

HYMF, Inc. v Highland Capital Mgmt., L.P.

2012 NY Slip Op 33475(U)

April 3, 2012

Sup Ct, NY County

Docket Number: 601027/2009

Judge: Shirley Werner Kornreich

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

PRESENT: Kornreich
Justice

PART 54

HYM F, Inc & Parolay

INDEX NO.

601027/09

MOTION DATE

- v -

MOTION SEQ. NO.

007

Highland Capital et al

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...

Answering Affidavits - Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

70, 71, 72, 79, 80, 81, 82, 84, 85

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is denied in accordance with the annexed decision/order.

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

Dated: 4/3/12

[Signature]
JUSTICE SHIRLEY WERNER KORNREICH
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
HYMF, INC., and BARCLAYS BANK PLC,

Plaintiffs,

-against-

**DECISION
& ORDER**

Index No.: 601027/2009

HIGHLAND CAPITAL MANAGEMENT, L.P.,
HIGHLAND SELECT EQUITY FUND, L.P.,
HIGHLAND CREDIT STRATEGIES FUND, L.P.,
HIGHLAND CREDIT OPPORTUNITIES CDO, L.P.,
HIGHLAND CRUSADER FUND, L.P.,
HIGHLAND CDO OPPORTUNITY FUND, L.P.,
HIGHLAND CDO OPPORTUNITY FUND, LTD.,
HIGHLAND EQUITY FOCUS FUND, L.P., and
HIGHLAND CAPITAL REAL ESTATE FUND
2002-A, L.P.,

Defendants.

-----X
SHIRLEY WERNER KORNREICH, J.

Plaintiffs move (Mot Seq 007) to compel production of documents that defendants withheld on the ground of attorney/client or work product privilege.¹ Defendants' specific objections to production based upon privilege are contained in defendants' privilege log, which was served on August 25, 2010. Affidavit of Joseph B. Schmit, dated December 22, 2010, Doc 71, Ex 3. The attorneys named in the documents rendered their legal services in Texas.

There are three categories of documents in dispute: 1) communications with JP Morgan Hedge Fund Services (JP Morgan), a third-party administrator for the Funds; 2) communications

¹The facts relating to this action are set forth in detail in this court's decision on Motion Sequence 008, on the parties' summary judgment motions. The readers' familiarity with that decision is assumed and the facts will not be repeated here. Capitalized terms in this decision have the same meaning as in the prior decision.

with Credit Suisse, described by defendants as their “syndication agent”;² and 3) communications with Charles Rice, an accountant employed by Highland.³ Letter of Ross Mortillaro, dated January 25, 2011.

The Texas attorney/client privilege is embodied in a statute and provides as follows:

Lawyer-Client Privilege

(a) Definitions. --As used in this rule:

(1) A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from that lawyer.

(2) A "representative of the client" is:

(A) a person having authority to obtain professional legal services, or to act on advice thereby rendered, on behalf of the client, or

(B) any other person who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client.

(3) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation.

(4) A "representative of the lawyer" is:

(A) one employed by the lawyer to assist the lawyer in the rendition of professional legal services; or

²Affidavit of Isaac Leventon, sworn to on January 7, 2011 (Leventon Aff).

³A fourth category, communications with investors, was ruled on upon by the court. Tr. 1/19/11.

(B) an accountant who is reasonably necessary for the lawyer's rendition of professional legal services.

(5) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(b) Rules of Privilege.

(1) General Rule of Privilege. --A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

Texas Rule of Evidence 503.⁴ As in New York, the party asserting the attorney/client privilege has the burden of establishing it. *Texas Dept of Mental Health & Mental Retardation v Davis*, 775 SW2d 467 (Ct of App, 3d Distr Austin 1989). The application of the privilege must be narrowly construed because it tends to prevent full disclosure of the truth. *Id.* The privilege

⁴Plaintiffs contended that New York attorney/client privilege was identical to the Texas statute. However, the court is applying Texas law because New York does not have the same definition of "representative."

protects only to confidential communications for the purpose of obtaining legal advice. *Id.* The privilege is lost where the communication is shared with persons other than those whose participation is needed in order to facilitate the rendition of legal services. *Id.*

Texas work product also is codified by statute:

(a) Work Product Defined. --Work product comprises:

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents;
or

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents.

(b) Protection of Work Product.

(1) Protection of Core Work Product--Attorney Mental Processes. --Core work product - the work product of an attorney or an attorney's representative that contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories - is not discoverable.

(2) Protection of Other Work Product. --Any other work product is discoverable only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the material by other means.

(3) Incidental Disclosure of Attorney Mental Processes. --It is not a violation of subparagraph (1) if disclosure ordered pursuant to subparagraph (2) incidentally discloses by inference attorney mental processes otherwise protected under subparagraph (1).

(4) Limiting Disclosure of Mental Processes. --If a court orders discovery of work product pursuant to subparagraph (2), the court must - insofar as possible - protect against disclosure of the mental impressions, opinions, conclusions, or legal theories not otherwise discoverable.

Texas Rule of Civil Procedure 192.5. The statute defines work product as a privilege. *Id.*

Here, with respect to JP Morgan, the court finds that to the extent that it was copied on documents seeking or giving legal advice, it was a “representative” within the meaning of Texas Rule of Evidence 503. After *in camera* review, the court finds that it was anticipated that JP Morgan would act on the advice of defendants’ counsel with respect to some of the redacted material. However, much of the redacted material in the JP Morgan documents for which defendants asserted the attorney/client privilege is not legal advice and/or does not seek legal advice. Thus, it must be disclosed. With respect to work product, the affidavit submitted by defendants’ counsel merely states in conclusory fashion that the JP Morgan redacted material was prepared in connection with or in anticipation of litigation. The documents themselves do not support that claim. Leventon Aff. Hence, defendants’ work product objections to production of the JP Morgan documents are overruled.

The Credit Suisse document objections on the ground of attorney/client privilege are overruled, except for the redactions that are confidential communications among defendants’ counsel. The Leventon Aff states that Credit Suisse was defendants’ syndication agent. Beyond that, there is no factual support for the claim that Credit Suisse was needed to facilitate the rendition of legal advice. Thus, copying Credit Suisse on the e-mail, destroyed confidentiality. The two Credit Suisse documents allegedly protected by work product do not appear to relate to anticipated or pending litigation. Mr. Leventon fails to explain why Credit Suisse was involved in preparing for litigation. Consequently, defendants did not establish work product protection for the Credit Suisse redactions.

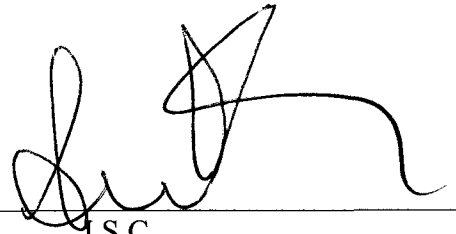
The objections to the Charles Rice documents on the ground of attorney/client privilege and work product are overruled, except for a few redactions reflected on the attached schedule.

Except for the permitted redactions, the communications do not involve legal advice or were not communications with an attorney.⁵ They are communications about business, not legal issues. The one document claimed to be work product (1441), does not appear to have been created in anticipation of or connection with litigation and Mr. Leventon fails to explain why work product is claimed on defendants' log. Accordingly, it is

ORDERED that within one week defendants shall disclose to plaintiffs the previously redacted material set forth on the attached schedule.

Dated: April 3, 2012

ENTER:



J.S.C.

⁵Initially, defendants thought that Charles Rice was an attorney, but he is an accountant.

Schedule of Documents to Disclose

A. JP Morgan Documents

1. No Legal Consultation:

a) all redactions in 587, 733, 1558, 1559, 2223, 3214, 1305, 1307-1313

b) disclose all of the redactions except the following:

I. 1199 11/13/2008 3:03 PM message before the word "attached"

ii. 1786, 1771 and 1960 1/15/09 email from Thomas Surgent, 1/14/09 & 1/6/09 emails from Helen Kim and 1/6/09 email from David DeSantis

iii. 1976 2/5/09 email from Stephanie Talbot 1/15/09 email from Thomas Surgent, 1/14/09 & 1/6/09 emails from Helen Kim and 1/6/09 email from David DeSantis

iv. 2230 email from Britt Brown 2/18/09, email from Jack Yang 1/27/09, email from Michael Colvin 2/17/09

B. Credit Suisse Documents:

1. No Legal consultation/No Work Product

a. disclose all redactions except the following:

I. 2762 & 2763 4/7/09 email from Jon Kibbe to Brian Albert

ii. 2851 & 2852 4/14/09 email from Jon Kibbe to Brian Albert and 4/14/09 email from Jon Kibbe to Jon Kibbe

C. Charles Rice Documents:

1. No Legal Consultation/No Work Product (1441 only)

a. disclose

i. all redactions in 1305, 1307, 1309, 1311, 1312, 1313

b. disclose all redactions except the following

- i. 1414 12/2/09 email from Joe Dougherty, 12/2/08 email from Matthew Okolita, 12/3/08 email from Joe Dougherty
- ii. 1543 redacted portion of 12/14/09 email from John Huntington
- iii. 1546 & 1547, 2/14/08 19:28:07 email from John Huntington & item 4 only in list contained in 12/14/08 19:49:22 email from John Huntington