

<b>Bank of N.Y. Mellon</b>
2013 NY Slip Op 30996(U)
May 6, 2013
Supreme Court, New York County
Docket Number: 651786/11
Judge: Barbara R. Kapnick
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JARBARA M. KAPNIK
Justice

PART 39

Index Number: 651786/2011
BANK OF NEW YORK MELLON
vs.
FOR AN ORDER PURSUANT TO
SEQUENCE NUMBER: 029
COMPEL DISCLOSURE

INDEX NO.
MOTION DATE
MOTION SEQ. NO.

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s).
Answering Affidavits — Exhibits No(s).
Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION

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

Dated: 5/6/13

J.S.C. (Signature)

- 1. CHECK ONE: CASE DISPOSED, NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED, DENIED, GRANTED IN PART, OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER, SUBMIT ORDER, DO NOT POST, FIDUCIARY APPOINTMENT, REFERENCE

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

-----x  
BANK OF NEW YORK MELLON (as Trustee  
under various Pooling and Servicing  
Agreements and Indenture Trustee under  
various Indentures) *et. al.*

Petitioners,

-against-

for an order, pursuant to CPLR § 7701,  
seeking judicial instructions and  
approval of a proposed settlement  
-----x

**DECISION/ORDER**  
Index No. 651786/11  
Motion Seq. No. 029

**BARBARA R. KAPNICK, J.:**

This motion was brought by Order to Show Cause by three members of the Steering Committee - the AIG Entities, the Triaxx Entities and the Federal Home Loan Banks of Boston, Chicago and Indianapolis. The movants seek an order (1) pursuant to CPLR 3124, compelling EmphaSys Technologies, Inc. ("ETI"), through its representative David Anthony, to answer questions posed during its deposition regarding work product ETI prepared for Bank of New York Mellon ("BNYM" or "Petitioner"), and concerning the 530 Covered Trusts at issue in this matter; (2) pursuant to CPLR 3124, compelling ETI to produce its documents and reports prepared for BNYM regarding such work product; and (3) directing resumption of ETI's deposition.

After hearing oral argument on the record on April 12, 2013, this Court ordered counsel for BNYM to submit the ETI documents and

corresponding privilege log to the Court for *in camera* inspection. See *Beach v. Touradji Capital Mgt., LP*, 99 AD3d 167, 171 (1<sup>st</sup> Dep't 2012); *Spectrum Sys. Intl Corp v. Chemical Bank*, 157 AD2d 444, 446-7 (1<sup>st</sup> Dep't 1990). On April 18, 2013, BNYM's counsel submitted the documents along with a revised privilege log.

BNYM asserts the attorney-client privilege and the work product privilege over tri-party electronic communications between itself, ETI and Mayer Brown LLP ("Mayer Brown") (counsel to BNYM), as well as over bilateral electronic communications between BNYM and ETI. Attachments to all such electronic communications are also being withheld. Petitioner is also asserting the same privilege as to disclosure of the underlying information through the testimony of an ETI witness, David Anthony.

All of the withheld documents and presumably the questions posed during the ETI deposition, which were objected to on the basis of the attorney-client or work product privileges, pertain to work that ETI performed to identify potential anomalies or unintended results that could result from the distribution of the \$8.5 billion settlement (the "Settlement") that is the subject of this Article 77 proceeding. Petitioner maintains that ETI was separately retained for this matter to assist *Mayer Brown* to determine whether Countrywide could potentially recoup part of the

Settlement distribution because, under the normal operation of the Trusts, it is the holder of "non-economic residual interests." Since it was never the intent for any of the Settlement payment to revert to Countrywide, ETI was asked to simulate the distribution of hypothetical unscheduled principal payments using data inputs and specifications provided by Mayer Brown. Petitioner argues that the results of ETI's work was then used by Mayer Brown to draft paragraph 3 of the Settlement Agreement, which provides language to ensure that all the Settlement proceeds go to investors and none revert to Countrywide.

Petitioner, therefore, maintains that the withheld communications are protected by the attorney-client privilege and any work produced by ETI regarding this project is protected from disclosure under the work product privilege. Petitioner further contends that it is undisputed that the withheld information remained confidential among ETI, BYMN and Mayer Brown.

The movants, on the other hand, argue that ETI is a third-party hired by BNYM, not a litigation consultant hired by Mayer Brown, and that its work product cannot be privileged because it does not contain legal advice, nor was it prepared in anticipation of litigation. Additionally, the movants argue that even if the withheld information is privileged, these materials are nonetheless

discoverable because the Intervenors have "substantial need of the materials in preparation of the case," and they are "unable without undue hardship to obtain the substantial equivalent of the materials by other means." CPLR 3102(d)(2).

"The [attorney-client] privilege extends to communications of 'one serving as an agent of either [the] attorney or client.'" *Hudson Ins. Co. v. Oppenheim*, 72 AD3d 489, 489-90 (1<sup>st</sup> Dep't 2010) (quoting *Robert V. Straus Prods. v. Pollard*, 289 AD2d 130, 131 (1<sup>st</sup> Dep't 2001)); see also *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 35 Misc.3d 1205(A), \*5 (Sup Ct, NY Co 2011) (holding that when third-parties are investigating as agents of the law firm, communications between the third-parties and the law firm are privileged), *aff'd*, 93 AD3d 574 (1<sup>st</sup> Dep't 2012). "The scope of the privilege is not defined by the third parties' employment or function; however, it depends on whether the client had an expectation of confidentiality under the circumstances." *Matter of Stenovich v. Wachtell, Lipton, Rosen & Katz*, 195 Misc2d 99, 110 (Sup Ct, NY Co 2003) (citing *People v. Osorio*, 75 NY2d 80, 84 (1989)).

With respect to the work product privilege, the analysis for deciding whether it applies was framed by the Court in *Spectrum Sys. Intl Corp*, 157 AD2d at 448. In that case

[t]he information requested was assembled to aid defendant in the operation of its business and as such, [wa]s not exempt from disclosure. In an affidavit submitted in support of defendant's motion for a protective order, defendant's investigations manager of fraud prevention and investigations alleged that a memorandum he prepared was exempt from disclosure because it was prepared in the course of "Special Counsel, Schulte Roth & Zabel's investigation of employee and vendor fraud." He maintained that this memorandum was prepared at a time when defendant was "contemplating" litigation against plaintiff, and that employment decisions relating to terminations and disciplinary actions were made based on legal counsel's advice. Thus, defendant's own affirmation attests to the fact that the material was not prepared primarily for litigation and that, in fact, there were other motivating forces behind its preparation.

. . . In order to qualify as "litigation" material under CPLR 3101(d), the document must have been prepared primarily if not solely for litigation [].

After careful review of the documents submitted for *in camera* review, this Court finds that all are properly withheld on the basis of the attorney-client privilege, the work product privilege or both. Those documents and/or testimony being withheld on the basis of the attorney-client privilege are appropriately withheld because, under the circumstances, the Court finds that ETI was serving as an agent of Mayer Brown, and all of the communications in which ETI was "present," reflect the client's "expectation of confidentiality" within the context of the communications. As

such, ETI's "presence" does not constitute a waiver of the attorney-client privilege.

The Court also finds that those portions of the withheld communications, including attached documents, over which the work product privilege is asserted are properly withheld. Here, ETI's work was completed at the express instruction of Mayer Brown, to enable Mayer Brown to draft paragraph 3 of the Settlement Agreement and ultimately file its Article 77 proceeding. It thus appears to this Court that the withheld material was "prepared primarily if not solely for litigation," and therefore, need not be produced.

The Court is also not persuaded by the movants' argument that the withheld information should nonetheless be produced pursuant to CPLR 3102(d)(2).

This constitutes the Decision and Order of this Court.

Dated: *May 6*, 2013

  
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BARBARA R. KAPNICK  
J.S.C.

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