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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 62

MARCUS SCHUMACHER, Plaintiff, -against- ANTIQUORUM USA, INC., EVAN ZIMMERMANN, CITY OF NEW YORK, PAUL WARE JR., and WILLIAM C. CLIFFORD, Defendants.	:	Decision and Order Index No. 103586-2008 Motion Seq. 001

Hon. Geoffrey Wright, J.S.C.

This action arises from an August 2007 incident where, according to the complaint, plaintiff Marcus Schumacher (Schumacher) was assaulted by security guards, defendants William C. Clifford (Clifford) and Paul Ware Jr. (Ware), who used allegedly excessive force to prevent him from entering the offices of Antiquorum USA, Inc. (AUSA) in New York City. Schumacher is a resident of Switzerland and, in May 2007, he became the Chief Operating Officer (COO) of Antiquorum S.A. (ASA), a Geneva-based auction house. On March 11, 2008, Schumacher commenced this litigation, claiming ten causes of action, including assault and battery, false arrest and imprisonment, negligent hiring, retention and supervision, vicarious liability, and intentional infliction of emotional distress. He seeks damages from the defendants for both

emotional and physical injuries, as well as punitive damages.

Schumacher has moved, by order to show cause, dated May 3, 2011, for an order compelling the production of e-mail communications responsive to two subpoena duces tecum served upon the nonparty law firm of Lowey Dannenberg Cohen and Hart (a/k/a Lowey Bemporal Selinger & Cohen, P.C.)(now known as Lowey Dannenberg Cohen & Hart, P.C.) (Lowey) and Richard Cohen, Esq. (Cohen), a partner at Lowey and counsel for defendant Evan Zimmermann (Zimmermann), AUSA's managing director and New York counsel. The first subpoena duces tecum, dated September 29, 2009, and the supplemental subpoena duces tecum, dated November 4, 2009, were served by Schumacher upon Cohen. Schumacher argues that Cohen played an integral role in the events leading to his assault and later arrest. He alleges that Cohen was instrumental in hiring the two security guards involved in the incident; that he provided instructions to them; and that he was involved in the payment of services.

Defendants Zimmermann and AUSA cross-move to quash the two subpoenas on the ground that the information sought is not necessary in the prosecution of this case. They also object on the basis that Schumacher seeks information protected by both attorney-client and work-product privilege.

Background

The present action is an offshoot of a larger dispute

concerning the ownership and control of two related corporate entities. Defendant AUSA, a domestic business corporation incorporated and licensed to do business in New York, was a subsidiary of ASA, and, along with its parent company, was in the business of buying, auctioning, importing and exporting antique time pieces. Osvaldo Patrizzi (Patrizzi) opened ASA in 1974, and subsequently became its Board of Directors' Chair, sole member of the Board, and Chief Executive Officer. Artist House is a publicly traded Japanese company that paid $30 million for a 50% equity stake in ASA and each company in the Antiquorum family of companies in January 2006.

At a June 15, 2007 shareholders' meeting, shareholders voted to expand the Board of Directors of AUSA by creating eight new positions on the board. That same day, a board meeting took place, during which board members presented a plan to name Zimmermann, Schumacher and an Artist House executive to leadership positions to help oversee the company's financials. Patrizzi was to be named Co-President. Patrizzi, upset with the plan, allegedly left the meeting room and refused to vote. Zimmermann used his vote to give Artist House a majority. On July 6, 2007, Patrizzi attempted to dismiss Zimmermann. However, Zimmermann refused to leave the New York office. After weeks of rising tension, the board suspended Patrizzi at an August 2, 2007 meeting in Geneva. Patrizzi was officially fired by the board of

directors in late August 2007. He has brought suit challenging the June 2007 shareholder and board votes in Switzerland.

The lawsuit to which the subpoenas relate seeks to recover damages for injuries that Schumacher allegedly suffered on August 2, 2007, when he was removed from the offices of AUSA by Clifford and Ware. Cohen allegedly introduced Clifford to Zimmermann at a meeting in the Four Seasons Hotel. Beginning on July 17, 2007, Schumacher was reporting to work at the offices of AUSA. Schumacher alleges that, as he attempted to enter the AUSA office, Clifford and Ware physically pushed him out of the office and into the lobby. He further alleges that the two defendants were dressed in civilian attire and failed to identify themselves. Schumacher allegedly showed them a power of attorney from Patrizzi, authorizing him to work at the AUSA office. However, Schumacher claims that the security guards ignored the power of attorney. Schumacher then attempted to continue through the AUSA office doors. He was allegedly thrown to the floor by Clifford and Ware, and the New York Police Department (NYPD) was called. Schumacher was arrested by the NYPD and taken to the psychiatric ward at Bellevue Hospital for an evaluation. Schumacher was eventually discharged from Bellevue Hospital and all criminal charges against him were dropped. After August 23, 2007, Schumacher was no longer COO of ASA.

Zimmermann and AUSA contend that the Lowey firm was hired by

Zimmermann on or about June 17, 2007 pursuant to the terms of a written engagement letter. The letter, addressed to Zimmermann, states, in part:

> "This letter will confirm that you have retained this firm *to advise and represent you in connection with your rights and obligations as an officer and director of, and/or holder of equity rights in, the various Antiquorum entities*. You have informed us that you have been placed in the middle of disputes among Osvaldo Patrizzi and Artisthouse [Artist House] concerning direction and control of the operation of the Antiquorum entities. At meetings of the shareholders and board of Antiquorum S.A. on June 15, 2007 in New York City, certain actions were voted upon, and subsequently contested, which have brought these matters to a head, and led to conflicting instructions to you, which has necessitated your need for *independent* counsel." (Emphases added.)

Affidavit of Zimmermann, exhibit A. On June 28, 2007, a formal Letter of Retention was sent by Cohen to Zimmermann. AUSA paid a retainer of $50,000 to Lowey. Although a separate engagement letter was never drafted, these two defendants allege that, as the relationship developed, the representation expanded to include legal work for AUSA and ASA.

Compliance with the subpoena and supplemental subpoena, with return dates of October 29, 2009 and November 24, 2009, respectively, required the production of documents from Cohen, pursuant to specific requests contained in riders to the subpoenas, and by Cohen's appearance at Lane, Sash & Larabee, LLP, a law firm in White Plains, to provide deposition testimony. It is undisputed that Cohen has complied in part with the prior

subpoenas. In accordance with the demands of the subpoenas, on November 13, 2009, Cohen, through his attorney at Lowey, produced documents, Bates Stamped RC-ANTIQ-0001 through RC-ANTIQ-0416, some of which were redacted. On April 22, 2010, Cohen was deposed at the same office.

At this time, Schumacher contends that during discovery, and after the defendants' depositions, he became aware that Cohen played a large role in the events and actions surrounding the alleged assault and arrest. Schumacher is seeking access to e-mail communications between the Lowey firm and the AUSA defendants concerning the hiring of security guards to secure the AUSA premises on August 2, 2007. Specifically, Schumacher is seeking approximately 130 unredacted e-mails listed on a submitted privilege log, including e-mails Bates Stamped RC-ANTIQ: 0037-0039; 0086-0089; 0118; 0122; 0123; 0132-0133; 0136; 0144-0146; 0169; 0177; 0184-0186; 0193; 0196; 0208; 0213; 0217; 0221; 0225; 0257; 0261-0263; 0265-0266; 0269; 0272-0275; 0281-0282; 0286; 0291; 0307; 0317-0318, where the names of two Debevoise attorneys, Natalie Reid, Esq. and Jeremy Feigelson, Esq. or the name of the law firm might appear. The request also covers (1) e-mails listed in the privilege log with "Zimmermann," "Lowey firm," and "T. Garber" (Cohen's attorney) in the "Author," "Recipient" or "CC" column which concern the AUSA or ASA entities, or Zimmermann (acting in his AUSA corporate capacity)

for in camera review; (2) all e-mails listed in the privilege log for a determination of whether these e-mails, produced in redacted form, pursuant to service upon Cohen of the subpoenas, should be produced due to their business purpose; and (3) an unredacted retainer agreement between Lowey, by Cohen as partner, and Zimmermann as client, dated June 28, 2007. He also contends that any communications that the Artist House attorneys saw should be disclosed to him. Schumacher contends that these communications concern the relevant parties, were transmitted during the relevant time period, and bear directly on the critical events and actions leading up to, including and immediately after the incident on August 2, 2007.

In response, Zimmermann argues that Cohen served as counsel for AUSA and ASA in the summer of 2007, and that those documents are privileged. He also alternatively claims that the common interest privilege protects these same documents.

Discussion

A. Procedural Issue: Timeliness

Schumacher insists that the cross motion to quash at this stage of the litigation is untimely and cannot be entertained. He maintains that defendants are moving to quash a subpoena that Cohen complied with over a year ago. Because Cohen did not move promptly to quash the subpoena, Schumacher argues that Cohen waived his right to challenge the subpoena and the cross motion

must be dismissed. The court disagrees with Schumacher's position.

CPLR 2304 does not specify the time within which a motion to quash a subpoena has to be made. The statute only states: "A motion to quash, fix conditions or modify a subpoena shall be made promptly in the court in which the subpoena is returnable." In *Matter of Santangello v People* (38 NY2d 536, 539 [1976]), the New York Court of Appeals stated that a "motion to quash ... should be made prior to the return date." Once a subpoena has been complied with, a motion to quash is no longer available (*see Brunswick Hospital Center v Hynes*, 52 NY2d 333, 339 [1981]; *see also Matter of Gammarano v Gold*, 51 AD2d 1012 [2d Dept 1976]; *Cherfas v Wolf*, 20 Misc 3d 1118[A], 2008 NY Slip Op 51397[U] [Sup Ct, Kings County 2008] [nonparty witness from New Jersey who testified in New York action for two days was foreclosed from challenging validity of the subpoena). In *Brunswick*, the Court of Appeals explained its rationale:

> "Quite simply, having complied with the process, the subpoenaed party no longer possesses the option of challenging its validity or the jurisdiction of its issuer. Any other rule would open the door to never-ending challenges to the validity of subpoenas, perhaps even years after initial issuance and compliance. At some point, litigation must terminate."

(Brunswick Hospital Center v Hynes, 52 NY2d at 339).

Notwithstanding, the courts permit the filing of an untimely objection if the information sought fits within one of the

exceptions to the rule requiring promptly filed objections. One instance in which the courts will permit an untimely filing is when the documents sought are protected by privilege (*see Spancrete Northeast, Inc., v Elite Assoc. Inc.*, 148 AD2d 694, 695 [2d Dept 1989]). In the present case, both defendants contend that the information sought is privileged. Therefore, the motion to quash will not be dismissed by this court as untimely.

B. Scope and Materiality of Discovery Request

As an initial matter, parties may obtain discovery regarding any matter, not privileged, that is relevant, material and necessary to the claim or defense of any party (*see* CPLR 3101 [a] [directing that there shall be "full disclosure of all matter material and necessary in the prosecution or defense of an action"]; *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968] ["the test is one of usefulness and reason"]; *Abrams v Pecile*, 83 AD3d 527, 528 [1st Dept 2011] [method of discovery must be shown to result in the disclosure of relevant evidence or evidence reasonably calculated to lead to the discovery of information bearing on the claims]). As well, discovery from a nonparty can only be ordered when the party seeking it demonstrates that the disclosure sought is material and necessary (CPLR 3101 [a] [4]) and that the information is otherwise unavailable (*see Quevedo v Eichner*, 29 AD3d 554 [2d Dept 2006]).

Conversely, a motion to quash a subpoena duces tecum can be

granted when the documents sought are irrelevant to any proper inquiry (*see Velez v Hunts Point Multi-Service Ctr., Inc.*, 29 AD3d 104 [1st Dept 2006]; *New Hampshire Ins. Co. v Varda, Inc.*, 261 AD2d 135 [1st Dept 1999]; *Matter of Reuters Ltd. v Dow Jones Telerate*, 231 AD2d 337, 341 [1st Dept 1997]). The burden of establishing that the requested documents and records are irrelevant is on the person being subpoenaed (*Gertz v Richards*, 233 AD2d 366 [2d Dept 1996]).

Nevertheless, unrestricted or "unlimited disclosure is not required" (*Smith v Moore*, 31 AD3d 628 [2d Dept 2006]). Nor will "carte blanche demands ... be honored" (*European American Bank v Competition Motors, Ltd.*, 186 AD2d 784, 785 [2d Dept 1992] [internal quotation marks and citations omitted]), particularly where the demand at issue would attach "'undue attention to the collateral matter to the detriment of the main issue'" (*Blittner v Berg and Dorf*, 138 AD2d 439, 441 [2d Dept 1988] [internal citation omitted]), or where they are overly broad, unduly burdensome, or lacking in specificity (*see Merkos L'Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 408 [2d Dept 2009]).

The court agrees with defendants' assertions that all the e-mail communications sought are not relevant to this litigation. Zimmermann claims that only a small portion of the withheld materials relates to Schumacher. He notes that the e-mails relating to Schumacher fall into four groups. The first group

relates to discussions of Schumacher's pending arrival in New York on or about July 17, 2007. Those e-mails do not allegedly discuss the physical removal of Schumacher or the hiring of security personnel. The second group of e-mails concerns the discussions to bar him from the AUSA premises and the events of August 1, 2007. These e-mails begin on July 30, 2007. The third group of e-mails relates to the actual exclusion of Schumacher from the office on August 2, 2007. The fourth group of withheld documents relates to the aftermath of the exclusion of Schumacher. These e-mails begin on August 2, 2007 and run to August 22, 2007. He alleges that the remaining e-mails pertain to the general corporate dispute that is the subject matter of litigation in Switzerland, and do not relate to Schumacher at all.

Putting aside the question of whether privilege attaches to any of these requested materials, the court agrees that the majority of the requested materials are remote and that Schumacher has failed to demonstrate their materiality and relevance. The court finds that the request for the Debevoise-related materials in particular are conclusory, and fail to demonstrate precisely how and why the "discovery sought will result in the disclosure of relevant evidence" (*Beckles v Kingsbrook Jewish Medical Center*, 36 AD3d 733, 733 [2d Dept 2007] [internal quotation marks and citations omitted]).

The court further finds that discovery will be limited to the time period covering July 30, 2007 through August 2, 2007. The details of the communications between Zimmermann and Cohen prior to the hiring of Clifford and those after the August 2 incident are beyond the scope of what is discoverable as the critical issue in this litigation is whether several torts were committed against Schumacher. Only those 26 e-mails that relate to the barring of Schumacher from the AUSA premises, and the hiring and supervision of Clifford are relevant. The remainder of the e-mails have nothing to do with Schumacher, his being kept out of the office, and his being removed from the office. They relate, in broad terms, to the corporate dispute between Patrizzi and ASA, AUSA, Artist House and Zimmermann. Accordingly, only the second and third group of e-mails, as delineated by Zimmermann, will be considered by the court as potentially relevant and discoverable.

C. Work Product Privilege

Three conditions must be met to earn work product protection: (1) the material must be a document, other written communication or a tangible thing; (2) that was prepared in anticipation of litigation; and (3) that was prepared by or for a party by an attorney, acting as an attorney, or his representative (*see Spectrum Systems Intl. Corp. v Chemical Bank*, 157 AD2d 444 [1st Dept 1990]). The work product exemption

protects an attorney's mental processes, conclusions, and legal theories from discovery by another party, thereby providing a privileged area where the attorney can analyze and prepare the case. Additionally, the work product exemption extends both to documents actually created by the attorney and memoranda, reports, notes, or summaries of interviews prepared by other individuals for the attorney's use.

To be shielded by this privilege, it must be shown that the relevant e-mails are "uniquely the products of a lawyer's learning and professional skills" (*Aetna Casualty and Surety Co. v Certain Underwriters at Lloyd's*, 263 AD2d 367, 368 [1st Dept 1999] [internal quotation marks and citation omitted]). Further, CPLR 3101 (d) (2) provides that materials prepared in anticipation of litigation are immune from disclosure unless the party seeking disclosure "has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means" (*see also Corcoran v Peat, Marwick, Mitchell and Co.*, 151 AD2d 443, 445 [1st Dept 1989]).

The dispute in this case centers on whether the communications were prepared in anticipation of litigation. In order to meet the test for materials prepared in anticipation of litigation, the document must have been prepared primarily, if not solely, for litigation (*see Spectrum Systems Intl. Corp. v*

Chemical Bank, 78 NY2d at 378; *Agovino v Taco Bell 5083*, 225 AD2d 569 [2d Dept 1996]). Work product protection is not available for documents that are prepared in the ordinary course of business or that were created irrespective of litigation (*see Westhampton Adult Home, Inc. v National Union Fire Ins. Co. Of Pittsburgh, Pa.*, 105 AD2d 627 [1st Dept 1984]). The focus, then, is whether under the totality of the circumstances surrounding the communications, it can fairly be said that the communications were created with an eye toward advancing Zimmermann's interest in the litigation process.

The court has no doubt that as soon as the board governance dispute arose, Zimmermann believed that litigation might result. The question, however, is whether the relevant e-mails would have been prepared in essentially the same form irrespective of litigation. In this case, it is clear that the relevant e-mails were created to assist Zimmermann in the hiring of security guards, a non-legal service. Cohen's e-mails therefore depended, for the most part, on his expertise in matters of business practice, not on his knowledge of legal principles. These kinds of communication, prepared in the ordinary course of a business inquiry, are not entitled to protection. Because the e-mails were something that a layperson could have done, the material is not privileged. More importantly, the relevant e-mails contain no legal reasoning, strategy or analysis and therefore were not

created because of the prospect of litigation. Since defendants have failed to carry their burden, the court concludes that the relevant e-mails are not exempt from discovery under the work product privilege.

D. Attorney-Client Privilege

In New York, the attorney-client privilege protects "confidential communication[s] made between the attorney or his or her employee and the client in the course of professional employment" (CPLR 4503 [a] [1]; *see also Matter of Grand Jury Subpoena (Bekins Record Storage Co., Inc.)*, 62 NY2d 324, 329 [1984]; *Priest v Hennessy*, 51 NY2d 62 [1980]). Unlike the work product privilege, the attorney-client privilege provides protection to any matters for which a client seeks legal advice or services (*see Bacon v Frisbe*, 80 NY 394 [1880]). The privilege, however, does not cover communications relating solely to nonlegal business matters (*see People v Belge*, 59 AD2d 307 [4th Dept 1977]).

Lawyers may sometimes infuse their legal advice with business and other considerations, and clients may not be able to distinguish legal from business problems. Determining whether the requested communication is legal or nonlegal in nature is largely fact-specific (*see e.g. Matter of Stenovich v Wachtell, Lipton, Rosen & Katz*, 195 Misc 2d 99 [Sup Ct, NY County 2003]). In *Rossi v Blue Cross & Blue Shield of Greater New York* (73 NY2d

588, 594 [1989]), the Court of Appeals resolved the problem of mixed communications by applying privilege when the legal character of the communication is "predominant."

It also is well settled that disclosure of an attorney-client communication to a third party or communications with an attorney in the presence of a third party, not an agent or an employee of counsel, vitiates the confidentiality required for asserting the privilege (*see Doe v Poe*, 92 NY2d 864 [1998]). As well, pursuant to CPLR 4503 (a), a client may expressly or impliedly waive the attorney-client privilege. Since there is no express waiver in this case, the court must look to the communications to determine if there was an implied waiver of the attorney-client privilege by Zimmermann. The crucial questions in assessing whether waiver of the privilege occurred are, whether the client intended to retain the confidentiality of the privileged materials and whether he took reasonable precautions to prevent disclosure (*see New York Times Newspaper Div. of New York Times, Inc. v Lehrer McGovern Bovis, Inc.*, 300 AD2d 169, 172 [1st Dept 2002]).

The common interest doctrine operates to protect information disclosed to other parties, expanding coverage of the attorney-client privilege to include situations in which two or more clients with a common interest in a matter agree to exchange information regarding the matter.

> "Before a communication can be protected under the common interest rule, the communication must satisfy the requirements of the attorney-client privilege; that is, the communication must have been made for the purpose of facilitating the rendition of legal advice or services in the course of a professional relationship and have been primarily or predominantly of a *legal* rather than a *commercial* nature."

(*U.S. Bank National Association v APP International Finance Company*, 33 AD3d 430, 431 [1st Dept 2006], citing *Gulf Islands Leasing, Inc. v Bombardier Capital, Inc.*, 215 FRD 466, 470-471 [SD NY 2003] [emphasis in original]).

"There must be a substantial showing by parties attempting to invoke the protections of the privilege of the 'need for a common defense [as opposed to the mere existence of a] common problem.'" (*Brooklyn Navy Yard Cogeneration Partners, L.P. v PMNC*, 194 Misc 2d 331, 334 [Sup Ct, Kings County 2002], quoting *Medcom Holding Co. v Baxter Travenol Laboratories*, 689 F Supp 841, 845 [ND Ill 1988]). Under those circumstances, parties may freely share otherwise privileged communications without waiving the privilege. Each client and each attorney become part of the protected attorney-client "unit," so that parties may pool their information in order to facilitate effective representation.

Applying these principles to these facts, there has been no waiver of the attorney-client privilege in this case. The court therefore rejects Schumacher's argument that the common interest privilege fails to shield Zimmermann's communications with Cohen.

As to the documents at issue, the court finds that it does

not have enough information to determine whether the 26 relevant documents are protected by the attorney-client privilege. In this case, the court recognizes that there is an issue of fact concerning the privileged nature of some of the relevant documents. "[W]hether a particular document is or is not protected [by the attorney-client privilege] is necessarily a fact-specific determination, most often requiring in camera review" (*Spectrum Systems Intl. Corp. v Chemical Bank*, 78 NY2d at 378 [internal citation omitted]). The privilege log provides an insufficient basis for determining whether the e-mails are indeed protected from disclosure. Thus, an in camera review of those relevant documents is the appropriate procedural vehicle to ensure that the attorney-client privilege is not violated, while permitting Schumacher to obtain the discovery necessary to support his claims (*see Carcana v New York City Hous. Auth.*, 47 AD3d 523 [1st Dept 2008]).

Conclusion

Based on the above, it is hereby

ORDERED that to the extent that the two defendants seek denial of the motion to compel on the grounds that all of the e-mail communications are exempt under the attorney-client privilege and the attorney work product privilege, the motion is denied, and the cross motion is granted, to the extent that it seeks an in camera review; and it is further

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

ORDERED that the court will conduct an in camera inspection and determination of the 26 relevant e-mail communications listed on defendants' privilege log that focus primarily on the events leading to the August 2, 2007 incident that are allegedly protected under the attorney-client privilege; and it is further

ORDERED that the Cohen and Lowey defendants are directed to submit unredacted copies of said e-mail communications listed in the privilege log to the court within 10 days of service upon them of a copy of this Order with notice of entry; and it is further

ORDERED that the parties are to appear before the court for a status conference on January 26, 2012 at 9:30 A.M.

Dated: November 17, 2011

ENTER:

GEOFFREY D. WRIGHT
AJSC

Geoffrey D. Wright, J.S.C.