

Finkelman v Klaus

2008 NY Slip Op 30695(U)

February 29, 2008

Supreme Court, Nassau County

Docket Number: 5257-05/

Judge: Stephen A. Bucaria

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CORRECTED SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 6
NASSAU COUNTY

PERRY FINKELMAN,

Plaintiff,

INDEX No. 5257/05

MOTION DATE: Oct. 3, 2007
Motion Sequence # 004

-against-

HOWARD KLAUS, HARRY KOTOWITZ, KAY ORGANIZATION, INC., KAY PROPERTY MANAGEMENT GROUP, INC., 224 BUILDERS, LLC, KAY PROPERTY MANAGEMENT SERVICES, INC., KAY MANAGEMENT GROUP, KAY MANAGEMENT GROUP, INC., 376 EAST 94TH STREET ASSOCIATES, LLC, KAY 321 WASHINGTON PROPERTIES, LLC, KAY BRIDGE PROPERTIES, LLC, KAY WATER PROPERTIES, LLC, KAY 138 BROADWAY REALTY ASSOCIATES, LLC, 47 THAMES REALTY, LLC and HK MANAGEMENT, LLC,

Defendants.

HOWARD KLAUS and HARRY KOTOWITZ,

Counterclaim-Plaintiffs,

-against-

PERRY FINKELMAN, AMERICAN

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DEVELOPMENT GROUP, LLC and JOHN DOES
 "1" through "5" and XYZ LLCs "A" through "C",
 said names being fictitious and unknown to
 Counterclaim plaintiffs,

Counterclaim-Defendant and
 Additional Counterclaim Defendants.

The following papers read on this motion:

Notice of Motion.....	X
Affirmation in Opposition.....	XXX
Reply Affirmation	X

This motion, by plaintiff Finkelman, for an order pursuant to CPLR 2308(a) and 3124 compelling the non-party law firm Tannenbaum, Halpern, Syracuse & Hirschtritt, LLP ("the Tannenbaum firm") and a partner of that firm, Joel A. Klarrieck, to comply with the Subpoena and Subpoenas Duces Tecum served on them on or about April 18, 2007 and directing Klarrieck to appear for a deposition is determined as hereinafter set forth.

In this action, plaintiff Finkelman asserts claims for, inter alia, dissolution of the parties' partnership; fraud in the execution of a Disparity Agreement and a declaration setting aside that Agreement for failure of consideration; breach of contract; breach of fiduciary duty; and, tortious conversion. Klaus and Kotowitz have advanced counterclaims and affirmative defenses alleging, inter alia, that the parties entered into a verbal "handshake" deal and "Global Agreement," which they seek to enforce. The settlement discussions and negotiations that occurred between the parties is, therefore, an issue in this action. At the time that the parties allegedly entered into the verbal "handshake" deal and Global Agreement, the Tannenbaum firm represented defendants Klaus and Kotowitz. Anchin Block & Anchin and Kenneth J. Malc and/or Malc and Company did accounting work for the partnership.

The Subpoenas and Subpoenas Duces Tecum sought the Tannenbaum firm's production of the following documents:

1. All documents and communications concerning discussions and/or negotiations to resolve the disputes between plaintiff, Howard Klaus and Harry Kotowitz, including, but not limited to, the draft agreement annexed hereto as Exhibit 1.
2. All documents and communications concerning the Freedom Agreement.
3. All documents and communications concerning the Disparity Agreement.
4. All documents and communications between [the Tannenbaum firm] and Anchin Block & Anchin concerning plaintiff, Howard Klaus, Harry Kotowitz and/or Harry Greenbaum.
5. All documents and communications between [the Tannenbaum firm] and Kenneth J. Malc and/or Malc and Company concerning plaintiff, Howard Klaus, Harry Kotowitz and/or Harry Greenbaum and any entity owned in part or in whole by plaintiff and any one or more of the three aforementioned individuals.
6. All documents and communications between [the Tannenbaum firm] and Harry Greenbaum concerning plaintiff Howard Klaus, Harry Kotowitz or The Kay Organization or any entities affiliated with it.

By letter dated May 2, 2007, the Tannenbaum firm and Klarriech memorialized their objections to the Subpoenas Duces Tecum as follows: They objected in general on the grounds, **inter alia**, that the Subpoenas Duces Tecum sought information which was not material and/or necessary in the prosecution and/or defense of the action; they were duplicative; and, that they sought information that could be obtained from other parties. They also objected to the Subpoenas Duces Tecum to the extent that they sought information that is beyond the limited scope of discovery set forth by the court; to the

extent they sought the production of documents which contain confidential, proprietary, commercial or otherwise sensitive information; and, on the grounds that they sought information that is protected by the attorney-client privilege, constitute work product or are otherwise immune from discovery. The Tannenbaum firm also maintained that Finkelman had to bear the costs of compiling some of the discovery responses.

Following extensive efforts to resolve the discovery dispute, plaintiff made this motion on or about August 8, 2007. Ultimately, on or about August 24, 2007, the Tannenbaum firm produced hard copies of some of the responsive documents. Other documents were not produced on account of the dispute regarding who should bear the production costs. Still others were withheld as privileged as reflected in a privilege log prepared by defendants Klaus and Kotowitz on August 29, 2007. They were:

- (1) An e-mail dated October 25, 2003 from Kotowitz to Klarreich and M. Newman re KMG Monterey Building Corp., as protected by the attorney-client privilege;
- (2) An e-mail dated October 22, 2003 from Kotowitz to Klarreich and M. Newman denominated miscellaneous as protected by the attorney-client privilege;
- (3) An e-mail dated April 15, 2004 from J. Sciarrino to Kotowitz, Klarreich and M. Newman denominated a "Disparity Payment Schedule," as protected by the attorney-client privilege;
- (4) A facsimile dated April 15, 2003 from J. Klarreich to Kotowitz and M. Newman, denominated a "Revised Term Sheet, as protected by the attorney-client and work product privilege;

- (5) An e-mail dated May 28, 2003 from N. Newman to J. Klarreich denominated "Response re e-mail from J. Klarreich re draft document" as protected work product; and,
- (6) An e-mail dated May 27, 2003 from M. Newman to J. Klarreich re "Letter Agreement" as protected work product.

By agreement, any and all communications between Tannenbaum and Klaus and/or Kotowitz were not even listed in the Privilege Log on account of the indisputable attorney-client privilege. For discovery purposes, Greenbaum was also treated as Tannenbaum's client and so Tannenbaum did not prepare a privilege log of communications involving Greenbaum, either.

Plaintiff's counsel advised, in response, that the privilege did not extend to communications with Newman because he was the accountant for entities in which the plaintiff was a member, partner or shareholder and Newman billed the Kay Organization for his work; and that the privilege did not extend to communications with Sciarrino as he was an employee of the Kay Organization and was compensated by Kay Management Corp., and as such, was plaintiff's employee, too.

Plaintiff Finkelman ultimately made this motion seeking to compel the non-parties' further response to his Subpoenas and Subpoenas Duces Tecum on or about August 18, 2007. Many of the non-parties defendants' objections to the Subpoenas and the Subpoenas Duces Tecum appear to have been abandoned or resolved. Only the objections raised by way of this motion will be addressed, *infra*.

Discovery from a non-party should be directed when the party seeking it demonstrates that the disclosure sought is material and necessary (CPLR 3101[a][4]) and that the information is otherwise unobtainable. (Quevedo v Eichner, 29 AD3d 554, 555, 2nd Dept., 2006). As a corollary, a motion to quash a Subpoena Duces Tecum should be granted only when the documents sought are "utterly irrelevant" to any proper inquiry. (Velez v Hunts Point Multi-Service Center, Inc., 29 AD3d 104, 112, 1st Dept., 2006).

When resisting the production of documents on the grounds of privilege, the burden falls on the party asserting it. (Spectrum Sys. Int'l Corp. v Chem. Bank, 78

NY2d 371, 377, 1991; see also, Priest v Hennessy, 51 NY2d 62, at p. 69, 1980, citing Matter of Gavin, 39 AD2d 626, 628, 3rd Dept. 1972, app. den., 31 NY2d 643, 1972). "[T]he protection claimed must be narrowly construed; and its application must be consistent with the purposes underlying immunity." (Delta Financial Corp. v Morrison, 15 Misc3d 308, 315, Supreme Court Nassau Co. 2007, citing Spectrum Systems International Corp. v Chemical Bank, supra, at p. 77; Priest v Hennessy, supra, at p. 69; Matter of Jacqueline F., 47 NY2d 215, 1979; Koump v Smith, 25 NY2d 287, 294, 1969). "In order for the [attorney-client] privilege to apply, the communication from attorney to client must be made for 'the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship.'" (Delta Financial Corp. v Morrison, supra, at p. 316, citing Rossi v Blue Cross & Blue Shield of Greater New York, 73 NY2d 588, 1989).

An attorney's obligation to protect client confidences and secrets of a client continues after the termination of employment. (Nesenoff v Dinerstein & Lesser, P.C., 12 AD3d 427, 428, 2nd Dept., 2004, citing Solow v Grace & Co., 83 NY2d 303, 1994). Sweeping assertions of privilege are unacceptable. "[A]n attorney-client relationship does not depend on the existence of a formal retainer agreement or upon payment of a fee." (Moran v Hurst, 32 AD3d 909, 911, 2nd Dept., 2006, citing Hansen v Caffry, 280 AD2d 704, 705, 3rd Dept., 2001, lv den., 97 NY2d 603, 2001). "[A] court must look to the words and actions of the parties to ascertain the existence of such a relationship." (Moran v Hurst, supra, at p. 911, citing Tropp v Lumer, 23 AD3d 550, 2nd Dept., 2005; McLenithan v McLenithan, 273 AD2d 757, 758, 3rd Dept., 2000). "The unilateral belief of a plaintiff alone does not confer upon him or her the status of a client." (Moran v Hurst, supra, at p. 911, citing Wei Cheng Chang v Pi, 288 AD2d 378, 380, 2nd Dept., 2001, lv den., 99 NY2d 501, 2002).

The attorney-client privilege "also encompasses communications between attorney and a client's agent or representative provided that the communications are intended to facilitate the provision of legal services by the attorney to the client." (Delta Financial Corp. v Morrison, supra, at p. 316-317, citing U.S. v Adlman, F3d 1495, 2d Cir. 1995; Golden Trade, S.r.L. v Lee Apparel Co., 143 F.R.D. 514, 518, S.D.N.Y. 1992). "It does not, however, cover communications between a non-lawyer and a client that involve the conveyance of legal advice offered by the nonattorney, except perhaps when the non-lawyer is acting under the supervision or the direction of an attorney." (Delta Financial Corp. v Morrison, supra, at p. 316 citing National Hockey League Players Association v Bettman, 1994 WL 38130 at *12, S.D.N.Y. February 4, 1994).

"The 'common interest' doctrine [also] . . . protects privileges such as the attorney-client privilege that would otherwise be waived by disclosure." (American Re-Insurance Co. v U.S. Fidelity & Guar. Co., 40 AD3d 486, 495, 1st Dept., 2007, citing Aetna Cas. & Sur. Co. v Certain Underwriters at Lloyd's, London, 176 Misc.2d 605, 612-613, Supreme Court N.Y. Co. 1998, aff'd, 263 AD2d 367, 1st Dept., 1999). The common interest privilege provides an exception to the rule that communications between an attorney and his client made in the presence of a third party who is not an agent or representative of the party lose their privilege. (Yemini v Goldberg, 12 Misc3d 1141, 1143, Supreme Ct. Nassau Co. 2006; citing Aetna Cas. & Sur. Co. v Certain Underwriters at Lloyd's, London, supra, at p. 611). Standing alone, that the third party has an interest in the litigation does not give rise to common interest privilege. (Yemini v Goldberg, supra, at p. 1144; Am. Re-Insurance Co. v U.S. Fidelity & Guaranty Co., supra, at p. 491). Before a communication can be protected under the common interest rule, the communication must satisfy the requirements of the attorney-client privilege; that is, the communication must have been 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. Bank National Association v APP International Finance Company, 33 AD3d 430, 431, 1st Dept., 2006; citing Gulf Island Leasing, Inc. v Bombardier Capital, Inc., 215 F.R.D. 466, at 470-471, S.D.N.Y. 2003). "There must be a substantial showing by parties attempting to invoke the protections of the privilege of the 'need for a common defense [as opposed to the mere existence of a] common problem.'" (Brooklyn Navy Yard Cogeneration Partners, L.P. v PMNC, 194 Misc2d 331, 334, Sup. Ct. Kings Co. 2002; quoting Medcom Holding Co. v Baxter Travenol Laboratories, 689 F.Supp. 841, 845, N.D.Ill. 1988; see also, Yemini v Goldberg, supra, at p. 1144).

CPLR 3122(b) requires a non-party asserting privilege to furnish a privilege log, specifying the nature of the documents, their general subject matter, their date, who prepared them and the basis for the privilege. (In re Subpoena Duces Tecum to Jane Doe, Esq., supra; see also, Marte v Brooklyn Hosp. Ctr., 9 AD3d 41, 2nd Dept., 2004). "[W]hether a particular document is or is not protected by the attorney-client privilege or work product doctrine is necessarily a fact-specific determination most often requiring *in camera* review." (Spectrum System Int'l Corp. v Chemical Bank, supra, at p. 378, citing Rossi v Blue Cross & Blue Shield of Greater New York, supra, at p. 592-593).

Much of defendants' opposition to the production of the documents yet to be produced is circuitous. It is obvious that the information sought cannot be obtained from

another source and it is equally clear that such documents have not yet been produced. As such, production of the documents now sought would hardly be redundant.

The communications involving Malc and Malc & Co. appear to no longer present a privilege issue. Even defendants counsel states "Malc & Co. continues to act as the parties' mutual accountant and provided information to both sides during the Global Agreement negotiations."

Defendants oppose the production of any communications involving Anchin Block & Anchin—referred to in the log as M. Newman who worked for them—as privileged work product because M. Newman of Anchin Block & Anchin was involved as a litigation consultant. (see, Delta Financial Corp. v Morrison, *supra*, at 436-437, Supreme Court Nassau Co. 2006). The retainer agreement with Anchin Block & Anchin for technical and accounting advice relative to this action was not entered into by Ruskin, Moscow, Faltischek on behalf of Klaus and Kotowitz until November 16, 2005, retroactive to May 5, 2005. The documents being withheld here involving Anchin Block & Anchin based on privilege pre-date that retainer. Defendants acknowledge that Anchin Block & Anchin "served as accountants to some or all of the related entities prior to and during the initial stages of negotiations between plaintiff Finkelman and defendants Klaus and Kotowitz." And, in fact, Kay Management Group paid Anchin Block & Anchin during the time period for which documents are sought, not Klaus and Kotowitz, individually. Under the circumstances, although it appears no privilege applies, an *in camera* review of the documents being withheld involving M. Newman is directed.

As for communications with Greenbaum, the defendants assert that Tannenbaum represented him, too, and as such, communications between Greenbaum and Tannenbaum are protected by the attorney-client privilege. Defendants maintain, *arguendo*, that Tannenbaum did not represent Greenbaum, Greenbaum and Sciarrino were both acting as their agents. Even now, it does not appear that Tannenbaum represented Greenbaum in negotiations. Despite Greenbaum's position that that was the case, the history of this case demonstrates that although clarification of Greenbaum's representation was repeatedly sought, that fact was never made clear. Here, glaringly absent is any clear statement by the Tannenbaum firm that it represented Greenbaum, let alone a retainer agreement between them. Even now, Pellegrino, on behalf of the Tannenbaum firm, simply states that he has been advised by Greenbaum's present lawyer that Greenbaum considered himself a client of Tannenbaum. That alone hardly establishes an attorney-client

relationship giving rise to a privilege. In fact, Greenbaum was the only signatory to the Global Agreement who did not receive a Release, thus further indicating that he was not represented by Tannenbaum. The attorney-client privilege does not apply to Greenbaum communications.

Beyond conclusory allegations by their attorney, Klaus and Kotowitz have not produced any evidence to substantiate their allegation that Greenbaum and Sciarrino were their agents. Conspicuously absent are affidavits attesting that from any of the individuals involved, as well as any details of the nature of the alleged agency relationship.

And, there has been no showing that Greenbaum and Klaus and Kotowitz's interest were all identical. In fact, they were seemingly at times adverse. An *in camera* inspection of the Greenbaum and Sciarrino communications is directed.

"The reasonable production expenses of a non-party witness" are recoverable by a non-party responding to subpoenas duces tecum. CPLR 3122[d]. While some costs are recoverable by a non-party responding to Subpoenas Duces Tecum, the responding party does bear the costs associated with withholding documents from production due to relevancy or privilege. (**AYW Networks, Inc. v Teleport Commc'ns Group, Inc.**, SFO June 13, 2005, Index No. 4586/1999, Supreme Court Nassau County [Warshawsky, J.]). The Office of Court Administration stated in its Memorandum in support of the amendment to CPLR 3122(d) that a "non-party can demand reimbursement of reasonable production expenses, mirroring CPLR 3111, and may withhold such production until the expenses are paid or the issue is otherwise resolved by the court." (Haig, 3 N.Y. Prac., Com. Litig. in New York State Courts § 22.7 (2d ed.), citing Memorandum of Office of Court Administration, 2002, McKinney's Session Laws of N.Y., at 2153). In fact, the costs of producing electronic records can be very steep and while what constitutes reasonable production expenses has not been well defined by state courts, guidance can be obtained from federal court decisions. "While unanimity is lacking, federal courts have held that, in addition to the actual copying costs, the reasonable cost of labor expended to gather and review documents for production, including attorney's fees, are covered under Rule 45." (Haig, 3 N.Y. Prac., Com. Litig. in New York State Courts § 22.7, 2d ed., citing In re Law Firms of McCourts and McGrigor Donald, 2001 WL 345233, S.D.N.Y. 2001; In re First American Corp., 184 F.R.D. 234, S.D.N.Y. 1998; **Kahn v General Motors Corp.**, 1992 WL 208286, S.D.N.Y. 1992; **Mycogen Plant Science, Inc. v Monsanto Co.**, 164 F.R.D. 623, E.D. Pa. 1996). "The sound rationale behind the federal rule-non-parties should not have to subsidize the costs of litigation in which they are not

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a party and parties should be deterred from engaging in fishing expeditions for marginally relevant documents—supports the extension of the principle to CPLR 3122(a)." (Haig, 3 N.Y. Prac., Com. Litig. in New York State Courts § 22.7). In fact, in the Practice Commentaries to CPLR 3122, it is noted that while reference to attorneys' fees is not made in that statute, "[t]he court would be empowered to direct such a payment, particularly where any substantial right of the non-party witness is involved and representation by an attorney is needed." (Connors, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B CPLR 3122:4, p. 378). The plaintiff is directed to pay Tannenbaum the costs incurred in producing the e-mail records in order to procure their production.

In conclusion, the defendants are directed to produce, for an *in camera* review within 15 days of this order, all of the documents listed in the Privilege Log as well as a Privilege Log and the documents referred to therein concerning Greenbaum communications.

Finkelman's motion for the costs associated with Tannenbaum and Klarreich's refusal to accept service of the Subpoena on April 16, 2007 is **granted**, without opposition.

Determination of the request to direct Klarreich to appear for a deposition is deferred until the conclusion of the *in camera* review of the documents.

Dated FEB 29 2008


J.S.C.
ENTERED

MAR 05 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE