

Mermelstein v Moezinia
2015 NY Slip Op 32664(U)
May 18, 2015
Supreme Court, Nassau County
Docket Number: 601493-13
Judge: Timothy S. Driscoll
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ORIGINAL

**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----X
**EDWARD MERMELSTEIN, individually and in the right
and on behalf of DDH PROPERTY HOLDINGS, LLC,**

Plaintiff,

- against -

HERTZL MOEZINIA,

Defendant.

**TRIAL/IAS PART: 14
NASSAU COUNTY**

**Index No: 601493-13
Submission Date: 4/8/15
Motion Seq. No. 3**

First Action

-----X
EDWARD MERMELSTEIN,

Plaintiff,

-against-

DANIEL MOEZINIA,

Defendant.

Index No. 601021-13

Second Action

-----X
**EDWARD MERMELSTEIN, individually and in
the right and on behalf of DDH PROPERTY
HOLDINGS, LLC,**

Plaintiff,

-against

ROBERT MALEWSKI,

Defendant.

**Index No. 604884-14
(formerly New York County
Index No. 151882-13)**

**Submission Date: 4/8/15
Motion Seq. Nos. 1 and 2**

Third Action

The following papers have been read on this motion:

Notice of Motion, Affirmation in Support, Affidavit in Support and Exhibits....x
Memorandum of Law in Support.....x
Notice of Motion, Affirmation in Support, Affidavit in Support and Exhibits....x
Affirmation in Opposition, Affidavit in Opposition and Exhibits.....x
D. Moezinia Affidavit in Opposition.....x
Affirmation in Reply and Exhibits.....x
Notice of Cross Motion, Affirmation in Support and Exhibits.....x
Memorandum of Law in Support.....x
Affirmation in Opposition.....x

This matter is before the Court for decision on 1) the motion filed by Defendant Robert Malewski (“Malewski”) on February 11, 2015, 2) the motion filed by Plaintiff Edward Mermelstein (“Mermelstein” or “Plaintiff”), individually and in the right and on behalf of DDH Property Holdings, LLC (“Company”) on March 2, 2015, and 3) the cross motion filed by Malewski on March 20, 2015, all of which were submitted on April 8, 2015. For the reasons set forth below, the Court 1) grants Malewski’s motion to amend his answer in the manner proposed and directs Malewski to file and serve a clean copy of his proposed amended answer (redlined version at Ex. 9 to Bizzaro 2/9/15 Aff. in Supp.) on or before June 5, 2015; 2) grants Plaintiff’s motion to compel to the extent that the Court directs Defendants to provide Plaintiff, on or before June 5, 2015, with copies of the documents set forth on the privilege log prepared by Malewski (*see* Ex. E to Vigliarolo Aff. in Supp.); and 3) with respect to Malewski’s cross motion for a protective order, directs Malewski to comply with the Court’s directive that Plaintiff be provided with copies of the documents set forth on the privilege log prepared by Malewski on or before June 5, 2015.

BACKGROUND

A. Relief Sought

In his motion filed February 11, 2015, Malewski moves for an Order, pursuant to CPLR § 3025, granting Malewski leave to amend his answer. There is no opposition to this motion.

In Plaintiff’s motion filed March 2, 2015, Plaintiff moves for an Order, pursuant to CPLR § 3124, compelling Defendants Hertzl Moezinia (“Hertzl”), Daniel Moezinia (“Daniel”) and Malewski to comply with Plaintiffs’ discovery demands.

Hertzl and Daniel oppose Plaintiff's motion. In his cross motion, Malewski moves for an Order, pursuant to CPLR § 3103, granting Malewski a protective order preventing Plaintiff from obtaining information and documentation pertaining to those communications between Malewski and the Company which are protected by the attorney-client privilege.

B. The Parties' History

The parties' history is outlined in detail in prior decisions ("Prior Decisions") of the Court and the Court incorporates those Prior Decisions by reference as if set forth in full herein. As noted in those Prior Decisions, the central dispute in these actions is whether Mermelstein has an ownership interest in the Company which was formed to acquire property ("Property") located in Roslyn Heights, New York, and subsequently purchased that Property. Daniel and/or Hertzl, who assert an interest in the Company, dispute that Mermelstein has any such interest. That Property was subsequently sold and it is Mermelstein's contention that the sale improperly proceeded without his consent, and that money is due to him from that sale. The Company retained Malewski, an attorney, to represent the Company in the sale transaction.

In the complaint filed by Plaintiff against Malewski (Ex. 1 to Bizzaro 2/9/15 Aff. in Supp.),¹ Mermelstein asserts a cause of action for legal malpractice based on the allegation that, as the attorney for the Company, Malewski owed a duty of care which he breached. With respect to his motion to amend, Malewski submits that, if the Court determines that Plaintiff was a member of the Company and was entitled to a share of the proceeds from the sale, and Malewski is found liable as a result of that determination, then Hertzl and/or Daniel should be liable for all or part of his alleged damages because one or both of them removed funds from the Company's account. Therefore, Malewski submits, he has meritorious cross claims against Hertzl and Daniel for indemnification and contribution in the event that Plaintiff obtains a judgment against him. In addition, certain documents produced by Plaintiff in response to Malewski's discovery demands (Ex. 8 to Bizzaro 2/9/15 Aff. in Supp.) support the conclusion that specific individuals and entities made payments which Plaintiff is seeking to recover as damages in this lawsuit.

¹ This matter was initially filed in the Supreme Court of New York County under Index Number 151882-13 and was subsequently transferred to the Supreme Court of Nassau County where it has been assigned Index Number 604884/14.

Therefore, Malewski submits, he should also be permitted leave to amend his answer to assert an affirmative defense that these individuals and entities are indispensable parties to this lawsuit.

In support of Plaintiff's motion to compel, Plaintiff's counsel affirms that Plaintiff served discovery demands on Hertzl and Daniel on January 7, 2014 (Exs. A and B to Vigliarolo Aff. in Supp.). Plaintiff subsequently served discovery demands on Malewski on or about January 15, 2015 (Ex. C to Vigliarolo Aff. in Supp.). In response to those demands, Hertzl served his response dated November 18, 2014 (Ex. D to Vigliarolo Aff. in Supp.) in which he objects to producing items 13, 60 and 61 on the grounds that they are privileged. Plaintiff's request number 13 seeks a copy of "any and all agreements, and any amendments or revisions thereto, by and between Defendant, in his alleged capacity as a member of [the Company] and an attorney." Plaintiff's request number 60 seeks a copy of "any correspondence or communications by and between Defendant and [Malewski], their agents or representatives regarding the negotiations of sale and actual sale of [the Property]." And Plaintiff's request number 61 seeks a copy of "any correspondence or communications by and between [the Company] and [Malewski], their agents or representatives regarding the negotiations of sale and actual sale of [the Property]."

Plaintiff's counsel affirms that Malewski provided a response to Plaintiff's Notice for Discovery and Inspection dated February 17, 2015, along with a privilege log of the same date which sets forth several documents in Malewski's possession regarding which he is asserting that the attorney-client privilege is applicable (*see* Ex. E to Vigliarolo Aff. in Supp.). The documents in the privilege log concern several emails and a letter which relate to the closing and certain proceeds from the sale, as well as the applicable closing figures, in addition to the proposed contract of sale and some closing checks. Plaintiff's counsel affirms that Malewski makes reference to documents that have been produced, but has not himself produced any documents. In addition, to date, Daniel has not responded to any of Plaintiff's discovery demands.

Plaintiff submits that Malewski was, at a minimum, the Company's attorney in relation to the purchase and sale of the Property. Plaintiff contends, further, that the evidence obtained to date demonstrates that Mermelstein was a member of the Company or otherwise had an ownership interest in the Company. In support, Plaintiff provides 1) bank account statements reflecting that \$390,000 was transferred on behalf of Plaintiff to the Company's account on

October 26, 2009 (Ex. F to Vigliarolo Aff. in Supp.), 2) bank account statements (Ex. G to Vigliarolo Aff. in Supp.) reflecting that, on the same date, \$390,000 was transferred from the Company's account, along with another \$390,000, to an attorney escrow account related to the purchase of the Property, 3) a balance sheet and general ledger (Ex. H to Vigliarolo Aff. in Supp.) reflecting that this capital contribution from Mermelstein was included in the Company Balance sheet and general ledger for the year ending 2009, prepared by the Company's accountants, 4) a deed documenting the Company's purchase of the Property which lists Malewski as the attorney for that purchase (Ex. I to Vigliarolo Aff. in Supp.), 5) K-1 forms issued by the Company for 2009, 2010 and 2011 which confirm Mermelstein's interest in the Company (Ex. J to Vigliarolo Aff. in Supp.), 6) the balance sheet, profit and loss statement, general ledger and unfiled tax returns for 2012, prepared by the Company's accountants, reflecting the sums due to Mermelstein following the sale as a result of his 50% membership interest in the Company (Ex. K to Vigliarolo Aff. in Supp.), and 7) emails providing further evidence of Mermelstein's ownership in the Company (Ex. L, M and N to Vigliarolo Aff. in Supp.).

In opposition to Plaintiff's motion, Hertzl affirms that he formed the Company in May of 2009 for the purpose of purchasing the Property. Mermelstein, an attorney, is a partner of a law firm that is the successor-in-interest to the law firm that Hertzl hired for the purpose of forming the Company. Hertzl was referred to Mermelstein's law firm by Uri Mermelstein ("Uri"), the brother of Mermelstein with whom Hertzl previously conducted business. Following the formation of the Company, Mermelstein approached Hertzl about becoming an investor in the Company. Plaintiff promised to provide one-half of the money to purchase the Property and to represent the Company in the purchase and sale of the Property.

Hertzl affirms that, in anticipation of Plaintiff's investment in the Company, Hertzl requested that his accountants issue K-1 forms to Plaintiff. Plaintiff, however, never made an investment in the Company, at which time Hertzl instead took on Daniel, his brother, as his partner. Hertzl affirms that the DDH in the Company's name stands for Daniel, David (Hertzl's brother-in-law) and Hertzl. Thereafter Daniel, who is not an attorney, drafted an operating agreement which he believed applied to his one-half interest in the Company. Plaintiff

“somehow got a copy of this” (Hertzl Aff. in Opp. at ¶ 14) and is now using it as proof of his alleged ownership interest in the Company. Plaintiff never executed an operating agreement with respect to his alleged interest in the Company.

Hertzl affirms that, following the purchase of the Property on September 10, 2010, he approached Uri to borrow approximately \$5,000 to purchase insurance on the Property. These monies were transferred via business checks from Plaintiff’s law firm operating account. Hertzl affirms that the wire transfer on which Plaintiff relies is a wire transfer from Sibel Mermelstein (“Sibel”), the wife of Plaintiff’s brother, and submits that it is not evidence of Plaintiff’s investment. Hertzl also notes that the evidence on which Plaintiff relies, including but not limited to the K-1 forms, is evidence that Plaintiff previously submitted in support of his prior motion for injunctive relief, which the Court denied. Hertzl submits that the documents that Plaintiff requests are protected by the attorney-client privilege, and that the Court should not require Hertzl to provide those documents.

In further opposition to the motion, Daniel disputes Plaintiff’s contention that he has failed to respond to Plaintiff’s discovery demands and affirms that he provided responses to Plaintiff’s Notice to Discovery and Inspection on December 3, 2014. Daniel submits that Plaintiff is not a part owner or member of the Company and opposes Plaintiff’s efforts to obtain documents that are privileged.

In further opposition to the motion, counsel for Hertzl (“Hertzl Counsel”) submits that the bank statement on which Plaintiff relies (Ex. F to Vigliarolo Aff. in Supp.), which reflects a transfer of monies from Sibel, does not establish Plaintiff’s ownership in the Company. Hertzl Counsel notes, further, that Plaintiff has failed to provide an affidavit from Sibel corroborating Plaintiff’s claims. Hertzl Counsel submits that “the documents Plaintiff submits are meaningless and show no ownership interest” (Smikun Aff. in Opp. at ¶ 33).

In reply, Plaintiff provides affidavits of Sibel and Uri. Sibel affirms that she was married to Uri in 1991 but they have been legally separated since 2011. Sibel affirms that, based on bank statements for two Chase accounts (one belonging to Sibel and the other to Uri), recently provided to her by Uri on September 3, 2009, \$721,720.29 was transferred by Uri into Sibel’s Chase checking account, ending in the digits 7741, without her knowledge. In addition, based on

her review of an October 2009 bank account statement for the Company, she affirms that on October 26, 2009, \$390,000 from those funds were transferred by Uri from Sibel's Chase account to another account without her knowledge. Sibel's review of her bank account statement for the period October 9 - November 9, 2009 reflects that the funds were transferred to the Company's Account containing the last four digits 7079. Sibel affirms that these transactions were conducted during her marriage to Uri without her knowledge.

Uri, the brother of Plaintiff, disputes Hertzl's claim that he provided Plaintiff with closing figures for the sale of the Property for the purpose of returning a \$5,000 loan from Uri. Uri affirms that he transferred money from Sibel's account for the purpose of advancing money on behalf of Plaintiff in relation to Plaintiff's initial capital contribution for the Company. On September 3, 2009, Uri transferred \$721,740.29 to Sibel's account. Uri affirms that on October 26, 2009, he transferred \$390,000 of that money from Sibel's account to the Company's account containing the last four digits 7079, and provides copy of the three statements reflecting 1) the transfer from Uri to Sibel, 2) the transfer from Sibel to the Company, and 3) the Company's receipt of those funds (Ex. Q-1 to Uri Aff.). Thereafter, Uri transferred an additional \$42,500 from his company Juscor Inc. ("Juscor"), of which he is the sole shareholder, to the Company's account. Uri provides a copy of Juscor's bank statement and the corresponding Company bank statement reflecting receipt of the transfer (Ex. Q-2 to Uri Aff.). Uri also transferred another \$2,500 from Juscor to the Company's account on behalf of Plaintiff. Uri submits that this evidence establishes that \$435,000 was transferred to the Company on Plaintiff's behalf.

Uri also affirms that he recently located a copy of the signature pages of a stipulation of settlement for an action titled *Cross County Federal Savings Bank v. 18 Middle Neck Road, David Rahimi et al.*, Index Number 14727-09 (Ex. Q-3 to Uri Stip.). Uri affirms that he executed this stipulation at the direction of the Company's counsel as agent for Plaintiff and Malewski executed the document above that signature as counsel for the Company. Uri submits that this stipulation supports the conclusion that Malewski was aware of the involvement of Plaintiff and Uri in the Company, and is consistent with Plaintiff's claim that he and Uri had an interest in the Company.

In further response to Defendants' submissions, counsel for Plaintiff affirms that, in light of the fact that Defendants interposed joint opposition papers in response to Plaintiff's motion, Plaintiff will address both sets of opposition papers jointly while addressing Malewski's cross motion for a protective order in a separate opposition and reply. Plaintiff submits that 1) Defendants fail to address the issue of whether the documents sought to be protected are subject to the attorney-client privilege; 2) if the Court determines that the attorney-client privilege is applicable, the evidence submitted by Plaintiff warrants a determination by the Court that the privilege must yield or otherwise be deemed waived; and 3) Daniel should be compelled to provide documents demonstrating that he made a capital contribution to the Company, paid expenses on its behalf or had any communication with any party regarding the subject transaction prior to the closing that forms the basis for this action.

In support of Malewski's cross motion and in opposition to Plaintiff's motion, counsel for Malewski ("Malewski Counsel") submits that an attorney that represents a limited liability company ("LLC") does not represent its individual members. Therefore, Malewski submits, the attorney-client relationship existed only between Malewski and the Company. Malewski Counsel advises the Court that, if the Court determines that Plaintiff was an owner of the Company, Malewski will not object to producing the documents referred to in the privilege log, and will testify regarding communications between the co-defendants and him. In light, however, of the fact that the co-defendants have not waived the attorney-client privilege, and the Court has not yet resolved this issue, Malewski is prohibited from potentially breaching the attorney-client communications privilege with the Company. Malewski Counsel also describes as "curious" (Bizzaro Aff. in Supp./Opp. at ¶ 14) Plaintiff's claims regarding outstanding discovery when, Malewski submits, it is Plaintiff who has failed to comply with Malewski's discovery demands.

In opposition, Plaintiff submits that 1) Defendants have failed to meet their burden of demonstrating that the documents in question are privileged; 2) the Court need not determine that Plaintiff was an owner of the Company to permit the attorney-client privilege to yield, and to compel disclosure of the documents in question; and 3) even assuming *arguendo* that the attorney-client privilege is applicable, the privilege has been waived, in part because Defendants

already produced documents similar to the documents they seek to withhold (*see* Ex. N to Vigliarolo Aff. in Supp.).

C. The Parties' Positions

With respect to his motion to amend, Malewski submits that, if the Court determines that Plaintiff was a member of the Company and was entitled to a share of the proceeds from the sale, and Malewski is found liable as a result of that determination, then Hertzl and/or Daniel should be liable for all or part of his alleged damages because one or both of them removed funds from the Company's account. Therefore, Malewski has meritorious cross claims against Hertzl and Daniel for indemnification and contribution in the event that Plaintiff obtains a judgment against him. In addition, certain documents produced by Plaintiff in response to Malewski's discovery demands (Ex. 8 to Bizzaro 2/9/15 Aff. in Supp.) support the conclusion that specific individuals and entities made payments which Plaintiff is seeking to recover as damages in this lawsuit. Therefore, Malewski submits, he should also be permitted leave to amend his answer to assert an affirmative defense that these individuals and entities are indispensable parties to this lawsuit.

With respect to Plaintiff's motion to compel and Malewski's motion for a protective order, Plaintiff lists the documents identified in the Privilege Log provided by Malewski (*see* Vigliarolo Reply Aff. at ¶ 13) which, Plaintiff submits, is the only document that identifies the communications on which the privilege claim is apparently based. Those documents consist of emails and a letter. Plaintiff submits that Hertzl and Daniel do not assert that any of the documents in question concerned confidential communications made by and between Malewski and Defendants, individually or in their purported capacities as 50% owners of the Company, for the purpose of obtaining legal advice or services. These emails concern 1) the contract and its terms, 2) the closing for the sale of the Property, 3) the closing figures, and 4) the anticipated net proceeds from the sale of the Property. Under these circumstances, Plaintiff submits, Defendants have not met their burden of demonstrating that these documents are subject to the attorney-client privilege and, therefore, the Court should grant Plaintiff's motion and compel their production.

In opposition to Plaintiff's motion, Hertzl submits *inter alia* that 1) as Plaintiff has failed to establish that he is a member or owner of the Company, he has no standing to pursue this

action either individually or derivatively; 2) the attorney-client privilege has not been waived, notwithstanding Defendants' production of certain emails; and 3) it would be against public policy to permit the requested disclosure.

Malewski advises the Court that, if the Court determines that Plaintiff was an owner of the Company, Malewski will not object to producing the documents referred to in the privilege log, and will testify regarding communications between the co-defendants and him. In light, however, of the fact that the co-defendants have not waived the attorney-client privilege, and the Court has not yet resolved this issue, Malewski is prohibited from potentially breaching the attorney-client communications privilege with the Company.

RULING OF THE COURT

A. Leave to Amend

Motions for leave to amend pleadings should be freely granted, absent prejudice or surprise directly resulting from the delay in seeking leave, unless the proposed amendment is palpably insufficient or patently devoid of merit. *Aurora Loan Services, LLC v. Thomas*, 70 A.D.3d 986, 987 (2d Dept. 2010), citing CPLR § 3025(b); *Lucido v. Mancuso*, 49 A.D.3d 220, 222 (2d Dept. 2008).

B. Relevant Discovery Principles

CPLR § 3101(a) broadly mandates full disclosure of all matter material and necessary in the prosecution or defense of an action, and this provision is liberally interpreted in favor of disclosure. *Francis v. Securitas Security Services USA, Inc.*, 102 A.D.3d 739, 740 (2d Dept. 2013), citing, *inter alia*, *Kavanaugh v. Ogden Allied Maintenance Corp.*, 92 N.Y.2d 952, 954 (1998) and *Allen v. Crowell-Collier Publ. Co.*, 21 N.Y.2d 403, 406 (1968).

The principle of full disclosure, however, does not give the party the right to uncontrolled and unfettered disclosure, and the trial courts have broad power to regulate discovery to prevent abuse. *Gilman & Ciocia, Inc. v. Walsh*, 45 A.D.3d 531 (2d Dept. 2007), quoting *Barouh Eaton Allen Corp. v. International Bus. Machs. Corp.*, 76 A.D.2d 873, 874 (2d Dept. 1980).

C. Attorney-Client Privilege

The attorney-client privilege, which is codified in CPLR § 4503(a), fosters the open dialogue between lawyer and client that is deemed essential to effective representation. *Sieger v.*

Zak, 60 A.D.3d 661, 662 (2d Dept. 2009), quoting *Spectrum Sys. Intl. Corp. v. Chemical Bank*, 78 N.Y.2d 371, 377 (1991). As the attorney-client privilege constitutes an obstacle to the truth finding process, however, its application must be consistent with the purposes underlying the immunity. *Sieger v. Zak*, 60 A.D.3d at 662, quoting *Matter of Priest v. Hennessy*, 51 N.Y.2d 62, 68 (1980); *Spectrum Sys. Intl. Corp. v. Chemical Bank*, 78 N.Y.2d at 377. Although the scope of the privilege is to be determined on a case-by-case basis, some general principles apply. Specifically, the privilege belongs to the client and attaches if information is disclosed in confidence to the attorney for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship. *Sieger v. Zak*, 60 A.D.3d at 662 quoting *People v. Osorio*, 75 N.Y.2d 80, 84 (1989); *Spectrum Sys. Intl. Corp. v. Chemical Bank*, 78 N.Y.2d at 378 (internal quotation marks omitted). The burden of proving each element of the privilege rests on the party asserting it. *Sieger v. Zak*, 60 A.D.3d at 662, quoting *People v. Osorio*, 75 N.Y.2d at 84.

D. Application of these Principles to the Instant Action

There being no objection to Malewski's motion to amend his answer, and in consideration of the liberal amendment principles, the Court will permit Malewski to serve his proposed amended answer, of which Malewski provides a redlined version (Ex. 9 to Bizzaro 2/9/15 Aff. in Supp.). The Court directs Malewski to file and serve a clean copy of his proposed amended answer on or before June 5, 2015.

With respect to Plaintiff's motion to compel and Malewski's cross motion for a protective order, the Court directs Defendants to provide Plaintiff, on or before June 5, 2015, with copies of the documents set forth on the privilege log prepared by Malewski (*see* Ex. E to Vigliarolo Aff. in Supp.). Hertzl and Daniel have not met their burden of establishing the applicability of the privilege to those documents, and have arguably waived any applicable privilege by virtue of their production of other, similar documents. Moreover, the outstanding dispute regarding Plaintiff's interest, if any, in the Company cannot serve as a basis for Hertzl and Daniel's refusal to produce these documents.

All matters not decided herein are hereby denied.

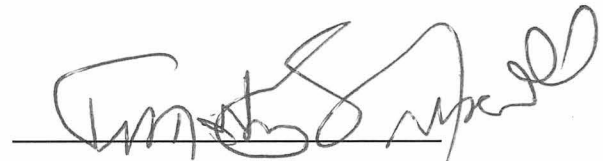
This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a Pre-Trial Conference on November 6, 2015 at 9:30 a.m.

ENTER

DATED: Mineola, NY

May 18, 2015



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

MAY 26 2015

NASSAU COUNTY
COUNTY CLERK'S OFFICE