Matter of Peerenboom v Marvel Entertainment, LLC
2016 NY Slip Op 31957(U)
September 30, 2016
Supreme Court, New York County
Docket Number: 162152/2015
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42
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MATTER OF HAROLD PEERENBOOM,

Plaintiff

v

MARVEL ENTERTAINMENT, LLC

Defendants.

Index No. 162152/2015
MOT. SEQ. 002, 003, 004

DECISION AND ORDER

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NANCY M. BANNON, J.:

I. INTRODUCTION

In this proceeding pursuant to CPLR 3119(e) to enforce a subpoena served upon the respondent Marvel Entertainment, LLC (Marvel), in aid of a civil action pending in the Circuit Court of Palm Beach County, Florida, nonparty Isaac Perlmutter moves for a protective order barring Marvel from producing copies of certain email messages alleged to be privileged. The petitioner, Harold Peerenboom, opposes the three separate motions for that relief. Marvel takes no position as to the assertion of the various privileges. The court grants those branches of the motions which seek to invoke the marital privilege to the extent of directing Marvel to produce items numbered 119, 120, 121, 139, 142, 143, 146, 148, and 388 in the privilege logs submitted by Perlmutter for an in camera inspection by the court, and otherwise denies the motions.

II. BACKGROUND

Peerenboom commenced an action in the Circuit Court of Palm Beach County, Florida, alleging that Perlmutter and his wife, Laura Perlmutter (Laura), defamed Peerenboom by sending anonymous defamatory letters to persons living or working at the Palm Beach condominium development where they all reside. Since Perlmutter is the CEO of Marvel, and allegedly utilized Marvel's e-mail server for his electronic communications, Peerenboom issued subpoenas in the Florida action, addressed to Marvel, to obtain any communications sent and received by Perlmutter or Laura via Marvel's e-mail server that were referable to Peerenboom and others involved in a dispute over the management of the tennis club at the condominium. Since Marvel maintains its principal office in New York, Peerenboom thereafter commenced this proceeding against Marvel to enforce the subpoenas. Although not named as a party to this proceeding, Perlmutter submits three separate motions for a protective order, alleging that many of the e-mails sought by Peerenboom are protected from disclosure by various privileges, such as the attorney-client privilege, the work-product privilege, the common-interest privilege, a purported accountant-client privilege, a limited principal-agent privilege, and the marital privilege.

Peerenboom opposes the motions, contending that Perlmutter

waived all privileges, inasmuch as Perlmutter sent or received the subject e-mail messages on Marvel's server, and Marvel's written computer usage handbook, as drafted by its corporate parent, the Walt Disney Company (Disney), provides that "hardware, software, e-mail, voicemail, intranet and Internet access, computer files and programs—including any information you create, send, receive, download or store on Company assets—are Company property, and [it] reserve[s] the right to monitor their use, where permitted by law to do so."

III. PRIVLEGED COMMUNICATIONS

The Legislature and the courts have articulated numerous privileges immunizing from disclosure otherwise discoverable communications that constitute evidence admissible in a judicial proceeding, or are likely to lead to the discovery of such evidence. These include the attorney-client privilege (see CPLR 4503), the attorney work-product privilege (see CPLR 3101[c]; Matter of New York City Asbestos Litigation, 109 AD3d 7, 12 [1st Dept 2013]), the common-interest privilege (see Ambac Assur. Corp. v Countrywide Home Loans, Inc., 27 NY3d 616 [2016]), the marital privilege (see CPLR 4502), and a principal-agent privilege where the agent merely relays communications between an attorney and client that are subject to the attorney-client privilege. See People v Osorio, 75 NY2d 80, 84 (1989)

"[S]tatutes bestowing an evidentiary privilege should be construed in furtherance of their 'policy to encourage uninhibited communication between persons standing in a relation of confidence and trust.'" Matter of Keenan v Gigante, 47 NY2d 160, 167 (1979), quoting People v Shapiro, 308 NY 453, 458 (1955). Despite the social utility of such privileges, they are in "[o]bvious tension" with the policy of this State favoring liberal discovery, as articulated in CPLR 3101(a)(1). Spectrum Sys. Intl. Corp. v Chemical Bank, 78 NY2d 371, 377 (1991). Since privileges shield from disclosure pertinent information, and therefore constitute obstacles to the truth-finding process, they must be narrowly construed. See Matter of Jacqueline F., 47 NY2d 215, 219 (1979); see also Madden v Creative Servs., 84 NY2d 738, 745 (1995); Spectrum Sys. Intl. Corp. v Chemical Bank, supra, at 377.

The person challenging disclosure by asserting a privilege bears the burden of establishing that the information sought is immune from disclosure. See Spectrum Sys. Intl. Corp. v Chemical Bank, supra, at 376-377; Ambac Assur. Corp. v DLJ Mtge. Capital, Inc., 92 AD3d 451, 452 (1st Dept 2012). For the reasons set forth herein, The court concludes that, in connection with all of the privileges asserted, save the marital privilege, Perlmutter has not satisfied his burden.

IV. WAIVER OF CERTAIN PRIVILEGES THAT MAY OTHERWISE BE UNILATERALLY ASSERTED

A. ATTORNEY-CLIENT and WORK-PRODUCT PRIVILEGES

The court agrees with Peerenboom that use of a proprietary e-mail system, subject to an employer's computer usage policy such as the one adopted by Marvel, constitutes a waiver of any privilege that can otherwise be unilaterally asserted by a declarant or the intended audience of an otherwise confidential communication. The use of one's own personal home computer to communicate with an attorney on a private, unencrypted e-mail account does not vitiate the attorney-client privilege or the work-product privilege, inasmuch the client may reasonably maintain an expectation that the communications are private and confidential (see Pure Power Boot Camp, Inc. v Warrior Fitness Boot Camp, LLC, 587 F Supp 2d 548, 564-565 [SD NY 2008]). Conversely, as to electronic communications sent and received on Marvel's server, Perlmutter waived his attorney-client privilege and work-product privilege. The court, in consonance with all of the state and federal courts in New York that have addressed the issue (see e.g. United States v Finazzo, 2013 US Dist. LEXIS 22479, *22 [ED NY 2013]; Matter of Reserve Fund Secs. & Derivative Litig. v Reserve Mgmt. Co., 275 FRD 154, 159-160 & n 2 [SD NY 2011] [collecting cases]; Falcon Envtl. Servs., Inc. v American Falconry Servs., LLC, 2013 NY Slip Op 33203(U), *21 [Sup Ct, Wayne County 2013]; Scott v Beth Israel Med. Ctr. Inc., 17

Misc 3d 934, 940-942 [Sup Ct, N.Y. County 2007]), adopts the four-factor analysis set forth in Matter of Asia Global Crossing, Ltd. (322 BR 247 [SD NY 2005]). That is, to determine if e-mail exchanges over an employer's email system remain privileged when there is a company policy in place providing otherwise, a court must consider whether: (1) the employer maintains a policy banning personal or other objectionable use; (2) the employer monitors the use of the employee's computer or e-mail; (2) third parties have a right of access to the computer or e-mails; and (4) the employer notified the employee, or the employee was aware, of the use and monitoring policies.

Disney's computer usage policy prohibits personal and other objectionable use of Marvel's server and e-mail system, Disney/Marvel had the right to monitor the use of all employees' computer usage, third parties have a right of access to the computer, Disney/Marvel expressly asserted a possessory interest in all e-mails sent and received on its servers, and Perlmutter was or should have been aware, as Marvel's Chairman or CEO, that Marvel implemented Disney's use and monitoring policies. Consequently, under the circumstances of this case, application of the factors articulated in Asia Global warrants a finding that Perlmutter did not have a reasonable expectation of privacy in connection with electronic messages sent and received on Marvel's server, and has waived the attorney-client and work-product

privileges in connection with them. See Scott v Beth Israel Med. Ctr. Inc., supra, at 940-942; see also Willis v Willis, 79 AD3d 1029, 1030-1031 (2nd Dept 2010) (attorney-client privilege waived where party sent e-mails to her attorney on an e-mail account that was "freely accessible" by third parties).

B. PRINCIPAL-AGENT PRIVILEGE

The principal-agent privilege immunizes from disclosure communications between an attorney or a client, on the one hand, and, on the other, an intermediary who is employed solely to relay communications protected by the attorney-client and work-product privileges. See People v Osorio, supra, at 84. Since Perlmutter seeks to invoke the attorney-client and work-product privileges, it is his burden of establishing their applicability (see id.). Since Perlmutter waived the attorney-client and work-product privileges with respect to all communications sent and received on Marvel's server, he consequently also waived the privileges in connection with any communications that may have been relayed through an intermediary.

The court further notes that Disney and Marvel employees are governed by the same company computer policies as Perlmutter, and have also waived their own principal-agent privilege by communicating by e-mail via the Disney/Marvel server. Therefore, any communications made on Perlmutter's behalf by an "agent" who

is also a Disney or Marvel employee are not protected by the privilege, and must be produced in discovery.

In any event, Perlmutter failed to discharge his burden in invoking the principal-agent privilege, as he has not shown, with any particularity, that his subordinates were relaying communications between him and his attorney in the first instance. See generally Gama Aviation Inc. v Sandton Capital Partners, L.P., 99 AD3d 423, 424 (1st Dept 2012); Robert V. Straus Prod. v Pollard, 289 AD2d 130, 131 (1st Dept 2001).

V. COMMON-INTEREST PRIVILEGE

The court rejects Perlmutter's contention that the common-interest privilege (see Ambac Assur. Corp. v Countrywide Home Loans, Inc., supra) prevents the disclosure of communications between him Stephen Raphael, who assisted him in financing the Florida litigation of Karen Donnelly, a mutual acquaintance who worked as a tennis pro at Perlmutter's condominium.

"Under the common interest doctrine . . . an attorney-client communication that is disclosed to a third party remains privileged if the third party shares a common legal interest with the client who made the communication and the communication is made in furtherance of that common legal interest." Id. at *2 (emphasis added). For the privilege to apply, the communication sought to be protected must relate to

actual or anticipated litigation. See id. The common interest privilege "serves to protect the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel." Matter of Asia Global Crossing. Ltd., supra at 264, quoting United States v Schwimmer, 892 F2d 237, 243 (2d Cir 1989) (internal quotation marks omitted).

Perlmutter makes only conclusory and unsubstantiated allegations that he shared some "legal" interest with Raphael, none of which adequately shows that he and Raphael in fact shared such an interest. Even if Perlmutter and Raphael shared the cost of attorney's fees incurred by Donnelly in connection with her Florida litigation, that arrangement does not serve as a basis for concluding that the two men share a common "legal" interest, as they are not parties to that litigation. Furthermore, the mere fact that Perlmutter is Raphael's co-defendant in another Florida action is not enough to properly assert a common interest privilege. Perlmutter failed to show that the communications he seeks to protect here are relevant to that matter, were made "in furtherance of a common legal interest" arising from that matter, and that, with respect to these communications, he and Raphael "had a reasonable expectation of confidentiality." Mt. McKinley Ins. Co. v Corning Inc., 81 AD3d 498, 499 (1st Dept 2011).

VI. ACCOUNTANT-CLIENT PRIVILEGE

Perlmutter suggests that there are some communications between his accountant and him that are privileged and, thus, immune from disclosure. New York, however, does not recognize such a privilege. See Buffamante Whipple Buttafaro, Certified Public Accountants, P.C. v Dawson, 118 AD3d 1283, 1284 (4th Dept 2014); First Interstate Credit Alliance, Inc. v Arthur Andersen & Co., 150 AD2d 291, 292 (1st Dept 1989).

VII. MARITAL PRIVILEGE

Perlmutter asserts that he has not waived his marital privilege with respect to electronic communications between his wife and him that were sent and received on Marvel's server. While the use of a proprietary email system that is subject to a policy such as Disney's effects a waiver of any privileges that can otherwise be unilaterally asserted, it does not abrogate such privileges where another's consent is necessary to effect a waiver. CPLR 4502(b) provides that "a husband or wife shall not be required, or, without consent of the other if living, allowed, to disclose confidential communication made by one to the other during the marriage." "To be borne in mind in deciding whether there has been a waiver is that the conjugal privilege belongs not to the witness but to the spouse against whom the testimony

is offered" (Prink v Rockefeller Ctr, 48 NY2d 309, 314 [1979]), which, in the present case, could be either Perlmutter or Laura. The proper application of CPLR 4502(b) thus requires the conclusion not only that Perlmutter cannot be compelled to testify against Laura in the Florida defamation action but cannot, without her consent, waive her marital privilege by sharing their confidential communications with third parties. Moreover, while the privilege is vitiated where spousal communications are knowingly made in the presence of third parties (see People v Scalise, 70 AD2d 346, 348 [3rd Dept 1979]), research reveals no case in which the privilege was vitiated where one spouse was unaware that third parties had knowledge of or access to the particular communication.

Since there is no allegation in the petition that Laura was an employee of Marvel or Disney, or that she was aware of the Disney e-mail usage policy, Perlmutter cannot unilaterally waive the marital privilege applicable to communication between Laura and him merely by communicating with her via the Marvel server. Rather, to defeat the privilege, Peerenboom is required to show that Laura consented to the disclosure of the subject communications, and there is no allegation or evidence that she did so, except where an allegedly marital communication was also shared with attorneys, in which case Perlmutter and Laura jointly consented to the abrogation of the marital privilege.

Nonetheless, CPLR 4502(b), by its terms, requires that, for the privilege to be invoked, the subject communications between spouses must be shown to be "confidential" in nature. "Not protective of all communications, the [marital] privilege attaches only to those statements made in confidence and 'that are induced by the marital relation and prompted by the affection, confidence and loyalty engendered by such a relationship.'" Matter of Vanderbilt (Rosner-Hickey), 57 NY2d 66, 73 (1982), quoting Poppe v Poppe, 3 NY2d 312, 315 (1957); see also Prink v Rockefeller Ctr, supra, at 314; Fisch, New York Evidence (2d ed), § 597, p 380.

Since there is no reason to believe that Laura consented to Perlmutter's waiver of the marital privilege in connection with several enumerated communications, the court concludes that all electronic communications between Perlmutter and Laura on the Marvel server that are confidential in nature are protected by the marital privilege, unless knowingly shared with third parties, including attorneys, inasmuch as any attorney-client privilege has been waived. Conversely, all electronic communications between Perlmutter and Laura on the Marvel server that are not confidential in nature, and have been requested in this litigation, must be turned over to Peerenboom.

Whether a communication is properly deemed confidential is an issue of fact to be determined by the court. See People v

Wilson, 64 NY2d 634, 636 (1984). To facilitate the determination of whether a particular marital communication is confidential and, hence, protected by the privilege, the court directs that Marvel provide the court with copies of items designated as numbers 119, 120, 121, 139, 142, 143, 146, 148, and 388 on Perlmutter's privilege logs for in camera inspection, and a determination thereafter of whether they are privileged.

VIII. CONCLUSION

ORDERED that the branches of the motion which are for protective orders preventing the disclosure of items designated as numbers 119, 120, 121, 139, 142, 143, 146, 148, and 388 on Perlmutter's privilege log are granted to the extent that Marvel Entertainment, LLC, shall provide those items to the court for an in camera inspection, and a determination thereafter of whether they are privileged, and the motions are otherwise denied.

This constitutes the Decision and Order of the court.

Dated: September 30, 2016

J.S.C.
HON. NANCY M. BANNON