforementioned redactions. The motion for an extension of the FDIC's time to seek the review is granted inasmuch as plaintiff has not been prejudiced.

Dated: March 7, 2005

FILED
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J. S. C.

¹The FDIC has submitted additional documents under a cover letter dated January 11, 2005. These additional documents constitute attorney work product with the exception of handwritten notes dated "12/15/97." The remaining notes on the same page constitute attorney work product.