SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 7

NASSAU COUNTY

BETTY JEAN TRAHAN

Plaintiff,

-against-

MOTION DATE: 11/09/07

MOTION SEQ. NO.: 006

EMANUEL F. GALEA and DEBRA A. GALEA (A/K/A DEBRA K. GALEA), HIS WIFE, and WASHINGTON MUTUAL BANK, FA, A FEDERAL ASSOCIATION,

INDEX NO.: 9758/2005

Defendants.

The following papers having been read on the motion (numbered 1-4):

Notice of Motion Protective Order.....1
Notice of Motion to Extend Discovery.....2
Order to Show Cause.....3
Affirmation in Opposition.....4

Separate motions by the plaintiff Betty Jean Trahan for: (1) a protective order pursuant to CPLR 3103; and (2) an order: [I] extending the time allowed for discovery; [ii] directing a further deposition of defendant Washington Mutual Bank N.A; and [ii] compelling the defendants Washington Mutual Bank, N.A., Emanuel Galea and Debra A. Galea to produce certain documents sought in plaintiff's demands for Inspection of Documents dated September 27, 2005.

Order to show cause by non-parties Grail A. Moore and Sheila L. Becker for: (1) a protective order pursuant to CPLR 2304 and 3103 quashing a judicial subpoena and subpoena duces tecum dated September 26, 2007; and (2) for the imposition of sanctions against the plaintiff and her counsel pursuant to 22 NYCRR

§130-1.

In May of 2005, the plaintiff Betty Jean Trahan commenced the within action seeking, *inter alia*, the equitable remedy of partition with respect to certain residential premises located at 86 Florida Street, Long Beach, New York, in which she claims "one third plus $4,000.00" interest" (RPAPL § 901).

According to the plaintiff, her alleged interest in the property was never legally extinguished since she not made a party to an underlying, 1995 foreclosure action.

The subject property was later sold in foreclosure to Berley Industries, Inc; Berely then conveyed the property to one Laureen Buchanan – who in turn – sold it in 2002 to the current owners and residents, codefendants Emanuel and Debra Galea.

The Galeas later obtained refinancing from codefendant Washington Mutual Bank, N.A.["Washington"], which entity is the current, first mortgage holder in connection with the property.

After the plaintiff instituted the within action, Washington filed a title claim against non-party Commonwealth Land Title Insurance Company ["Commonwealth"], the insurer in connection with the Galea refinance.

In prior motion practice this Court held, among other things, that although the plaintiff was not made a party to the previous foreclosure proceeding, issues of fact had been presented with respect to, *inter alia*, the defendants' laches defenses – a holding very recently affirmed by the Appellate Division, Second Department (*Trahan v. Galea*, ___ AD3d___, 2008 WL 516675 [2nd Dept 2008]). Specifically, this Court held that questions of fact had been presented with respect to whether the plaintiff had inexcusably delayed in failing to assert her alleged rights, thereby

resulting in prejudice to the defendants (*see,* Winslow, J., Order dated December 5, 2007 at 6).

Thereafter, on April 27, 2007, the parties appeared before the Court for a preliminary conference, after which it was ordered that the plaintiff would serve her demands for discovery and inspection no later than May 10, 2007 (Galea Opp., Exh., "1"; Winslow, J., PC Order at 2).

Presently before the Court are the plaintiff's two discovery-based applications in which she seeks: (1) an additional deposition from codefendant Washington; (2) an order compelling the defendants to produce documents requested in her September 25, 2007 demands; and (3) a protective order with respect to Washington's August 17, 2007 interrogatories which, the plaintiff principally contends, impermissibly request materials immune from disclosure by virtue of an alleged attorney-client privilege.

The defendants have opposed the plaintiff's motions and non-parties Grail A. Moore and Sheila L. Becker – who are claims counsel employed by Commonwealth – move by unopposed order to show cause to quash two subpoenas served upon them by plaintiff's counsel in September of 2007.

The non-party motion to quash the subject subpoenas is **granted** without opposition. Apart from the absence of opposition – and the plaintiff's failure to establish the existence of "special circumstances" (*Doe v. Karpf*, 36 AD3d 652; *Tannenbaum v. City of New York*, 30 AD3d 357, 358; *Smith v. Moore*, 31 AD3d 628; *Tannenbaum v. Tenenbaum,* 8 AD3d 360) – the challenged subpoenas are, *inter alia*, over broad and predicated upon attenuated claims of relevance and materiality (*see generally, White Bay Enterprises, Ltd. v. Newsday, Inc.*, 288 AD2d 211, 212; *Oak Beach Inn Corp. v. Town of Babylon*, 239 AD2d 568). Upon

the record presented, however, the Court declines to impose sanctions on plaintiff and her counsel.

Those branches of the motion which are to "extend discovery" beyond the end dates set forth in the Court's preliminary conference order, and relatedly, for a further order compelling compliance with the two, belatedly served document demands, are **denied.**

Although the Court's conference order requires service of the plaintiff's document demands by no later than May 10, 2007, the subject notices were not served until September of 2007.

Both notices seek materials relating to the defendants' asserted defenses – which were originally interposed in the defendants' answers (Pltff's Exhs., "F" "E"; Pltff's Mot. to Compel, Exhs., "R", "S").

There is nothing in the record which suggests that the plaintiff could not have made these basic document demands in a timely fashion. Indeed, the various defenses advanced by the defendants, and in particular, the laches defense, have been linchpin of the defendants' opposition from the very inception of the matter – as highlighted by this Court's prior, 2006 orders and the Appellate Division's recent affirmance.

Moreover, the Court disagrees with the counsel's repeated assertion that certain deposition statements made by the defendants' witnesses in late May of 2007 constitute determinative admissions with respect to the various defenses asserted – or that this testimony creates an excuse for the late service of the subject document demands, *i.e.*, testimony to the effect that, *inter alia*, neither defense witness was then aware of any documents and/or specific information regarding the laches and unclean hands defenses, and that neither had any personal knowledge of plaintiff's

conduct relative to the subject controversy or the defenses asserted (E. Galea Dep., at 75-78).

Putting aside the fact that there is no dismissal application before the Court relating to the defendants' defenses, the Court views the testimony in question as fully consistent with the laches theory asserted by the defendants from the commencement of the action; namely, that neither defendant had any prior knowledge of the plaintiff or her alleged claims before the home was purchased and refinanced, and that both were innocently harmed by the plaintiff's alleged, inexcusable delay.

In any event, and with respect to the discovery issues actually implicated by the plaintiff's motions, the Court finds that the plaintiff's demands are over broad and lacking in requisite particularity, since they effectively request – without meaningful qualification – each and every document which the defendants intend to rely on "in proof" of their defenses (*Law Offices Binder & Binder, P.C. v. O'Shea*, 44 AD3d 626, 626 *see also, Taji Communications, Inc. v. Bronxville Towers Apartments Corp.*, ___AD3d___, 849 NYS2d 890 [2nd Dept. 2008]; *Gilman & Ciocia, Inc. v. Walsh*, 45 AD3d 531; *Bell v. Cobble Hill Health Center, Inc.*, 22 AD3d 620, 621 *see also, Benzenberg v. Telecom Plus of Upstate New York, Inc.*, 119 AD2d 717).

While the scope of disclosure is "open and far-reaching" (*Kavanagh v.Ogden Allied Maintenance Corp.*, 92 NY2d 952, 954 [1998]; *Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 406 [1968]), "unlimited disclosure is not required" (*Smith v. Moore, supra*, 31 AD3d 628; *Auerbach v. Klein*, 30 AD3d 451, 452); nor will "*carte blanche* demands * * * be honored" (*European American Bank v. Competition Motors, Ltd.*, 186 AD2d 784, 785), particularly where the demands at issue are open

ended, unduly burdensome, or lacking in specificity (*see, Paradis v. F.L. Smithe Machine Co., Inc.*, 25 AD3d 594, 595; *Bell v. Cobble Hill Health Center, Inc.*, *supra*, 22 AD3d 620; *Brandes v. North Shore University Hosp.*, 1 AD3d 550, 551).

Significantly, "[t]he supervision of disclosure * * * rests within the sound discretion of the trial court" and "it is within the court's wide discretion to determine what is "material and necessary'" (*Garcia v. First Spanish Baptist Church of Islip*, 259 AD2d 465, 466 *see, Mattocks v. White Motor Corp.*, 258 AD2d 628, 629 *see also, Pacheco v. New York City Housing Authority*, ___AD3d___, 849 NYS2d 904, 905 [2nd Dept. 2008]).

The plaintiff also moves for a protective order "quashing" defendant Washington's interrogatories dated August 17, 2007, which notice requests: (1) information relating to the nature, scope and content of communications between the plaintiff and her current attorney prior to his formal retention; and (2) various documents, including the retainer agreement plaintiff later entered into with counsel and – as narrowed by the parties' submissions – an unsolicited, February, 2005 letter written to the plaintiff by her current attorney several months before the action was commenced.

According to the plaintiff, the materials sought are protected by the attorney-client privilege and/or constitute work product.

It bears noting that plaintiff's counsel claims that the plaintiff supposedly first learned of her rights in the property when he sent her the February, 2005 letter (Bogal Aff., ¶ 30; Trahan Aff.,¶¶ 33-34, 36). The plaintiff has similarly testified, and also asserted in an attached affidavit, that prior to receiving this letter she had never spoken to or met her current counsel and that she learned of her alleged rights from him (Migatz Opp. Aff., Exh., "A" at 72; Trahan Aff.,¶ 42).

In general, the attorney-client privilege "protects confidential communications between a lawyer and client relating to legal services sought by the client" (*In re Nassau County Grand Jury Subpoena Duces Tecum Dated June 24, 2003,* 4 NY3d 665, 678-679 [2005]; CPLR 4503[a] *see, Spectrum Systems Intern. Corp. v. Chemical Bank,* 78 NY2d 371, 378 [1991]; *Rossi v. Blue Cross & Blue Shield,* 73 NY2d 588, 593-594 [1989]; *Priest v. Hennessy,* 51 NY2d 62, 68-69 [1980]).

Moreover, "for the privilege to apply when communications are made from attorney to client – whether or not in response to a particular request – they must be made for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship" (*Rossi v. Blue Cross & Blue Shield, supra,* at 593 *see also, Spectrum Systems Intern.Corp. v. Chemical Bank, supra,* at 377-378).

The burden of establishing that requested materials are protected by the attorney-client privilege or are otherwise immune from discovery rests with the party asserting the immunity or privilege (*see, Spectrum Systems Intern. Corp. v. Chemical Bank, supra,* at 377; *Doe v. Poe,* 244 AD2d 450, 451-452, *affd,* 92 NY2d 864 [1998]; *People v. Osorio,* 75 NY2d 80, 84 [1989]; *Cain v. New York Central Mut. Fire Ins. Co.,* 38 AD3d 1344; *Bib Const. Co., Inc. v. City of Poughkeepsie,* 260 AD2d 590).

With these principles in mind, the Court agrees that Items "1," "2" and "6" are discoverable inasmuch as they merely request, *inter alia,* the date when the plaintiff retained her current attorney; whether there were any pre-retention conversations; and whether the retainer agreement entered into by the plaintiff with current counsel was written or oral. The plaintiff has not demonstrated how or why these requests are protected by any privilege or the work product doctrine (*e.g.,*

Cain v. New York Central Mut. Fire Ins. Co., supra).

Items "7", and "8" inquire – without requesting the content of any communications – how many such pre-retention conversations took place; when the conversations occurred; and whether they were in "person or by telephone".

To the extent that these demands are limited in scope to conversations pertaining to the plaintiff's claims in the subject property, they may be probative of her knowledge – or lack thereof – at a given point in time – a disputed and key issue in the case. The Court notes that both counsel and the plaintiff have repeatedly asserted that plaintiff's sole source of knowledge relative to her alleged rights was information provided exclusively by her current counsel, Stanley Bogal (Trahan Aff., ¶¶ 33-34, 45; Bogal Aff., ¶ 30).

However, a protective order should be granted with respect to item "9," which expansively seeks the content of all conversations between the plaintiff and her counsel prior to his formal retention.

It has been held that "[t]he 'fiduciary relationship existing between lawyer and client extends to preliminary consultation by a prospective client with a view toward retention of the lawyer'" (*Seeley v. Seeley,* 129 AD2d 625, 627, *quoting from, Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F2d 1311, 1319 [7th Cir. 1978]; *Rose Ocko Foundation, Inc. v. Liebovitz*, 155 AD2d 426, 427; *Leisman v. Leisman,* 208 AD2d 688; *Burton v. Burton*, 139 AD2d 554).

The plaintiff has asserted in her opposing affirmation that after she received counsel's unsolicited letter, her subsequent conversations with him included discussions relating to trial and litigation strategies and/or the obtaining of legal advice as to the proper manner in which to proceed for the recovery of her alleged interest in the property (Trahan Aff., ¶¶ 47, 65).

These assertions are sufficient to implicate the privilege and bar discovery of the open ended responses sought in Item "9".

However, the plaintiff has failed to establish the existence of a privilege or other immunity with respect to item "5" – which requests the February 2005 letter counsel sent to the plaintiff prior to the commencement of the within action.

The plaintiff has not sustained her burden of demonstrating that the unsolicited letter was sent "in the course of a professional relationship" or that it should otherwise be afforded the protections of the privilege (*cf., Pellegrino v. Oppenheimer & Co., Inc.*, ___AD3d___851 NYS2d 19 [1st Dept. 2008]; *Martin v. Martin*, 224 AD2d 597).

The Court of Appeals' holding in *Spectrum* (*supra,* at 377), to the effect that a communication initiated by an attorney may also be protected by the privilege, is legally and factually inapt, since in that case an attorney-client relationship had already been established prior to the making of the disputed communication (*Rossi v. Blue Cross & Blue Shield, supra,* at 593).

Further, since this Court has already held that "the operative facts relating to precisely how * * * [the plaintiff] acquired" knowledge of her alleged rights could be determinative of her claim (Order of Winslow, J., Dec. 5, 2007, at 8), the Court agrees that the February, 2005 letter could "lead to the disclosure of admissible proof" (*Polygram Holding, Inc. v. Cafaro*, 42 AD3d 339, 341; *Bigman v. Dime Sav. Bank of New York, FSB*, 153 AD2d 912, 914).

The miscast theories and assertions in plaintiff's memorandum of law relating to attorney solicitations and protected attorney advertising have no relevance to the narrow discovery issues before the Court.

Lastly, and upon the exercise of its broad discretion in supervising disclosure

(*see, Smith v. Moore*, 31 AD3d 628), the Court declines to compel codefendant Washington to submit to a further and additional deposition.

The Court has considered the plaintiff's remaining contentions and concludes that none supports an award of relief beyond that granted above.

ORDERED that the order to show cause by the non-parties Grail A. Moore and Sheila L. Becker for a protective order pursuant to CPLR 2304 and 3103 quashing a judicial subpoena and subpoena duces tecum, both dated September 26, 2007, and for sanctions, is **granted** without opposition to the extent that the subpoenas are quashed, and the motion is otherwise **denied**; and it is further,

ORDERED that the motions by the plaintiff are **granted** to the extent that a protective order shall be issued with respect to items "3", "4," and "9", as contained in interrogatories dated August 17, 2007 and served by codefendant Washington Mutual Bank, N.A., and it is further,

ORDERED that responses to the remaining discoverable items propounded in the August 17, 2007 interrogatories shall be produced by the plaintiff no later than 20 days after the date of this decision and order, and it is further,

ORDERED that the remaining branches of the plaintiff's motions are **denied.**

This constitutes the Order of the Court.

Dated: March 27, 2008 ENTER:

J.S.C.