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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART THREE

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JOSEPH KORFF,

Plaintiff,

-against-

Index No. 601425/2003
Motion Date: 3/21/2014
Motion Seq. No.: 002, 003

RICHARD A. CORBETT, THE CONCORDE COMPANIES, formerly known as International Plaza, a Florida Partnership, HALL OF FAME ASSOCIATES, a Florida Partnership, and a successor, HALL OF FAME ASSOCIATES LTD., a Florida Partnership, and CSAT, INC., a Delaware Corporation,

Defendants.

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BRANSTEN, J.

Presently before the Court are two motions to compel. In motion sequence 002, Plaintiff Joseph Korff seeks to compel Defendants Richard A. Corbett, The Concorde Companies, Hall of Fame Associates, Hall of Fame Associates Ltd. and CSAT, Inc.'s (collectively "Defendants") compliance with certain requests made in Plaintiff's Fourth Request for Production of Documents. In motion sequence 003, Plaintiff Korff moves to compel non-party Taubman Centers, Inc.'s ("Taubman") compliance with a subpoena duces tecum served upon it by Plaintiff on June 26, 2013. Both motions are opposed. For the reasons that follow, both motions are granted in part and denied in part.

I. Background[1]

Defendants Richard A. Corbett and the Concorde Companies, formerly known as International Plaza, acquired rights to a 35-year leasehold on approximately 135 acres of land adjacent to Tampa International Airport in Tampa, Florida. (Compl. ¶ 8.) In connection with their development of the property, Defendants engaged Plaintiff to provide various business, consulting and legal services. *Id.* ¶ 9. For his work, Plaintiff contends that Defendants "repeatedly agreed and assured" him that he would be paid hourly fees and additional compension based upon the eventual result of any development. *Id.*

During the course of the engagement, Plaintiff entered into an agreement ("Agreement") with Defendant Corbett addressing Plaintiff's payment. The Agreement took the form of a letter sent by Plaintiff to Corbett, and was signed by Corbett "on behalf of himself and all entities in which he has an interest," as well as by "International Plaza a Florida General Partnership By: Richard A. Corbett." *Id.* Ex. A. In relevant part, the Agreement states that "You [Corbett] will pay upon receipt by International Plaza, its partners or affiliates, 5% of gross receipts (excluding gross receipts from the current golf course operation) until $26,250,000 is paid when the percentage will be 10%. You will determine increases above that percentage amount in your sole discretion." *Id.*

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[1] All facts described in this section are drawn from Plaintiff's Complaint.

In the early 1990s, Plaintiff negotiated a joint venture between the Defendants and non-party Taubman, which provided Defendants with the capital necessary to develop and build International Plaza. *Id.* ¶¶ 2, 20. International Plaza opened in September 2001, and since has become the "dominant luxury shopping and dining destination in the Tampa Bay metroplex and extended trade area." *See* Affirmation of Kellen G. Ressmeyer Ex. O.

Plaintiff now contends that Defendants failed to honor the debt owed to him under the Letter Agreement. Accordingly, Plaintiff brings claims for breach of contract, unjust enrichment, declaratory judgment, and accounting.

II. Discussion

Through the instant motions, Plaintiff seeks to compel Defendants' and third-party Taubman's compliance with certain document requests. Plaintiff contends that Defendants refused to produce documents relevant to his claim for damages and withheld documents as covered by the attorney-client privilege. In addition, Plaintiff maintains that third-party Taubman failed to respond adequately to its subpoena duces tecum and therefore waived all objections to production of documents covered therein. These arguments are addressed below.

A. *Plaintiff's Motion to Compel Production of Documents by Defendants* (Motion Sequence 002)

In motion sequence 002, Plaintiff seeks the production of a broad range of documents, challenging Defendants' relevance and privilege objections.

New York law requires "full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." *See* CPLR 3101(a); *see also Kavanagh v. Ogden Allied Maint. Corp.*, 92 N.Y.2d 952, 954 (1998) (pretrial discovery is to be "open and far-reaching"). This rule is liberally construed, with the terms "material" and "necessary" encompassing "'any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity.'" *Andon v. 302-304 Mott St. Assoc.*, 94 N.Y.2d 740, 746 (2000) (citation omitted). However, while courts generally give the phrase "material and necessary" a broad construction, "unlimited disclosure is not permitted." *Tower Ins. Co. of N.Y. v. Murello*, 68 A.D.3d 977, 977 (2d Dep't 2009) (citation omitted). Indeed, discovery requests which are overly broad or seek material not relevant to the issues in the litigation are not proper. *Taji Commc'n, Inc. v. Bronxville Towers Apt. Corp.*, 48 A.D.3d 551, 552 (2d Dep't 2008) (reversing order compelling party to respond to discovery requests seeking irrelevant material); *Show Lain Cheng v. Young*, 60 A.D.3d 989, 991 (2d Dep't 2009) (upholding denial of motion to compel party to respond to discovery requests which were irrelevant to issues of the case). Because of this policy of

full disclosure, "the burden of establishing any right to protection is on the party asserting it," and "the protection claim must be narrowly construed." *Spectrum Sys. Int'l Corp. v. Chemical Bank*, 78 N.Y.2d 371, 377 (1991).

1. Plaintiff's Request for All Documents Related to the December 2012 Sale of Defendants' Interest in International Plaza and All Documents Sufficient to Show Income and Revenues Derived from International Plaza

Plaintiff first requests all documents related to Defendants' sale of their interest in International Plaza in December 2012, arguing that this request bears directly on his claim for damages. Plaintiff's request is broken down into several subparts.

a. **Negotiation of the December 2012 Sale Price**

Plaintiff seeks documents related to negotiation of the purchase price for the December 2012 sale. Plaintiff grounds this request in the assertion that the negotiations likely included Defendants' projections regarding future receipts from the property, and that such projections are relevant to Plaintiff's claim for "gross receipts" under the Letter Agreement. Putting aside the speculative nature of this contention, Plaintiff's argument adopts an expansive reading of "receipts" that goes far beyond the commonly understood meaning of the term. The term "receipt" is defined as "the act of receiving something" or

"the fact of being received." *See* THE AMERICAN HERITAGE DICTIONARY 1032 (2D ED. 1991). Black's Law Dictionary defines "gross receipts" in the tax context as "the total amount of money or other consideration *received* by a business taxpayer for goods sold or services performed in a taxable year." BLACK'S LAW DICTIONARY (9th ed. 2009) (emphasis added.) However, Plaintiff's request here seeks documents related not to funds actually received by Defendants but to projections regarding funds that may have been received by Defendants in the future. Such projections are not encompassed by the term "gross receipts" nor are they material and necessary to the calculation of "gross receipts."

Likewise, Plaintiff's contention that such documents may reveal Defendants' efforts to structure the transaction to avoid the claims in this litigation fails for the same reasons. Again, putting aside that the only support for this request is argument, documents regarding Defendants' structuring of the December 2012 sale are neither material nor necessary to the calculation of the "gross receipts" actually received by Defendants. Accordingly, Plaintiff's request for documents concerning Defendants' negotiations, calculations, assumptions and projections regarding the December 2012 sale price is denied.

b. **Financial Records for International Plaza**

Plaintiff next seeks any monthly and quarterly ledgers or balance sheets for International Plaza, reflecting any proceeds received by Defendants or any of their affiliates from the property. Again, Plaintiff contends these documents contain information relevant to the calculation of Plaintiff's fee based on "gross receipts" from International Plaza.

Defendants object to this request, arguing that Plaintiff has already received sufficient information to calculate the amounts "received by Corbett or his entities from International Plaza's operations." *See* Defs.' Opp. Br. at 11. However, the fact that certain relevant information has been properly disclosed to Plaintiff does not preclude the production of additional relevant documents. Indeed, CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action," notwithstanding the fact that certain materials related to the same subject already have been disclosed. *See* CPLR 3101(a).

However, as Defendants point out, there is likely to be a considerable amount of information in the monthly and quarterly ledgers, as well as the balance sheets, which does not reflect receipts by Corbett or his entities from International Plaza's operations. Defendants maintain that this information is of a highly confidential and competitively sensitive nature. Thus, while Plaintiff is entitled to receive those portions of the balance

sheets and monthly and quarterly ledgers that show amounts received by Defendants from International Plaza, any additional information not reflecting such receipts may be redacted.

In addition, the Court notes Plaintiff's request in the alternative for Defendants' unredacted tax returns. Since Plaintiff has failed to make the heightened showing required for such disclosure, this request is denied. *See Williams v. N.Y. City Hous. Auth.*, 22 A.D.3d 315, 316 (1st Dep't 2005) ("Because of their confidential and private nature, disclosure of tax returns is disfavored. The party seeking disclosure must make a strong showing of necessity and demonstrate that the information contained in the returns is unavailable from other sources.").

c. **Distribution of Funds from the December 2012 Sale**

Plaintiff also seeks documents related to payment of the $275 million sale price for International Plaza to Defendants. However, Plaintiff does not dispute Defendants' assertion that it has already received the closing documents responsive to this request. *See* Defs.' Opp. Br. at 11. Moreover, Plaintiff offers no arguments in support of this request. Accordingly, this portion of Plaintiff's motion is denied.

d. **Request for Unredacted Copies of Documents Containing Financial Information**

Plaintiff's request that the Court direct the removal of all redactions included by Defendants in their production of financial information is denied. Plaintiff makes only a general argument that the redactions were too broadly applied and that certain information regarding revenues that he expected to see in Defendants' income statements was redacted. However, Defendants explain that the redacted information relates to investments and business ventures by Defendants and other Corbett entities that are unrelated to International Plaza. In the absence of any showing by Plaintiff that calls Defendants' justification into question, the Court cannot order the wholesale removal of all redactions in Defendants' documents. In the future, to the extent any disagreements remain regarding redactions, the parties are directed to meet and confer on a document-by-document basis to address such concerns.

2. Plaintiff's Request For Documents Withheld as Covered by the Attorney-Client Privilege

Plaintiff next seeks to compel the production of eleven documents that Defendant maintains are covered by the attorney-client privilege.[2] Plaintiff offers two arguments in

[2] Plaintiff originally sought the production of twelve documents; however, since Defendants removed the privilege designation from one of the requested documents, only eleven contested documents remain. *See* Defs.' Opp. Br. at 14 n. 5.

support: (1) that as "co-counsel" to the attorneys exchanging the emails in question, such emails were never intended to be kept confidential from him; and (2) that even if privileged, Defendants have placed Plaintiff's conduct at issue in this litigation, waiving any privilege. Both arguments lack merit.

First, Plaintiff offers no support for the proposition that his status as an attorney vitiates the privilege that otherwise would attach to communications to and among Defendants' counsel. Plaintiff merely asserts that he was an attorney who provided services to Defendants and that he worked on the same matters as those addressed in the instant emails. From this, Plaintiff extrapolates that Defendants could not have intended to keep the communications at issue confidential from him. Defendants dispute this factual characterization, maintaining that their counsel never served as "co-counsel" with Korff.

Further, Plaintiff offers no case law supporting his argument. Instead, Plaintiff points to an unreported Delaware case, *Sokol Holdings, Inc. v. Dorsey & Whitney, LLP*, 2009 WL 2501542, at *7 (Del. Ch. Aug. 5, 2009). Contrary to Plaintiff's assertion, this case does not stand for the proposition that a client's communications with one attorney are by rule deemed not to be private from another attorney representing the same client. Instead, the Delaware court addressed a very different issue, ruling that the client waived privilege attaching to an attorney communication by placing that communication at issue

in a malpractice claim. Thus, in the absence of any legal support for his assertion, Plaintiff's attempt to vitiate the privilege attaching to these emails fails.

Moreover, Plaintiff's argument that Defendants waived the privilege attaching to these emails by placing their contents "at issue" likewise lacks merit. "At issue" waiver "occurs where a party affirmatively places the subject matter of its own privileged communication at issue in litigation, so that invasion of the privilege is required to determine the validity of a claim or defense of the party asserting the privilege, and application of the privilege would deprive the adversary of vital information." *Deutsche Bank Trust Co. of Am. v. Tri-Links Inv. Trust*, 43 A.D.3d 56, 64 (1st Dep't 2007). Generally, "no 'at issue' waiver is found where the party asserting the privilege does not need the privileged documents to sustain its cause of action." *Ambac Assurance Corp. v. DLJ Mortg. Capital, Inc.*, 92 A.D.3d 451, 452 (1st Dep't 2012). Here, as an affirmative defense, Defendants assert that the "claims in the Complaint are barred by the ethical violations that Korff ... committed against his clients." *See* Fifth Affirmative Defense. Defendants maintain, however, that "[n]one of the privileged communications at issue relate to these matters." *See* Defs.' Opp. Br. at 16. Therefore, based on Defendants' representation, no invasion of the privilege is required since the privileged documents are not being used by Defendants to assert their defense. Accordingly, there has been no "at issue" waiver, and this portion of Plaintiff's motion to compel is denied.

B. *Plaintiff's Motion to Compel Production of Documents by Non-Party Taubman Centers, Inc.* (Motion Sequence 003)

Plaintiff next seeks to compel third-party Taubman Centers, Inc.'s ("Taubman") compliance with a June 26, 2013 subpoena duces tecum. Plaintiff contends that Defendant failed to respond to the subpoena properly and therefore has waived any objections to it.

Taubman's response to this subpoena, while far from a model response, was sufficient to state its jurisdictional objection to the discovery sought by Plaintiff. However, while the form of the response was sufficient, the response itself lacked merit. In an email from Taubman's counsel to Plaintiff's attorney, Taubman asserted that the subpoena was improperly issued in New York. Specifically, Taubman's counsel stated: "I don't believe the subpoena to have any force over our Company located in Michigan. Accordingly we do not intend to respond to the subpoena." *See* Affirmation of Kellen G. Ressmeyer Ex. H (July 8, 2013 email from Andrew Conway to Carl W. Oberdier). Notwithstanding Taubman's objection, review of the subpoena reveals, and Taubman does not contest, that the subpoena was served on Taubman's registered agent in New York. *Id.* Ex. A. Such service was proper under CPLR 2303 and BCL § 306(a), which provide, respectively, for service of a subpoena and service of process on a registered agent. Thus, Taubman's jurisdictional objection to the subpoena fails.

Moreover, Taubman made no other timely objection to the June 26, 2013 subpoena. While Taubman points to a letter sent to the Court on September 25, 2013 raising certain burden and relevance objections, *see* Oberdier Affirm. Ex. M., such objections were not made on a timely basis to Plaintiff after receipt of the subpoena under CPLR 3122.[3] Further, while such objections may have been made to previous subpoenas, they were not made properly as to this subpoena. Accordingly, the Court concludes that Taubman has not preserved any proper objections to this subpoena, and thus Taubman is required to comply with the requests made therein.

However, to the extent that Plaintiff seeks information from other Taubman-related entities that are located out-of-state, Plaintiff is required to seek a commission or serve those entities directly in New York, if possible. No basis has been shown on the instant motion to pierce the corporate veil or to impute that service on one Taubman entity is sufficient for discovery from others.

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[3] The Court notes that the September 25, 2013 letter was sent by Defendants' counsel – not counsel for Taubman Centers, Inc. Defendants do not have standing to assert objections on behalf of a non-party. *See AQ Asset Mgmt. LLC v. Levine*, 111 A.D.3d 245, 260 (1st Dep't 2013) (holding that parties lacked standing to object to a subpoena issued to a third-party). While Plaintiff asks that the Court enjoin Defendants from directing non-parties, like Taubman, not to respond to discovery requests, Plaintiff has produced no evidence that Defendants actually were obstructing Taubman's response, only that Defendants responded in Taubman's stead. Accordingly, no need has been shown for an injunction; however, the Court notes that Defendants cannot object to Taubman's subpoena on Taubman's behalf.

III. Conclusion

Accordingly, it is

ORDERED that Plaintiff's motion to compel production of documents from Defendants Richard A. Corbett, The Concorde Companies, Hall of Fame Associates, Hall of Fame Associates Ltd. and CSAT, Inc. is granted in part and denied in part; and it is further

ORDERED that Plaintiff's motion to compel non-party Taubman Centers, Inc.'s compliance with its June 26, 2013 subpoena is granted; and it is further

ORDERED that the Defendants and Taubman shall produce the documents ordered compelled herein no later than 30 days from service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a compliance conference in Room 442, 60 Centre Street, on May 20, 2013, at 10 AM.

Dated: New York, New York
April 3, 2014

ENTER:

Hon. Eileen Bransten, J.S.C.