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

PRESENT: HON. RICHARD B. LOWE, III Justice

PART 56

KE Capital

- v -

KE-R, LLC

INDEX NO. 603579/06

MOTION DATE 11/5/07

MOTION SEQ. NO. 004

MOTION CAL. NO.

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

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

HON. RICHARD B. LOWE, III

Dated: 3/19/08

J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 56

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XE CAPITAL MANAGEMENT, LLC and XE L.I.F.E., LLC,

Plaintiffs,

-against-

Index No. 603579/06

XE-R, LLC, MARK ROSS & CO., INC., and MARK E. ROSS,

Defendants.

Hon. Richard B. Lowe, III:

Plaintiff moves for a protective order, pursuant to CPLR 3103 (a), 3101 (b) and (c), precluding defendants from obtaining discovery of documents withheld by plaintiffs on the basis of attorney-client and/or attorney work product privilege.

At issue on this motion is not whether certain communications are privileged, but who holds the privilege, where both parties, at some point in a transaction, were simultaneously represented by the same law firm. Plaintiffs contend that the communications at issue are between themselves and their long-standing regular outside counsel, Debevoise & Plimpton, LLP (Debevoise), concerning a transaction in which Debevoise was simultaneously representing both plaintiffs and a joint venture in which plaintiffs were members, defendant XE-R, LLC ("XE-R"). They claim that the communications defendants are seeking passed only between themselves and the firm and excluded XE-R, and that most of the communications took place after Debevoise's representation of XE-R necessarily ended. Defendants contend that there was no dual representation, that XE-R was never removed from the transaction and Debevoise's representation of XE-R in the transaction was not terminated, and that Debevoise's

representation of XE-R was not limited in scope and duration to the drafting of documents for the financing transaction, but that it extended to XE-R's potential future settlement brokerage rights, which rights are being disputed in this litigation.

BACKGROUND

Plaintiff XE Capital Management, LLC ("EX Capital") is an asset and hedge fund management firm, which specializes in insurance premium finance and structured finance (Affirmation of Kevin S. Reed, dated October 19, 2007, ¶ 2). XE L.I.F.E., LLC (XE LIFE) is a wholly owned subsidiary of XE Capital (see id.; Plaintiff's Memorandum in Support, at 3). Defendants Mark Ross & Co (MR & Co.) and Mark Ross are experts in the life insurance field, particularly in the premium financing and life settlements areas (Affirmation of Lisa Brogan, dated October 29, 2007, ¶ 5). In the Spring of 2004, XE Capital entered into a joint venture with MR & Co. as a vehicle for the parties in the area of premium financing and settlement of life insurance policies (Brogan Affirm., ¶ 6). On August 12, 2004, the XE-R joint venture was formed (id., ¶ 7). Just prior to that, XE LIFE was formed to act as a conduit for XE Capital's funding efforts in XE-R (id.). MR & Co. participated in XE-R through a newly created subsidiary, R 2004, LLC, which is also XE-R's managing member (id.).

MR & Co. and Mark Ross had a long-term relationship with Mr. and Mrs. "Doe," who had obtained life insurance policies through MR & Co., and who were working through MR & Co. on a premium financing plan for the policies (id., ¶ 8). In the premium financing transaction, the Does would receive financing from XE Capital or one of its affiliates, for their premiums for a two-year period, evidenced by notes. At the conclusion of the two-year period, the Does could either repay the notes in full, or tender their interests in certain LLCs that actually owned the

policies, to XE-R (id.). XE-R would then be free to sell the policies in the secondary, life settlement market (id., ¶ 9, and Exhibit 3 annexed thereto). MR & Co. was made the direct lender for the short-term interim financing for the Doe policies (id., ¶ 14). MR & Co. worked with the Does' attorneys, as well as with Debevoise, which was acting as XE Capital's counsel, in drafting the interim financing (id., ¶ 15).

Debevoise had been XE Capital's regular outside counsel for some time before this transaction was executed. In fact, it had coordinated the formation, structuring, and financing of XE Capital, XE LIFE, and related entities in 2003 (Plaintiff's Memorandum, at 4; see also Reed Affirm., Exhibit B, § 4).

On October 11, 2004, XE-R retained Debevoise to act as its counsel with respect to the Doe transaction (see Exhibit B to Reed Affirm.). The Engagement Letter, in its initial paragraph, provides that Debevoise was agreeing to assist XE-R in "reviewing, structuring and documenting the proposed insurance policy loan transaction with entities owned or controlled by [redacted] . . . and similar transactions" (id., at 1). The following section, entitled "Scope of Engagement," provided that Debevoise was representing XE-R and not any of its affiliates, and that the work was limited to the matters described above, and that it only extended to work performed from October 6, 2004 and on, with the exception of work performed reviewing the form of promissory note and security agreement delivered to it on October 1, 2004 (id., § 2). In the section entitled "Conflicts and Related Issues," the letter states that XE-R is aware that Debevoise is "regular outside counsel for XE Capital Management, Inc., one of the members of [XE-R], and other members of the XE group of companies . . . and consents to our continuation of that representation," and that if Debevoise determined, in its professional judgment, that it was no

longer appropriate to represent XE-R because of the foregoing relationship, that Debevoise could resolve the matter by withdrawing from its representation of XE-R (id., § 4).

Once the interim financing was complete, the parties began working on the permanent financing arrangement with the lead Debevoise attorney, Jeffrey S. Wood, working on the matter (Brogan Affirm., ¶ 21). On November 17, 2004, XE-R and MR & Co.'s General Counsel, Lisa Brogan (then Lisa Filloramo), sent an e-mail to Terry Leighton at XE Capital, seeking to streamline the transaction (Exhibit 6 to Brogan Affirm.). In this e-mail, Ms. Brogan proposes that the funding go directly from XE LIFE to the Doe partnership, instead of from XE LIFE through XE-R then to the Doe partnership, and that she was going to "simply put the loan agreement, etc. into XE LIFE's name" (id.). Ms. Brogan asserts that this proposal was simply intended to streamline and simplify the balance of the Doe financing paperwork (Brogan Affirm., ¶ 23). Upon the agreement of the parties to her proposal, Ms. Brogan sent another e-mail to persons at XE Capital, XE-R, and to Debevoise, stating that "[l]et everyone be aware that this means that it is XE LIFE which now has approval rights for any action to be taken by any of the [Doe] LLCs" (Exhibit 6 to Brogan Affirm.).

Plaintiffs assert that XE-R now was no longer a party to the Doe transaction (Plaintiffs' Memorandum in Support, at 6).

XE-R disputes this assertion, contending that it was only intended to simplify the transaction, not to exclude XE-R. In support, XE-R submits emails from November 23, 2004 through to January 10, 2005 between itself, through Ms. Brogan, to Mr. Wood regarding the drafting of documents with regard to, and the closing of the Doe transaction (Exhibit 9 to Brogan Affirm.; Brogan Affirm., ¶¶ 33-35). These documents, it contends, demonstrate that it was still

very much a part of the Doe transaction, and was being represented by Debevoise.

On January 19, 2005, the Doe permanent financing transaction closed. Plaintiffs claim that Debevoise had substantially no further communications with XE-R, but that it had numerous communications with plaintiffs regarding the Doe transaction and other matters, consistent with its role as plaintiff's regular outside counsel.

XE-R counters that it did have further communications with Debevoise. On May 15, 2006, Mr. Wood e-mailed Ms. Brogan regarding the Doe transaction, because the Doe notes were coming due. He asked her to think about the issues arising from the notes coming due, and to share her thoughts with him before they called Terry Leighton of XE Capital (Exhibit 11 to Brogan Affirm.; Brogan Affirm., ¶ 39). Ms. Brogan responded that once the conference call was set up, then she would see what she could pull together for her and Wood to discuss (id.).

In July 2006, defendant Ross approached XE LIFE about acting as the life settlement broker for the Doe policies in the life settlement market (Complaint, ¶¶ 4, 25). XE LIFE through XE Capital refused. In an e-mail on July 17, 2006, sent by Terry Leighton of XE Capital to defendant Mark Ross, Mr. Leighton stated that XE Capital determined "not to pursue the sale of [the Doe] policies through XE-R, if at all, unless and until there is a resolution of the larger issues between XE-R and XE Capital" (Exhibit 7 to Brogan Affirm.). At the time, the relationship between plaintiffs and Ross had deteriorated because of plaintiffs' contention that Ross committed a "pattern" of misconduct regarding XE-R's operations. These "large issues," regarding XE Capital's claim that defendants breached the XE-R Agreement (Exhibit 3 to Brogan Affirm.), later became the subject of an arbitration between the parties, and are not directly at issue in this litigation (Complaint, ¶ 24).

On or about October 3, 2006, XE LIFE claims that it learned that Ross, acting on behalf of XE-R, sought to market the Doe policies as the exclusive settlement broker, and XE LIFE demanded that he cease and desist that activity (Complaint, ¶ 5). Ross, MR & Co., and XE-R averred that they had the exclusive right to broker the policies, and plaintiffs contended that they had no such right. Plaintiffs selected Sierra Solutions, LLC as the Doe policies' broker (Decision 6/14/07, at 2).

On or about October 12, 2006, plaintiffs commenced this action against defendants, seeking a declaratory judgment, damages, and an injunction. They seek a declaration that they have the right to determine who can broker the Doe policies, an injunction enjoining defendants from asserting an exclusive right to broker these policies, and damages for devaluation of the policies due to defendants' actions (Complaint, ¶¶ 1, 40-61; Decision 6/14/07, at 3). Defendants have asserted counterclaims for declaratory relief, a permanent injunction, breach of contract, breach of the duty of good faith and fair dealing, tortious interference with a business relationship, and a declaration of alter ego liability. On a prior motion to dismiss, this court dismissed part of the declaratory counterclaim, retaining only the portion pleading an exclusive right to broker the Doe policies based on the XE-R Agreement, and dismissed the injunction, the breach of the duty of good faith, tortious interference, and the alter ego liability counterclaims (Decision 6/14/07, at 9-20).

Document discovery has been proceeding in this action since before August 2007. On August 2, 2007, defendants demanded the production of all communications between plaintiffs and Debevoise relating to the Doe transaction, dated between October 1, 2004 and the commencement of this action on or about October 12, 2006 (Exhibit F to Reed Affirm.). This

demand was based on defendants' view that Debevoise represented XE-R in connection with the Doe transaction, and, therefore, communications between plaintiffs and Debevoise concerning the same matters are not privileged. In a letter to plaintiffs dated August 2, 2007, defendants argued that the documents were discoverable, because there was no termination of the attorney-client relationship between XE-R and Debevoise, that Debevoise did not withdraw as counsel to XE-R, and that Debevoise did not separately represent plaintiffs in connection with the Doe matter (Exhibits F and G to Reed Affirm.).

In the present motion, plaintiffs argue that XE-R is seeking communications that Debevoise sent to XE Capital without copying XE-R, which it contends are private exchanges between XE Capital and its regular outside counsel, and are communications that were intentionally not sent to XE-R or to anyone else. They contend that XE Capital holds the privilege with regard to these private communications with Debevoise. Plaintiffs urge that XE-R and Debevoise had a very narrow relationship defined in the Engagement Letter. They contend that the Engagement Letter expressly provides for Debevoise's simultaneous representation of XE Capital and XE-R with regard to the Doe transaction, but that XE-R's retention of Debevoise concluded on November 17, 2004 when XE-R removed itself from the Doe transaction, or, at the latest, on January 19, 2005, when the Doe transaction closed. Plaintiffs assert that it is irrelevant whether Debevoise formally terminated its relationship with XE-R or not.

In opposition, defendants assert several grounds to defeat the protective order. First, they contend that there was no dual representation of XE-R and XE Capital under the Engagement Letter. Even if there was a dual representation, defendants claim that as co-clients, neither XE-R nor XE Capital can conceal communications with Debevoise from the other. Next, defendants

maintain that the Doe transaction was never removed from XE-R, as plaintiffs argue, and that Debevoise was not automatically relieved of its responsibilities as counsel as a result of XE-R's proposal to simplify the transaction. Further, defendants contend that Debevoise's representation of XE-R was not limited to the drafting of the loan documents for the financing. The Doe transaction did not terminate upon the funding of the loan. Rather, Debevoise's representation included representing XE-R's potential future settlement brokerage rights. Thus, defendants argue that Debevoise's representation of XE-R was not somehow automatically terminated upon the closing of the loan. Finally, defendants assert that Debevoise never provided any notice of termination or withdrawal until the commencement of this action.

DISCUSSION

The essential consideration on a motion for a protective order, pursuant to CPLR 3103 (a), on the ground of attorney-client privilege is whether the documents or materials sought are in fact privileged, which privilege was not waived (Matter of Beiny, 129 AD2d 126, 137 [1st Dept 1987], appeal dismissed 71 NY2d 994 [1988]). The attorney-client privilege, which is codified in CPLR 4503 (a), "enables one seeking legal advice to communicate with counsel for this purpose secure in the knowledge that the contents of the exchange will not later be revealed against the client's wishes" (People v Osorio, 75 NY2d 80, 84 [1989] [citation omitted]). Thus, it encourages open and frank exchanges between attorney and client (Matter of Beiny, 129 AD2d at 138; see Matter of Priest v Hennessy, 51 NY2d 62, 67 [1980]). The privilege belongs to the client, and attaches to confidential communications made for the purpose of obtaining legal advice (People v Osorio, 75 NY2d at 84). Generally, the courts have held that the scope of the attorney-client privilege must be "narrowly construed to restrict its impact" (Finn v Morgan, 46

AD2d 229, 234 [4th Dept 1974]). The burden of proving the elements of privilege rests on the party asserting it (People v Osorio, 75 NY2d at 84; Finn v Morgan, 46 AD2d at 236). First, the party must establish that there was an attorney-client relationship, and then that the communications were made in confidence (Finn v Morgan, 46 AD2d at 234-35).

XE Capital has the burden of proving the attorney-client and attorney work product privilege. It has made a showing that it had an attorney-client relationship with Debevoise, and has made some showing that XE-R was not present or a party to the various communications noted in the August 17, 2007 privilege log. XE-R, however, urges that it was being jointly represented with XE Capital by Debevoise regarding the Doe transaction. When a lawyer represents several parties regarding a matter of common interest, any confidential communications exchanged are protected from disclosure to third parties (Bolton v Weil, Gotshal & Manges LLP, 14 Misc 3d 1220[A], 2005 NY Slip Op 52329 [U] * 5 [Sup Ct, NY County 2005], citing Wallace v Wallace, 216 NY 28, 33 [1915]). However, these joint clients cannot reasonably expect the lawyer to keep information from the other client (id.; see Talvy v American Red Cross in Greater New York, 205 AD2d 143, 150 [1st Dept 1994], affd 87 NY2d 826 [1995]). Therefore, the "attorney-client privilege may not be raised to prevent disclosure of communications relevant to the common interest of former joint clients in subsequent litigation" (Matter of McCormick, 287 AD2d 457, 457 [2d Dept 2001]; see also American Re-Insurance Co. v United States Fidelity & Guar. Co., 40 AD3d 486, 491 [1st Dept 2007] [the clearest indication of common interest is dual representation, but common interest can also extend to a situation where there is a joint defense or strategy, with separate representation]; Goldberg v American Home Assur. Co., 80 AD2d 409, 413 [1st Dept 1981]; The North River Ins. Co. v

Philadelphia Reinsurance Corp., 797 F Supp 363, 366 [D NJ 1992]; The North River Ins. Co. v Columbia Cas. Co., 1995 WL 5792, *2-5 [SD NY 1995]). Before this exception applies, each party must establish that it was a client of the attorney representing both (Schlosser v Schlosser, 7 Misc 3d 1012[A], 2005 Slip Op 50566[U] [Sup Ct, NY County 2005]).

Here, XE-R has established that it was a client of Debevoise with respect to the Doe transaction through submission of the Engagement Letter. That retainer agreement specifically states that Debevoise was representing XE-R "in reviewing, structuring and documenting the proposed insurance policy loan transaction with [the Does] and similar transactions" (Exhibit B to Reed Affirm., at 1). The Engagement Letter also shows that Debevoise was XE Capital's regular outside counsel, and that XE-R consented to Debevoise's continuation of that representation (id. at 2-3). Contrary to plaintiffs' contentions, the Engagement Letter does not indicate that Debevoise was maintaining a separate and distinct representation of XE Capital in connection with the Doe transaction, the precise transaction for which XE-R retained Debevoise. In addition, the fact that the loan documents were drafted, at the suggestion of XE-R and MR & Co.'s General Counsel, to streamline the transaction, and have the funding not go through XE-R, but to go directly from XE LIFE to the Doe partnership, did not terminate Debevoise's attorney-client relationship with XE-R. XE-R submits numerous e-mails from November 17, 2004, when that change was made to the transaction, to the date of closing on January 19, 2005, demonstrating that Debevoise was still representing, and giving legal advice to XE-R through Ms. Brogan (Exhibit 9 to Brogan Affirm.).

Further, the language of the Engagement Letter does not limit Debevoise's representation of XE-R to only the closing of that financing transaction. Rather, as evidenced by the email from

Mr. Wood, of Debevoise, to Ms. Brogan on May 15, 2006, regarding the Doe notes coming due, the "insurance policy loan transaction" with the Does continued beyond the January 19, 2005 closing, and Debevoise was still representing XE-R. XE Capital's claim that it was impossible for Debevoise to continue reviewing, structuring and documenting the Doe transaction after the closing is contradicted by the privilege log it submitted (Exhibit 12 to Brogan Affirm.), which, in fact, notes numerous communications concerning the "Doe financing" past the January 19, 2005 closing. It was not until July 17, 2006, when XE Capital made it clear to XE-R that XE Capital was not pursuing a sale of the Doe policies through XE-R, unless and until there was a resolution of the issues between the parties, that the interests of XE-R and XE Capital diverged. After that point, there is no evidence of any communications or representation by Debevoise of XE-R, and it was clear that Debevoise was no longer representing XE-R (see Matter of McCormick, 287 AD2d at 458). Therefore, Debevoise was jointly representing XE-R and XE Capital with respect to the Doe transaction at least until July 17, 2006.

CONCLUSION

As a joint client, XE Capital may not assert the attorney-client privilege against XE-R for communications with Debevoise, even though not made in each other's presence, during that period of joint representation, after their interests become adverse, as in the present litigation (People v Osorio, 75 NY2d at 84; Talvy v American Red Cross in Greater New York, 205 AD2d 143, supra; Matter of McCormick, 287 AD2d 457, supra; Bolton v Weil, Gotshal & Manges LLP, 14 Misc 3d 1220[A], supra). Therefore, entries in plaintiffs' Privilege Log (Exhibit 12 to Brogan Affirm.) dating from October 1, 2004 through to July 17, 2006, are not subject to the attorney-client privilege as to defendant XE-R, which was a joint client of Debevoise at that time

with regard to the Doe transaction, and must be turned over to XE-R pursuant to its discovery request. These documents, which reflect communications between Debevoise as counsel, and its clients XE Capital and XE LIFE with respect to the Doe transaction, are not protected by the privilege as the documents concern matters that are relevant to the common interest of the joint clients, including XE-R, and may be relevant to the issues in this action (see Bolton v Weil, Gotshal & Manges LLP, 14 Misc 3d 1220[A], supra. Thus, XE Capital and XE LIFE have no reasonable expectation of confidentiality regarding these documents. The fact that this discovery may be disadvantageous to plaintiffs does not by itself bar disclosure (id.). To the extent that XE-R and plaintiffs have conflicting interests regarding the Doe policies' settlement rights, this conflict does not make their individual communications with their joint attorneys confidential (see Finn v Morgan, 42 AD2d 229, supra). Any entries in the same Privilege Log after July 17, 2006, are subject to the attorney-client privilege as asserted by plaintiffs and are not subject to discovery by XE-R.

Accordingly, it is

ORDERED that the motion for a protective order is granted only to the extent that documents reflecting communications in Plaintiffs' Privilege Log, dated August 16, 2007, between plaintiffs and Debevoise, regarding the Doe transaction, which occurred after July 17, 2006, and is denied as to earlier communications.

Dated: March 19, 2008

ENTER:

HON. RICHARD B. LOWE, III J.S.C.