

Bank of Am., N.A. v National Fin. Sys., Inc.

2009 NY Slip Op 31721(U)

July 29, 2009

Supreme Court, New York County

Docket Number: 600350/08

Judge: Barbara R. Kapnick

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

PRESENT: **BARBARA R. KAPNICK**

PART 39

Index Number : 600350/2008

BANK OF AMERICA, N.A.

vs

NATIONAL FINANCIAL SYSTEMS

Sequence Number : 006

QUASH SUBPOENA, FIX CONDITIONS

INDEX NO. 600350/08

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

_____ 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 and cross-motion are decided in accordance with the accompanying memorandum decision.

FILED
AUG 03 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/29/09


BARBARA R. KAPNICK
J.S.C. J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39

-----X
BANK OF AMERICA, N.A.,

Plaintiff,

-against-

NATIONAL FINANCIAL SYSTEMS, INC.,
GEORGE KENNEDY and ROBERT HERNANDEZ

Defendants

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

DECISION/ORDER
Index No. 600350/08
Motion Seq. No. 006

FILED
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COUNTY CLERK'S OFFICE
NEW YORK

This motion concerns a Subpoena (Duces tecum) dated March 13, 2009 served by plaintiff-judgment creditor Bank of America, N.A.¹ upon The Weinstein Group, P.C., former counsel to defendants-judgment debtors, seeking the production of:

all records concerning or relating to moneys due to The Weinstein Group, P.C., and/or payments (including for deposit into escrow) made to or received by The Weinstein Group, P.C. from [defendants] National Financial Systems, Inc., George Kennedy and/or Robert Hernandez, or any person(s) on their behalf, and sums due to The Weinstein Group, P.C. including but not limited to invoices, letters, faxes, emails, bookkeeping records, cancelled checks, deposit slips, bank records, and all other evidences and writings (on paper and in electronic form) of the dates and amounts of application of any such sums, which you have in your custody or power.

The Weinstein Group now moves for an order quashing the Subpoena, or alternatively providing for a protective order

¹ A Judgment was entered in favor of plaintiff and against defendants pursuant to the Decision/Order of this Court dated October 21, 2008.

pursuant to CPLR § 3103(a) concerning the confidential information of The Weinstein Group, on the grounds that: (i) plaintiff seeks information which is protected by the attorney-client privilege; and (ii) plaintiff has failed to make a showing of "special circumstances" and/or that the information sought cannot be obtained from other sources such that would allow it to obtain discovery from a non-party, i.e., the Weinstein Group.

Plaintiff cross-moves for an order requiring The Weinstein Group to comply with the Subpoena, and awarding plaintiff its costs and attorneys' fees pursuant to 22 NYCRR § 130-1.1, on the grounds that the documents sought are not privileged, and plaintiff has a right pursuant to CPLR § 5223 to seek discovery from third parties in aid of the enforcement of its Judgment.²

The defendants have not submitted any papers and did not appear in response to either the motion or cross-motion.

² Pursuant to CPLR § 5223,
[a]t any time before a judgment is satisfied or vacated, the judgment creditor may compel disclosure of all matter relevant to the satisfaction of the judgment, by serving upon any person a subpoena, which shall specify all of the parties to the action, the date of the judgment, the court in which it was entered, the amount of the judgment and the amount then due thereon, and shall state that false swearing or failure to comply with the subpoena is punishable as a contempt of court.

It is well settled that "for the [attorney-client] 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 (citation omitted)." *Rossi v Blue Cross & Blue Shield of Greater N.Y.*, 73 NY2d 588, 593 (1989). The communication itself must be "primarily or predominantly of a legal character". *Rossi v Blue Cross & Blue Shield of Greater N.Y.*, *supra* at 594; see also, *Spectrum Systems International Corp. v Chemical Bank*, 78 NY2d 371 (1991).

The Court of Appeals has held that

[t]he fee arrangements between attorney and client do not ordinarily constitute a confidential communication and, thus, are not privileged in the usual case (citations omitted). A communication concerning the fee to be paid has no direct relevance to the legal advice to be given. It is a collateral matter which, unlike communications which relate to the subject matter of the attorney's professional employment, is not privileged.

Nor does the payment of legal fees by a third person, in and of itself, create an attorney-client relationship between the attorney and his client's benefactor sufficient to sustain a claim of privilege. (citations omitted).

Matter of Priest v Hennessy, 51 NY2d 62, 69-70 (1980).

In the instant case, LLOYD J. Weinstein, Esq. of The Weinstein Group contends that the disclosure of the actual legal bills he sent to the defendants constitute confidential communications

because they contain specific information regarding the legal services rendered by the firm.

However, plaintiff's counsel clarified on the record on May 5, 2009 that plaintiff is primarily seeking information regarding (a) the amount of legal fees paid; (b) who paid those fees; and (c) when those fees were paid. This information does not appear to be "primarily or predominantly of a legal character" and is thus not protected by the attorney-client privilege.


Accordingly, the motion is granted to the extent of granting The Weinstein Group a protective order quashing the Subpoena to the extent that it seeks confidential information, and the cross-motion by plaintiff is granted to the extent of directing The Weinstein Group to provide the limited information requested on the record, as set forth above, within 30 days of service of a copy of this order with notice of entry.

That portion of the cross-motion seeking sanctions (specifically, costs and attorneys' fees) is denied, in the discretion of the Court, for the reasons stated on the record.

This constitutes the decision and order of this Court.

Date:

July 29th 2009


Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.

FILED

AUG 03 2009 4

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