

Kagan v Minkowitz
2016 NY Slip Op 32429(U)
December 9, 2016
Supreme Court, Kings County
Docket Number: 500940/2016
Judge: Sylvia G. Ash
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At an IAS Term, Comm-11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 9th day of December, 2016.

P R E S E N T:

HON. SYLVIA G. ASH,

Justice.

----- X
JEREMY KAGAN, Individually and Derivatively
on Behalf of M.M.T. DIAGNOSTICS (2014) LTD.,

Plaintiff(s),

- against -

GERALD MINKOWITZ, PATHS TO RICHES,
LLC, MOSHE BERMAN, FRAN FENAMORE,
NEWCO.,

Defendant(s),

- and -

M.M.T. DIAGNOSTICS (2014) LTD.,

Nominal Defendant.

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The following papers numbered 1 to 5 read herein:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____

DECISION AND ORDER

Index # 500940/2016

Papers Numbered

1-3

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Defendants, GERALD MINKOWITZ, PATHS TO RICHES, LLC, MOSHE BERMAN, and FRAN FENAMORE, move to compel certain discovery withheld by Plaintiff, JEREMY KAGAN ("Kagan").

According to Defendants, during Kagan's deposition, Kagan testified that he communicated with his brother, Gamliel Kagan ("Gam"), about this lawsuit and further, that he had sent many emails to his attorneys discussing this lawsuit while copying a person or persons other than his attorneys. Kagan also testified that Gam is largely funding this litigation. It is Defendant's position that these actions by Kagan, as CEO and shareholder of M.M.T. DIAGNOSTICS (2014) LTD. ("MMT"), constituted a misappropriation of MMT's proprietary

business information and a breach of Kagan's duty of loyalty to MMT insofar as he was revealing confidential business information to a third party. As a result of Kagan's testimony, Defendants served upon Kagan a Second Request for Production of Documents dated June 1, 2016, requesting, in sum and substance, all communications between Kagan and Gam relating to this lawsuit and any communications and/or documents sent or received by Kagan and his counsel on which any third party was copied.

According to Defendants, Kagan provided some responsive documents to the aforementioned request but withheld 49 documents as identified in a privilege log asserting privilege protections.

Kagan submits that the withheld documents/communications are protected by the attorney-client privilege, common-interest privilege and/or as attorney work product. Kagan also contends that these privileges were not waived by disclosure to Gam because Gam, given his technical and business expertise and close relationship to him, serves as his agent or his counsel's agent. Specifically, Kagan claims that Gam was essential in "making clear to Plaintiff's Counsel the nature of MMT's business, Plaintiff's role therein and the history of the development effort, which Gam himself was involved in throughout as Plaintiff's business advisor from the beginning." Alternatively, Kagan argues that, due to Gam's ties to Kagan as an intimate family member and confidante, they share a commonality of interest to which the attorney-client privilege applies. In addition to attorney-client privilege, it is Kagan's position that the withheld documents are protected as attorney work product because they were either prepared in anticipation of litigation or trial or contain "mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation" and that any disclosure to Gam does not constitute a waiver because Gam is not an adversary but an ally to whom disclosure would still be protected.

In response, Defendants contend that Gam cannot be considered Kagan's or his counsel's "agent" for privilege purposes because Gam's participation was not necessary or indispensable for Kagan to obtain legal advice. Further, that there can be no common-interest privilege because Gam is not a party to this litigation and has never played a formal, authorized role within MMT. Finally, Defendants argue that Kagan has waived any work-product privilege because his disclosures to Gam are inconsistent with maintaining secrecy and significantly increase the possibility that Defendants will obtain the information since Defendants can simply serve a subpoena on Gam.

Discussion

The attorney-client privilege protects “confidential communications made between the attorney . . . and the client in the course of professional employment” (CPLR §4503[a]). The attorney-client privilege may be asserted when the character of the services or advice provided is predominantly legal in nature (*Spectrum Sys. Intl. Corp. v Chem. Bank*, 78 NY2d 371, 378-380 [1991]). The purpose of the attorney-client privilege is to “ensure that one seeking legal advice will be able to confide fully and freely in his attorney, secure in the knowledge that his confidence will not later be revealed to the public to his detriment or his embarrassment” (*People v Mitchell*, 58 NY2d 368, 373 [Ct App 1983]).

Although it is generally accepted that disclosures of attorney-client communications to third parties will constitute a waiver of the attorney-client privilege (*People v Osorio*, 75 NY2d 80, 84 [1989]), disclosures to a third party may nonetheless be protected if the privileged information is shared with a client’s or his or her attorney’s agent (*see People v Mitchell*, 58 NY2d at 373). For example, “[a]n exception exists for statements made by a client to the attorney’s employees or in their presence because clients have a reasonable expectation that such statements will be used solely for their benefit and remain confidential” (*People v Osorio*, 75 NY2d at 84 [*citations omitted*]). “Similarly, communications made to counsel through a hired interpreter, or one serving as an agent of either attorney or client to facilitate communication, generally will be privileged” (*Id.*). “The scope of the privilege is not to be defined by a third party’s employment or function; it rather depends upon whether the client had “a reasonable expectation of confidentiality under the circumstances”” (*Stroh v General Motors Corp.*, 213 AD2d 267, 268 [1st Dept 1995]).

Another exception to the waiver of attorney-client privilege is the common-interest privilege (*Lieberman v Gelstein*, 80 NY2d 429, 437 [2006]). To fall within this exception, the privileged communication must be for the purpose of furthering a legal interest common to the client and the third party and the communication must be made “in reasonable anticipation of litigation” (*see Hyatt v State of Cal. Franchise Tax Bd.*, 105 AD3d 186, 205 [2d Dept 2013][*citations omitted*]). This doctrine is rooted in criminal law and serves to allow “the attorneys of criminal co-defendants to share confidential information about defense strategies without waiving the privilege as against third parties” (*Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 27 NY3d 616, 625 [2016]).

With regards to the attorney work product privilege, the protection applies only to “documents prepared by counsel, as an attorney, which reflect counsel’s learning and professional skills, including legal research, analysis, conclusions, legal theory and strategy (*Brooklyn Union Gas Co. v American Home Assur. Co.*, 23 AD3d 190, 190-191 [1st Dept 2005]). “Work product protections are only waived when disclosed to a third-party “when there is a likelihood that the material will be revealed to an adversary, under conditions that are inconsistent with a desire to maintain confidentiality”” (*TC Ravenswood, LLC v National Union Fire Ins. Co. of ...*, 2013 NY Misc. LEXIS 2631, 2013 NY Slip Op 31335(U), *6 [New York Cty, 2013 [citing *People v Kozlowski*, 11 NY3d 223, 246 [2008]]]).

Here, Kagan has submitted to the Court, for *in camera* review, various email exchanges between himself and his counsel that were either forwarded to Gam or wherein Gam was copied. Upon review of the papers submitted and consideration of the foregoing principles, the Court finds that the attorney-client emails which were forwarded to Gam are not protected by the attorney-client privilege because no counsel was present when Gam received the information. Kagan fails to provide support for the proposition that the attorney-client privilege applies to email communications between a client and his attorney that were *later forwarded to a third party*. Moreover, even if the attorney-client privilege were applicable, because these attorney-client emails were forwarded to Gam after the fact, Kagan cannot show that Gam served to facilitate attorney-client communication or representation at the time such communication took place so that the agency exception would apply. In any case, Kagan has failed to establish that Gam, generally, is his agent or his counsel’s agent whose services are necessary for the provision or receipt of legal services.

Secondly, the common-interest privilege does not apply to the facts of this case since there is no indication that Gam has a “legal interest” in common with Kagan because there is no pending or anticipated litigation against Gam.

Finally, with regards to the attorney work product privilege, unlike the attorney-client privilege, the protection is not waived when disclosed to a third party so long as the circumstances of disclosure are consonant with maintaining confidentiality. Here, the Court finds that any disclosure to Gam of emails containing attorney work product are still protected under this privilege. Accordingly, the Court has culled through the *in camera* submission¹ and

¹ The *in camera* submission was deficient insofar as the pages were not bates-stamped. The Court, for the sake of efficiency, has taken the time to manually bates-stamp the submission from page 1 to 138.


indicated certain portions of pages² that are protected from disclosure on the basis that they reflect the opinions and legal strategies as stated by Kagan's counsel. The protected information are reflected in the following pages:

1	67	97
5	72	
10	73	
28	75	
29	76	
36	85	
37	86	
38	91	
39-59	94	

Kagan is directed to pick up the submission from chambers, redact the information as indicated, and turn over the submission to Defendants within 60 days of Notice of Entry. If the parties need clarification of this Order, they are directed to call the Court via conference call.

This constitutes the Decision and Order of the Court.

E N T E R,



Sylvia G. Ash, J.S.C.

² The protected material is indicated by a demarcation and the initials "HS."