

**AMP Servs. Ltd. v Walanpatrias Found.**

2008 NY Slip Op 33217(U)

December 1, 2008

Supreme Court, New York County

Docket Number: 106462/04

Judge: Barbara R. Kapnick

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

PRESENT: ~~BARBARA R. KAPNICK~~ J.S.C. Justice

PART 29

Index Number : 106462/2004

AMP SERVICES LIMITED

vs

WALANPATRIAS FOUNDATION

Sequence Number : 007

CONFIRM/REJECT REFEREE REPORT

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

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

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

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

his 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

FILED

DEC 03 2008

COUNTY CLERK'S OFFICE NEW YORK

Dated: 12/1/08

BARBARA R. KAPNICK 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: IAS PART 39

-----X  
AMP SERVICES LIMITED as Trustee of THE  
WALTER AND ANNA BRONNER TRUST, as assignee  
of the Estate of HARRY JOSEPH, deceased,  
and as assignee of PETER BRONNER, MONICA  
BRONNER KRANEPOOL, ROBERT BRONNER, and  
KARIN BRONNER,

DECISION/ORDER  
Index No. 106462/04  
Motion Seq. No. 007

Plaintiff,

- against -

WALANPATRIAS FOUNDATION a/k/a DORAW and  
WALANPATRIAS SIFTUNG,

Defendants,

-----X  
BARBARA R. KAPNICK, J.:

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

Plaintiff moves for an order reviewing and reversing the  
Special Discovery Referee's Decision and Order dated August 15,  
2008 directing AMP to disclose all communications that AMP has had  
with the United States Internal Revenue Service ("IRS") regarding  
the alleged fraudulent transfer of funds at issue in this action.<sup>1</sup>

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<sup>1</sup> The Referee in this case, John Kenney, Esq., was  
appointed pursuant to CPLR § 3104 by Stipulation and Order  
Regarding Special Referee dated November 8, 2006, in which the  
parties agreed "to allow Mr. Kenney to resolve any and all  
disputes that may arise in connection with the depositions of  
directors, employees or representatives of AMP and Walanpatrias,  
and to rule on issues of the confidentiality of disclosures",  
without "waiving or foregoing any right or remedy provided for by  
New York law.

Both AMP and the IRS have asserted fraudulent conveyance claims seeking to undo the transfer of assets from Walanpatrias' account at Lehman Brothers, Inc. to Lehman Brothers International (Europe).

As outlined in the Referee's 27-page Decision and Order, in March 2005, AMP commenced a series of communications with the IRS related to those matters. The communications continued through June 2006.

AMP opposed the disclosure of these communications, arguing that they were subject to the common interest privilege, on the grounds that: (i) the underlying communications were protected by the work product doctrine, attorney-client privilege and/or were trial preparation materials; (ii) the IRS and AMP had and continued to have a common legal interest concerning their respective fraudulent conveyance claims; and (iii) the communications between the IRS and AMP regarding the alleged fraudulent conveyance were for the purpose of developing legal theories and analyzing information in furtherance of their common interest.

"It is well-established that the attorney-client privilege is waived if the holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the communication

to a third-party or stranger to the attorney-client relationship (footnote omitted).” *Denney v Jenkins & Gilchrist*, 362 F.Supp.2d 407, 412 (SDNY 2004).

In contrast, the protection afforded work product is not waived because the material is disclosed to a third party, rather,

a waiver of work product protection occurs when the covered materials are used in a manner that is inconsistent with the protection. (citation omitted). One circumstance that is inconsistent with the need for work product protection is when work product materials are either given to an adversary or used in such a way that they may end up in the hands of an adversary. Case law is clear that “[o]nce a party allows an adversary to share the otherwise privileged thought processes of counsel, the need for the privilege disappears.” (citation omitted). Thus, “a voluntary disclosure of work product to an adversary waives the privilege as to other parties.” *Id.* ... It is not necessary that the disclosure be made to an actual adversary. In *Medinol v. Boston Scientific Corp.*, 2002 WL 31415692 (S.D.N.Y. Oct. 28, 2002), for example, a corporation had disclosed work product to its independent auditors. Referring to the “adversarial tension” between such parties, *id.* at \*3 (citation omitted), the Court held that the work product protection was waived. *Id.* at \* 4.

*Bank of America, N.A. v Terra Nova Insur. Co.*, 212 FRD 166, 170 (SDNY 2002).

Such disclosure of material subject to the attorney-client privilege and/or work product protection may, however, remain protected pursuant to the common interest doctrine which applies

"to situations 'where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel.' That is, the doctrine applies where parties are represented by separate counsel but engage in a common legal enterprise." Like all privileges, the common interest rule is narrowly construed.

The party asserting the common interest rule bears the burden of showing that there was "an agreement, though not necessarily in writing, embodying a cooperative and common enterprise towards an identical legal strategy." "A claim resting on the common interest rule requires a showing that 'the communication in question was given in confidence and that the client reasonably understood it to be so given.'" "Some form of joint strategy is necessary to establish a [joint defense agreement], rather than merely the impression of one side (footnotes omitted).

*Denney v Jenkins & Gilchrist, supra* at 415.

As the Referee noted on page 15 of his Decision and Order "'some meeting of the minds between the parties'" (citing *Denney v Jenkins & Gilchrist, supra* at 415-416) is required.<sup>2</sup>

AMP contends that the Special Referee erred in finding that it did not satisfy its burden of showing that there was a common

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<sup>2</sup> However, as the Referee also noted on page 13, this Court has previously held that

a total identity of interests among participants is not required under New York law. See *Gus Consulting GMBH*, 858 N.Y.S.2d 591, 593, 2008 WL 2206648, at \*2. Rather, "the privilege applies where an interlocking relationship or a limited common purpose necessitates disclosure to certain parties." *Id.*

interest privilege between AMP and the IRS, because AMP submitted an Affidavit from Heather McShain, an Assistant United States Attorney in the Southern District of New York, confirming that the United States agreed to "use its best efforts to keep confidential any information or material provided by AMP that AMP requested be kept confidential."

Plaintiff also submitted an Affidavit from Sheldon S. Cohen, Esq., an attorney for AMP, stating, in relevant part as follows:

3. In or about November 2004, I met with Mark E. Matthews, Esq., who was at that time the Deputy Commissioner of the Internal Revenue Service. The purpose of the meeting was to discuss certain legal strategies and theories with the government that would serve the interests of both the Internal Revenue Service and AMP.

4. At that time Mr. Matthews orally agreed that the Internal Revenue Service would use its best efforts to keep confidential any material AMP provided to it.

In addition, plaintiff submitted an affidavit from Debra J. Guzov, Esq., a member of Guzok Ofsink, LLC, another one of the attorneys for AMP, who similarly alleged as follows:

3. On May 11, 2006 at 11:00 a.m., I and AMP's attorney David Keyko of Pillsbury Winthrop Shaw Pittman LLP met with Heather McShain and Katy Marks of the U.S. Attorney's Office. The purpose of the meeting was to discuss certain legal strategies and theories with the government that would serve the interests of both the [IRS] and AMP...

4. Both Ms. McShain and Ms. Marks confirmed that the IRS had already agreed to use its best efforts to keep confidential any information or material we provided to it and that it would continue to honor its agreement with respect to any subsequent information and material we provided.<sup>3</sup>

In reviewing the extensive arguments of counsel and the evidence submitted, and after conducting an in-camera review of the documents at issue, the Referee correctly found that the attorney-client privilege had been waived by the voluntary disclosure to a third-party, i.e., the IRS. He also correctly found on pages 25-26 that the privilege afforded to work product had been waived by disclosure to an entity with which AMP had an "adversarial tension", since .

there does not appear to be any doubt that AMP and the IRS are themselves actual or potential adversaries with respect to the underlying federal actions against Walanpatrias. Although both AMP and the IRS are pursuing the same claims in the parallel lawsuits, they do not appear to be in alignment against a common opponent or to share a common interest. ...

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<sup>3</sup> AMP further argues that: (i) it did not otherwise waive the protection from disclosure with respect to the communications at issue under the 'selective waiver doctrine' by voluntarily cooperating with a government agency investigating AMP (see, *In re Cardinal Health, Inc. Secs. Lit.*, 2007 WL 495150 [SDNY 2007]) because AMP contends that there was no government investigation of AMP at the time of the disclosure; and (ii) that it did not waive the privilege by providing information to the government to otherwise attack its adversary (see, *In re Steinhardt Partners, L.P.*, 9 F.3d 230 [2nd Cir. 1993]), because the communications at issue related solely to the development of legal theories and information pertaining to Walanpatrias' alleged fraudulent transfer of funds.

In addition, AMP has been named as a defendant in the IRS action. AMP's argument that it is only a "nominal" defendant in that action, and thus does not stand in an adversarial relationship to the IRS is not persuasive. While it is true that the IRS is only claiming priority over AMP with respect to the disputed funds, and has no "direct claims" against AMP, their interests are not the same or even similar.

Moreover, Mr. Kenney concluded on page 24, as does this Court, that,

[t]he affidavits submitted by AMP emphasize that both the IRS and the Department of Justice, acting as counsel for the IRS in litigation that ensued, agreed to use their respective best efforts to keep confidential any material AMP provided. Also, Mr. Keyko and Ms. McShain both assert a common interest between AMP and the IRS with respect to the underlying fraudulent transfer claim. However, merely having a shared interest in the outcome of the underlying litigation is not sufficient to create a common interest.

Moreover, none of the affidavits identifies an oral or written agreement or understanding embodying a common legal strategy or showing that the IRS or the DOJ and AMP were acting with a common interest or purpose. As the Informant Reward Agreement makes clear, the IRS will do what is in its best interest and AMP will testify in public and have its identity made public, if that serves the interest and purpose of the IRS. Any understanding of confidentiality by AMP must be subject to this agreed right of the IRS to make public whatever it may receive from AMP.

It is well settled that

[t]he trial court is afforded broad discretion in supervising disclosure and its determinations will not be disturbed unless that discretion has clearly been abused (citations omitted). The deference afforded to the trial court regarding disclosure extends to its decision to

confirm a referee's report, so long as the report is supported by the record (emphasis supplied; citations omitted).

*DiMascio v General Electric Co.*, 307 AD2d 600, 601 (3<sup>rd</sup> Dep't 2003).  
See also, *Certain Underwriters at Lloyds, London v Occidental Gems, Inc.*, 41 AD3d 362 (1<sup>st</sup> Dep't 2007).

Based on the papers submitted and the oral argument held on the record on October 24, 2008, this Court finds that the report of the Special Referee, including his conclusion that plaintiff failed to establish the existence of an oral or written common interest agreement, and his determination that the communications at issue are thus subject to disclosure, is well supported by the record.

Accordingly, plaintiff's motion to review and reverse the Decision and Order of the Special Referee is denied.

This constitutes the decision and order of this Court.

Dated: December / , 2008

BARBARA R. KAPHICK  
J.S.C.

BARBARA R. KAPHICK

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