

Don v Singer

2009 NY Slip Op 30196(U)

January 23, 2009

Supreme Court, New York County

Docket Number: 105584/06

Judge: Joan A. Madden

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

PRESENT: Hon. Joan A. Mitter

PART 11

Index Number : 105584/2006

DON, GARY

VS.

SINGE, BARUCH

SEQUENCE NUMBER : 005

COMPEL

INDEX NO. _____

MOTION DATE 9-11-08

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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 is decided in accordance with the attached Memorandum Decision & Order.

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

FILED
FEB 02 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: January 23, 2009

[Signature] J.S.C.

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: PART 11

-----X INDEX NO. 105584/06
GARY DON, LAWRENCE H. GERSTEIN, and NEW
YORK DEVELOPERS COLLABORATIVE, LLC

Plaintiffs,

--against--

BARUCH SINGER, MARK JUNGER, MOSES ROSNER,
HERALD SQUARE DEVELOPMENT LLC, ROSMA
DEVELOPMENT LLC, and MNM INVESTORS GROUP LLC,

Defendants.

-----X
JOAN A. MADDEN, J.:

FILED
FEB 02 2009
COUNTY CLERK'S OFFICE
NEW YORK

Plaintiffs move for an order compelling defendants to answer certain deposition questions, answer interrogatories, and to produce documents previously ordered to be produced by this court and request the imposition of sanctions. Defendants oppose the motion.

Background

This action seeks to recover damages in connection with the alleged wrongful ouster of plaintiffs from their role in a multi-million dollar real estate development project. As the basis for the action is relevant to the discovery issues before the court, the facts as alleged in the complaint, are summarized below.

Plaintiffs Gary Don ("Don") and Lawrence Gerstein ("Gerstein") were partners in commercial real estate development business and in furtherance of this business, used plaintiff New York Developers Collaborative, LLC ("NYDC"), as their corporate vehicle. At issue here is a deal for the purchase and development of a site located on the Avenue of the Americas between 30th and 31st Street in Manhattan ("the Property"). Plaintiff allege that in 2005, they identified the Property as an area for development of a residential and commercial real estate project ("the

Project”), and subsequently generated a document summarizing their business plan, that later became a Confidential Memorandum.

As plaintiffs did not have the financing to pay for the Project, they sought various business partners. In April 2005, a broker hired by the plaintiffs found as potential partner, defendant Mark Junger (“Junger”), who signed a confidentiality and non-circumvention agreement (the “CNC Agreement”) on behalf of himself and his company defendant Rosma Development LLC (“Rosma”), which was countersigned by Don. Under the CNC Agreement, defendants Junger and Rosma and their affiliates or persons to whom they make disclosures agreed to “hold Confidential Information (regarding the Project) in the strictest confidence and [not to] contact the owner of the Property to promote participate or engage in any business which is or may be competitive with the business of NYDC at the Property, including, without limitation any acquisition, financing, purchase or other transaction involving the Property (other than through NYDC). . . .”

In May 2005, plaintiffs met with Junger and his partner, defendant Moses Rosner (“Rosner”), of defendant MNM Investors Group, LLC (“MNM”) who agreed to provide the required capital amount of \$20 million, through a partner. Plaintiffs allege that before permitting Junger and Rosner to meet with the sellers, and after a May 13, 2005 meeting involving extensive negotiations, Don and Gerstein and Junger and Rosner agreed to be partners and entered into a joint venture relationship regarding the acquisition of the Site and development of the Project.

A Joint Venture Agreement (“the JV Agreement”) dated May 13, 2005, which was signed by Don, Gerstein, Junger and Rosner provided *inter alia*, that Junger, Rosner, and MNM at their sole option would decide whether plaintiffs would make a \$500,000 capital contribution and receive an 18% ownership interest or not make a capital contribution and receive a 12%

ownership interest. It was also agreed that plaintiffs would receive 40 % and Junger, Rosner and MNM would receive 60% of all projected net profits (which was \$68,000,000 at the time the JV Agreement was entered).¹

During the week the JV Agreement was signed, Junger and Rosner informed Don and Gerstein that defendant Singer was the partner who had the needed capital and who would be participating as a partner in the JV Agreement to purchase the Site and to develop the Project. Plaintiffs allege that before Singer was provided with any information about the purchase of the Site and the Project, Singer entered into the CNC Agreement, and that after he signed the CNC Agreement (hereinafter "The Singer CNC Agreement"), they gave him the Confidentiality Memorandum and the proprietary development information.

On May 24, 2005, a meeting regarding the purchase of the Property was held between Don, Gerstein, Junger, Rosner, Singer, and the sellers and their representatives from the brokerage firm, and the parties agreed to a \$72 million purchase price. Other meetings regarding the Project were also held during May and June of 2005. Singer's attorney Andrew Alberstein, Esq. ("Alberstein") of Goldberg, Weprin & Ulster ("GWU") attended these meetings.

In mid-June 2005, defendants tried to renegotiate the terms of the JV Agreement with plaintiffs to curtail plaintiffs' participation and decrease plaintiffs' economic return. Specifically, it is alleged that defendants sought to limit plaintiffs' ownership interest to 7% but later increased it to 9% and then limited to profits from sales of residential units, and to have plaintiffs

¹The complaint alleges that entry in the JV Agreement did not affect the confidentiality and non-circumvention provisions of the Confidentiality Memorandum and the CNC Agreement and, in fact, defendants Junger and Rosner were told that they were not to disclose the Confidentiality Memorandum or proprietary development plans to any third person without such third person first entering into confidentiality and non-circumvention agreement.

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relinquish their right to the agreed-upon 40% of net profits. If plaintiffs refused to accept the new terms, defendants threatened not to honor their commitments with respect to the Project.

When plaintiffs refused to accept these new terms, it is alleged that defendants, along with Singer's counsel Alberstein, ceased providing plaintiffs with information, data or updates regarding negotiations with the sellers, and that once it became clear that plaintiffs would not agree to substantial modifications in the JV Agreement, defendants took steps to oust plaintiffs from the purchase and development of the Project.

It is further alleged that in August of 2005, Singer met with plaintiffs and offered them a \$3.5 million dollar pay-off, and that when plaintiffs refused, defendants ceased any further communications with plaintiffs. According to the complaint, in October 2005, defendant Herald Square Development LLC ("Herald") was established by defendants Singer, Junger, Rosner, Rosma and MNM for the purpose of purchasing the Site from the sellers, and in February 2006, defendants completed the purchase of the Property.

In its decision and order dated May 19, 2008, this court granted, with few exceptions, plaintiffs motion to compel discovery, notwithstanding any claim of attorney-client or work production privilege and also rejected certain objections made by defendants on the grounds of relevance ("The May 19 decision"). As set forth below, the May 19 decision governs many of the issues raised on this motion to compel, and thus will be addressed summarily below.

DISCOVERY MOTION

Plaintiffs seeks to compel testimony regarding an August 3, 2005 letter written by Alberstein to Singer and Junger. Defendants argue that the letter contains communications protected by the attorney client privilege and seek to recall it, and object to questions regarding the letter. Defendants' position is without merit. As stated in its May 19 decision, the court

rejected the claim that the communication among Alberstein, Singer and Junger was protected by the attorney-client privilege on the grounds that Junger was Singer's agent and found that any privilege attached to such communications was waived. People v. Osorio, 75 NY2d 80,84 (1989); National Education Training Group, Inc. v. Skillsoft Corp., 1999 WL 378337, *4 (SDNY 1999); Delta Financial Corp. v. Morrison, 15 Misc3d 308, 317 (Sup Ct Nassau Co. 2007)(citations omitted). Here, as the August 3, 2005 letter was sent to Junger as well Singer, any attorney-client privilege attached to the communications in the letter have been waived. Accordingly, defendants Singer and Junger are required to answer deposition questions regarding the August 3, 2005 letter. Moreover, when deposed, Alberstein will also be required to answer questions about the letter. In addition, as it is not protected by the attorney-client privilege, the request by Singer to recall the letter produced in discovery on this ground is denied.

Plaintiffs also seek to compel Junger to answer certain deposition questions (1) relating to other real estate deals with Singer, including the reasons for not including Singer in deals since the 2005 transaction at issue in this case, (2) the names of other investors allegedly contacted by Junger and Rosner for the Herald Square deal, (3) whether Junger received compensation in connection with the acquisition and sale of other properties purchased by Singer in the Herald Square neighborhood during the 2005 time period, (4) his communications with Attorney Alberstein and Galanter of GWU as they related to the Herald Square property, including communications received from plaintiffs and their counsel Marlin Kruzhdov, (5) regarding a check dated March 1, 2007 in the amount of \$1,980,000 from the Jarvis Center Development LLC, (another project owned by Singer) to Junger and Rosner's attorneys, which plaintiffs assert was payment for Junger and Rosner's work on the Herald Square project.

Plaintiffs' motion to compel Junger to answer the above-listed questions is granted to the

extent below. With respect to deposition questions relating to other real estate deals involving Singer, Junger should answer questions to the extent they relate to the nature of the relationship between Singer, Junger and Rosner and how they did business together. Since the specific business deals which are the subject of inquiry occurred at about the same time as the Herald Square transaction, and the nature of the relationship between these defendants is central to plaintiff's claims, this information is material and relevant.

The names of the other investors who were sought by Junger for the Herald Square deal is relevant to verify that Singer was not the only investor contacted about the deal. With respect to the reasons why Junger did not enter into other deals with Singer after 2005, the question should be limited to whether the reason was related in any way to the Herald Square transaction.

Next, the communications between Junger and Singer's attorneys (Alberstein and Galanter) are not privileged since, as indicated in the May 19 decision, Junger was not Singer's agent with respect to these communications. Contrary to Singer's position, the holding in the May 19 decision is not limited to the communications discussed in that decision but applies to all communications between Junger and Singer's attorneys that are at issue in this litigation. Moreover, on this record it would appear that when they are deposed, Alberstein and Galanter would be required to answer questions regarding their communications with Junger. In addition, questions about the check dated March 1, 2007 in the amount of \$1,980,000 are potentially relevant to the manner in which Junger and Rosner were compensated for their work on the Herald Square transaction, and should be answered.

As for the deposition questions regarding Tower 56, LLC, in its May 19 decision, the court held that the organizational documents for Tower 56, LLC were discoverable since a proposed June 2005 agreement concerning the acquisition of the Herald Square property was to

use the operational agreement for Tower 56, LLC as a model, even though the June proposal did not go through. Based on this holding, defendants are required to answer questions relating to the Tower 56, LLC operating agreement, including its relationship to acquisition of the Herald Square property.

With regard to deposition questions about Refsnart Corp., in its May 19 decision, the court found since Refsnart Corp's was the entity that initially purchased the Property from the Sellers, and then transferred the Property to Herald in December 2005, its organizational documents were material and relevant. Based on this holding, defendants should be compelled to answer questions regarding Refsnart Corp structure and ownership and its role in the transaction. Moreover, when they are deposed Alberstein and Galanter would be required to answer questions about Refsnart, which is wholly owned by their law firm, GWU, subject to any objections based on privilege.

Plaintiffs also seek to compel Singer to answer certain deposition questions: (1) regarding whether Singer was informed by Alberstein that he had rejected a request from plaintiffs for certain documents and updates regarding the Project, (2) regarding whether Singer instructed Alberstein not to provide plaintiffs with documents including purchase updates and updates as to the status of negotiations. Counsel for Singer objected to these questions at Singer's deposition based on the attorney-client privilege. This objection is unavailing.

Because of the strong public policy favoring full disclosure, the burden of proving each element of a privilege [of the attorney client privilege] rests on the party asserting it." Spectrum Systems Intern'l Corp. v. Chemical Bank, 157 AD2d 444, 447 (1st Dept 1990), aff'd as modified, 78 NY2d 371 (1991). "In order to raise a valid claim of [attorney-client] privilege, the party seeking to withhold the information must show that it was a 'confidential communication' made

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between the attorney and the client in the context of legal advice or services.” Bertalo’s Restaurant Inc. v Exchange Ins. Co., 240 AD2d 452, 454 (2d Dept), lv. dismissed 91 NY2d 848 (1997). “The communication itself must be primarily or predominately of a legal character.” Spectrum Systems Intern’l Corp. v. Chemical Bank, 78 NY2d at 378 (citation omitted). In addition, facts in a client’s possession are not insulated from discovery simply as a result of being reported to counsel. Rossi v. Blue Cross and Blue Shield of Greater New York, 73 NY2d 588, 594 (1989).

Under this standard, Singer has not meet his burden of showing that the communications at issue are protected by the attorney-client privilege. In particular, any communication by Alberstein to Singer as to whether a request by plaintiffs for certain information regarding the Project had been rejected would be a factual statement relating to a business transaction and would not be primarily legal in character.² In addition, any communication from Singer to Alberstein on the issue of whether or not the documents and information were provided would be factual and not protected by virtue of being reported to counsel. Since the communications are not subject to the attorney-client the privilege, Alberstein would also be required to answer questions regarding such communications at his deposition.

Next, Singer should be compelled to answer deposition questions, produce documents, and answer interrogatory questions relating to the net profits Singer realized from the sale, as this information is relevant to plaintiffs’ claim for disgorgement damages. That being said, however, detailed information as to the source of the money used to purchase the Property does not appear to be relevant to the calculation of net profits. Accordingly, while plaintiffs are entitled to

²To the extent Alberstein gave legal advice as to the advisability of withholding the information, such advice would be subject to the attorney-client privilege.

discovery regarding the amounts Singer expended to purchase the property, which may touch upon the source of such money, plaintiffs are not entitled to detailed discovery as to the source of such money.

Defendants Junger and Rosner shall also be required to answer interrogatory question number 4 insofar as it seeks information regarding their use of the approximately \$2 million they received from Singer after the Herald Square Property was sold as plaintiffs may be able to recover any profits obtained with this money as disgorgement damages.

Next, to the extent that defendants have not yet complied with the May 19 decision, and this court's orders dated October 11, 2007 and April 4, 2008 requiring the production of phone records, they are directed to do so within fifteen days of the date of this decision order, or they will be subject to discovery and monetary sanctions.

Finally, the requests for sanctions by plaintiffs and Singer are denied. However, the court admonishes defendants that to the extent the bases for their objections to discovery or refusal to answer deposition questions have been previously rejected by this court, they may be subject to sanctions, including but not limited to, an order of preclusion or an order that the issues upon which the discovery or questions are relevant shall be determined in accordance with the claim of the party obtaining the order per CPLR 3126.

Conclusion

In view of the above, it is

ORDERED that plaintiffs' motion is granted to the extent set forth herein; and it is further

ORDERED that within fifteen days of the date of this decision and order, if they have not already done so, defendants shall comply with directions to produce documents contained in the

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court's decision and order dated May 19, 2008 and the court orders dated October 11, 2007 and April 4, 2008, or discovery sanctions and/or monetary sanctions shall be imposed based upon a submission to this court by plaintiffs of an affidavit on notice to defendants indicating any material non-compliance by defendants; and it is further


ORDERED that defendants shall provide plaintiffs with interrogatory responses, including documents, within thirty days of the date of this decision and order; and it is further

ORDERED the requests for sanctions are denied; and it is further

ORDERED that the further depositions of Singer and Junger shall be taken within thirty days of the date of this decision and order.

A copy of this decision and order is being mailed by my chambers to counsel for the parties.

DATED: January 23 2009



J.S.C.

FILED
FEB 02 2009
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NEW YORK