

IDX Capital, LLC v Phoenix Partners Group LLC

2009 NY Slip Op 31735(U)

August 4, 2009

Supreme Court, New York County

Docket Number: 102806/2007

Judge: Richard B. Lowe

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

RICHARD B. LOWE III

PRESENT: _____

PART 56

Index Number : 102806/2007
 IDX CAPITAL, LLC
 VS.
 PHOENIX PARTNERS GROUP
 SEQUENCE NUMBER : 011
 ORDER OF PROTECTION

INDEX NO. _____

MOTION DATE _____

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

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION

FILED

AUG 04 2009

COUNTY CLERK'S OFFICE
NEW YORK

RICHARD B. LOWE III

Dated: 7/30/09

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: IAS Part 56

-----X
IDX CAPITAL, LLC, JAMES CAWLEY,
HELEN CAWLEY, JAMES CAWLEY, SR.,
BRADY HALPER, RON NEAL, BHANU
PATEL, and STARLIGHT INVESTMENTS,
LTD.,

Index No. 102806/2007

Plaintiffs,

-against-

DECISION AND ORDER

PHOENIX PARTNERS GROUP LLC,
PHOENIX PARTNERS GROUP LP,
INTERDEALER INFORMATION
TECHNOLOGIES, LLC, WESLEY WANG,
NICHOLAS STEPHAN, MARCOS BRODSKY,
JASON HOROWITZ, PATRICK NIHAN and
TERENCE SOLOMONE,

Defendants.

-----X
RICHARD B. LOWE, III, J.:

Plaintiff, IDX Capital, LLC (“IDX”) seeks a protective order, pursuant to CPLR § 3103 (a), preventing Defendant Wesley Wang (“Wang”) from compelling the discovery of alleged privileged documents and communications possessed by non-party, Sandler O’Neill & Partners (“Sandler”).

BACKGROUND

In September 2006, IDX retained Sandler, an investment bank, for the purpose of assisting IDX in negotiations with Knight Capital Group (“Knight”) about a possible business combination between the two companies (the “Knight Transaction”). Pursuant to a letter agreement between IDX and Sandler (the “Letter Agreement”), Sandler was to: (1) assist IDX “in analyzing, structuring, negotiating and effecting a Business Combination with Knight” (Cawley Aff., ¶ 4 and Ex. A); and (2) make all reasonable attempts to keep information

confidential (Cawley Aff., Ex. A). The Letter Agreement stipulated that Sandler would not provide any legal advice concerning the Knight Transaction (*id.*). In November 2006, IDX retained outside counsel, Golenbock Eiseman Assor Bell & Peskoe LLP (“Golenbock”), to provide IDX with legal advice concerning the Knight Transaction (Pl. Memo in Support at 2).

IDX’s CEO, James Cawley (“Cawley”) shared attorney-client communications with Sandler, and copied Sandler on all e-mails to Golenbock (collectively, the “Golenbock Correspondences”) (*id.*). Cawley believed it was necessary to share these communications so Sandler could more effectively negotiate the Knight Transaction (Cawley Aff., ¶ 10).

In April 2008, Wang subpoenaed Sandler seeking the Golenbock Correspondences. However, IDX refused claiming attorney-client privilege and attorney work product¹ on two grounds: (1) Sandler is an agent of IDX; and (2) the communications and documents disclosed to Sandler were predominantly legal in nature.² Wang argues that any privilege was waived because: (1) the confidential information disclosed to Sandler was not used in furtherance of attorney-client communications; (2) the Golenbock Correspondences were primarily for a business purpose; and (3) the privilege logs failed to adequately describe the necessity of the claimed privilege for certain withheld documents. Neither party disputes that the communications sought are relevant to the underlying matter.

DISCUSSION

The attorney-client privilege protects “confidential communications made between the attorney . . . and the client in the course of professional employment” (CPLR 4503 [a]). The attorney-client privilege “enables one seeking legal advice to communicate with counsel . . .

¹ However, in this instant motion, IDX raises arguments which seek protection only under its claim of attorney-client privilege.

² IDX did produce redacted versions of the subpoenaed Golenbock Correspondences.

secure in the knowledge that the contents [*sic*] of the exchange will not later be revealed against the client's wishes" (*People v Osario*, 75 NY2d 80, 84 [1989]). The party asserting privilege has the burden of proving the necessity of it, in light of the strong public policy considerations in favor of disclosure (*Rossi v Blue Cross & Blue Shield*, 73 NY2d 588, 592 [1989]).

The attorney-client privilege may be asserted when the character of the services or advice provided is predominantly legal in nature (*Spectrum Sys. Intl. Corp. v Chem. Bank*, 78 NY2d 371, 378-380 [1991]; *see also Steinovich v Wachtell, Lipton, Rosen & Katz*, 195 Misc 2d 99, 106 [NY Sup Ct 2003] ["The fact that business advice is sought or even given does not automatically waive privilege, where the advice given is predominantly legal, as opposed to business, in nature."]). "The critical inquiry is whether, viewing the lawyer's communication in its full content and context, it was made in order to render legal advice or services to the client" (*id.* at 379).

Although it is generally accepted that disclosures of attorney-client communications to third parties will constitute a waiver of the attorney-client privilege (*Osario*, 75 NY2d at 84), disclosures to a third party may nonetheless be protected if the privileged information is shared with a client's or her attorney's agent (*People v. Mitchell*, 58 NY2d 368, 373 [1983]; *Steinovich*, 195 Misc 2d at 110 ["communications made to counsel by one serving as an agent of [the] client to facilitate communications, will be privileged"]). There is a two-prong test that must be satisfied in order for a third party to qualify for the agency exception. Both prongs must be satisfied if the party is to successfully assert attorney-client privilege when a disclosure is made to a third party (*Natl. Educ. Training Group, Inc. v Skillsoft Corp.*, M8-85 (WHP), 1999 US Dist LEXIS 8680 at *12 [SD NY June 19, 1999]).

The first prong is “whether the client had an expectation of confidentiality” in disclosing the purportedly privileged information to a third party (*Steinovich*, 195 Misc 2d at 110). The second prong is whether disclosure to a third party was necessary for the client to obtain informed legal advice (*Stroh v Gen. Motors Corp.*, 213 AD2d 267, 268 [1st Dept 1995]; *see also Doe v Poe*, 244 AD2d 450, 451 [2d Dept 1997] [no attorney-client privilege because third party’s presence was not necessary to facilitate communication between bank CEO and bank attorneys], *affd* 92 NY2d 864 [1998]).

The standard by which New York courts evaluate the first prong is not based on the formal employment arrangement—*i.e.*, whether there was an exclusive agency agreement—but rather on the circumstances surrounding the case (*Steinovich*, 195 Misc 2d at 110). In order to satisfy the second prong, the party asserting privilege must show that the third party’s presence was “more than just useful and convenient,” and that the third party’s involvement was “nearly indispensable or serve[d] some specialized purpose in facilitating attorney-client communications” (*Natl. Educ. Training Group*, 1999 US Dist LEXIS 8680 at *12 [applying New York law]).

Expectation of Confidentiality

This Court finds that IDX intended to keep confidential the information shared between Golenbock and Sandler. Sandler, in the Letter Agreement, “agree[d] to use all reasonable efforts to keep confidential information confidential” (Cawley Aff., Ex. A). In addition, Cawley stated that he had “no reason to believe that Sandler disclosed the Golenbock Correspondence to Knight or any other person” (Cawley Aff., ¶ 12).

Wang argues that Cawley’s statement was disingenuous because “Cawley [was] well aware that the substance of those communications was conveyed by Sandler to Knight . . .”

(Wang's Memo in Opp. at 7). However, it appears that IDX expected Sandler to negotiate the transaction without detailing the nature of any legal advice given to IDX. Furthermore, there is no indication that the Knight Transaction involved the complete and open exchange of all information possessed by either Knight or IDX, such that Golenbock's legal advice would have been shared.

Necessity of Disclosures to Third Party, Sandler

This Court finds that IDX's disclosures to Sandler were not necessary for the furtherance of attorney-client communication. IDX admits that it hired Sandler to assist in the Knight Transaction prior to hiring Golenbock to advise IDX of the potential legal ramifications. This fact alone militates against finding that Sandler was a necessary medium to assist in the attorney-client communication because it creates the impression that Sandler's primary function—i.e., its “specialized purpose”—was to effectuate the Knight Transaction (*see Doe*, 244 AD2d 450, *aff'd* 92 NY2d 864; *Allied Irish Banks, P.L.C. v Bank of Am.*, 240 FRD 96, 104-105 [SD NY 2007] [finding waiver of attorney-client privilege because third party-investigator's presence was not necessary for the rendering of legal advice]).

Sandler was more than a mere interpreter used by Golenbock to aid its ability to communicate with IDX (*see Osario*, 75 NY2d at 84 [interpreters are covered under the attorney-client privilege]; *see also Stroh*, 213 AD2d 267 [attorney-client privilege maintained when daughter of elderly client was used to help client recall memory]). Sandler was not used primarily for the purpose of explaining terms and aspects of the deal to further Golenbock's ability to give legal advice (*see Export-Import Bank of the U.S. v Asia Pulp & Paper Co.*, 232 FRD 103, 113 [SD NY 2005] [communications between counsel and client's financial advisor are not privileged when the financial advisor does more than primarily assist counsel's

comprehension of the facts]). Sandler was primarily used to facilitate the business end of the Knight Transaction, and not to help IDX's outside counsel form a legal opinion.

IDX cites to a recent Fourth Department case, *First American Commercial Bancorp, Inc. v Saatchi & Saatchi Rowland, Inc.*, 56 AD3d 1137 (4th Dept 2008), in which the facts are analogous to the case at bar, to demonstrate that the attorney-client privilege was not waived by IDX. In *First American*, defendants shared attorney-client communications with a third party investment bank. The court held that attorney-client privilege was not waived since the investment bank was an agent of the defendant, and the primary purpose of the communication exchange was to enable defendant to obtain legal advice (*id.* at 1138-1139).

However, *First American* seems to be an outlier with respect to established precedent within this Department and the Court of Appeals. *First American* did not undertake the two-prong analysis required under the agency exception (*see Doe*, 244 AD2d 450, *aff'd* 92 NY2d 864; *Stroh*, 213 AD2d 267). Rather, in conclusory fashion it stated that because there was an exclusive agency agreement, the agency exception was satisfied (*First American*, 56 AD3d at 1339). Thus, this Court finds *First American* inapposite.

Lastly, this Court need neither address the substance of IDX's claims with respect to the substantial legal nature of the Goldenbock Correspondences, nor Wang's claims about the defects in IDX's privilege log. Even conceding that the communications between IDX, Golenbock, and Sandler were of a substantially legal nature, no such privilege can be asserted once the information is disseminated to a third party that does not qualify under the agency exception (*Steinovich*, 195 Misc 2d at 108 [selective disclosure of legal advice to third parties generally vitiates attorney-client privilege]). Wang's claims about the defects in the privilege log are also moot by virtue of the discussion above.

CONCLUSION


Because IDX did not satisfy both prongs of the agency exception, this Court denies its motion for protective order.

Accordingly, it is hereby:

ORDERED, that Plaintiff's motion for protective order is denied.

Date: July 30, 2009

Enter:


JUSTICE RICHARD B. LOWE, III

J.S.C.

FILED
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