Pagan v Ramirez
2014 NY Slip Op 33592(U)
January 2, 2014
Supreme Court, New York County
Docket Number: 114662/09
Judge: Saliann Scarpulla

[* 1]

EA 1/8/14. E

C-3

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

PRESENT: HON. SALIANN SCARPULLA PART 19
Justice

JANINE PAGAN, et al.,

Plaintiffs,

- v -

REVEREND RICHARD RAMIREZ, et al.

Defendants.

INDEX NO. 114662/2009

MOTION DATE

MOTION SEQ. NO.

The following papers, numbered 1 to 3 were read on this motion for a protective order.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2-3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is

ORDERED that the motion is determined in accordance with the accompanying decision/order dated January 2, 2014. It is further

ORDERED that plaintiff is to come to Room 335, 60 Centre Street to pick up the documents submitted for in camera review as soon as is practicable.

This constitutes the Decision and Order of the Court.

Dated: January 2, 2014

Saliann Scarpulla, J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19

----------X

JANINE PAGAN, ALFREDO PAGAN, GLORIA VALDERRAMA, MARIA COLON, NAOMI BABILONIA, LUZ RIOS, MARGARITA MERCADO, ANGEL LAGUERRE, MIGUEL CINTRON, and JESSICA ACEVEDO,

Plaintiffs,

-against-

REVEREND RICHARD RAMIREZ, ROBERT M. MANNERS AND H.O.P.E.-L.I.F.E. NOAH'S ARK CHURCH INC.,

Defendants.

----------X

Index No.: 114662/09
Submitted: 10/23/2013

DECISION AND ORDER

HON. SALIANN SCARPULLA, J.:

In this action, a battle for control over a religious corporation and the building it owns, defendant H.O.P.E-L.I.F.E. Noah's Ark Church Inc. (the "Church") moves for an order compelling Reverend Richard Del Rio ("Del Rio") to respond to certain deposition ("EBT") questions asked of him at a nonparty EBT.[1] Defendant Reverend Richard Ramirez ("Ramirez") moves for the same relief and for (1) a ruling that attorney-client privilege does not apply to communications made at certain meetings; and (2) an order compelling the production of records relating to those meetings and compelling Del Rio to identify and produce the bylaws used at a meeting held on May 1, 2009.

In their complaint, plaintiffs, a group of congregants, allege that defendant Ramirez, who was elected as pastor of the Church in 2007, and defendant Assistant

[1] "Tr" will be used to reference the submitted transcript of Del Rio's EBT.

Reverend Robert M. Manners ("Manners"): (1) orchestrated the 2007 appointment of Ramirez as pastor of the Church in order to control the Church and its building; (2) disenfranchised the congregation's existing members; and, (3) created bylaws that make the removal of Ramirez, as Church pastor, difficult. Plaintiffs also allege negligent misrepresentation and fraud and seek a judgment declaring the bylaws null and void.

The complaint alleges, and it is undisputed that, on May 1, 2009, a meeting was held which was attended by Del Rio, plaintiffs, plaintiffs' counsel, Chadbourne & Park, LLC ("Chadbourne"), and others, to elect Del Rio as pastor of the Church.[2] In June 2013, Del Rio, a non-party, was deposed by the Church. Chadbourne objected to certain questions asked on the basis of attorney-client privilege, or cautioned Del Rio about answering the questions based on that ground. The Church moves for an order requiring Del Rio to return for a continued deposition, and to respond to those questions.

The Church and Ramirez argue that Del Rio's presence at meetings attended by plaintiffs and Chadbourne waives attorney-client privilege. These defendants further argue that the common-interest privilege exception does not apply. Ramirez also asserts that plaintiffs and Del Rio do not have an agency relationship because, from late 2008

---

[2] Ramirez disputes plaintiffs' characterization of the May 1, 2009 meeting as an election of Del Rio as the Church's pastor, and characterizes the transaction as an agreement, between Del Rio and the attendees, that Del Rio would take on that role in the event of plaintiffs' success in this suit. For the sake of convenience, without any legal determination made or implied, the court will refer to the transaction that occurred as an election.

through May 1, 2009, the relationship was arm's length, as Del Rio sought employment and/or to take over pastoral supervision of the Church and its property, in the event of plaintiffs' success in this suit. Ramirez also notes that 18 people attended the May 1, 2009 meeting, including Del Rio's wife.

Ramirez asserts that part of his and defendant Manner's defense is that plaintiffs have fabricated their claims because the Church rejected plaintiff Janine Pagan's ("Pagan") 2008 demand that she be given a financial interest in proceeds of the sale of the Church's building. Pagan's mother, now deceased, was the Church's former pastor. Ramirez asserts that evidence of what occurred at the meetings may reveal plaintiffs' admissions as to the true nature of, or motive behind, plaintiffs' claims against defendants, or other facts concerning plaintiffs' challenge to the adequacy of the notice given for the 2007 meeting at which Ramirez was elected pastor. Ramirez argues that plaintiffs' use of the same bylaws to conduct their own meetings would be an implicit concession of the validity of those bylaws.

In opposition, plaintiffs argue that privilege was not waived because Del Rio has been acting as plaintiffs' legal representative or agent and shares a common legal interest with them. Chadbourne has represented Pagan since January 2009 (plaintiffs' memorandum of law in further opposition at 4), and plaintiffs submit the affirmation of Chadbourne attorney, Lawrence Plotkin ("Plotkin"). Plotkin and another Chadbourne lawyer attended the May 1, 2009 meeting/election. Plotkin avers that the meeting was

held in order to determine whether or not Chadbourne would represent other interested congregants, and states that, at the meeting, he informed the congregants that Chadbourne represented Pagan. Plotkin also avers that for most of the meeting he and his colleague observed a discussion about the Church's history, in order to assist Chadbourne in developing a legal strategy, and discussed representing the congregation in seeking the return to them of the Church corporation and building. Plotkin avers that Del Rio was designated by the congregants to lead the Church at the May 1, 2009 meeting and that, after the meeting, at an unspecified date and time, Chadbourne agreed to represent the congregation members. Chadbourne also asserts that it has represented Del Rio in a limited capacity, based on his May 1, 2009 election as plaintiffs' pastor, and plaintiffs' treatment of him as their legal representative, effected through the May 1, 2009 election.

Plaintiffs submit the affirmation of Chadbourne attorney Stacey Trimmer ("Trimmer"), in which Trimmer states that Del Rio acted as plaintiffs' representative since May 1, 2009, by assisting Chadbourne in coordinating meetings and phone calls, participating in confidential communications with plaintiffs involving legal advice concerning this lawsuit, and helping to apprise plaintiffs of litigation developments. Trimmer submits an engagement letter, dated August 21, 2009, signed by Del Rio on behalf of a group that, at the time, denominated itself, as "Congregation of H.O.P.E.-

L.I.F.E. Noah's Ark Church, Inc." This action was originally commenced in that name in October 2009.[3]

Discussion

The attorney-client privilege protects "confidential communication[s] made between the attorney . . . and the client in the course of professional employment." CPLR 4503 (a) (1). This privilege "enables one seeking legal advice to communicate with counsel for this purpose secure in the knowledge that the contents of the exchange will not later be revealed against the client's wishes." *People v. Osario*, 75 N.Y.2d 80, 84 (1989).

"In order for the privilege to apply, the communication from attorney to client must be made for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship[, and t]he communication itself must be primarily or predominantly of a legal character." *Spectrum Sys. Intl. Corp. v. Chemical Bank*, 78 N.Y.2d 371, 377-378 (1991) (citation and internal quotation marks omitted). The burden of asserting and demonstrating privilege, and lack of waiver, rests with the party asserting privilege. *Matter of Priest v. Hennessy*, 51 N.Y.2d 62, 69 (1980); *New York Times Newspaper Div. of N.Y. Times Co. v. Lehrer McGovern Bovis*, 300 A.D.2d 169, 172 (1st Dept 2002). "[T]he protection claimed must be narrowly construed; and its application

---

[3] By Order, dated April 18, 2013, the complaint of Congregation of H.O.P.E.-L.I.F.E. Noah's Ark Church, Inc. was dismissed for lack of standing, but plaintiffs were permitted to assert claims as individuals.

must be consistent with the purposes underlying the immunity." *Spectrum Sys. Intl. Corp.*, 78 N.Y.2d at 377.

The Church and Ramirez argue that Del Rio's presence at meetings attended by plaintiffs and Chadbourne waives attorney-client privilege. These defendants further argue that the common-interest privilege exception, which "is an exception to the traditional rule that the presence of a third party waives the attorney-client privilege," *Hyatt v. State of Cal. Franchise Tax Bd.*, 105 A.D.3d 186, 205 (2d Dept 2013) (citation and quotation marks omitted), does not apply because plaintiffs and Del Rio do not share a common legal interest, or a joint defense, as Del Rio appeared at the EBT without counsel.

Ramirez's request for a broad, prospective ruling concerning attorney-client privilege is denied, as generally "[r]ulings on the propriety of deposition questions should only be made once a specific question has been asked and its answer refused," *Eliali v. Aztec Metal Maintenance Corp.*, 287 A.D.2d 682, 682 (2d Dept 2001), in order to avoid advisory opinions and further disputes "as to which questions may or may not be asked." *Tardibuono v. County of Nassau*, 181 A.D.2d 879, 881 (2d Dept 1992). *See also White v. Martins*, 100 A.D.2d 805, 805 (1st Dept 1984) ("It was improper to direct prospectively

that all questions to be asked in the future be answered, reserving objections for the trial court, without knowing what those questions may be").[4]

The Church moves for rulings on a number of objections raised at the EBT.

(1) The Church asked Del Rio about his understanding as to whether the May 1, 2009 meeting was conducted in conformity with the bylaws (Tr at 14). As this question does not concern a legal communication, and factual issues concerning Del Rio's understanding about bylaws are not shielded by privilege, Del Rio is ordered to answer the question. At the continued EBT, the Church is allowed to ask follow-up questions about Del Rio's knowledge concerning bylaws or meeting procedures; however, the total EBT time is not to exceed 1½ hours.[5]

(2) Del Rio was asked whether an attorney advised him not to bother with the board of trustees (Tr at 83, 86). This question seeks information which concerns legal advice. At oral argument, the defendants confirmed that, except for paper discovery matters, their concern lies with statements made at the May 1, 2009 meeting, and perhaps before. Plaintiffs and Del Rio do not contend that attorney-client privilege prevents

---

[4] The note of issue was filed in December 2010. The Church was allowed to intervene as a defendant in July 2012, and was also allowed post-note discovery. Ramirez does not adequately explain why he did not seek discovery about the May 1, 2009 meeting and election, which is addressed in the complaint, before the note of issue was filed. In addition, as plaintiffs hold the privilege, not defendants, only plaintiffs may waive the privilege. It follows that there is no waiver based on defendants' claimed needs.

[5] Del Rio testified that he did not recall if the congregation adopted bylaws (Tr at 73).

disclosure of communications made during meetings held prior to May 1, 2009, and there is no assertion that an attorney took part in any meetings held then.

The presence of a third party does not waive attorney-client privilege if the third party is acting as an agent of either an attorney or the client to facilitate communication. *Osorio*, 75 N.Y.2d at 84; *Gama Aviation Inc. v. Sandton Capital Partners, L.P.*, 99 A.D.3d 423, 424 (1st Dept 2012). "The scope of the privilege is not defined by the third parties' employment or function, however; it depends on whether the client had a reasonable expectation of confidentiality under the circumstances." *Osorio*, 75 N.Y.2d at 84.

Del Rio submits an affidavit in opposition to the motion in which he avers that he attended the May 1, 2009 meeting, that his wife left the room and closed the door for privacy, and that "[s]ince the [m]eeting," he has assisted Chadbourne with this case, including contacting congregation members and arranging for meetings to discuss the case. Del Rio does not state that at or prior to the May 1, 2009 meeting, he was, or agreed to be, plaintiffs' legal representative or agent, or that he acted in this capacity. Although at the EBT, Del Rio testified that he represented the Church, or those who considered themselves the Church's congregation, he clarified his assertion by stating, "I am their pastor. And that's it." (Tr at 87). When asked if he was Pagan's representative, Del Rio answered that he was her pastor, as well as the pastor of the other individuals that "are considered the church." (*Id.* at 88).

Plaintiff Pagan avers that the Chadbourne attorneys were present at the May 1, 2009 meeting as her counsel, and were there to discuss possibly representing the congregation as a whole. Plaintiff Alfredo Pagan, Pagan's husband, states that at the time of the meeting, he understood that Chadbourne represented his wife, and was attending the meeting to help him and other congregation members get back the Noah's Ark church building. Several of the other plaintiffs state that Del Rio was elected as pastor of the congregation at the meeting, and that they believed that their discussions with Chadbourne in Del Rio's presence were privileged and confidential. However, none of these plaintiffs state that during the meeting, or at any time before the election, they considered Del Rio their legal representative, or their representative at all, other than as the pastor or religious leader, or that they had an explicit or implicit agreement with Del Rio that he would act on their behalf regarding legal matters. While Del Rio signed an engagement letter with Chadbourne on behalf of a group (denominated in the letter as the Congregation of H.O.P.E.-L.I.F.E. Noah's Ark Church, Inc.) evidencing his belief that he was, at that time acting on behalf of this group, the letter is dated August 2009, over three months after the May 2009 meeting.

Furthermore, there is nothing in the record that demonstrates that the meeting attendees required Del Rio's assistance in conveying information to Chadbourne. *Compare Stroh v. General Motors Corp.*, 213 A.D.2d 267, 268 (1st Dept 1999) (privilege not waived by presence of daughter of "aged" mother/client); *St. Louis v Hrustich*, 35

Misc. 3d 1232[A], 2012 NY Slip Op 50982[U], *2 (Sup. Ct. Albany Co. 2012) (no waiver where injured woman unable to care for herself relied on finacé). Therefore, plaintiffs have not sufficiently met their evidentiary burden to demonstrate that Del Rio was the agent or the legal representative for the meeting attendees on May 1, 2009, or before that date.

Plaintiffs also assert the common-interest privilege. This privilege:

> is an exception to the traditional rule that the presence of a third party waives the attorney-client privilege. To fall within that exception, the privileged communication must be for the purpose of furthering a legal interest common to the client and the third party. The legal interest that those parties have in common must be identical (or nearly identical), as opposed to merely similar. This Court has held that application of the common-interest privilege further requires that the communication be made in reasonable anticipation of litigation.

Hyatt, 105 A.D.3d at 205 (citation and internal quotation marks omitted). Plaintiffs' submissions demonstrate that some plaintiffs considered Del Rio to be part of the congregation from the time of the election, or some other unspecified time.[6] However, Del Rio did not become a plaintiff in this action, does not assert that he was a congregant, and, if he has a legal interest in the outcome of this case, it is not as an original worshiper or member of the Church congregation claiming to have been disenfranchised by

---

[6] Janine and Alfredo Pagan, both aver that they consider Del Rio part of the congregation, but do not state that this was so prior to the meeting or at the meeting before the election took place. In fact, Pagan states that in January 2009, Del Rio was the pastor of another group, and that since the May 1, 2009 election, she has considered Del Rio to be a member of the congregation.

Ramirez's conduct in taking over as pastor and changing Church bylaws. Del Rio also does not claim that he was defrauded, or that any misrepresentation was made to him, or that he was the Church's pastor when the alleged wrongdoing occurred. There is nothing in Del Rio's affidavit demonstrating that he has a legal interest, as opposed to a personal or business interest, that is identical or nearly identical to that of the plaintiffs. While some of the plaintiffs state that Del Rio shares a common interest with them, their assertions are conclusory. Moreover, Chadbourne states that, at the time of the May 1, 2009 meeting, it did not have an attorney-client relationship with anyone other than Pagan, and the common-interest privilege is limited to communications "between counsel and parties with respect to legal advice in pending or reasonably anticipated litigation in which the joint consulting parties have a common legal interest." *Aetna Cas. & Sur. Co. v. Certain Underwriters at Lloyd's, London*, 176 Misc 2d 605, 612 (Sup. Ct. NY Co. 1998), *aff'd* 263 A.D.2d 367, 368 (1st Dept 1999). Communications at the meeting concerning the bylaws being used in an election held, which is an event or transaction, do not fall into that category.

Finally, of the 18 or so people at the May 1, 2009 meeting, only 10 are plaintiffs here, and only six of these 10 plaintiffs submit affidavits stating that they believed that their discussions at the meeting were privileged and confidential. This is not sufficient to demonstrate that even the majority of those who attended the meeting believed that the discussions were confidential, or that they agreed to keep in confidence what was

discussed. Therefore, plaintiffs have not met their burden to demonstrate that the common-interest privilege applies. As plaintiffs have not met their burden on the grounds that they assert here, or demonstrated that they had a reasonable expectation of privacy concerning discussions about bylaws at the May 1, 2009 meeting or earlier meetings, Del Rio is directed to answer the question for that time period.

(3) Del Rio answered the question of whether or not he consulted with the attorneys personally or on behalf of the plaintiffs/congregants regarding the matter of his becoming pastor (Tr at 89-91), and is not required to answer again.

(4) Del Rio was asked if the May 1, 2009 meeting was called in conformity with the bylaws (Tr 165). Del Rio answered that the meeting was called in conformity with the law of New York State and charities, that when you have a board meeting you have to give notice, and that he did not remember in detail. He then stated "but I can say to you that the attorneys told us that we have to" at which point Chadbourne objected to the extent that Del Rio might reveal privileged communications (Tr at 166). Del Rio then continued answering, without revealing what the lawyers told the congregation. The Church did not ask a follow-up question. Therefore, there is no record of a question concerning an attorney communication upon which to make a ruling. However, as discussed in the first item above, defendants are not precluded from seeking a complete, and responsive, answer from Del Rio about his knowledge about the bylaws, including which bylaws, if any were used at the May 1, 2009 meeting.

(5) Del Rio sufficiently answered the question of whether or not the attorneys prepared documents for a meeting when he stated "I don't recall any documents from the attorneys, no." (Tr at 170).

(6) When asked if the attorneys spoke at the May 1, 2009 meeting, Del Rio answered affirmatively (Tr at 172), and need not answer again.

(7) Pages 173-174 of the EBT transcript reflect the following discussion:

Q. Tell us what the attorneys said?
A. I don't recall exactly what the attorneys said.
Q. Did they manipulate the people?
A. No, they didn't manipulate the people.
Q. Did they discuss legal issues at all?
A. They basically informed them of what the situation was.
Q. What did they say?
A. I don't recall.

Del Rio answered the questions asked, and is not required to do so again.[7]

In addition, the court has reviewed the attorney notes from the meeting *in camera*. Plotkin states that the notes are attorney work product, and plaintiffs argue that they are privileged.

The work product privilege, CPLR 3101(c), applies to documents prepared by counsel, as an attorney, which reflect his or her "learning and professional skills, such as those reflecting an attorney's legal research, analysis, conclusions, legal theory or

---

[7] The Church cites to pages 20-24 of the transcript, but apparently to point out Del Rio's stated position at the EBT, as there is was no pending question objected to and not answered.

strategy." *Brooklyn Union Gas Co. v. American Home Assur. Co.*, 23 A.D.3d 190, 191 (1st Dept 2005). Plotkin avers that he and his colleague, who took the notes, attended the meeting for the purpose of providing legal services and that the information has been kept confidential. The somewhat cryptic, handwritten notes appear to reflect information gathered or observations made from the May 1, 2009 meeting and, possibly thoughts, impressions, and strategies. Except for the attendee list, discussed below, the notes are not in the nature of meeting minutes, and are immune from discovery as work product because they may indirectly, or otherwise, reflect counsel's mental processes and impressions. *Corcoran v. Peat, Marwick, Mitchell & Co.*, 151 A.D.2d 443, 445 (1st Dept 1989) ("[l]awyer's interviews, mental impressions and personal beliefs procured in the course of litigation are deemed to be an attorney's work product"). In any event, the notes do not address bylaws or contain information or admissions that Ramirez states that he seeks in order to prove his defense that Pagan has fabricated all of the complaint claims due to the Church's rejection of her alleged demand for an interest in the proceeds of the sale of the Church's building.

The Chadbourne file also contains a list of attendees at the meeting/election, on Del Rio's letterhead. These names, of what plaintiffs assert were potential Chadbourne clients, are not privileged. *See Matter of D'Alessio v. Gilberg*, 205 A.D.2d 8, 10 (2d Dept 1994) (generally a client's name is not privileged, as it not considered confidential or a communication). Plaintiffs do not claim that the list was created by an attorney, and it

should be turned over within 14 days of the date of this order. To the extent that the handwritten markings on the document reflect or concern meeting attendance or anticipated attendance, or record the election vote, they are not privileged and also must be provided to defendants.

In response to Ramirez's request to compel the production of documents, on the record at oral argument plaintiffs' counsel represented that, other than the notes discussed above, a full response has been provided, and that plaintiffs would respond to an additional demand that Ramirez had previously served. This resolves the portion of the motion concerned with documents, as well as any application for discovery made during oral argument.

In light of the foregoing, it is

ORDERED that the motion by defendant H.O.P.E-L.I.F.E. Noah's Ark Church Inc. is granted only to the extent that Reverend Richard Del Rio is to appear for a continued deposition to answer the questions discussed in the items labeled in the decision above as numbers one and two, and the Church is not precluded from asking related follow-up questions regarding the bylaws or meeting procedures that were used at the May 1, 2009 or earlier meetings, but the deposition, which is to be conducted within 30 days of the date this order, is to be no longer than 1½ hours and that plaintiffs are directed to produce the list of names, on Del Rio's letterhead, in accordance with the

directive above, within 14 days of the date of this order, and the motion is otherwise denied.

This constitutes the decision and order of the Court.

Dated: New York, New York
January 8 , 2014

ENTER:

Saliann Scarpulla, J.S.C.