

Nama Holdings, LLC v Greenberg Traurig, LLP

2014 NY Slip Op 32304(U)

August 25, 2014

Sup Ct, New York County

Docket Number: 601054/2008

Judge: Eileen Bransten

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

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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. 601054/2008
Motion Seq. No. 015
Motion Date: 5/8/2014

Plaintiffs,

- against -

GREENBERG TRAURIG, 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.

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BRANSTEN, J.:

In motion sequence 015, plaintiff NAMA Holdings, LLC (“NAMA”), for 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”) (collectively, the “Alliance Companies”), seeks confirmation of a special referee report granting its motion to compel the production of all documents identified on a privilege log (“Log”) produced by defendants Greenberg Traurig, LLP (“Greenberg”) and Robert Ivanhoe (collectively, the “Attorney Defendants”). The

Attorney Defendants, as well as Defendants Shawn Samson and Jack Kashani (collectively, the “Managers”), oppose. For the reasons that follow, plaintiff’s motion is granted, and the special referee report is confirmed.

I. Background

The facts of this matter have been discussed extensively in previous decisions of this court, as well as numerous decisions by Justice Lowe,¹ the Appellate Division, First Department,² and courts and arbitration panels in Delaware and both federal and state California courts.³ Familiarity with the facts is therefore assumed, and only facts necessary to the instant motion are discussed.

A. *The Second Amended Complaint*

In 2000, Alliance Network commenced the “WMC Project” – an extensive real estate development in downtown Las Vegas called World Market Center. NAMA, which

¹ See Justice Lowe’s decisions dated November 18, 2008, March 31, 2010, and November 30, 2010 (Sup. Ct., N.Y. Cnty.).

² See 92 A.D.3d 614 (1st Dep’t 2012); 76 A.D.3d 804 (1st Dep’t 2010); 62 A.D.3d 578 (1st Dep’t 2009).

³ See, e.g., *World Mkt. Ctr. Venture, LLC v. Nama Holdings, LLC*, 2010 WL 1756876 (Del. Ch. 2010), appeal dismissed *NAMA Holdings, LLC v. World Mkt. Ctr. Venture, LLC*, 2A.3d 74 (Sup. Ct. Del. 2010); *NAMA Holdings, LLC v. World Mkt. Ctr. Venture, LLC*, 948 A.2d 411 (Del. Ch. 2008), *aff’d* 945 A.2d 594 (Sup. Ct. Del. 2008); *NAMA Holdings, LLC v. Related World Mkt. Ctr., LLC*, 922 A.2d (Del. Ch. 2007); *Samson v. NAMA Holdings, LLC*, 2009 U.S. Dist. LEXIS 114494 (C.D. Cal. 2009), *aff’d* 637 F.3d 915 (9th Cir. 2011).

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.

Plaintiffs allege that 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 that 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, as well as aided and abetted the Managers’ breach of duty by, among other things, advising and counseling the Managers with respect to their interference with NAMA’s rights and the rights and benefits of the Alliance Companies under the “Alliance Company Agreements.” In addition, plaintiffs contend that the Attorney Defendants aided and abetted the Managers’ breach by concurrently representing the Managers individually, as well as 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.

B. *Plaintiff's Document Requests*

Relevant to plaintiffs' motion to compel, 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 Exs. U & V.⁴ On September 26, 2008, Greenberg served its objections and responses to both sets of document requests and later amended its responses to NAMA's second set of document requests on October 17, 2008. *Id.*, Exs. W, X, & Y. Greenberg produced a Log identifying the documents withheld from its production. *Id.*, Ex. Z.

On January 4, 2011, NAMA served document requests on the Managers, who objected and responded on February 24, 2011. *Id.*, Exs. BB & 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 International Markets Centers, LP transfer ("IMC Transfer"). *Id.*, Exs. DD & EE. On September 11, 2012, the Managers and Greenberg objected to producing these documents. *Id.*, Exs. FF & GG.

⁴ The Rogan Affirmation was submitted with Plaintiffs' motion to compel (motion seq. 012).

NAMA then filed a motion to compel, seeking production of all documents listed by Greenberg on the Log, as well as documents related to the IMC Transfer. NAMA maintains that neither the attorney-client nor work product privilege justifies defendants' withholding of the documents at issue. NAMA argues, *inter alia*, that the fiduciary and crime-fraud exceptions to the attorney-client privilege compelled production. NAMA also argues that communications between the Attorney Defendants and third-parties, such as Related World Market LLC ("Related") and its counsel, were not privileged.

C. *The April 25, 2013 Decision and Order*

In an April 25, 2013 Decision and Order, this Court discussed the arguments presented by NAMA in support of its motion to compel and referred NAMA's motion to a Special Referee to ascertain whether the documents on Greenberg's Log were, in fact, privileged. In particular, the Decision noted that documents sought after an adversarial relationship developed between NAMA and the Alliance Companies "are arguably privileged, dependent upon their content." (April 25, 2013 Decision at 8.) However, the record did not clearly establish if or when that adversarial relationship developed. *Id.* The Court therefore directed the Special Referee to conduct a hearing to determine if such a relationship existed and when. *Id.* Further, the Court noted that there was some evidence in the record possibly demonstrating an adversarial relationship dating back to 2003; however, the Court made no conclusion as to whether there was an adversarial relationship at all, let alone on that particular date. *Id.*

The Court also noted plaintiff's argument that the "crime-fraud" exception bars the Attorney Defendants' use of the attorney-client privilege to withhold documents concerning communications made in furtherance of their alleged breach of fiduciary duty. In addition, the Court noted NAMA's spoliation argument, as well as its claim that communications between Greenberg and third-parties, such as Related, were not protected by the attorney-client privilege and did not fall under a joint-defense or common-interest privilege. These arguments were each to be addressed by the Special Referee in conjunction with the Referee's review of the Log.

While the Decision largely set forth subjects for the Special Referee hearing, one portion of NAMA's motion to compel was decided and disposed. The Court granted NAMA's motion to compel documents relating to the IMC Transfer. Accordingly, these documents were not at issue before the Special Referee.

D. *The Special Referee's Decision and the Instant Motion*

The Special Referee conducted two days of hearings on July 9, 2013 and December 17, 2013. In addition, the Special Referee conducted a telephone conference with the parties on December 19, 2013 and accepted post-submission briefing.

During the hearings, the Special Referee focused on the adversity issue, i.e. whether an adversarial relationship existed between NAMA and the Alliance Companies. In an exchange with counsel for the Attorney Defendants during the December 17, 2013

hearing, the Special Referee noted: “The issue is whether or not there was a dispute between Alliance Network and NAMA which in some way precludes NAMA in this present litigation from obtaining documents that it would otherwise be entitled to.” *See* Affirmation of Jonathan Rogin in Support of Motion to Confirm, dated March 25, 2014, Ex. C at 147. Further, the Referee stated that “[e]verybody agrees that but for a dispute, NAMA would be entitled to the documents it seeks,” to which counsel for the Attorney Defendants agreed. *Id.* (“Under Justice Bransten’s order, correct.”).

On March 4, 2014, the Special Referee rendered his decision. In his ruling, the Referee noted that “the principal issue that the parties argued about, which testimony was taken and about which post-trial and post-hearing submissions dealt with, was the issue relating to the alleged adversarial relationship ... [t]hat is were the interests of NAMA and the Alliance Network adversarial... [a]nd if so, when did those adversarial relationships exist.” *See* March 4, 2014 Tr. at 6:24-7:3. The Referee then ruled that there was no adversarial relationship between the Alliance entity and NAMA, and that as a result, each of the documents listed on the Log were discoverable. *See* March 4, 2014 Tr. 8: 19-23.

Shortly thereafter, plaintiff NAMA filed the instant motion to confirm the Special Referee’s report. Defendants Greenberg and Ivanhoe oppose, arguing that Referee acted outside the scope of the reference and disregarded this Court’s purported finding of adversity. Defendants Sampson and Kashani likewise oppose, arguing that the Special

Referee confused NAMA and the Alliance Companies in his oral ruling a handful of times, requiring rejection of the report in its entirety.

II. Discussion

CPLR 4403 permits a court to confirm or reject a referee's report, in whole or in part. "It is well settled that the report of a Special Referee shall be confirmed whenever the findings contained therein are supported by the record and the Special Referee has clearly defined the issues and resolved matters of credibility, since the Special Referee is considered to be in the best position to determine the issues presented." *Nager v. Panadis*, 238 A.D.2d 136, 135-36 (1st Dep't 1997).

The Court has reviewed the Referee's Report and the papers submitted by the parties and concludes that the Referee's Report should be confirmed.

A. *Adversarial Relationship*

The Attorney Defendants attack the Special Referee's conclusion that no adversarial relationship existed between NAMA and the Alliance Network on several fronts. First, the Attorney Defendants contend that this Court already found such an adversarial relationship, rendering the Special Referee's determination erroneous on its face. Next, the Attorney Defendants argue that the Special Referee misapplied the First

Department's recent ruling in *Barasch v. Williams Real Estate Co.*, which according to Defendants, mandates a finding of adversity. Finally, the Attorney Defendants urge that the record evidence overwhelmingly establishes adversity. Each of these arguments will be considered below in turn.

1. The April 25, 2013 Decision and Order

The Attorney Defendants first attack the Referee's report on the grounds that it "does not take into account this Court's prior finding of adversity." *See* Attorney Defs.' Opp. Br. at 4. Since this Court did not make a prior finding of adversity in its April 25, 2013 Decision and Order, this argument fails. *See infra*.

2. Application of *Barasch v. Williams Real Estate Co.*

Next, the Attorney Defendants contend that the Special Referee erroneously failed to apply the First Department's decision in *Barasch v. Williams Real Estate Co.*, 104 A.D.3d 490 (1st Dep't 2013), which according to Greenberg and Ivanhoe, mandates a finding of adversity. A closer review of *Barasch*, however, reveals that the Special Referee was correct to find the case inapplicable.

In *Barasch*, a shareholder and director of Williams Real Estate Co. ("Williams") commenced a special proceeding to compel the company to pay her the fair value of her

shares. During the course of discovery, plaintiff learned of the existence of certain emails between the company and its counsel discussing plaintiff's dissent from the transaction underlying her fair value claim. When plaintiff moved to compel the production of those documents, the company refused, citing the attorney-client privilege. In reviewing the trial court's decision granting plaintiff's motion to compel production of the communications, the First Department focused on the issue of adversity, and held that as of the date of plaintiff's dissent from the underlying transaction, she "was in an adversarial position with [the company]." *Id.* at 492. Accordingly, the attorney-client communications between [the company] and its counsel regarding how to deal with petitioner are privileged." *Id.*

While the Attorney Defendants maintain that *Barasch* is analogous to the facts of the instant case, the finding of adversity in *Barasch* was highly dependent on the facts of that case and hinged on the type of claim asserted by the plaintiff. The *Barasch* plaintiff brought a direct claim against the Williams individually, seeking damages for herself. As a result, she was found to be adverse to Williams. Conversely, the instant claim is brought by NAMA *derivatively*, on behalf of the Alliance Companies. Therefore, NAMA is not adverse to the Alliance Companies; in fact, by bringing this claim *derivatively*, NAMA is seeking to vindicate the Alliance Companies' rights vis-à-vis the defendant Managers who are alleged to have breached their duties to the company. Thus, the Special Referee correctly concluded that the instant matter is outside the ambit of *Barasch*.

Moreover, the derivative nature of the instant claims underscores the distinction between the Alliance Companies and the defendant Managers for the purpose of the adversity analysis. The Attorney Defendants contend that NAMA's adversity with the Managers is equivalent to adversity with the Alliance Companies themselves. However, the crux of plaintiff's claims is that the Managers acted contrary to the Companies' interests. Simply put, NAMA is adverse to the Managers, who NAMA contends acted adversely to the interests of the Alliance Companies. As a result, contrary to the Attorney Defendants' protestations, the instant litigation is not "*per se* adverse" nor does the long-simmering dispute between the NAMA and the Managers demonstrate adversity between NAMA and the Companies. As a result, the Special Referee's conclusion that NAMA is not adverse to the Alliance Companies was soundly made.

3. Record Evidence

Further, the Special Referee's conclusion is fully supported by the record submitted to him. The parties discuss five particular record items in their briefing on this motion: (1) the testimony of defendant Samson before the Special Referee; (2) a 2004 Settlement Agreement; (3) the testimony of counterclaim-defendant Nigel Alliance before the Special Referee; (4) correspondence between NAMA and the defendant Managers; and, (5) a California arbitration brought by the defendant Managers on behalf

of the Alliance Network against NAMA. Each of these items supports the Special Referee's finding that NAMA was adverse to the Managers and not the Companies.

a. **Defendant Samson's Testimony and the 2004 Settlement Agreement**

At the December 17, 2013 hearing, defendant Samson testified on behalf of Defendants that that "disputes" between the Companies and NAMA escalated by "the first half of 2003" and soon after became "adversarial." (December 17, 2013 Tr. at 49: 14-26, 62: 6-8. Nonetheless, Samson also testified that all existing disputes were resolved an April 15, 2004 Settlement Agreement. *See Reply Affirm. of Jonathan Rogin Ex. E (Settlement Agreement).*

This Settlement Agreement was entered into by the defendant Managers, the three companies serving as "Members" of the Alliance Network (one of which was NAMA),⁵ and the Alliance Network. While Samson characterizes the relationship between NAMA and Alliance Network as "adverse" prior to the Settlement Agreement, the Agreement itself belies this characterization. The Settlement Agreement makes no mention of any dispute existing between NAMA and the Companies. Instead, the Agreement states that "certain disputes have arisen *among the Members and between certain of the Members*

⁵ The other Members were Prime Associates Group, LLC and Crescent Nevada Associates, LLC.

and the Manager.” *Id.* at 1 (emphasis added). Thus, to the extent that disputes existed during this time frame, the Settlement Agreement entered into by the parties states that the disputes were between NAMA and the defendant Managers, Samson and Kashani.

b. Testimony of Nigel Alliance

The testimony of Nigel Alliance before the Special Referee confirms that the disputing parties were NAMA and the Managers. Nigel Alliance is a member, as well as an owner, of NAMA. *See* Dec. 17, 2013 Tr. at 118: 15-21. Nigel Alliance testified that “NAMA[’s] problem was not with Alliance Network. I said it from beginning [sic]. NAMA’s problem was with the manager who abused everything from A to Zed. There was no problem with Alliance Network and NAMA. The problem was with the manager. Always been.” (Dec. 17, 2013 Tr. at 142: 17-21.)

c. Correspondence Between NAMA and the Managers

Correspondence between NAMA and the Managers further demonstrates this tension. In a May 27, 2003 letter to the defendant Managers, NAMA lays out its disputes with the Managers. This letter distinguishes the Managers from the Companies and seeks to hold the Managers individually accountable for potentially violating their obligations to the Companies. *See* Affirmation of Justin Chu Ex. J at 2 (“NAMA also gets the

impression that the Co-Managers are creating such circumstances and preparing themselves an alibi [sic] for an event according to which the company and the Co-Managers themselves might fail to perform their obligations...”).

d. California Arbitration

Indeed, this conflict between NAMA and the defendant Managers is likewise evident in the California arbitration. Defendants Samson and Kashani filed an arbitration demand against NAMA “in their capacity as managers of Alliance Network, LLC,” likewise naming the Alliance Companies as claimants. *See Reply Affirm. of Jonathan Rogin Ex. G. NAMA*, in its own right, filed a counter-demand; however, NAMA did not name the Alliance Companies as respondents in its action. *Id.* Instead, NAMA brought claims for itself and derivatively on behalf of the Alliance Companies against defendants Samson and Kashani. *Id.* As NAMA’s pleading makes clear, NAMA’s claims in the arbitration were not against the Alliance Companies; instead, NAMA’s claims pertained to the defendant Managers’ “scheme to deprive NAMA of its rights and benefits from the [WMC] Project.” *Id.* at 5.

While Samson and Kashani were ultimately dismissed from the arbitration on procedural grounds, the arbitrators’ findings nonetheless emphasized NAMA’s conflict with the Managers. *See Affirm. of Justin Y.K. Chu Ex. H* at 8 (“In general, the evidence established that, subsequent to the formation of WMCV, Samson and Kashani largely

abdicated their contractual duties to act on behalf of Alliance Network, and instead shifted their allegiance to protecting Prime's interests and deferring to the wishes of Related."); *id.* at 9 ("In addition, Samson and Kashani had negotiated an arrangement with Related and Hypo ... NAMA's critique of that arrangement has merit: We find that this arrangement constituted self-dealing on the part of Samson, Kashani and Prime, at the expense of NAMA.").

Taken individually or together, the record evidence supports the Special Referee's finding that no adversarial relationship existed between NAMA and the Alliance Companies. Accordingly, the Special Referee's report, compelling the production of those documents at issue on Greenberg's Log is confirmed.

B. *Other Issues Raised by the Attorney Defendants*

The Attorney Defendants next contend that the Special Referee's failure to "collect" evidence pertaining to the joint defense and common-interest privileges, as well as third-party waiver, was error that bars confirmation of the report. *See id.* at 5. Notwithstanding the Attorney Defendants' characterization, it is not the role of the Special Referee to direct the collection of evidence; instead, the onus is on the Attorney Defendants and their counsel to present the testimony and evidence deemed necessary to persuade the court. The Attorney Defendants point to no statement by the Special

Referee precluding them from presenting evidence as to the joint defense and common-interest privileges or the third-party waiver issue.

Moreover, the record reveals that the Attorney Defendants agreed with the Special Referee's statement that the adversity issue was the threshold issue to be decided. *See* Affirmation of Jonathan Rogin in Support of Motion to Confirm, dated March 25, 2014, Ex. C at 147 (THE COURT: "Everybody agrees that but for a dispute [as to adversity], NAMA would be entitled to the documents it seeks. MR. SMURZYNSKI: Under Justice Bransten's order, correct."). This position was echoed by the Attorney Defendants in their opening brief to the Special Referee. *See* Reply Affirm. of Jonathan Rogin Ex. K at 1-2 ("This Court rightly determined at the initial conference on July 9, 2013 that the primary threshold issue is the date on which NAMA and the Alliance Companies became adverse. After hearing the testimony and receiving the evidence on that issue, this Court should hold further hearings as necessary ... Only thereafter – within the scope of any review determined – should the Court conduct a document-by-document review to the extent it remains necessary.") Thus, under the framework agreed to by the Special Referee and all counsel, upon finding that NAMA and the Alliance Network were not adverse, the privilege issue was decided – NAMA was entitled to the documents at issue. *Id.*

Next, the Attorney Defendants argue that NAMA has no "protectable interest" in documents pertaining to Phase III of the WMC Project and therefore is not entitled to this

subset of documents. The Attorney Defendants' argument, however, ignores the posture of this litigation. This is not a direct action by NAMA; instead, NAMA brings this action derivatively on behalf of the Alliance Companies. Therefore, the Attorney Defendants have failed to demonstrate that NAMA's interest, or lack thereof, has any bearing on the production of the Phase III documents. Accordingly, this argument does not provide a basis to reject the Special Referee's report.

Finally, the Attorney Defendants argue for the first time that the Log contains privileged communications regarding the instant action, which should not be produced. *See* Attorney Defendants' Opp. Br. at 1. This argument was not presented to the Special Referee and thus has been waived. *See Hexcel Corp. v. Hercules Inc.*, 291 A.D.2d 222, 223 (1st Dep't 2002). Even if the claim were preserved and properly raised here, the Attorney Defendants have failed to offer any competent evidence – or even a citation – in support. *See Priest v Hennessy*, 51 N.Y.2d 62, 69 (1980) (“[T]he burden of proving each element of the privilege rests upon the party asserting it.”).

C. *Defendant Managers' Opposition Argument*

The Managers attack the Special Referee's Report on the grounds that the Referee misspoke three times in rendering his ruling. *See* Managers' Opp. Br. at 1. Each time, the Special Referee substituted the word “NAMA” for the “Alliance Companies,” resulting in the inaccurate statement that Greenberg represented NAMA.

Notwithstanding the fact that the Special Referee himself corrected these errors on the transcript before issuing the Report, the Managers maintain that these three erroneous words in the Referee's eight-page ruling warrant rejection of the Report. The Court disagrees. The mistakes highlighted by the Managers are nothing more than slips of the tongue, and moreover, were corrected by the Special Referee during his review of the transcript before issuance of the Report. Accordingly, the Managers' objection has no merit.

(Order follows on the next page.)

III. Conclusion

Accordingly, it is

ORDERED that plaintiffs' motion to confirm the March 25, 2014 Report of Special Referee Gammerman is granted; and it is further

ORDERED that defendants shall produce all documents identified on Greenberg's privilege log, as well as all documents responsive to plaintiff's document requests relating to the IMC Transfer, within 45 days from the date of this Order; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 442, 60 Centre Street, on October 7, 2014, at 10 AM.

Dated: New York, New York
August 25, 2014

ENTER



Hon. Eileen Bransten, J.S.C.