

**U.S. Bank N.A. v Lightstone Holdings LLC**

2016 NY Slip Op 30644(U)

April 12, 2016

Supreme Court, New York County

Docket Number: 651951/2010

Judge: Anil C. Singh

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 45

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U.S. BANK NATIONAL ASSOCIATION, as Trustee  
for the Registered Holders of Wachovia Bank  
Commercial Mortgage Trust Commercial Mortgage  
Pass-Through Certificates, Series 2007-ESH, acting by  
and through its Special Servicer, CWC Capital Asset  
Management LLC,

Plaintiff,

-against-

LIGHTSTONE HOLDINGS LLC, DAVID  
LICHTENSTEIN, LINE TRUST CORPORATION  
LTD, DEUCE PROPERTIES LTD, BANK OF  
AMERICA, N.A., WACHOVIA BANK, N.A.,  
MERRILL LYNCH MORTGAGE LENDING, INC.,  
U.S. BANK NATIONAL ASSOCIATION, as Trustee  
for MAIDEN LANE COMMERCIAL MORTGAGE  
BACKED SECURITIES TRUST 2008-1, DEBT II  
ESH, L.P., DEBT-U ESH, L.P., KEYBANK  
NATIONAL ASSOCIATION, and ASHFORD  
HOSPITALITY FINANCE LP.

Defendants.

DECISION AND ORDER

Index No. 651951/2010  
Mot. Seq. 023 & 024

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HON. ANIL C. SINGH, J.

In this action for breach of a guaranty agreement defendants Line Trust Corporation Ltd. and Deuce Properties Ltd. (“Line Trust”) move by order to show cause for an order compelling non-party Cadwalder, Wickersham & Taft (“Cadwalder”) to (i) respond to the subpoenas duces tecum by producing an unredacted copy of the email chain and billing records that relate to the drafting of the guaranty agreement and (ii) responding to the subpoena ad testificandum by compelling Matthew Robertson, Esq. and Larry Rouslin, Esq. to testify concerning their intent when drafting the Inter-creditor Agreement. Non-party Cadwalder opposes (Mot. Seq. 023).

Plaintiff US Bank National Association moves by order to show cause for a conditional order requesting that if this Court grants either of the requests sought by Line Trust then the Court should also order Cadwalder to disclose further information related to other sections of the Guaranty Agreement and the Inter-creditor Agreement. Defendants Line Trust oppose (Mot. Seq. 024).

Motion Sequence 023 and 024 are consolidated for disposition.

### **Facts**

Wachovia Bank, Bear Sterns, Bank of America (“Original Lenders”) collectively loaned \$7.4 billion to a group of borrowers who used the funds to purchase a chain of hotels (“ESH Loan”). The ESH Loan was structured as a \$4.1 billion loan from Senior Lenders (“senior debt”) and a series of mezzanine loans totaling \$3.3 billion by junior lenders (“junior debt”). Defendants Ashford and Line Trust were both junior lenders in the transaction. Plaintiff became trustee of a trust that ultimately possessed all of the senior debt and Line Trust possessed a portion of the junior debt. The borrowers were affiliated with defendants Lighthouse and David Lichtenstein (the “Lighthouse defendants”) who provided a \$100 million guaranty in support of the ESH loan.

The senior and junior lenders executed an Inter-creditor Agreement (“ICA”) that set forth their respective right as it related to repayment on the ESH loan. The borrowers later filed for bankruptcy triggering the Lighthouse guaranty obligation. The junior lenders, including Line Trust, were able to recoup \$85 million of the guaranty from defendant Lighthouse. Plaintiff US Bank, as, the senior lender to the ESH Loan now seeks to recover from the junior lenders the payments they received under the guaranty.

At issue in this litigation is whether the senior lenders or the junior lenders had priority to the \$100 million Guaranty payment. On defendants' motion to dismiss, Justice Schweitzer originally held that Section 15 (q) of the ICA granted priority to the junior lenders and dismissed plaintiffs' complaint. The First Department reversed, holding that "[b]ecause the IC Agreement's clauses concerning the lenders' rights to prosecute and collect on Guaranty claims are 'ambiguous, [they] cannot be construed as a matter of law, and dismissal ... [was] not appropriate' (U.S. Bank Nat. Ass'n v Lightstone Holdings LLC, 103 AD3d 458, 459 [1st Dept 2013]).

Non-party Cadwalder represented some of the Original Lenders in the ESH loan transaction, including Bank of America, Wachovia, and Bear Stearns. Cadwalder did not represent Defendants Line Trust or Ashford. Line Trust is seeking documents and testimony from Cadwalder regarding the priority to the guaranty.

Specifically, Line Trust is seeking the email chains in which Robert Boyd an attorney representing a potential purchaser of the junior loans asked, "Guaranty- 15(q) - is the Guaranty allocated pro rata among junior lenders only or Senior and Junior Lenders?" That e-mail was forwarded from the Original Lenders to Cadwalder for a response. There are six e-mail chains ("subject e-mail chain") that stemmed from Mr. Boyd's query totaling twenty-one individual emails with redactions. Additionally, Line Trust is seeking attorney time entries to determine if there were phone conversations in response to the e-mail chain. Lastly, Line Trust seeks general deposition testimony from Cadwalder attorneys Matthew Robertson, Esq. and Larry Rouslin, Esq.

At the direction of Cadwalder's clients, Bank of America, Wachovia, and Bear Stearns, Cadwalder has asserted that the subject email chain and testimony at issue is protected by attorney-client privilege.

This Court entered an interim order directing non-party Cadwalder to produce at oral argument an un-redacted version of the subject email chain for in camera review. However, during oral argument, plaintiff objected to my review of the emails expressing a concern that as fact finder on the case, I may become unfairly prejudiced. As a result, this Court declined to review the un-redacted subject email chain.

### **Legal Analysis**

“[A]n attorney... shall not disclose ... confidential communication made between the attorney . . . and the client in the course of professional employment” (Civil Practice Law and Rules 4503). The attorney-client privilege exists to ensure that persons seeking legal advice will be able to confer fully and freely with an attorney, secure in the understanding that all confidences will be protected from future disclosure (Priest v Hennessy, 51 NY2d 62, 68 [1980]). In order to invoke the privilege there must be an attorney-client relationship and the communication must have been made in confidence for the purpose of obtaining legal advice (Matter of Jacqueline F., 47 NY2d 215, 219 [1979]). The proponent of the privilege, in this case non-party Cadwalder, bears the burden of establishing that the information sought is immune from disclosure (People ex. rel. Spitzer v Greenberg, 50 AD3d 195, 200 [1st Dept 2008]).

### Line Trust's Motion to Compel

#### Subject Email Chain

The moving defendants contend the information sought regarding the intent of the provisions of the conflicting clauses of the ICA must be ascertained via the parole evidence. Defendants' further argue that they have been unable to depose anyone with personal knowledge as to what the parties intended on the priority issue. Accordingly, the discovery from Cadwalder is material and necessary on this question.

### *Confidentiality*

First, defendants argue that the information regarding the guaranty priority was intended to be distributed to third parties, potential purchasers of the junior loans, thus there was no confidentiality. Cadwalder's client, Wachovia, instructed its attorneys to send third parties, including Fortress, drafts of the ICA for feedback on its terms. Cadwalder responds that defendants' characterization of the ICA as a marketing document is inaccurate. Moreover, Cadwalder highlights that no persons outside of Cadwalder attorneys and their clients were included on the redacted portions of the 15(q) Email.

In order to assert a valid claim of attorney-client privilege, it must be shown that information sought to be protected from disclosure was a confidential communication (People v Mitchell, 58 NY2d 368, 373 [1983]). However, not every communication made to lawyer in her professional capacity is confidential or intended to be so; generally, question of privileged confidentiality depends on circumstances; client's intentions and reasonable expectations of confidentiality or disclosure, as expressed and inferred from her conversations, are of critical importance (People v Fentress, 103 Misc 2d 179, 191 [NY Co Ct 1980]). A client's instructions to her attorney, to negotiate with a third person and pass on client's proposals, are not confidential communications. (Brown v Ingersoll, 226 NYS2d 479 [Sup Ct 1962]).

Here Cadwalder was providing information as it relates to the priority of the guaranty under 15(q) of the ICA that was intended to be transmitted to a third party. If it is understood that the information between an attorney and client made privately was to be conveyed to others then it is not confidential (United States v Tellier, 255 F2d 441, 448 [2d Cir 1958]). There can therefore be no reasonable expectation of privacy of this information in order to confer the stature of privileged communication.

### *Legal Advice*

Second, Line Trust contends that from what they can glean from the redacted email chain, Cadwalder was acting as business people assisting in a sales effort. Information regarding business terms is not legal advice but rather business advice. Cadwalder responds that the redacted portion of the email reflects information in order for Cadwalder to provide legal advice.

“When information is conveyed to an attorney, the communication need not specifically ask for legal advice in order to maintain the document's privileged status, so long as the information is sent to counsel in order for counsel to provide legal advice” (Urban Box Off. Network, Inc. v Interfase Managers, L.P., 01 CIV. 8854 LTS/THK, 2006 WL 1004472, at \*4 [SDNY Apr. 18, 2006]). “[E]ven where there is a business transaction which is being considered, such transactions might have legal consequences on which legal advice is needed” (*id.*) For example, advice concerning the mechanics and consequences of alternative business strategies would be privileged. (In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983, 731 F2d 1032, 1038 [2d Cir 1984]).

If the lawyer is serving as a business representative of his client, those functions that she performs purely in that capacity -- such as negotiation of the provisions of a business contract or

relationship -- are not the source of a privilege (Note Funding Corp. v Bobian Inv. Co., 93 CIV. 7427 (DAB), 1995 WL 662402, at \*3 [SDNY Nov. 9, 1995]).

Ultimately, which party had the priority to the 100 million dollar guaranty, is a factual business term rather than an invitation for legal advice. At the time the subject email chain was generated, the ICA was a living and breathing document that was subject to revisions. In the scope of the broader business transaction, Cadwalder's clients were presenting terms of the ICA to potential purchasers and asking for their comments upon it. The communication was intended "to assist counsel in performing other services, such as the provision of business advice or the performance of such functions as negotiating purely commercial aspects of a business relationship." (Note Funding Corp. v Bobian Inv. Co., 93 CIV. 7427 (DAB), 1995 WL 662402, at \*2 [SDNY Nov. 9, 1995]). Accordingly, the communication in the subject email chain was not predominately legal advice and therefore not privileged.

Assuming *arguendo* that the subject email chain was privileged, the privilege nevertheless has been waived. During oral argument, counsel for Line Trust confirmed on the record that a party in this case shared with him the contents of the subject email chain. Thereafter while this motion was *sub judice*, Brett Miller, attorney for Wells Fargo, successor-in-interest to defendant Wachovia, submitted an affirmation to this Court detailing additional information regarding disclosure of the subject email chain. Cadwalder represented Wachovia during the course of the drafting of the ICA. Mr. Miller, the current attorney representing Wachovia states that in the context of settlement discussions in June 2015, he turned over the subject email chain to plaintiff's counsel by redacting as privileged one portion of the email chain which was between attorneys at Cadwalder, dated June 21, 2007 at 7:32 PM. The remainder of the chain containing five individual emails was un-redacted.

Mr. Miller further averred that subsequently, in September 2005, counsel for Line Trust asked him whether Wells Fargo, as successor in-interest to Wachovia, would object to Line Trust taking the deposition of Mr. Fineman since plaintiff had decided not to depose him. Mr. Miller responded that he would not object to the deposition and further averred that plaintiff likely had decided not to depose Mr. Fineman because his testimony would likely resolve any ambiguities concerning 15 (q) of the ICA. Most importantly, Mr. Miller stated that there was an email from Mr. Fineman that would support any such testimony. Mr. Miller then proceeded to disclose the substance of the subject email chain to Line Trust. This purposeful disclosure by Wachovia's counsel constitutes a waiver of the subject email chain (see People v Rivera, 58 AD2d 147, 149 [1st Dept 1977] affd, 45 NY2d 989 [1978] (finding waiver of privilege of statement made by an attorney who was acting within scope of his authority)).

#### Plaintiff's Conditional Motion

Plaintiff argues that Line Trust's motion should be denied, but in the alternative if it is granted then plaintiff is additionally entitled to 144 documents<sup>1</sup> and testimony relating to (i) the intent and meaning of the relevant sections of the ICA, including 6(b), 10, and 15 (q), (ii) the lenders' priority with respect to payments made under the Guaranty Agreements, (iii) any purported waiver by the Senior Lender of any of the rights under the Senior Guaranty.

#### *Privilege*

Without the benefit of an in camera review, this Court cannot ascertain whether or not the additional documents constitute legal advice or business information. Accordingly, plaintiff's

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<sup>1</sup> Plaintiffs are referring to the 144 documents that have been designated as privileged in Cadwalder's privilege log dated July 18, 2014 and relate to the intent and meaning of the provisions in the ICA. The existence of any other documents is purely speculative.

motion is referred to a special referee to hear and report whether the additional documents are privileged.

#### *Selective Disclosure*

In the event the additional documents are privileged, they may still be discoverable if the production of the subject email chain at issue in Line Trust's motion would constitute selective disclosure. Selective disclosure is defined as the "act of divulging part of a privileged communication, or one of several privileged communications, usu[ally] because the divulged portion is helpful to the party giving the information, while harmful portions of the communication are withheld" (SELECTIVE DISCLOSURE, Black's Law Dictionary (10th ed. 2014)). A waiver of attorney-client privilege occurs when a party discloses a portion of privileged communication but withholds other communication that are not as beneficial to the party's position. (Melcher v Apollo Med. Fund Mgt. L.L.C., 37 AD3d 217 [1st Dept 2007]). The special referee shall hear and report whether the additional documents should be produced under the theory of selective disclosure.

#### *Subject Matter Waiver*

Lastly, plaintiff argues that Wachovia's disclosure of the contents of the 15 (q) subject email chain constitutes a subject matter waiver as it relates to the entitlement of the senior lender or the junior lender to the guaranty under §§ 6(b), 10, and 15 (q) of the ICA.

The First Department analyzed the interplay of the various provisions of the ICA when it held, "a court should avoid an interpretation that would leave contractual clauses meaningless" as it relates to the priority to the guaranty (U.S. Bank Nat. Ass'n v Lightstone Holdings LLC, 103 AD3d 458, 459 [1st Dept 2013]). Thus a subject matter waiver may have occurred when the attorney for Wachovia disclosed the contents of the 15 (q) subject email chain thus waiving the

privilege as it relates to the additional documents which provide information on the other ICA provisions. The analysis of a subject matter waiver is highly fact specific (Compare Charter One Bank, F.S.B. v. Midtown Rochester, L.L.C., 191 Misc. 2d 154 [Sup Ct 2002] (rejecting notion that “any disclosure” of confidential communication should waive privilege for all documents involving same subject matter), with Stenovich v. Wachtell, Lipton, Rosen & Katz, 195 Misc. 2d 99, 109 [Sup Ct. 2003] (finding the opposite, that a “[w]aiver of the attorney-client privilege normally compels the production of other documents protected by the privilege which relate to the same subject”). Accordingly, this matter shall be referred to a special referee to hear and report whether the additional documents should be produced under the theory of subject matter waiver.

#### Corresponding Deposition Testimony

Based on my findings that the subject email chain concerns business terms and privilege in any event has been waived Mr. Robertson and Mr. Rouslin shall be deposed regarding the meaning and intent of the ICA. Their testimony is material and necessary as it relates to the issue of priority.

#### Time and Billing Records

In order to refresh the recollection of Mr. Robertson and Mr. Rouslin, Line Trust are seeking Mr. Robertson and Mr. Rouslin’s billing records for one week June 19<sup>th</sup> to June 26<sup>th</sup> 2007. The general rule is when bills, invoices and records of payment are created primarily for a business purpose they are not immune from disclosure because these records are not legal advice (Matter of Bekins Record Stor. Co., Inc., 62 NY2d 324, 329 [1984]). On the other hand, fee

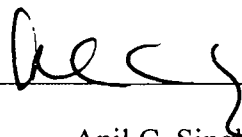
statements can be privileged if they contain detailed accounts of the legal services rendered (Eisic Trading Corp. v Somerset Mar., Inc., 212 AD2d 451, 451 [1st Dept 1995]).

While there may be information that needs to be redacted because it is of a privileged nature, generally billing records are discoverable. Cadwalder is directed to produce the sought after time and billing statements with redactions of any detailed accounts of legal services rendered with a privilege log. Cadwalder has further objected on the ground of burden. One week of time entries for two timekeepers are not overly burdensome. The time entries and log, if any, shall be turned over within 30 days.

This constitutes the decision and order of the Court.

Date: April 12, 2016

New York, New York

  
Anil C. Singh