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| Rosma Dev., LLC v Motovich |
| 2007 NY Slip Op 34521(U) |
| November 13, 2007 |
| Supreme Court, New York County |
| Docket Number: 113942/05 |
| Judge: Judith J. Gische |
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Supreme Court of the State of New York
County of New York: Part 10

Rosma Development, LLC

Plaintiff,

Decision/Order

-against-

Index# 113942/05

David Motovich, et al.

Defendant.

Pursuant to CPLR 2219(a) the court considered the following numbered papers on this motion:

| PAPERS | NUMBERED |
|--|----------|
| Privilege log..... | 1 |
| Deposition Transcript of Michael Bleich dated 4/17/07..... | 2 |
| RA Rubin, Esq. Affd . Dated 11/07/07..... | 3 |
| M. Bleich affirm. Dated 11/07/07..... | 4 |
| Documents submitted for in camera review..... | 5 |

FILED

Hon. Judith J. Gische:

NOV 26 2007

Upon the foregoing papers, the decision and order of the court is as follows:

COUNTY CLERK'S OFFICE
NEW YORK

This matter involves enforcement of a guaranty agreement made in favor of the plaintiff ("guaranty agreement"). Defendants claim that the guaranty agreement is a fraud that was "cobbled together" from other documents. At this time the parties have asked the court for rulings regarding certain documents that have been withheld from discovery based on claims of attorney client and work product privilege. The withheld documents have been identified on a privilege log created by plaintiff, Rosma Development, LLC. The documents all come from the files of plaintiff's attorneys, Troutman, Sanders LLP. The court already made certain rulings on the withheld documents in open court [see: transcript dated November 1, 2007]. The remaining documents which require rulings fall into two

categories. The first is document # 33 which is a signed agreement with handwritten notations. The second pertains to documents #s 7,8,12, 17, 18, 19, 22, 23, 24, 25, 27, 30, 32, and 41. Each of these documents lists Michael Bleich as a "participant". Michael Bleich worked as a "consultant" for plaintiff, at least from July 2005 through January 2006. Defendants argue that any attorney client privilege has been waived by disclosure to Mr. Bleich.

With respect to document #33, plaintiff has provided the affidavit of Richard A. Rubin, Esq. an attorney with Troutman, Sanders, LLC. He has sworn that the handwritten notations on the document are his and that they were made only after a copy of the underlying document, with signatures, was provided to him. At the argument of these issues on November 1, 2007, the parties acknowledged that they all had the underlying signed document, without notations. Thus, document #33, which contains handwritten commentary by an attorney, is protected from disclosure as attorney work-product. CPLR §3101(c).

In connection with issues concerning the status of Mr. Belich, plaintiff has provided the court with a transcript of Mr. Bleich's deposition taken on April 17, 2007 and Mr. Belich's recent affirmation. In each of these documents Mr. Bleich describes the nature his relationship with plaintiff and the duties he undertook in connection with the guaranty agreement that is the subject of this action. Mr. Bleich is an accountant who was paid as a consultant to work on the books and records of plaintiff. He also drafted small agreements on plaintiff's behalf. He was neither an officer nor a director of plaintiff and plaintiff was not Mr. Bleich's only client. Beginning in July 2005 he was involved in having the guaranty agreement drafted. To that end he was the liaison between Messrs. Junger

and Rosner, the principals of plaintiff and plaintiff's attorneys. He told the attorneys what the terms of the guaranty agreement would be and he met with and discussed drafts of the agreement with Junger and Rosner. He forwarded those comments back to plaintiff's attorneys. Mr. Bleich claims that he was assisting the principals of plaintiff in this matter because English was not their first language. The issue raised is whether the disclosure of communications to Mr. Bleich has eviscerated the attorney client privilege.

The attorney client privilege protects the disclosure of communications between an attorney and his/her client that concern the getting or giving of advice. CPLR §4503; also CPLR §3101(b). Since confidentiality is at the heart of the privilege, communications made in the known presence of a third party are not privileged. People v. Harris, 57 NY2d 335 (1982) cert. den. 460 US 1047 (1983). A client, however, may use his or her own agent to transmit a communication to the attorney without losing the privilege as long as the client had a reasonable expectation of confidentiality. People. Osorio, 75 NY2d 80 (1989). Allowing privilege to attach in cases involving agents is justified by the need for the presence of persons who can aid the client in communicating or assist the lawyer in performing legal services. McKinney's Practice Commentary §4503(c); Stroh v. General Motors Corp., 213 AD2d 267 (1st dept. 1995). The scope of this agency privilege is not defined by the third parties' employment or function. Nor is it defined by a technical showing of agency. Village of Kiryas Joel Local Development Corp. v. Insurance Company of North America, 1992 WL 8207 (SDNY 1002). It depends on whether the client had a expectation of confidentiality under the circumstances. Stenovich v. Wachtell, Lipton, Rosen & Katz, 195 Misc.2d 99 (NY Co. Sup. Ct. 2003); Village of Kiryas Joel Local Development Corp. v. Insurance Company of North America, *supra*. The burden of proving

that the privilege attaches rests with the party asserting it. Muriel Siebert & Co. Inc. v. Intuit, Inc.; 32 AD3d 284 (1st dept. 2006).

In this case plaintiff has met its burden. In the first instance, the court has reviewed the withheld documents. They fall into the category of getting or giving legal advice. Mr. Bleich assisted the principal as an intermediary with the attorney. He communicated with the attorney about the guaranty agreement and other collateral agreements that were part of the transaction. He also communicated with the principals to ascertain out their comments. The comments of the principals were then communicated back to the attorneys. There was no expectation that Mr. Bleich would or did communicate the information he conveyed back and forth between the principals and the attorneys to anyone else. There was a reasonable expectation of privacy.

In this regard, the court does not need to determine, as a matter of first impression, whether the doctrine adopted by the Eighth Circuit Court of Appeals, that the privilege attaches when an independent contractor is really a *de facto* employee, applies in New York State. See: Export-Import Bank v. Asia Pulp & Paper, 232 FRD 103 (SNNY 2003); In re: Adelpia Communications Corp. , 2007 Bankr. Lexus 660 (SDNY Bankruptcy Court, 2007)(nor). The New York common law doctrine of "agency" privilege is sufficiently broad to include an independent contractor, provided that such person otherwise establishes the required expectation of confidentiality.

Also to be distinguished is a situation where Mr. Bleich might have only been providing financial information to the attorneys or to the principal. If that were the case, there would be no privilege. United States v. Kovel, 296 F2d 918 (2nd Cir. 1961). Although Mr. Bleich was an accountant and performed accounting services for plaintiff, his services

in connection with the guaranty agreement were not of such a nature. This was gleaned from a review of the documents submitted for *in camera* inspection.

Accordingly, this court holds that the document denoted as # 33 on plaintiff's privilege log is protected by the work product privilege and that documents denoted as #s 7,8,12, 17, 18, 19, 22, 23, 24, 25, 27, 30, 32, and 41 on plaintiff's privilege log are protected by the attorney client privilege. Plaintiff is directed to pick such documents up from the court within fifteen days of this decision. This constitutes the decision and order of the court.

Dated: New York, New York
November 13, 2007

SO ORDERED:



J.G. J.S.C.
JUDITH J. GISCHE, J.S.C.

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