

EOS Partners SBIC, L.P. v Levine

2007 NY Slip Op 31853(U)

June 21, 2007

Supreme Court, New York County

Docket Number: 0601530/2005

Judge: Bernard J. Fried

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

PRESENT: Fried **BERNARD J. FRIED** J.B.C. PART 60m
Justice

Eos Partners

NYS SUPREME COURT
REVIEWED
JUN 27 2007
E-FILING DEPT.

FILED
INDEX NO. 601530105
MOTION DATE _____
MOTION SEQ. NO. 005
MOTION CAL. NO. _____

- v -

Jonathan B. Levine et al

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 **FILED**

Upon the foregoing papers, It is ordered that this motion

JUN 22 2007

COUNTY CLERK'S OFFICE
NEW YORK

This motion is decided in accordance with the accompanying memorandum decision.

SO ORDERED

Dated: 6/21/07

B. J. Fried
BERNARD J. FRIED *s.c.*
J.B.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: PART 60

-----X
EOS PARTNERS SBIC, L.P. derivatively, on behalf of
DDS PARTNERS, LLC,

Plaintiffs,

INDEX NO.: 601530/05

- against -

JONATHAN B. LEVINE, STACEY LEVINE, KELLEN
MORI, JOSHUA SHAW, GOSMILE INC., GOSMILE
CORP., DDS PARTNERS, LLC, AND JOHN DOES 1-99,

Defendants.

FILED

JUN 22 2007

COUNTY CLERK'S OFFICE
NEW YORK

Fried, J.:

By way of Order to Show Cause, defendants, Jonathan B. Levine, Stacey Levine, Kellen Mori, Joshua Shaw, GoSmile Inc., GoSmile Corp., DDS Partners LLC ("DDS"), and John Does 1-99 (collectively "Defendants"), move to compel the production of documents, which the plaintiff, Eos Partners SBIC, L.P. ("EOS"), derivatively on behalf of DDS, claims are protected by the attorney-client privilege.

Briefly, this is an action for breach of contractual and fiduciary obligations brought derivatively by EOS, one of the largest shareholders of DDS. DDS provides dental practice management services to various dental practices in Manhattan, New York. The action seeks relief for alleged corporate abuses committed against DDS, primarily by its former Chief Executive Officer and Chairman of the Board, Jonathan B. Levine. The complaint alleges that Levine improperly used DDS resources, capital, and personnel to develop valuable assets, including a line of teeth whitening products and the GoSmile trade name.

Pursuant to CPLR § 3124, defendants seek an order to compel the plaintiff to produce certain documents withheld on the grounds of the attorney-client privilege.¹ DDS retained O'Melveny & Myers, LLP to advise DDS on corporate matters. The documents at issue are communications from O'Melveny & Myers, LLP to Steven Friedman, EOS's current president, and Craig Abramowitz, the Chief Executive Officer of DDS. The disputed documents also include communications between Clifton, Budd & DeMaria, LLP, who is representing EOS in this lawsuit, and Friedman and Abramowitz. (See Friedman Aff). It is undisputed that the communications, which included emails, faxes, and legal memoranda, concerned this litigation or facts and circumstances giving rise to this litigation.

Defendants argue that these communications are not privileged and, therefore, must be disclosed. The argument is that the common interest privilege does not extend to protect communications between a derivative plaintiff and a defendant corporation, on whose behalf the derivative action has been brought.

In opposition, plaintiff argues that the communications are privileged because they are based on a common interest or a joint relationship between the parties. Because the lawsuit is a derivative action filed ultimately for the benefit of the DDS corporation and its shareholders, plaintiff maintains that the legal interests of EOS and DDS are common and aligned.

¹ Specifically, defendants seek disclosure of the 3rd, 16th, 22nd, 23rd, 24th, 26th, 29th, 41st, 42nd, 43rd, 44th, and 51st entries on the EOS privilege log, dated October 27, 2006.

The attorney-client privilege, codified in CPLR § 4503(a), generally prohibits counsel from disclosing confidential communications from a client seeking legal advice. The party invoking the privilege has the burden of showing that it applies. (People v. Osorio, 75 N.Y.2d 80, 84 [1989]). Because the privilege has the effect of withholding relevant information from the fact finder, it applies only where necessary to achieve its purpose and protect from disclosure confidential communications between client and counsel. (E.g., Stenovich v. Wachtell, 195 Misc.2d 99, 106 [Sup. Ct. N.Y. Cty. 2003]). Courts have recognized that at times “the public interest is served by shielding certain communications . . . from litigation, rather than risk stifling them altogether.” The privilege requires that the communications are made for “the purpose of facilitating the rendition of legal advice or services in the course of a professional relationship and have been primarily or predominantly of a *legal* rather than a *commercial* nature.” (U.S. Ban Nat’l Ass’n v. APP Int’l Finance Co., 33 A.D.3d 430, 430 [1st Dep’t 2006] [emphasis in original]). Here, there is no dispute that these basic requirements of the privilege are met. The question that remains is whether a shareholder plaintiff and a defendant corporation share a common legal interest in a shareholder derivative lawsuit that enables their communications to be privileged.

New York courts have recognized a “conditional, or qualified, privilege to a communication made by one person to another upon a subject in which both have an interest known as the common interest privilege.” (U.S. Ban Nat’l Ass’n, 33 A.D.3d at 430). The common interest privilege protects certain communications to third parties who would otherwise waive the attorney-client privilege. (See U.S. v. Schwimmer, 892 F.2d 237, 243

[2nd Cir. 1989]; Strougo v. Bea Assoc., 199 F.R.D. 515, 520 [S.D.N.Y., 2001]). The rationale is that as long as “the privilege is not abused, the flow of information between persons sharing a common interest should not be impeded.” (Liberian v. Gelstein, 80 N.Y.2d 429, 437 [1992]). Because such privilege excludes documents and communications from discovery, it has been construed narrowly and is limited to communications between counsel and parties with respect to a pending litigation in which the parties have a “common legal interest.” (See, e.g., Stenovich, 756 N.Y.S.2d 367, 376 [Sup. Ct. 2003]). Typically, it applies where multiple parties are jointly represented. That is, when the parties are represented by a single counsel and working together toward a common legal goal. (Strougo, 199 F.R.D. at 520). “[I]n its most extreme form,” this has been extended to apply to communications between parties who are represented by separate counsel but only when they share an identical legal interest. (See North River Ins. Co. v. Columbia Cas. Co., 1995 WL 5792, at *3 [S.D.N.Y., Jan. 5, 1995]). This application extends protection to communications to third parties who are distinct legal entities from the client receiving the legal advice. (Id.). The key requirement, however, is that “the nature of the interest be identical, not similar, and be legal, not solely commercial.” (Id. quoting Duplan Corp. v. Deering Milliken, Inc., 397 F.Supp. 1146, 1172 [D.S.C. 1975]).

Here, the communications in dispute are between plaintiff’s counsel or president Friedman and a third party, Abramowitz, the CEO of the opposing party DDS. The opposing parties are not jointly represented as they do not share the same counsel. (See Strougo, 199 F.R.D. at 520). Although Friedman and Abramowitz have independently shared certain information regarding the litigation, the parties retained separate counsel and do not have a

coordinated legal strategy. For example, Arthur J. Robb, EOS's former counsel, has acknowledged that his firm did not act in concert with DDS's counsel in DDS's discovery demands. (See Arthur J. Robb Affirmation, ¶ 2). As earlier discussed, the common interest privilege only applies in the present case if the parties share an identical legal interest. (See North River Ins. Co., supra, 1995 WL 5792, at *3). Here, notwithstanding the inherent relation between shareholders and their corporation, the present parties do not share an identical legal interest because they are opposing parties to the litigation. Although the parties commercial interests may to some extent coincide and DDS may only be a nominal defendant, the structure of this action illustrates that their interests are antagonistic. (See id. at *4; Ferko v. Nat'l Ass'n for Stock Car Auto Racing, Inc., 219 F.R.D. 403, 407 [E.D. Tex. 2003]).² "What is important is not whether the parties theoretically share similar interests but rather whether they demonstrate actual cooperation toward a common goal." (Id.). As opposing parties in the litigation, EOS and DDS's legal interests are divergent and the two do not share a privileged relationship.³

Accordingly, Defendants motion to compel production of the documents is granted.

Dated: 6/21/07

FILED

JUN 22 2007

Bernard J. Fried
BERNARD J. FRIED
J.S.C.

COUNTY CLERK'S OFFICE
NEW YORK

² The application of the common interest doctrine in the context of relations between insurers and their insured is analogous. When an insurer does not appoint counsel for the insured, the parties do not necessarily have a common interest in the litigation. The insurer "may have the same 'desire' as the insured that the insured not be found liable for damages in an underlying action, but this does not qualify as an identical legal interest." In fact, the insurer's legal interest may directly conflict with that of the insured in some respects. (North River Ins. Co., 1995 WL 5792, at *4 (citing International Ins. Co. v. Nemont Mining Corp., 800 F.Supp. 1195, 1196 [S.D.N.Y. 1992])).

³ Because I have concluded that the communications in dispute are not privileged, defendants' second claim that plaintiff waived any privilege that may have existed is moot.