

**NAMA Holdings, LLC v Greenberg Traurig, LLP**

2013 NY Slip Op 33981(U)

April 25, 2013

Supreme Court, New York County

Docket Number: 601054/08

Judge: Eileen Bransten

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. EILEEN BRANSTEN

J.S.C.

PRESENT: \_\_\_\_\_ Justice

PART 3

Index Number : 601054/2008
NAMA HOLDINGS, LLC
vs.
GREENBERG TRAURIG LLP
SEQUENCE NUMBER : 012
COMPEL

INDEX NO. 601054/2008
MOTION DATE 1/15/2013
MOTION SEQ. NO. 12

The following papers, numbered 1 to 3, were read on this motion to/for Compel

Notice of Motion/Order to Show Cause — Affidavits — Exhibits [No(s). 1]
Answering Affidavits — Exhibits [No(s). 2]
Replying Affidavits [No(s). 3]

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

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 4-25-13

[Signature] J.S.C.
HON. EILEEN BRANSTEN

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 3

----- X

NAMA HOLDINGS, LLC, a Nevada limited liability company, for itself and derivatively on behalf of ALLIANCE NETWORK, LLC, a Nevada limited liability company, ALLIANCE NETWORK HOLDINGS, LLC, a Delaware limited liability company, and NETWORK WORLD MARKET CENTER, LLC, a Delaware limited liability company,

Index No. 601054/08  
Motion Seq. No. 12  
Motion Date: 1/15/2013

Plaintiffs,

- against -

GREENBERG TRAUERIG, LLP, a New York limited liability partnership and ROBERT J. IVANHOE, SHAWN SAMSON, JACK KASHANI, and RELATED WORLD MARKET CENTER LLC, a Delaware limited liability company,

Defendants.

----- X

**BRANSTEN, J.:**

This matter comes before the Court on the motion filed by NAMA Holdings, LLC (“NAMA”), on behalf of itself and derivatively on behalf of Alliance Network, LLC (“Alliance Network”), Alliance Network Holdings, LLC (“Network Holdings”), and Network World Market Center, LLC (“Network LLC”) for an order: (i) granting its motion to compel in its entirety; (ii) requiring the law firm of Greenberg Traurig, LLP (“Greenberg”), Robert J. Ivanhoe (Greenberg and Ivanhoe together, “Attorney Defendants”), Shawn Samson and Jack Kashani (Samson and Kashani together,

“Managers”, and Greenberg, Ivanhoe, and the Managers collectively, “Defendants”) to produce all documents identified on the privilege log (“Log”) provided by Greenberg in this action; and (iii) requiring Defendants to produce all documents responsive to NAMA’s document requests relating to the International Markets Centers, LP transfer (“IMC Transfer”).

#### **I. Background**

In 2000, Alliance Network commenced the “WMC Project” – an extensive real estate development in downtown Las Vegas called World Market Center, which is a multi-phase, mixed-use development, anticipated to include a showroom complex, convention center and hotel, and related auxiliary facilities. NAMA, which originally owned a 70% majority interest in Alliance Network, brought this action on its own behalf, and derivatively on behalf of Alliance Network, Network Holdings, a subsidiary of Alliance Network, and Network LLC, a subsidiary of Network Holdings.

Allegedly, Defendants engaged in a secret partnership to develop a competing project called the “Blue Diamond Venture” (“BDV”) in which the Attorney Defendants improperly took a financial interest. NAMA claims that BDV wrongfully appropriated intellectual property and business opportunities belonging to Alliance Network, and it

violated the “Manager – Managed Operating Agreement of Alliance” governing Alliance Network.

The Second Amended Complaint alleges that the Attorney Defendants breached their fiduciary duties to Alliance Network and NAMA, and aided and abetted the Managers’ breach of duty by, among other things, advising and counseling the Managers concerning the interference with NAMA’s rights and the rights and benefits of Alliance Network and its affiliates (“Alliance Companies”) under the “Alliance Company Agreements,” and by concurrently representing the Managers individually and various individuals and entities involved in the BDV, which directly competes with the WMC Project and which usurped Alliance Network’s interests. The Second Amended Complaint also alleges that the Attorney Defendants actively assisted the Managers in their efforts to improperly burden the assets of the Project, convert, for their own benefit, the assets and funds of the Alliance Companies, attempt to divest NAMA of its interest in Alliance Network or the WMC Project or certain of its phases, and burden the Alliance Companies with imprudent debt and improper calls for capital investment to the detriment of NAMA and the Alliance Companies.

Relevant on this motion, NAMA served its first and second set of document requests on Greenberg on May 1, 2008, and August 26, 2008 respectively. *See* Affirmation of Jonathan Rogin, dated October 23, 2012 (“Rogin Affirm.”), Exs. U and V.

On September 26, 2008, Greenberg served its objections and responses to both sets of document requests. *Id.*, Exs. W and X. On October 17, 2008, Greenberg amended its objections and responses to NAMA's second set of document requests. *Id.*, Ex. Y. Greenberg produced the Log identifying the documents withheld. *Id.*, Ex. Z. On January 4, 2011, NAMA served document requests upon the Managers, who objected and responded on February 24, 2011. *Id.*, Exs. BB and CC. On August 22, 2012, NAMA served a second set of document requests on the Managers, and a third upon Greenberg, seeking documents related to the IMC Transfer. *Id.*, Exs. DD and EE. On September 11, 2012, the Managers and Greenberg objected to producing these documents. *Id.*, Exs. FF and GG. According to NAMA, the Managers have never produced a privilege log in this action.

NAMA characterizes Defendants' discovery compliance as a "meager production," consisting of "Greenberg's delivery of a massive 195 page 'privilege log' containing over 3000 entries." *Id.*, Ex. Z. NAMA opines that Defendants seek to obstruct, or at least substantially delay, disclosure of their "self-serving actions," which purportedly have been taken since 2004 at the expense of the Alliance Companies and NAMA. NAMA argues that Defendants' "privilege" claims are meant to conceal their misconduct and conflicts of interest, as shown by their refusal to produce any documents as to the IMC Transfer.

NAMA makes a number of arguments in support of its motion to require Defendants to produce all documents identified on the Log, as well as all documents responsive to NAMA's document requests relating to the IMC Transfer. NAMA maintains that neither the attorney-client nor work product privilege justifies defendants' withholding documents because (1) Defendants are continuing to wrongfully conceal their conduct from the Alliance Companies and NAMA, entities whose interests they are supposed to be representing; (2) the Managers abdicated their duties to these entities and have spoliated evidence; (3) the "fiduciary exception" to the attorney-client privilege compels production; (4) NAMA is asserting valid derivative claims, and the Attorney Defendants' advice directly affected the Alliance Companies; and (5) the "crime-fraud exception" to the privilege compels disclosure.

NAMA also argues that numerous categories of withheld documents are not even arguably privileged, such as: (1) communications with Related World Market Center LLC ("Related") and Related's counsel; (2) communications with other members of Alliance Network and their counsel; (3) communications with other third parties, and (4) Greenberg's internal communications. Moreover, NAMA contends that Defendants have also waived any applicable privileges due to other patent deficiencies in the Log.

Defendants argue that: (1) the fiduciary exception is inapplicable, because NAMA has been adverse to the Alliance Companies since at least 2003; (2) NAMA is not entitled

to documents protected by the privilege held by Greenberg's other clients; (3) in the related arbitration, the arbitration panel rejected NAMA's claims regarding Greenberg's conflicts of interest; (4) the crime-fraud exception is inapplicable; and (5) the Log is sufficiently detailed. Defendants also argue that NAMA is not entitled to documents relating to the IMC Transfer because they are not material or necessary to its claims.

## II. Discussion

A "tension exists between the policy favoring full disclosure and the policy permitting parties to withhold relevant evidence. Consequently, the burden of establishing any right to protection is on the party asserting it; the protection claimed must be narrowly construed; and its application must be consistent with the purposes underlying the immunity." *Spectrum Sys. Int'l Corp. v. Chemical Bank*, 78 N.Y.2d 371, 377 (1991). Contrary to NAMA's argument, Defendants have met their burden of establishing that some of the documents may be privileged. However, a hearing is required.

At oral argument, the Court suggested that the documents in question be reviewed by a judicial hearing officer to ascertain which documents on the Log were properly deemed privileged, and, thus, exempt from disclosure. Counsel for NAMA argued that an item-by-item review was unnecessary, because the Court would likely rule that the privilege was inapplicable as a matter of law without examining the individual

documents. That turned out not to be the case. The matter will be referred to a special referee to ascertain the privilege pursuant to the general parameters discussed below.

The “fiduciary exception” bars an individual who consults an attorney in a fiduciary capacity may not later invoke the attorney-client privilege to shield those communications from a beneficiary on whose behalf he was purportedly seeking advice or assistance, upon a showing of “good cause” for their disclosure. *Hoopes v. Carota*, 142 A.D.2d 906, 909-10 (3d Dep’t 1988), *aff’d* 74 N.Y.2d 716 (1989). Here, materials sought by NAMA that pertain to the transactions underlying this action are not privileged under the fiduciary exception, since NAMA has established “good cause.” *Id.* at 910. To the extent that it has been found that the communications between Defendants and counsel were made while Defendants abdicated their duties owed to the venture, the privilege does not apply. *See Sieger v. Zak*, 60 A.D.3d 661, 662-663 (2d Dep’t 2009) (privilege does not apply if the party consulted counsel in his individual capacity rather than on behalf of the corporation).

In support of its motion, NAMA submitted persuasive evidence that, pursuant to the fiduciary exception, the privilege does not apply as to communications during the period of time that the parties were not in an adversarial posture. *See Rogan Affirm. Ex. J* (June 25, 2010 judgment in the related Arbitration (“Arbitration Judgment”) entitled *Prime Associates Group, LLC v NAMA Holdings*, Superior Court, State of California, Los

Angeles County, Case No. B5123207). In the Arbitration, the arbitrators found, among other things, that (1) the Managers improperly withheld information from NAMA investors, *Id.* Ex. J at 12, 17; and (2) the Managers improperly approved the proposed funding notice despite its provisions inimical to the best interests of the investors. *Id.*, Ex. J at 12, 19.

However, the documents sought after an adversarial relationship developed are arguably privileged, dependant upon their content. *Barasch v. Williams Real Estate Co., Inc.*, 104 A.D.3d 490 (1st Dep't 2013) ("Thus, it is clear that as of September 8, 2008, petitioner was in an adversarial position with Williams, and the attorney-client communications between Williams and its counsel regarding how to deal with petitioner are privileged"). Here, evidence in the record indicates that an adversarial relationship may date back to 2003. *See* Arbitration Judgment, at 11.

As for the crime-fraud exception, the attorney-client privilege may not be invoked "where it involves client communications that may have been in furtherance of a fraudulent scheme, an alleged breach of fiduciary duty or an accusation of some other wrongful conduct." *Art Capital Grp. LLC v. Rose*, 54 A.D.3d 276, 277 (1st Dep't 2008) (internal quotation marks and citation omitted). Arguably, this exception is also applicable because, although it is termed "crime-fraud exception," it is a means to invade the attorney-client privilege where the requested communications were in furtherance of

an alleged breach of fiduciary duty. *See Horizon Asset Mgmt., Inc. v. Duffy*, 82 A.D.3d 442, 443 (1st Dep't 2011). NAMA supports its theory with allegations from the Second Amended Complaint that Defendants are liable for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, intentional interference with contractual relations, and conversion. This issue should be addressed at the hearing in conjunction with a review of the Log. *See Alvarez v. Reyes*, 96 A.D.3d 627, 628 (1st Dep't 2012) ("plaintiff's attorney-client privilege was not waived under the crime-fraud exception, since the motion court, following a hearing, determined that no such misconduct had occurred").

NAMA is entitled to the documents relating to the IMC Transfer. Defendants argue that, as "was discussed in the discovery conference in September 2011, these documents are neither material nor necessary to the prosecution of this action as they pertain to a transaction that occurred more than a year after the filing of the operative Second Amended Complaint." (Defendants' Opp. Br. at 35). Defendants do not contend, however, that the discovery conference culminated in a ruling in their favor on this issue. That the IMC Transfer may have occurred in 2011, after the events complained of in 2006 and 2009, by itself, does not render them immaterial, in light of the explanation provided by NAMA. Indeed, NAMA has adequately explained the relevance of that transaction. *See NAMA Moving Br. at 32-33.*

The other issues are to be evaluated at the hearing, because they require a resolution of disputed factual issues, such as NAMA's claim of spoliation, or an examination of the individual documents. For example, NAMA argues that communications between Greenberg and third parties, such as Related, are not protected by the privilege, because they were not Greenberg's clients, whereas Defendants contend that communications with these third parties are protected under the joint-defense and common-interest privilege. NAMA responds that Defendants failed to assert this privilege on the Log, and failed to substantiate that the communications were part of a common defense, as opposed to ongoing business communications. A hearing is required to untangle the conflicting allegations.

### **III. Conclusion**

For the foregoing reasons, the Court directs that this matter be referred to a special referee to hear and report. Specifically, the Court requests that the special referee perform an item-by-item review to ascertain which documents on the Log were properly deemed privileged.

**ORDER**

Accordingly, it is

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119 M, 646-386-3028 or [spref@courts.state.ny.us](mailto:spref@courts.state.ny.us)) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this Court at [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh) at the "References" link under "Courthouse Procedures"), shall assign this matter to an available Special Referee to hear and report as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or email an Information Sheet (which can be accessed at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be


authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that any motion to confirm or disaffirm the Report of the Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; and it is further

ORDERED that, unless otherwise directed by this Court in any Order that may be issued together with this Order of Reference to Hear and Report, the issues presented in any motion identified in the first paragraph hereof shall be held in abeyance pending submission of the Report of the Special Referee and the determination of this court thereon.

Dated: New York, New York  
April 25, 2013

ENTER:

  
Hon. Eileen Bransten, J.S.C.