

**Flynn v Canadian Imperial Bank of Commerce**

2008 NY Slip Op 30605(U)

February 13, 2008

Supreme Court, New York County

Docket Number: 0604018/2006

Judge: Charles E. Ramos

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF NEW YORK — NEW YORK COUNTY

PART 53

Index Number : 604018/2008

FLYNN, PAUL A.

VS.

CANADIAN IMPERIAL BANK

SEQUENCE NUMBER : 002

STRIKE A PLEADING

*ce*

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

ad 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

RECEIVED  
FEB 26 2008  
MOTION SUPPORT  
OFFICE

is decided in accordance with  
accompanying memorandum decision and order.

Dated: 2/13/08

*[Signature]*  
HON. CHARLES E. RAMOS, C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

REFERENCE

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

*MIA P*

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK:COMMERCIAL DIVISION

-----X  
PAUL A. FLYNN,

Plaintiff,

Index No. 604018/06

-against-

CANADIAN IMPERIAL BANK OF COMMERCE,  
CANADIAN IMPERIAL HOLDINGS, INC.,  
CIBC WORLD MARKETS CORP.,

Defendants.  
-----X

**Charles Edward Ramos, J.S.C.:**

Defendants Canadian Imperial Bank of Commerce ("CIBC"), Canadian Imperial Holdings, Inc. ("CIHI"), and CIBC World Markets Corp. ("CWM") move pursuant to CPLR 3126 to strike allegations in plaintiff Paul A. Flynn's complaint or in the alternative, to compel disclosure of communications and documents between Mr. Flynn and his former attorney James Walden. (CPLR 3126)

Mr. Flynn was a Managing Director at CIBC. In September 2001, he had conducted a due diligence review of Security Trust Company ("STC") to evaluate the protocols and operational controls STC adopted to protect assets under management. He prepared a memorandum, dated October 12, 2001 (the "STC Memo"), which summarized the due diligence review and circulated it to his supervisors. In Fall 2003, CIBC was the subject of a criminal investigation by the New York State Attorney General (the "NYSAG") and a civil investigation by the Securities and Exchange Commission (the "SEC") for their market timing practices. Mr. Flynn's STC Memo and other activities were subjects of the NYSAG's investigation.

**FILED**  
**FEB 22 2008**  
**COUNTY CLERK'S OFFICE**  
**NEW YORK**

In November 2003, CIBC assigned Mr. Walden as outside counsel to represent Mr. Flynn.

On December 4, 2003, Mr. Flynn was notified by Mr. Walden that the NYSAG contacted CIBC to arrange a meeting with Mr. Flynn the following Monday. Mr. Flynn was told that his failure to appear would result in his arrest. Mr. Walden also informed Mr. Flynn, that CIBC terminated his employment effective immediately.

On January 15, 2004, Mr. Walden was advised that CIBC would no longer be paying his attorney's fees for Mr. Flynn. On January 24, 2004, Mr. Walden advised Mr. Flynn that he (Flynn) was facing larceny charges and recommended the acceptance of a plea bargain. Mr. Flynn rejected the plea offer and subsequently hired new counsel.

On February 3, 2004, the SEC instituted proceedings against Mr. Flynn alleging that he substantially assisted STC and two hedge fund clients in late trading and deceptive market timing of mutual fund shares. Mr. Flynn was also arrested by the NYSAG agents and indicted. The criminal charges against Mr. Flynn were dismissed on November 21, 2005.

On August 2, 2006, all SEC charges against Mr. Flynn were dismissed as well. Mr. Flynn then commenced this lawsuit alleging nineteen causes of action against CIBC for its conduct during the NYSAG and the SEC investigations. Mr. Flynn alleges that in an attempt to evade liability, CIBC misrepresented to the NYSAG and the SEC that Mr. Flynn was responsible for the illegal market timing practices which resulted in his arrest and

[\* 4 ]  
indictment.

Defendants now seek attorney-client communications by arguing that the disclosures made by Mr. Flynn in his complaint and during the discovery process resulted in a blanket waiver of the attorney-client privilege and that all privileged communications are now discoverable.

Mr. Flynn contends that there was no waiver of the attorney-client privilege. He contends that the communications he disclosed were not privileged communications and that therefore no waiver should apply.

#### Discussion

The attorney-client relationship "arises only when one contacts an attorney in his capacity as such for the purpose of obtaining legal advice or services." *Spectrum Sys. Int'l Corp. v Chem. Bank*, 78 NY2d 371, 378 (1991). Neither party disputes the existence of the attorney-client relationship between Mr. Flynn and Mr. Walden. Mr. Flynn admits Mr. Walden was retained to represent him and that he consulted Mr. Walden for legal advice.

"The attorney-client privilege applies to confidential communications between clients and their attorneys made in the course of professional employment." (CPLR 4503 [a]). "[S]uch privileged communications are absolutely immune from discovery." (CPLR 3013). Privilege is applicable if the communication was made "for the purpose of facilitating the rendition of legal advice or services." *Spectrum*, 78 NY2d at 378 (1991). "The communication itself must be primarily or predominantly of a

legal character." *Rossi v Blue Cross & Blue Shield*, 73 NY2d 588, 593 (1989).

Pursuant to CPLR 4503(a), the client may expressly or impliedly waive the privilege. (CPLR 4503 [a]). Waiver is implied when a client voluntarily testifies to a privileged matter, publicly discloses such matter, or permits their attorney to testify regarding the matter. *Jakobleff v Cerrato, Sweeney & Cohn*, 97 AD2d 834, 835 (2nd Dept 1983).

Since there is no express waiver in this case, this Court must look to the disclosed communications to determine if there was an implied waiver of the attorney-client privilege by Mr. Flynn.

"A waiver may also be found where the client places the subject matter of the privileged communication in issue." *Id.* An "at issue" waiver requires that the party asserting privilege:

"places the subject matter of its own privileged communication at issue in litigation, so that invasion of the privilege is required to determine the validity of a claim or defense of the party asserting the privilege, and application of the privilege would deprive the adversary of vital information." *Deutsche Bank Trust Co. of Ams. v Tri-Links Inv. Trust*, 43 AD3d 56, 63 (1st Dept 2007).

An example of an "at issue" waiver is the assertion of the reliance upon the advice of counsel as an affirmative defense. *Id.* at 64.

A review of the allegations in the complaint and deposition testimony shows that Mr. Flynn has not placed all of his privileged communications with Mr. Walden at issue.

Mr. Flynn disclosed the following communications between himself and Mr. Walden in his complaint:

"Walden met with Flynn and told Flynn that CIBC could end up 'throwing you under the bus' and suggested that Flynn resign."  
(Complaint ¶ 57).

"On December 24, 2003, Flynn was asked to meet with Walden to discuss a compensation package being offered by CIBC if he 'cooperated' by continuing to help to CIBC in its internal investigation and keeping CIBC aware of developments with the NYSAG and SEC..." (Complaint ¶ 64).

"Walden advised Flynn to accept a plea bargain with the NYSAG. Walden told Flynn 'it's not nice to have your children visiting you in jail.'" (Complaint ¶ 68).

Mr. Flynn disclosed the following communications between him and Mr. Walden in his deposition testimony:

- Q. And in what context did Mr. Walden use the phrase, "CIBC could end up throwing you under the bus"?
- A. I think what Mr. Walden was trying to tell me was that in these circumstances that cooperating with your employer can likely backfire on you because they can use that information to your detriment, which in this case it was.
- Q. Was Mr. -- was Mr. Walden advising you not to cooperate with CIBC?
- A. What Mr. Walden was advising me to do was resign. (Exhibit A 176, 7-18).
- Q. Did Mr. Walden advise you one way or the other whether you should cooperate with CIBC?
- A. I mentioned when I initially met with Mr. Walden, he suggested that I cooperate with CIBC. That I resign my post and that we terminate our relationship as well.
- Q. Were there any other times when you discussed with Mr. Walden whether or not you should cooperate with CIBC?
- A. Yes. Mr. Walden mentioned to me that at the times that I went in to see the [NYS]AG or, more specifically, the December 9<sup>th</sup> meeting,

that it wasn't a wise decision. (Exhibit A 187, 3-15)

- Q. To your knowledge, what information did Mr. Walden provide CIBC on January 15, 2004?
- A. January -- it appears that he had advised them that the [NYS]AG was asking me to plead to an E felony, and that he had discussions with them possibly. I don't recall specifically what he said, but it was more than obvious to me from his comments about Mr. Vaughn that CIBC was aware of the plea negotiations with the NYSAG. (Exhibit A 194, 11-19).

The subject matter of the disclosed communications made during Mr. Walden's representation of Mr. Flynn clearly relates to the NYSAG and SEC investigations. Despite Mr. Flynn's attempts to characterize the communications as threats rather than advice, the "attorney-client privilege is not lost merely by reason of the fact that it also refers to certain nonlegal matters." *Rossi*, 73 NY2d at 594 (1989).

Defendants argue that the allegations have placed Mr. Flynn's communications with Mr. Walden "at issue," but the privileged communications are not required to sustain Mr. Flynn's causes of action and Walden is not a defendant. The fact that the communication "contains information relevant to issues the parties are litigating does not, without more, place the contents of the privileged communication itself 'at issue.'" *Deutsche*, 43 AD3d at 64 (1st Dept 2007). Furthermore, Mr. Flynn even admits that he went against the advice of his then counsel, Mr. Walden.

Defendants also argue that Mr. Flynn's selective disclosure has waived the privileged communications.

"Selective disclosure is not permitted as a party may not

rely on the protection of the privilege regarding damaging communications while disclosing other self-serving communications." *Id.*

"Disclosure of confidential communications may waive the privilege with respect to communications of the same subject matter." *Stratagem Dev. Corp. v Heron Int'l N.V.*, 153 FRD 535, 544 (SD NY 1994).

The scope of the attorney-client privilege waiver is determined on a case by case basis by considering the context of the waiver and the prejudice caused to the other party by permitting partial disclosure of privileged communications. *United States v Doe (In re Grand Jury Proceedings)*, 219 F3d 175, 182 (2d Cir 2000).

Based on principles of fairness, courts most often impose the subject matter waiver when the privilege-holder attempts to "use the privilege as both 'a sword' and 'a shield' or when the party attacking the privilege will be prejudiced at trial." *In re Leslie Fay Cos. Sec. Litig.*, 161 FRD 274, 282 (SD NY 1995).

The Second Circuit determined:

"broad subject matter waiver occurs where one party asserts the advice of counsel as a defense in a judicial setting because the other party would be highly prejudiced by having to defend against an incomplete disclosure of privileged information." *McGrath v Nassau County Health Care Corp.*, 204 FRD 240, 245 (ED NY 2001).

However, a "limited waiver is appropriate where disclosure occurs in a context and fashion that does not greatly prejudice the non-disclosing party." *Id.*

In determining if limited disclosure is appropriate, the Second Circuit looks to five factors:

"(1) whether the disclosure occurred in an extrajudicial forum, (2) the stage of the litigation in which the disclosure was made, (3) whether the disclosure was made to opposing counsel or the court, (4) whether limited disclosure is prejudicial to the opposing party, and (5) whether disclosure was purposeful or inadvertent. *Id.*"

The disclosures by Mr. Flynn were intentional and occurred in an extrajudicial forum, during the pleading and discovery stages of litigation to opposing counsel. *Asset Value Fund Ltd. Pshp. v Care Group*, 1997 US Dist. LEXIS 17968 (SD NY 1997) (disclosures during depositions are extrajudicial and do not result in subject matter waiver).

Defendants' assertions that they will be prejudiced because they have raised the affirmative defense requiring invasion of the privilege is unavailing and illogical. *Jakobleff*, 97 AD2d at 835 (1st Dept 1983) (invasion of privilege to enable the non-privilege-holder to assert a defense would contravene the purpose of privilege).

There is no logical or equitable basis to broaden the waiver beyond those matters actually revealed when the disclosures of privileged information are made extrajudicially and without prejudice to the opposing party. While disclosures in the public arena maybe be misleading, as long as the disclosures remain extrajudicial, there will be no legal prejudice warranting the court to impose a broad subject matter waiver. Disclosures, even if selective, made in public rather than in court create no risk

of legal prejudice unless put at issue in the litigation by the privilege holder. *In re von Bulow*, 828 F2d 94, 103 (2d Cir 1987).

Defendants have not demonstrated any prejudice that requires invasion of the attorney-client privilege. Mr. Flynn has waived the attorney-client privilege as to any information already disclosed, but there is no subject matter waiver as a result of the extrajudicial disclosures. However, this does not prevent a future waiver if the communications are put "at issue" in the litigation.

Mr. Flynn did disclose two memos from O'Melvany & Meyers which memorialize the December 11, 2003 interview ("Interview Memo") and December 17, 2003 meeting ("Meeting Memo") with the NYSAG. Both documents contain headings indicating the memos are attorney work product.

Mr. Flynn asserts that the production was in furtherance of full disclosure concerning the investigations by the NYSAG.

Defendants contend that Mr. Flynn's selective disclosure of the Interview Memo and Meeting Memo (the "Memos") constitutes a waiver of privilege for all attorney work product, specifically the attorney's notes concerning the investigative interviews by the NYSAG.

"Disclosure of a privileged document generally operates as a waiver of the privilege." *N.Y. Times Newspaper Div. Of N.Y. Times Co. v Lehrer McGovern Bovis, Inc.*, 300 AD2d 169, 172 (1st Dept 2002). It is "the burden of the proponent of the privilege to

prove non-waiver." *John Blair Communications, Inc. v Reliance Capital Group, L.P.*, 182 AD2d 578 (1st Dept 1992). There are exceptions to the general rule, but Mr. Flynn has conceded that he intentionally disclosed the Memos. Therefore the attorney work product privilege is waived with respect to the Memos.

Defendants also seek the unredacted production of a memorandum written by Mr. Flynn's wife, memorializing the advice given to Mr. Flynn by Mr. Walden. On April 6, 2007, Mr. Flynn produced the memorandum, but with redactions. Mr. Flynn has since produced the unredacted version rendering this issue moot.


Accordingly, it is

ORDERED, that the motion of defendants Canadian Imperial Bank of Commerce, Canadian Imperial Holdings, Inc., and CIBC World Markets Corp. to strike the allegations in the complaint or in the alternative, to compel disclosure of privileged communications between plaintiff Paul A. Flynn and Mr. Walden is denied in its entirety, and it is further,

ORDERED, that plaintiff Paul A. Flynn has waived privilege only as to the statements disclosed in the complaint and deposition, and it is further,

ORDERED, that plaintiff Paul A. Flynn has waived privilege with respect to the two memoranda memorializing the December 11, 2003 and December 17, 2003 meetings.

Dated: February 13, 2008

**FILED**  
**FEB 22 2008**  
**NEW YORK COUNTY CLERKS OFFICE**  
  
\_\_\_\_\_  
J.S.C.  
**HON. CHARLES E. RAMOS**

Counsel are hereby directed to obtain an accurate copy of this Court's opinion from the record room and not to rely on decisions obtained from the internet which have been altered in the scanning process.

