

Meissner v Tracy Yun
2016 NY Slip Op 30468(U)
March 17, 2016
Supreme Court, New York County
Docket Number: 650913/2012
Judge: Jeffrey K. Oing
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

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JOERN MEISSNER, individually and
Derivatively on behalf of MANHATTAN
REVIEW,

Index No. 650913/2012

Plaintiff,

Mtn Seq. No. 006

-against-

DECISION AND ORDER

TRACY YUN and MANHATTAN ENTERPRISE
GROUP, LLC,

Defendants.

-----x

JEFFREY K. OING, J.:

Plaintiff Joern Meissner moves, pursuant to CPLR 3124, to compel the production of four email threads between defendant Tracy Yun ("Yun") and attorney Christopher Kelly ("Kelly") dated December 30, 2010, November 4, 2011, December 21, 2011, and March 27, 2012, respectively.

Defendant claims that these documents are protected by attorney-client privilege. For a party to assert this privilege, an attorney-client relationship must have been established (Priest v Hennessy, 51 NY2d 62, 68-69 [1980]). Such a relationship is established when a party contacts the attorney in his or her capacity as an attorney for the purpose of obtaining legal advice or services (Priest v Hennessy, 51 NY2d 62, 68-69

[1980]). In addition, the information sought to be protected from disclosure must be a "confidential communication" made to the attorney for the purpose of obtaining legal advice or services (Priest v Hennessy, 51 NY2d 62, 69 [1980]). The burden of satisfying each of these elements rests on Yun (Miranda v Miranda, 184 AD2d 286 [1st Dept 1992]).

The record demonstrates that Kelly represented Manhattan Review, LLC ("MR"), rather than Yun. First, the only retainer agreement produced by Yun is an unsigned retainer agreement between Kelly and MR (Higgins Aff. in Supp., Ex. F). In addition, the legal work Kelly did was for the benefit of MR -- including, inter alia, Kelly incorporating MR, drafting MR's operating agreement, and providing advice about MR's lease -- and Kelly billed MR for this work (Kelly EBT Exs. 2-9, 23, 27-43, Higgins Aff. in Supp., Ex. D).

Yun fails to offer any compelling evidence to support a contrary conclusion. While she points to the fact that, in most of the emails at issue here, she communicated with Kelly from her personal email address, this course of conduct is insufficient to establish a separate relationship outside of Kelly's representation of MR, as she also used this personal email to conduct business. Kelly's statements that he believed he

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represented Yun as an individual rather than MR is also unavailing, as an attorney's statement is insufficient to establish that an attorney-client relationship existed (Priest v Hennessy, 51 NY2d 62, 70 [1980]).

In the December 30, 2010 email, Yun contacted Kelly to see if he could be retained to assist and advise Manhattan Review, LLC regarding issues with the New York Unemployment Insurance Board. Clearly, from the beginning of the relationship, Kelly represented MR, rather than Yun. Accordingly, this email chain is not privileged.

In the November 4, 2011 email chain, Yun informed Kelly of a dispute with Meissner as to the ownership of MR and asked for copies of certain documents Kelly filed to establish MR as a Delaware LLC. Undisputed evidence demonstrates that Kelly billed MR for his review of the requested documents and his discussion of same with Yun (Kelly EBT Ex. 29, Higgins Aff. in Supp., Ex. D). Accordingly, this email chain is not privileged.

As the December 21, 2011 email chain relates to Yun's alleged breach of fiduciary duty in dissolving MR and transferring certain related trademarks, it would be admissible even if an attorney-client privilege existed (Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker, 1 AD3d 223, 224 [1st

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Dept 2003] [attorney-client privilege may not be invoked where it involves client communications that may have been in furtherance of an alleged breach of fiduciary duty or an accusation of some other wrongful conduct]).

The email chain commencing on March 27, 2012 is privileged, however, because it concerns trial preparations in this lawsuit and occurred after the dissolution of MR, at which point Kelly did not represent that entity.

Accordingly, it is

ORDERED that plaintiff's motion to compel is granted as to the email chains dated December 30, 2010, November 4, 2011, and December 21, 2011, and denied as to the email chain dated March 27, 2012; and it is further

ORDERED that counsel shall appear in Part 48 on May 11, 2016 at 10:30 a.m. for a status conference.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 3/17/16



HON. JEFFREY K. OING, J.S.C.

JEFFREY K. OING
J.S.C.