

**Walnut Hous. Assoc. 2003 L.P. v MCAP Walnut  
Hous. LLC**

2015 NY Slip Op 30389(U)

March 18, 2015

Supreme Court, New York County

Docket Number: 653945/2013

Judge: Shirley Werner Kornreich

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This opinion is uncorrected and not selected for official publication.

**SHIRLEY WERNER KORNREICH**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 54

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WALNUT HOUSING ASSOCIATES 2003 L.P.,  
BF WALNUT PARK, LLC, as General Partner,  
BFIM SPECIAL LIMITED PARTNER, INC.  
and MMA WALNUT PARK PLAZA, L.P.,  
Derivatively on behalf of WALNUT HOUSING  
ASSOCIATES 2003 L.P., and WALNUT PARK  
PLAZA, L.P., in its Individual Capacity

Index No.: 653945/2013

**DECISION & ORDER**

Plaintiffs,

-against-

MCAP WALNUT HOUSING LLC, MUNICIPAL  
CAPITAL APPRECIATION PARTNERS II, L.P.,  
RICHARD G. COREY, and AMERICAN FOUNDATION  
FOR AFFORDABLE HOUSING, INC.,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Familiarity with this action and the court’s prior decisions is presumed.<sup>1</sup> Plaintiffs now move, by order to show cause, to compel defendants to produce communications with two independent contractors who performed work for the Partnership over which defendants have asserted the attorney-client privilege.<sup>2</sup> The issues on this motion were addressed at a November 20, 2014 discovery conference,<sup>3</sup> during which the court’s law clerk ruled on these very issues. For the reasons that follow, the court adheres to those determinations and, therefore, plaintiffs’ motion is granted in part and denied in part.

<sup>1</sup> All capitalized terms have the same meaning as in the court’s prior decisions.

<sup>2</sup> The subject communications were provided to the court for *in camera* review. *See People v Kozłowski*, 11 NY3d 223, 244 n.12 (2008) (“A trial court may conduct an in camera review of subpoenaed materials to assess an opposing party’s privilege claims”).

<sup>3</sup> The other discovery rulings referred to in the parties’ briefs, but not formally at issue on this motion, were resolved in recent telephone discovery conferences with the court.

The first contractor, Julia Blackett, assisted the Partnership with its relationship with local housing authorities. Defendants have consented to produce her documents so long as plaintiffs stipulate that such production does not constitute a waiver of defendants' other assertions of privilege. Plaintiffs refuse to so stipulate. Defendants, thus, simply seek an order that no such waiver would result from the production of Blackett's documents, a production defendants are ready to make. Below, the court issues the order sought by defendants.

As to the second consultant, Robert Wertheimer, defendants claim he provided advice with respect to the insurance coverage required by the Partnership Agreement. Corey, as principal of the Old General Partner, was obligated under the Partnership Agreement to procure certain coverage on behalf of the Partnership and the limited partners (plaintiffs). By letter dated July 18, 2013, plaintiffs demanded that Corey comply with the Partnership Agreement's insurance coverage requirements. *See* Dkt. 328. In a July 29, 2013 email exchange between Corey, Wertheimer, and Joseph F. Donley (defendants' counsel in this action), Mr. Donley provided Corey with legal advice, based on his interpretation of the Partnership Agreement, about the scope of Corey's insurance coverage obligations. Defendants argue that this communication is privileged because Mr. Donley was providing legal advice to Corey about his obligations as general partner, as opposed to providing legal advice to the Partnership. *See Spectrum Sys Int'l Corp. v Chemical Bank*, 78 NY2d 371, 377 (1991); *Priest v Hennessy*, 51 NY2d 62, 67-68 (1980). Moreover, defendants contend that since Wertheimer's involvement was a necessary part of the legal advice, no waiver occurred. *See Gama Aviation Inc. v Sandton Capital Partners, L.P.*, 99 AD3d 423, 424 (1st Dept 2012) (attorney-client communications that include third-party consultant are privileged where reasonable expectation of confidentiality exists), accord *People v Osorio*, 75 NY2d 80 84 (1989) and *Robert V. Straus Prods., Inc. v*

*Pollard*, 289 AD2d 130, 131 (1st Dept 2001); *see also Hudson Ins. Co. v Oppenheim*, 72 AD3d 489, 489-90 (1st Dept 2010) (same).

Plaintiffs, however, aver that the *Garner* rule requires a different result. This rule is “a fiduciary exception to the attorney-client privilege” and applies “when a fiduciary retains an attorney to advise him or her in the exercise of his or her fiduciary responsibilities.” *See Stenovich v Wachtell, Lipton, Rosen & Katz*, 195 Misc2d 99, 111-13 (Sup Ct, NY County 2003), accord *Garner v Wolfenbarger*, 430 F2d 1093, 1103-04 (5th Cir 1970). The *Garner* rule requires a good cause showing to compel disclosure. *Hoopes v Carota*, 74 NY2d 716, 718 (1989), *aff’g* 142 AD2d 906 (3d Dept 1988); *see Grontas v Kent N. Assocs. LLC*, 2014 WL 344265, at \*3 (Sup Ct, NY County 2014) (“Under the fiduciary exception, where a party involved in litigation is in a fiduciary relationship with another person, courts have permitted the other person, upon a showing of good cause, to pierce the attorney-client privilege for communications between counsel and the fiduciary.”); *see generally In re Bank of N.Y. Mellon*, 42 Misc3d 171, 178-80 (Sup Ct, NY County 2013) (setting forth good cause factors,<sup>4</sup> including that “the information sought was **highly relevant** to and may be the only evidence available”) (emphasis added).

Even if the *Garner* rule applied (an issue the court need not reach), no good cause exists here. The only information to be gleaned from the July 29, 2013 email exchange is Mr. Donley’s

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<sup>4</sup> *See id.* at 178-79, citing *Hoopes*, 142 AD2d at 910:

(1) there was an apparent identity of interests ...; (2) plaintiffs may have been directly affected by any decision defendant made on his attorneys’ advice; (3) the information sought was highly relevant to and may be the only evidence available on whether defendant’s actions ... were in furtherance of the interests of the [parties’ or] for his own interests in preserving and promoting the rewards and security of his own position as a corporate officer; (4) the communication apparently related to prospective actions by defendant, not advice on past actions; (5) plaintiffs’ claims of defendant’s self-dealing and conflict of interest are at least colorable, and the information they seek is not only relevant, but specific.

legal interpretation of the Partnership Agreement. The emails do not contain any important factual information about Corey's actions. Indeed, without revealing more, the emails do not indicate if Mr. Donley's advice was followed. The emails, therefore, are not highly relevant and certainly are not the best evidence of whether Corey ultimately complied with the Partnership Agreement's insurance requirements, an issue which the parties' ample discovery will surely reveal.

Finally, the other emails between Corey, Wertheimer, and Donley were sent on April 9, 2014, after the instant action was pending and *after* Corey was removed as general partner.<sup>5</sup> Hence, plaintiffs cannot argue that any legal advice was being rendered to the Partnership because, at the time the advice was rendered, Corey was no longer acting on behalf of the Partnership. The emails clearly are privileged since they contain legal advice concerning a response to plaintiffs' demands during the pendency of this litigation. Accordingly, it is

ORDERED that plaintiffs' motion to compel is decided as follows: (1) within 7 days of the entry of this order on the NYSCEF system, defendants shall produce all documents referenced by entries 1-57 (Blackett's communications) in their December 30, 2014 supplemental privilege log (Dkt. 305), and such production shall not constitute a waiver as to any of the other privileged documents at issue on this motion; and (2) plaintiffs' motion is denied with respect to entries 58-62 (Wertheimer's communications), which need not be produced because they are privileged.

Dated: March 18, 2015

ENTER:

  
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J.S.C.

<sup>5</sup> This occurred by order dated January 15, 2014. See Dkt. 46.