

**Jaysons Holding Co. v White House Owners Corp.**

2010 NY Slip Op 30619(U)

March 17, 2010

Suprme Court, Nassau County

Docket Number: 18188/09

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice

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JAYSONS HOLDING COMPANY,

Plaintiff,

-against-

WHITE HOUSE OWNERS CORPORATION,  
MICHAEL SCHNEIDER, individually, and as  
a MEMBER OF THE BOARD OF DIRECTORS  
OF WHITE HOUSE OWNERS CORPORATION,  
PRECISION ASSET MANAGEMENT, and THE  
BOARD OF DIRECTORS OF WHITE HOUSE  
OWNERS CORPORATION, COMPRISED OF  
MICHAEL SCHNEIDER, LAURA METZ,  
ROSE FEINGOLD, DEBORAH STEINHORN,  
HILLARY STORCH, JEAN BOBICK and  
LEAH LUCKMAN,

Defendants.

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The following papers read on this motion:

Notice of Motion..... X  
Affirmation in Opposition..... X  
Reply Affirmation..... XX

This motion, by defendants, for a Protective Order pursuant to CPLR §3101(a),

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restricting plaintiff from obtaining disclosure of material protected by the attorney-client privilege, and such other and further relief as to this Court may seem just and proper, is determined as hereinafter set forth.

**FACTS**

The plaintiff, Jaysons Holding Company, is a New York Partnership and the Sponsor of a two story cooperative apartment located at 547-557 Central Avenue, Cedarhurst, New York. On January 14, 1986, the plaintiff transferred title of the building to the White House Owner Corporation in accordance with a cooperative conversion. At the time of the transfer, the building was comprised of 77 residential units and 3 commercial units and out of the totality thereof, the plaintiff retained 53 units. Since the time of the transfer, the plaintiff has sold 39 of the units and owns and sublets the 14 which remain.

Approximately two years ago, the plaintiff elected to market two of the units and recently entered into contracts of sale with respect to units 31A (the proposed sale thereof will be governed by the terms as are recited in the Stipulation executed on October 21, 2009, by and between counsel for Jaysons Holding Company and White House Owners Corporation) and 39B. The plaintiff posits that the Board of Directors of the White House Owners Corporation (hereinafter "WHOC"), through its President and named defendant, Michael Schnieder, has refused to issue new shares or consider any transfer of same in connection with the sale of the subject units, without the purchasers first obtaining approval of the Board. Such prior approval allegedly consists of requiring prospective renters and purchasers to provide financial documentation and to undergo an interview with the Board of Directors. The plaintiff alleges that the actions of the Board of Directors are illegal and in contravention of the documents governing the relationship between itself and the cooperative, and accordingly, the within application seeking injunctive and declaratory relief ensued.

The plaintiff served interrogatories upon the defendants requesting information concerning communications between the defendant, its Board of Directors and WHOC's legal counsel. The defendant objected to this disclosure and was directed by this Court to make application for a protective order by motion.

**DEFENDANT'S CONTENTIONS**

The defendants contend that a Protective Order should be granted to prevent the plaintiff from compelling disclosure of privileged communications between WHOC, its Board of Directors and their legal counsel, and that such communications requested by the plaintiff are protected by the attorney-client privilege. They assert that the plaintiff's demand to compel disclosure of electronic mail communications made between the defendant, its officers and its legal counsel should be denied as improper.

The defendants' attorney further asserts that much of the legal advice and legal services that the defendant's counsel has rendered to WHOC and its Board of Directors were in the form of E-mail communications. He argues that nothing contained within the Counterclaim, or the legal or factual issues underlying these counterclaims amounts to a waiver by WHOC of its attorney-client privilege. Additionally, they assert that it would be absurd to compel White House to forfeit its attorney-client privileges based solely on the fact that it has asserted Counterclaims for a prior invasion of this privilege.

**PLAINTIFF'S CONTENTIONS**

The plaintiff contends that the defendants' application for a Protective Order should be denied on both procedural and substantive grounds; and that the motion indicates clearly that the items requested in the interrogatories should have been responded to in their entirety, and that the plaintiff is entitled to the disclosure as requested in that document.

From a procedural standpoint, the Discovery Request was not attached to the application requesting a Protective Order regarding the plaintiff's first set of interrogatories; and the defendant also failed to specify each and every request that they are seeking a Protective Order against by indicating each actual request number individually.

Additionally, the plaintiff argues that the defendants failed to follow the directions from this Court at the time of the initial Oral Application, to provide any and all E-mails to the Court for an "in camera" viewing, when filing their application. The Court also directed that, if desired, the defendant may put the documents in a separate, sealed envelope for the Court's review in order to preserve their confidentiality.

They argue that the defendant waived their attorney-client privilege by not only publishing the information to other members of the general public, but also publishing directly to the plaintiff's legal counsel via E-mail, the very same information that they now claim to be privileged. Additionally, the defendants' filing of a counterclaim in itself would amount to an affirmative action, putting this privileged information at issue. It is for these actions, the plaintiff contends that the defendant's attorney-client privilege should be waived.

### DECISION

With respect to the plaintiff's assertion that the defendant has effectively waived the attorney-client privilege asserted herein, the Court has examined the parties' pleadings, especially the defendant WHOC's counterclaims. The counterclaims assert, seriatim; a cause of action for attorney's fees pursuant to the Proprietary Lease; a cause of action against the plaintiff's agent, Jay Simens, an attorney, alleging improper communications with WHOC, through its Board and officers and ". . . published confidential communications between a former officer and Board Member of defendant WHOC and its attorneys [that are] subject to the attorney-client privilege"; and seeks damages as a result of Simens' purported violation of WHOC's privacy rights and breach of attorney-client privilege.

According to the record on submission herein, these counterclaims all arise out of e-mails sent directly to Mr. Simens, as the agent for the plaintiff. It is apparent that these communications directly relate, and in fact are, the bases of the WHOC counterclaims. CPLR 4503 provides that an attorney-client privilege attaches to communications between the attorney and the client; and an exception to that rule is when a waiver is effected by the publication to a third-party outside the umbrella of that privilege, especially where that third party is the adversary (see Bluebird Partners, L.P. v First Fidelity Bank, N.A., 248 AD2d 671 NYS2d 7, 1<sup>st</sup> Dept., 1998). Herein, that adversarial relationship was established prior to the commencement of this action because the very issue that forms the foundation of this action, i.e., that the renters or future owners of units owned by the plaintiff were not subject to an interview or submission of financial data was an issue prior to litigation. Moreover, a portion of those e-mails form the very basis of the counterclaims. It has been held that where the record establishes a substantial need for the adverse party (herein the plaintiff) ". . .to have access to materials which may allow it to contest. . .claims [against it]" (Goldberg v Hirschberg, 10 Misc3d 292,

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quoting from Bolton v Weil Gotshal & Manges LLP, 4 Misc3d 1029A, 798 NYS2d 343, N.Y. County, 2004). Nor is this a situation where the disclosure was inadvertent (see, AFA Protective Systems, Inc. v City of New York, 13 AD3d 564, 788 NY2d 128, 2<sup>nd</sup> Dept., 2004). This Court determines that a waiver of the privilege has been waived.

Moreover, this Court, in the application made in open court on January 14, 2010, directed the production of all the e-mails that the defendants seek to withhold from the plaintiffs in this motion.

“THE COURT: But I want all the materials necessary for me to completely deal with the matter. I will accept it in a form that you feel preserves the confidentiality of your clients or your position or whatever it is that you need to preserve. But I need all of the information necessary to decide the matter”.

Those documents have not been supplied to this Court. Such deficit also dictates a denial of the application. The defendant WHOC is directed to fully respond to the plaintiff's Interrogatories, and to include the attendant documents required therein, within 20 days after service of a copy of this order upon defendants' counsel and the counterclaiming defendant's attorney.

Dated 17 March '10

  
J.S.C.

**ENTERED**

**MAR 19 2010**

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**