

**Guerrero v Hott**

2008 NY Slip Op 31514(U)

May 27, 2008

Supreme Court, New York County

Docket Number: 0602359/2005

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE  
*Justice*

PART 10

Lin

INDEX NO.

602359/08

MOTION DATE

- v -

Hoff

MOTION SEQ. NO.

004

MOTION CAL. NO.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

motion (s) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of every date.

**FILED**

JUN 05 2008

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 5/27/08

JUDITH J. GISCHE, J.S.C.

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check If appropriate:  DO NOT POST  REFERENCE

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

Supreme Court of the State of New York  
County of New York: Part 10

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Enrique O. Guerrero and Kenny D. Lin,

Plaintiffs,

-against-

Richard D. Hott and Hott, Guerrero &  
Linn, P.C.,

Defendants.

**Decision/Order**  
Index# 602359/05  
Mot. Seq. #004

**Present:**  
Hon. Judith J. Gische, JSC

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

PAPERS	
Notice of Motion, DGK affirm., exhibits.....	1
Notice of Cross-motion, RDH affd., exhibits.....	2
DGK Reply affirm.....	3

**FILED**  
JUN 03 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

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Gische, J.:

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

Plaintiffs claim that they were partners with defendant Richard D. Hott in defendant law firm Hott, Guerrero & Linn P.C. They claim that Richard D. Hott diverted monies and legal fees paid by clients away from the law firm for his own personal benefit and account. Among other cases included in their claims are fees from two cases litigated in the Federal District Court of the Southern District of New York State, respectively known as LaFontaine v. American Airlines (03 CV 1387) ("LaFontaine") and Castillo v. American Airlines (01 CV 1386) ("Castillo") (collectively "federal cases"). Defendant Hott does not deny that he was, for a time, partners with plaintiffs. He

claims instead that it was always understood that the Lafontaine and Castillo cases were his cases alone.

Plaintiffs now move for an order compelling defendants to produce the files they have on those cases. and after the documents are produced, for a further deposition of Richard D. Hott on the La Fontaine and Castillo cases. Defendants have cross-moved for a protective order pursuant to CPLR §3103 denying the disclosure sought. Defendants claim the documents are protected by the attorney client privilege and attorney work product. They also claim that the discovery is subject to a confidential settlement which bars disclosure of the materials sought and that a sealing order made by Justice Sweet in the federal district court cases precludes disclosure. Finally defendants argue that plaintiffs have failed to establish entitlement to fees and therefore should be denied discovery.

For the reasons set forth below, plaintiffs' motion is granted and defendants' motion is granted in part only to the extent that the documents and other discovery provided shall be used by plaintiffs only in connection with the instant action, and shall not be disclosed, without further court order, to any person other than those representing plaintiffs or otherwise assisting plaintiffs in connection with the prosecution of this action.

The court first rejects defendants' position, that plaintiffs must establish their underlying case in order to be entitled to discovery. One of the purposes of discovery is to enable a party to obtain information that may be within the control of the other side in an effort to put its own claims before the court. CPLR § 3101(a); Allen v. Crowell-Collier Pub. Co., 21 NY2d 403 (1968) (*citing with approval* Matter of Comstock [21

actual order is not provided to the court. Without the order, the court cannot determine what its' particular terms or conditions are. In any event, the plaintiffs are not *per se* seeking any court files. They are seeking office files for which there can be no sealing order.

Finally, the defendants argue that the terms of the actual settlements in the federal cases require that the requested materials remain confidential. They provide a redacted copy of the releases which provided in pertinent part:

“ RELEASORS agree that this Releaser, including but not limited to the settlement amount, shall be and shall remain confidential. Without limiting the foregoing, RELEASORS agree not to publicize, communicate or disclose to any third parties, either themselves or through their representatives or attorneys, any information or documents concerning this dispute with RELEASEES, settlement negotiations, the payments described above, or the terms of this ;Release without prior written permission from both AMERICAN AIRLINES, INC. AND AIRBUS G.I.E. **or as required by a court of competent jurisdiction.** RELEASORS further agree to submit under seal any papers submitted to any court to obtain approval for this Release or the distribution of the proceeds hereunder.” (bold face added).

The primary reason the agreement to keep the settlement and related papers confidential does not bar this court's order is because the agreement provision itself contemplates that it can be superceded by an order of a court of competent jurisdiction. This is just such a court, which court is of the opinion that the documents are otherwise discoverable in the context of this action. Masterwear Corp. v. Bernard, 3 AD3d 305 (1<sup>st</sup> dept. 2004). In this regard, however, the general agreement of confidentiality convinces the court that, although the files should be disclosed, their disclosure should be limited to use only in connection with the prosecution of this action. Masterwear Corp. v. Bernard, *supra*.

AD2d 843 (4<sup>th</sup> dept 1964)] holding “if there is any possibility that the information sought in good faith for the possible use as evidence-in-chief or in rebuttal or for cross-examination, it should be considered ‘evidence material...in the prosecution or defense ’”). Clearly the files, which will reveal the work done, when it was done, by whom it was done, and possibly under whose auspices it was done, are highly relevant on whether the law firm, or only Mr. Hott himself, were (was) entitled to the legal fees that were paid in connection with the federal cases.

Defendants’ claim of privilege is unavailing. The party asserting privilege, whether attorney work product or attorney client privilege, has the burden of proving that it applies. People v. Greenberg, 50 AD3d 195 (1<sup>st</sup> dept. 2008); Bombard v. America Mutual Ins. Co., 11 AD3d 647 (2<sup>nd</sup> dept. 2004). Not all documents in a client’s files are subject to privilege. Documents that are disclosed to a third party lose the privilege. Defendants produced no privilege log. This is more than a trifling error. It deprives the court of the ability to evaluate the *bona fides* of the claim in the first instance and whether an *in camera* inspection of the identified documents is warranted. See: Royal Indemnity Co. v. Solomon Smith Barney, Inc., 4 Misc3d1006(A)(Sup Ct. NY Co. 2004); Stenovich v. Wachtel, Lipton Rosen & Katz, 195 Misc2d 99(Sup Ct. NY Co. 2003). Moreover, to the extent that defendants claim the file includes the same documents filed with the Federal District court, that has been sealed, there can be no privilege. Documents filed with the court lose any claim of privilege that might have otherwise attached. See generally, Howard Rosengarten P.C. v. Hott, 49 AD3d 328 (1<sup>ST</sup> dept. 2008).

Defendants’ reliance on Judge Sweets’ sealing order is also unavailing. The

Accordingly it is hereby:

ORDERED that plaintiff's motion to compel discovery is granted and the files and/or documents maintained by either or both of the defendants in connection with the actions known as LaFontaine v. American Airlines (03 CV 1387) and Castillo v. American Airlines (01 CV 1386) shall be produced to plaintiffs on or before **June 13, 2008**, and it is further

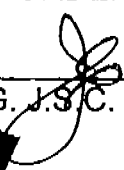
ORDERED that defendant Richard D. Hott shall re-appear for deposition on **June 27, 2008** beginning at 10:00 am to answer questions put to him on the documentary discovery produced pursuant to this order and any reasonable questions that flow therefrom, and it is further

ORDERED that the documents and other discovery provided shall be used by plaintiffs only in connection with the instant action and shall not be disclosed, without further court order, to any person other than those representing plaintiffs or otherwise assisting plaintiffs in connection with the prosecution of this action and it is further

ORDERED that any requested relief not expressly addressed herein is denied and that this shall constitute the decision and order of the court.

Dated: New York, New York  
May 27, 2008

SO ORDERED:

  
\_\_\_\_\_  
J.G. J.S.C.

**FILED**  
JUN 03 2008  
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NEW YORK