

**Weil, Gotshal & Manges LLP v Fashion Boutique of
Short Hills, Inc.**

2005 NY Slip Op 30054(U)

November 9, 2005

Supreme Court, New York County

Docket Number: 0100630/6302

Judge: Richard B. Lowe

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

RICHARD B. LOWE III

PRESENT: _____
Justice

PART 52

Neil Gotshal + Mangus

INDEX NO. 100630/03

MOTION DATE 9/21/05

MOTION SEQ. NO. 007

MOTION CAL. NO. _____

- v -

Jasheem Boutique of Shore Nells

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

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...

Answering Affidavits - Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

Motion is decided in accordance with the attached memorandum decision

FILED
NOV 17 2005
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 11/9/05

RICHARD B. LOWE III
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 56

-----X
WEIL, GOTSHAL & MANGES LLP,

Plaintiff,

-against-

FASHION BOUTIQUE OF SHORT HILLS, INC.,
ANNETTE C. FISCHER AND RANDI FISCHER,

Defendants.
-----X

FASHION BOUTIQUE OF SHORT HILLS, INC.

Counterclaim-Plaintiff,

Index No. 100630/03

-against-

WEIL, GOTSHAL & MANGES LLP,
HELENE D. JAFFE and ROBERT G. SUGARMAN,

**DECISION
AND ORDER**

Counterclaim-Defendants
-----X

RICHARD B. LOWE, III, J.:

Nonparty PRADA USA Corp. ("Prada") moves to quash a subpoena served upon it by defendant, Fashion Boutique ("FB") that demands the deposition of General Counsel of Prada, Jessica Martini ("Ms. Martini") and the production of documents related to Plaintiff-Counterclaim-Defendants, Weil Gotshal & Manges LLP ("WGM") representation of FB.

BACKGROUND

This action involves WGM's attempt to recover legal fees that FB has refused to pay for its representation of FB in a federal action against Fendi USA, Inc. ("Fendi") for corporate misdeeds, which consequently led to the demise of FB's retail business (*Fashion*

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Boutique of Short Hills, Inc. v Fendi USA, Inc. and Fendi Stories, Inc., 91 Civ. 4544 [SDNY 1993]). FB was offered a substantial settlement of \$1.4 million, but rejected it. The jury found in favor of FB, subjecting Fendi to pay compensatory damages of \$35,000 and punitive damages of \$75, 000 (*id.*).

FB is counter-claiming for legal malpractice and breach of fiduciary duty, alleging WGM provided un-zealous representation due to a conflict of interest that arose out of their dual representation of Prada in the acquisition of Fendi's corporate parent in Europe and during the representation of FB against Fendi. Specifically, FB alleges that WGM did not make appropriate use of the testimony of a particular witness, Caroline Clarke ("Ms. Clarke"), in the underlying trial and that Ms. Martini has knowledge related to the use of this testimony. WGM, on the other hand, alleges it had no knowledge of the conflict during representation of FB and therefore represented FB zealously in the Fendi action.

In its review of this Court's prior motion to dismiss, the First Department identified the legal malpractice issue as whether "but for the law firm's failure, due to its debilitating conflict of interest, to make proper use of Ms. Clarke's testimony, the Fashion Boutique case against Fendi would have had a more favorable result" (*Weil Gotshal & Manges, LLP v Fashion Boutique*, 10 AD 3d 267, 269 [1st Dep't 2004]).

In addition to Ms. Martini's testimony, FB has sought documents from WGM related to its representation of Prada. FB seeks the deposition of Ms. Martini to testify about her knowledge about the transaction in which the parent of Prada USA Corp. acquired interest in Fendi. Furthermore, FB seeks the production of (1) documents sufficient to identify all matters on which Prada USA retained WGM; (2) all publicly filed pleadings in which WGM represented Prada USA; (3) all documents showing the names of

attorneys at WGM who worked on any matter for Prada USA Corp. including the date and number of hours worked on each date by each attorney and the name of the matter on which the attorney worked; (4) any retainer agreement, letter of engagement or similar document with WGM and (5) all documents showing the structure of the transaction in which the parent of Prada USA Corp. acquired interest in Fendi and the role of Martini in conducting the affairs of Fendi from 1999 to the present.

DISCUSSION

A. DEPOSITION OF JESSICA MARTINI

1. Relevant Standard

Before FB may depose Ms. Martini, they must show that her deposition is “material and necessary” to the action, and that the disclosure sought is “sufficiently related to the issues in litigation to make the effort to obtain them in preparation for trial reasonable” (*Samide v Roman Catholic Diocese of Brooklyn*, 16 AD 3d 482, 483 [2nd Dep’t 2005]). Ms. Martini, as a non-party witness seeking to quash the subpoena, bears the heavy burden of demonstrating that the disclosure sought is “utterly irrelevant to any proper inquiry.” (*New Hampshire Inc. Co. v Varda, Inc.*, 261 AD 2d 135, 135 [1st Dep’t 1999]).

2. Ms. Martini’s Role In The Negotiations

FB asserts that Ms. Martini has knowledge of WGM’s use of Ms. Clarke’s testimony. They support this argument by an October 7, 1999 letter that suggests Ms. Martini might have met with WGM about representing Prada in the summer or fall of 1999, when former Fendi Director of Operations, Ms. Clarke, admitted to FB that her prior testimony in the case against Fendi was false. (*see Grobman Aff. Ex. D*) Therefore, FB discredits Prada’s assertion that WGM was unaware of and unaffected by their

simultaneous representation of Prada's acquisition of Fendi during the time of this meeting. FB asserts that discovery of all conversations that took place during the negotiations for Prada's retention of WGM, which involve Ms. Martini, are material and necessary to the determination of whether WGM was aware of their dual representation.

Prada contends that Ms. Martini should only be deposed if the information sought from her will either lead to the discovery of admissible evidence, or provide evidence that is "material and necessary" to proving FB's claim of legal malpractice (CPLR 3101[a]). Prada further contends that deposing Ms. Martini would infringe upon her attorney-client privilege.

As to the issue of whether Ms. Martini's testimony will provide evidence that is "material and necessary," this court is convinced that the facts on the record suggest that Ms. Martini's knowledge of and role in the negotiations prior to the retention of WGM are not only material and necessary, but crucial, to the determination of whether WGM was aware of a conflict of interest when they agreed to represent Prada (CPLR 3101[a]). That, coupled with the fact that WGM has refused to disclose this information or to produce the person with the most knowledge who could attest to this information, suggests that Prada ought to produce Ms. Martini for a deposition to disclose her knowledge of the conversations that took place.

Prada's second, related, argument regarding attorney-client privilege is also without merit. The attorney-client privilege, although sacred, may be infringed upon where it "constitutes an 'obstacle' to the truth finding process, but the invocation of this exception should be consistent with its purpose" (*Priest v Hennessy*, 51 NY2d 62, 68 [1980]). WGM has refused to produce their retainer agreement with Prada, or any other

documents containing information about their negotiations, and this information is otherwise unobtainable. Therefore, Prada's failure to disclose this information, through the testimony of Ms. Martini or otherwise, would constitute an obstacle to the truth finding process (*id.*).

Prada's attempt to invoke the attorney-client privilege to withhold Ms. Martini's testimony fails on yet another ground. The attorney-client privilege does not apply to communications regarding the identity of clients (*In re Matter of Nassau County Grand Jury Subpoena Duces Tecum*, 4 NY3d 665, 666 [2005]), nor does it apply to "correspondence advising of the date and time of the meeting" (*SEC v Beacon Hill, LLC*, 2004 WL 1746790). Since FB seeks information which is related to the pre-retention identity of the WGM's representation of Prada, this information is not privileged.

3. *Martini's Knowledge Of The Corporate Structure*

FB properly asserts that because Ms. Martini was Prada's General Counsel, she is the appropriate person to testify about the corporate relationship between Prada and Fendi at the relevant time. To support this contention FB relies on their new member contact sheets for Prada, which lists Martini as a representative of Prada but contains no information concerning entities related to Prada such as their affiliates and subsidiaries (see Grobman Aff. Ex. F New Matter Sheets). FB maintains that as General Counsel listed on the contact sheet, Martini would have intimate knowledge of Prada's corporate structure. This is significant because Prada denies involvement in the acquisition of Fendi's corporate parent in Europe, suggesting that it was their Italian affiliate that completed the acquisition. They further deny that Ms. Martini has any knowledge of this

acquisition since this was an over-seas arrangement and she is the General Counsel of Prada USA.

Prada fails to reconcile why Ms. Martini is listed as the Prada contact on Prada USA's contact sheet, yet none of Prada's entities are listed (Grobman Aff. Exh. F). This issue sheds light on why it is important to discern whether WGM was otherwise informed of Prada's relationship with Fendi at their initial meetings with Prada. Knowledge of this timing is critical because it would help determine whether WGM was put on notice of their conflict of interest during discussions of retention, or if they inadvertently found out about the conflict of interest later. FB alleges that WGM first found out about the conflict on August 1, 2000, at a time when Ms. Martini was communicating with them for retention. They support this assertion with evidence of letters that were signed by Ms. Martini, dated July 17, 2000 and August 1, 2000 (*see* Grobman Aff. Exh. H; *see also* Grobman Aff. Exh. D). WGM, to the contrary, alleges that they learned of this conflict of interest later, during the Fendi action. Either Ms. Martini or any other executive who could best testify to Prada USA's corporate structure is needed to resolve this gray area.

4. *Timing Of The Conflict Of Interest*

FB asserts that Ms. Martini's testimony is critical to their defense of WGM's \$2.7 million claim for allegedly unpaid attorney's fees based upon the faithless service doctrine. Under the faithless service doctrine, a disloyal counsel has to forfeit the fees from the *date upon which the disloyalty began*. (*GRG Group v Ravenal*, 247 AD2d 201, 202 [1st Dep't 1998]); (*Schneider v Wien & Malkin, LLP*, 5 Misc3d 1011(A) [Sup Ct 2004]), leave to appeal granted, (2005 NY App Div LEXIS 5234) (requiring forfeiture of attorneys fees for period of conflict of interest, even if no damages were suffered.). WGM argues that before

FB can assert a defense under the faithless service doctrine, they must first demonstrate that WGM was disloyal, absent which, the time period of their representation of Prada or any affiliated entities would be irrelevant.

While WGM's argument has some merit, the conversation between Ms. Martini and WGM about their representation is crucial because it could reveal the point in time that they were aware of their dual representation. If the deposition of Ms. Martini reveals that WGM was aware of the dual representation at the time of the negotiations, then it would suggest that they were motivated to misuse the testimony of Ms. Clarke in the underlying litigation and therefore had a conflict of interest (*Weil Gotshal & Manges, LLP*, 10 AD3d at 269). This would suggest evidence of legal malpractice.

This court need not discuss the faithless service doctrine to ascertain damages until FB proves WGM's liability under its claim of legal malpractice. Nevertheless, the date that disloyalty began is still critical because it will determine whether WGM engaged in legal malpractice when they agreed to represent Prada. If the timing reveals that a conflict existed at the time WGM was retained by Prada, it becomes an issue of fact to determine whether that conflict affected their representation.

Further, timing is of concern because at the same time that WGM was preparing Ms. Clarke's testimony, they had planned meetings to represent Prada in their acquisition of Fendi. It is of paramount importance whether WGM's representation of FB was mentioned during these negotiations. While the date that WGM began to represent Prada may be obtained from a retainer agreement, only the testimony of those who participated in the negotiations could clarify whether WGM was aware of the conflict at that time.

5. FB's Burden On Their Motion to Subpoena Non-Party Prada

Prada contends that “special circumstances” exist in this case that would impede on the pursuit of nonparty discovery. To the contrary, this court is not bound to be concerned with inquiry of “special circumstances.” Indeed, the law as provided by the First Department is clear – “[t]here is no longer any necessity for ‘special circumstances’” to be shown by a nonparty (*Schroder*, 249 AD2d at 70). The First Department further clarified its position when it stated that the Second Department’s requirement of “special circumstances... are in conflict with this court’s own decisions and are therefore not followed” (*id.*). Since the First Department does not consider ‘special circumstances’ in determining the scope of nonparty discovery, Prada’s argument that Ms. Martini should not be allowed to testify because FB has not shown ‘special circumstances’ is irrelevant.

Nonetheless, even if this court applied the law of the Second Department, Ms. Martini’s testimony would fall under the umbrella of “special circumstances” for two reasons. First, WGM has refused to disclose information related to preliminary negotiations with Prada. Second, if Ms. Martini was present at these negotiations, her knowledge would be crucial to the finding of a conflict of interest, which would support FB’s defense of legal malpractice.

Further, this court finds that Ms. Martini has unique knowledge that is unobtainable from other sources, which if disclosed, could provide significant information relevant to WGM’s knowledge of a conflict of interest (*New Hampshire Insurance Co.*, 261 AD2d at 135). By definition then, her knowledge could not possibly be considered irrelevant as Prada contends (*id.*). Rather, her knowledge is material and necessary to the determination of FB’s legal malpractice counter-claim.

B. DISCOVERY OF DOCUMENTS

FB contends that information related to WGM's conflict of interest *cannot* be obtained from sources they have already received. This is because they are foremost concerned with discovering the specific conversations that took place during the negotiations for Prada's retention of WGM, but WGM has refused to respond to those relevant discovery requests. Prada, on the other hand, contends that FB *can* obtain all the evidence it needs related to their retention of WGM in late 1999 from the documents they have already received.

This Court is reluctant to compel the further production of documents because in the event that Ms. Martini's testimony discloses that she was not involved in the negotiations, or that WGM was in fact unaware of a conflict of interest at that time, these documents would be irrelevant.

FB shall proceed with the deposition of Ms. Martini. Then, if necessary, FB shall invoke the process of this Court to compel WGM to produce documents they have otherwise refused to disclose in so much as they contain information related to FB's claim for legal malpractice.

CONCLUSION

Accordingly, it is hereby


ORDERED that nonparty Jessica Martini comply and be deposed according to the extent indicated above.

ORDERED, that nonparty Prada will comply and produce the deposition of Jessica Martini within 20 days of service of a copy this order with notice of entry.

Martini within 20 days of service of a copy this order with notice of entry.

Dated: November 9, 2005

ENTER:



RICHARD B. LOWE
RICHARD B. LOWE, III
S.C.

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