

Kramer v Zeckendorf
2007 NY Slip Op 30590(U)
April 4, 2007
Supreme Court, New York County
Docket Number: 0128014/2002
Judge: Jane S. Solomon
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PART 55

PRESENT: JANE S. SOLOMON
Justice

Richard J. Kramer
- v -
Williams Sir Zichendorf

INDEX NO. 12804/02
MOTION DATE 10/23/06
MOTION SEQ. NO. 037
MOTION CAL. NO. _____

The following papers, numbered 1 to 7 were read on this motion to/for Compel

PAPERS NUMBERED
<u>1-3</u>
<u>4-5</u>
<u>6-7</u>

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

See attached Decision & Order

FILED

APR 6 2007

CLERK OF THE COURT

Dated: 4/4/07

JANE S. SOLOMON
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST

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 55

-----X

RICHARD L. KRAMER, individually and
as father and natural guardian of
ALANA KRAMER, TIVIA KRAMER and
GARY R. SIEGEL, as Trustee for EQUITY
RESOURCES TRUST,

DECISION AND ORDER

Index No.: 128014/2002

Plaintiffs,

- against -

WILLIAM LIE ZECKENDORF, ARTHUR W.
ZECKENDORF, W10Z/515 REAL ESTATE,
L.P., ZECKENDORF REALTY, L.P.,
515/ZGP, LLC, W10Z/515GEN-PAR, LLC,
CHARLES IRWIN, DANIEL M. NEIDICH,
STUART ROTHENBERG, WHITEHALL STREET
REAL ESTATE, WH ADVISORS, LLC.,
WHITEHALL IX/X, INC., STEVEN DUN,
CRAIG GOLDMAN, MELVIN HEINEMAN, FRANK
NEWMAN, BRUCE SHERMAN, DANIEL
ROSENBLUM, ALICE KULICK, 515 PARK
AVENUE CONDOMINIUM, THE BOARD OF
MANAGERS OF 515 PARK AVENUE
CONDOMINIUM, BROWN HARRIS STEVENS
RESIDENTIAL MANAGEMENT, LLC, FRANK
EDWARD WILLIAMS, FRANK WILLIAMS AND
ASSOCIATES N/K/A FRANK WILLIAMS &
PARTNERS, ARCHITECTS LLP, JAROS
BAUM & BOLLES, J.A. JONES-GMO, LLC,
FRESH MEADOWS MECHANICAL CORP.,
CANTOR SEINUK GROUP, GUNDERLIN
LTD, INC.,

FILED
JAN 14 2002
CLERK OF THE COURT
COUNTY OF NEW YORK

Defendants.

-and-

CHRISTOPHER BROWNE, as President of
the BOARD OF MANAGERS OF 515 PARK
AVENUE CONDOMINIUM,

Cross-claim Defendant.

-----X

(and third-party actions)

JANE S. SOLOMON, J.:

Defendants/third-party plaintiffs William Lie Zeckendorf, Arthur William Zeckendorf, W10Z/515 Real Estate, L.P., 515/ZGP, LLC, W10Z/515 Gen-Par, LLC, Charles Irwin, Daniel M. Neidich, Stuart Rothenberg, Whitehall Street Real Estate Limited Partnership X (s/h/a Whitehall Real Estate), WH Advisors, LLC X (s/h/a WH Advisors, LLC and Whitehall IX/X, Inc. (collectively referred to as the "Sponsor Defendants") seek to enforce a subpoena duces tecum served upon a non-party. The motion is granted in part for the reasons below.

THIS MOTION

The subpoenaed party is Citigate Sard Verbinnen ("CSV"), a public relations firm. The questions on this motion are whether the attorney-client privilege extends to communications by plaintiffs and counsel with a public relations firm engaged by counsel in connection with this lawsuit, and whether the attorney work product doctrine applies to material generated or retained by the public relations firm so engaged.

The subpoena was served on or about August 14, 2006, and was returnable on September 6, the date already scheduled for the deposition of a CSV employee. It called for the production of three categories of material: (1) Correspondence, including memoranda made in connection with any communications, between CSV and plaintiffs, their former attorney in this action, their present attorney in this action, and the personal assistant of

plaintiff Richard L. Kramer ("Kramer"); (2) correspondence between CSV and any other person in the media or news gathering industries; and (3) press releases, in draft or final form, and press packets or other information conveyed to any person regarding 515 Park Avenue.

CSV's attorney contacted the Sponsor Defendants' attorney and requested an adjournment. The Sponsor Defendants's attorney accommodated the request and adjourned the September 6 return date without specifying a new date. CSV also contacted plaintiffs' attorney. After September 6, but before a new return date was set, CSV's lawyer informed the Sponsor Defendants that plaintiffs would object to the production of responsive material. On September 15, 2006, plaintiffs' attorney told the Sponsor Defendants' attorney that it would be producing the material on CSV's behalf, and that some material identified on a privilege log would be withheld. On September 26, 2006, some material was produced by plaintiffs' attorney, and a privilege log describing the rest was produced.

This motion was made by order to show cause on October 16, 2006. Plaintiffs formally objected to the subpoena in response. They contend that the material sought is subject to attorney-client privilege and the work product doctrine, and that these objections were asserted timely.

BACKGROUND

This lawsuit arises from an alleged mold infestation in a newly constructed luxury condominium apartment building at 515 Park Avenue in Manhattan.¹ Plaintiff Equity Resources Trust is a family trust for Kramer and his family. It purchased one of the condominium units in April 2000, and the Kramers moved into the apartment in January 2001. In November 2002, a report commissioned by the condominium's Board of Managers indicated that there were harmful levels of mold in the building, and in some of the individual units. In December 2002, the Board of Managers sued the Sponsor Defendants, and others, in connection with construction problems and the alleged mold infestation. That lawsuit has settled.

Plaintiffs commenced this action on December 31, 2002. The complaint alleged claims for personal injury, negligence, fraud, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, breach of contract, and for rescission of the purchase contract. Complaint, annexed as Exhibit B to the Order to Show Cause. One week later, the New York Post ran an article which opens: "The world's most expensive condo building - 515 Park Ave. - has been invaded by killer mold, the Post has learned." Paul Tharp, Ritz Apts. Turn Into Solid Mold, N.Y.

¹ The facts are set forth in greater detail in a previous order in this matter, dated December 6, 2005 (motion sequence 21), and familiarity with those facts is assumed.

Post, January 6, 2003 (annexed to Order to Show Cause as Exhibit H). Kramer is cited as a source for the article, and he is quoted describing the building as "an opulent slum". Id. Kramer is again quoted by the New York Post in an article about 515 Park Avenue that appeared approximately three weeks later. Paul Tharp, 'Moldman' Hit By Condo Suit, N.Y. Post, January 29, 2003 (annexed to Order to Show Cause as Exhibit J).

Kramer, it turns out, had help in crafting quotable phrases and placing them with the media. Plaintiffs' former counsel, the law firm Kasowitz, Benson, Torres & Friedman, LLP (the "Kasowitz firm"), which drafted and filed the complaint, had retained CSV to provide public relations services in connection with its representation of Kramer.

CSV sent the Kasowitz firm a retainer letter, dated December 31, 2002 (the date the complaint was filed), which memorialized their agreement ("Retainer Letter").² The Kasowitz firm agreed to retain CSV as its communications consultant in connection with representating Kramer concerning 515 Park Avenue. The Retainer Letter states that:

² The Retainer Letter (Bates stamp numbers CSV 301-304) was included in the privilege log, but plaintiffs disclosed it before this motion was submitted. The copy submitted to court at oral argument is part of the record on this motion.

A. As communications counsel, CSV will provide the following services to Kasowitz:

- 1) Provide public relations advice and counsel, and recommend a media strategy in connection with the matter for which we have been retained.
- 2) Prepare and distribute such communications materials as may be appropriate and agreed upon.
- 3) Respond to inquiries from the press and other third parties authorized by Kasowitz as may be appropriate and agreed upon.
- 4) Perform such other public relations services as are mutually agreed upon.

. . .

Retainer Letter, Bates stamped CSV 301.

CSV kept a file that included documents it generated and received in connection with its work for the Kasowitz firm. Plaintiffs produced some of this material to the Sponsor Defendants, but withheld twenty-two documents, asserting that they were privileged as attorney-client communications and attorney work product. See, Kramer Privilege Log for CSV Production 9/26/06, annexed as Exhibit G to Order to Show Cause ("Privilege Log"). Plaintiffs submitted the withheld documents to court for in camera inspection.

Broadly speaking, the Privilege Log identifies documents as e-mails, handwritten or typed notes by CSV

employees, a schedule and a letter from CSV to the Kasowitz firm. The hand-written notes (Bates stamped CSV 301-320) were penned by a CSV employee at meetings with attorneys from the Kasowitz firm; the typed notes (Bates stamped CSV 324-330) are not identical but are identified as a typed version of the hand-written notes. There is a flurry of e-mail messages dated between January 3 and January 8, 2003, and communications continue through June 2003. There are no documents involving plaintiffs' present attorneys.

A thread of e-mail messages dated March 31, 2003 between Kramer, his lawyers and CSV (Bates stamped CSV 204-209) is included. It begins with a message presumably from Kramer (it originates from the e-mail account of his employee, Barbara Sojka) to his lawyers at the Kasowitz firm, who then forward it to CSV where it is further distributed and commented upon. In the originating message, Kramer complains about the cost and effectiveness of CSV's efforts and suggests a more direct method of publicizing conditions in 515 Park Avenue.

In February 2005, plaintiffs submitted a joint memorandum³ regarding the relevant date for the purposes of calculating damages. Joint Memorandum, annexed as Exhibit 1 to Aff. of Sergio F. Oehninger, Esq. In the joint memorandum,

³ Plaintiffs submitted the joint memorandum with Kerusa Co., LLC, a former condominium unit owner at 515 Park Avenue that was the plaintiff in a related lawsuit that has been dismissed (Kerusa Co., LLC v W10Z/515 Real Estate Limited Partnership, Index No. 601610/03).

plaintiffs argued that the relevant date for determining its damages is the date of purchase, and they offered to submit an expert opinion concerning damages. They subsequently produced a letter from a purported expert on how to ascertain the past price of a New York City condominium unit. Letter to Eric L. Siegel, Esq., from Hassan Tehranian, Professor and Chairman of the Finance Department of Boston College, dated May 11, 2005, annexed as Exhibit C to Order to Show Cause. Mr. Tehranian opined that the value of Kramer's unit should have grown at the rate of 1.4% per month from April 2000 to May 2005. Using this calculation, he estimated the fair market value in May 2005 should have been \$18.89 million. He further opined: "Because the Market has become aware of various design and construction defects and mold-related issues in the Building, the current appraised value of [Kramer's unit] is in fact only \$13 million." Id. at paragraph 8. The expert's opinion, and indeed, plaintiffs' entire theory of damages, is premised upon the fact that the market, i.e., the public, became aware of a mold problem in 515 Park Avenue. And how the public became aware of the alleged mold problem is significant.

Kramer testified at his deposition regarding the New York Post article, and what he knew about the activities of a public relations firm in connection with his lawsuit:

Q: When did you first believe that the market values

of 515 Park Avenue were suffering?

A: The day the New York Post wrote about the mold condition, . . .

Q: Do you have a public relations consultant?

A: No, sir.

Q: Did you discuss with your public relations consultant - -

A: I said I didn't have one.

Q: Do you know if anyone on your behalf spoke to the New York Post?

A: I do not know.

Q: Did you authorize anyone to speak to the New York Post?

A: No.

. . .

Q: At what point did market values begin to suffer at 515 Park Avenue?

A: The day the article came out. And the brokerage world in general knew about the problems, the mold problems.

Kramer Dep. Transcript, pp 335-337, annexed as Exhibit D to Order to Show Cause.

DISCUSSION

A. Relevance, Timeliness of Objection and Standing

As a threshold matter, plaintiffs assert that the motion should be denied because the material sought is irrelevant. The Sponsor Defendants argue persuasively that if the court is to accept plaintiffs' theory of damages, CSV played a role and some light properly may be shed on its activities. An in camera review of the documents supports the view that the material is relevant and must be produced if not barred by a privilege or some other protection under the CPLR.

Given the languid pace of this litigation, the court can hardly justify finding that plaintiffs surrendered their rights because they failed to voice an objection within a few weeks of learning that potentially sensitive material was at issue, particularly where the Sponsor Defendants agreed to an indefinite adjournment of the return date for answering the subpoena.

Plaintiffs have standing to object on the grounds of privilege to the disclosure of material in the possession of a non-party. The privilege belongs to the client, even if material is held by another, and the CPLR recognizes a person's right to assert privilege to prevent disclosure from any source. CPLR 3101(b).

B. Attorney-Client Privilege

Plaintiffs assert that all the withheld material is immune from disclosure under the attorney-client privilege. Confidential communications made in the course of professional employment between a client and its attorney are privileged unless waived, subject to certain exceptions. CPLR 4503(a). Its essential purpose is to encourage a client to be fully forthcoming with counsel and to receive, in return, frank advice which will protect the client's legal rights. Upjohn Co. v United States, 449 US 383 (1981). The burden of establishing a right to protection from disclosure is on the party asserting it, and the protected claim must be narrowly construed. Spectrum Sys. Intl. Corp. v Chemical Bank, 78 NY2d 371, 379 (1991).

In the present case, the communications at issue are documents in CSV's possession, so we are not dealing with a direct intrusion into the attorney-client relationship. Instead, plaintiffs contend, the attorney-client privilege extends to communications involving CSV because it was retained by the Kasowitz firm to provide advice and guidance on how to navigate high-profile litigation that was certain to garner media attention. Defendants, on the contrary, claim CSV assisted in obtaining that attention.

The attorney-client privilege has been extended to protect confidential communications involving consultants used by

an attorney for the purpose of assisting the attorney in providing legal advice. United States v Kovel, 296 F2d 918 (2d Cir 1961). The Kovel case involved an investigation into allegations of income tax evasion. The target of the investigation consulted with a lawyer specializing in tax law who had an accountant on staff under the direct supervision of the firm's partners. The accountant met with the client in connection with preparing a defense. The United States Attorney subpoenaed the accountant, Mr. Kovel, who cited the attorney-client privilege in refusing to testify. The United States Court of Appeals, Second Circuit, held that Kovel properly invoked the attorney-client privilege, and the court recognized that the "complexities of modern existence prevent attorneys from effectively handling clients' affairs without the help of others". Id. at 921. It analogized an attorney's consultation with an accountant to his use of an interpreter where the client speaks a foreign language, and stated that "[w]hat is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer. If what is sought is not legal advice but only accounting service, or if the advice sought is the accountant's rather than the lawyer's, no privilege exists." Id. at 922.

The reasoning articulated in Kovel has been widely accepted in American courts, and its principles have been applied

to protect communications involving a variety of experts retained by counsel to assist in providing legal advice. Not long ago, the attorney-client privilege was extended to communications involving a public relations consultant. See, In re Grand Jury Subpoenas, 365 F. Supp. 2d 321 (SDNY 2003).⁴

Soon after In re Grand Jury Subpoenas was issued in June 2003, another judge in the Southern District held, under different circumstances, that communications with a public relations firm were not privileged. "A media campaign is not a litigation strategy. Some attorneys may feel it is desirable at times to conduct a media campaign, but that decision does not transform their coordination of a campaign into legal advice." Haugh v Schroder Investment Mgmt. N. Am., Inc., 2003 US Dist. JEXIS 14586, *9-10 (SDNY Aug. 25, 2003).

As a practical matter, there is no reason why the Kovel reasoning would not extend to protect confidential communications with a public relations consultant. However, the proponent of the privilege has the burden of showing that the communication was made in not only confidence, but with the purpose of obtaining legal advice from the lawyer. Spectrum Sys. Intl. Corp., 78 NY2d at 379. Plaintiffs fail to meet that burden here.

Plaintiffs claim a blanket attorney-client privilege

⁴ For a helpful discussion of this decision, see Charles W. Martini and Charles F. Wilson, Defending Your Client in the Court of Public Opinion, 27 *Champion* 20 (2004).

over all the withheld documents. But the material is not addressed to advising the attorneys on public relations. Instead, it describes the roll-out of a media campaign, the law firm's participation in the media campaign, and assessments of the campaign's effectiveness. Plaintiffs and their lawyers assisted in compiling facts used by CSV in an effort to solicit interest in the story not only from the New York Post, but from other publications as well. In short, the material submitted for in camera review indicates that the Kasowitz firm engaged CSV to carry out a media campaign. Plaintiffs do not identify any material withheld on the ground of attorney-client privilege that is addressed to advising the Kasowitz firm on public relations issues related to plaintiffs' legal rights. Accordingly, it is not privileged under Kovel and its progeny.

Kovel and In re Grand Jury Subpoenas are further distinguished in that each of those decisions involved experts retained by the law firm in connection with defending a client's legal rights after the substantive events of the legal dispute had occurred. In this action, the consultant was involved in the events which plaintiffs rely on for relief in this lawsuit. Kramer testified that the value of condominium units in 515 Park Avenue was impacted by the January 6, 2003 New York Post article. And plaintiffs base their damages claim, at least in significant part, on the harm to the value of their unit caused by the public

perception that it is stigmatized by mold infestation. See, Joint Memorandum, paragraphs 4, 8-9. Kramer testified that the market values began to sink when the New York Post article came out.

CSV was retained December 31, 2002, and the withheld documents indicate its direct participation in shaping the content of the January 6, 2003 article. In addition to providing that CSV would give public relations advice to the Kasowitz firm, the Retainer Letter also covers the performance of other public relations services. In fact, the documents indicate that CSV did more than advise Kasowitz on the vagaries of public relations. See, Kovel, 296 F2d at 921.

The March 31, 2003 message thread described above was not treated confidentially by counsel, and is not related to obtaining legal advice. Instead, it is suggestion for how to bolster the public relations campaign. Plaintiffs do not address this communication in the motion papers, and have not met their burden of showing that it is privileged. Spectrum Sys. Intl. Corp., 78 NY2d at 379.

C. Attorney Work Product Doctrine

Two CPLR has two relevant provisions. First, CPLR 3101(c) provides that attorney work product "shall not be obtainable". Next, material ". . . prepared in anticipation of

litigation or for trial by or for another party, or by or for that party's representative (including an attorney, consultant, . . . or agent) may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of its case and is unable without undue hardship to obtain the substantial equivalent by other means. In ordering discovery of the materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation." CPLR 3101(d)(2).

"Not every manifestation of a lawyer's labor enjoys the absolute immunity of work product." Hoffman v Ro-San Manor, 73 AD2d 207 (1st Dept. 1980). Attorney work product encompasses material that is uniquely the product of a lawyer's learning and professional skill. ACWOO Int'l Steel Corp. v Frenkel & Co., 165 AD2d 752 (1st Dept. 1990). Attorney work product protection under CPLR 3101(c) should be construed "as narrowly as possible to include only those materials prepared by the attorney, acting as an attorney, and containing his analysis and trial strategy." 6 Weinstein, Korn & Miller, New York Civil Practice: CPLR, ¶ 3101.44. Because it is essential that a lawyer work with a degree of privacy, "free from intrusion by opposing parties and their counsel," work product immunity protects the adversarial

process by fostering the attorney's adequate preparation.

Hickman v Taylor, 329 US 495, 500-501 (1947).

Plaintiffs claim that all the material withheld is protected under work product doctrine. They do not contend that any of the material is protected under CPLR 3101(d)(2) (this may be because Kramer denied at his deposition that he had a public relations consultant, or that he authorized anyone to speak on his behalf to the New York Post, so he could not claim that CSV acted as his agent or representative). Nevertheless, the handwritten and typed notes regarding meetings between lawyers at the Kasowitz firm and CSV employees include factual recitations involving this lawsuit that may disclose a lawyer's mental impressions, conclusions or legal theories. Accordingly, that material shall not be produced.

D. Conclusion

The services CSV provided went far beyond assisting a lawyer who needed professional help in advising a client. It orchestrated a media campaign with input from Kramer and his lawyers. When the United States Supreme Court created the attorney work product exception to disclosure in Hickman v Taylor, it stated that it is essential that a lawyer work with a degree of privacy. 329 U.S. at 500-501. In this case, whatever ideas, theories or strategies plaintiffs' lawyers developed in

private, they then reached out to CSV to create a public impact beyond the lawsuit, i.e., the material here is reverse work product, intended to project the lawyer's private thoughts into the public mind. Plaintiffs have not met their burden in showing it is entitled to protection.


It hereby is

ORDERED that the motion to compel non-party CSV to produce documents in response to subpoena is denied with respect to those documents Bates stamped CSV 301-320 and CSV 324-330, and otherwise the motion is granted; and it further is

ORDERED that plaintiffs shall produce the material within ten days of service of a copy hereof with notice of entry.

Dated: April 4, 2007

ENTER:



J.S.C.

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JANE S. SOLOMON

FILED

APR - 6 2007

*U.S. District Court
District of Columbia*