

**Toobian-Sani Enters., Inc. v Bronfman Fisher Real Estate Holdings, LLC**

2017 NY Slip Op 30133(U)

January 20, 2017

Supreme Court, New York County

Docket Number: 651847/2012

Judge: Saliann Scarpulla

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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 39

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TOOBIAN-SANI ENTERPRISES, INC., INDIVIDUALLY  
AND ON ITS OWN BEHALF AND DERIVATIVELY ON  
BEHALF OF 210 WEST 91ST STREET OWNER, LLC,

Plaintiff,

-against-

BRONFMAN FISHER REAL ESTATE HOLDNGS, LLC,  
210 W 91 ACQUISITION LLC AND AVI DAN, AS  
DEFENDANTS, AND 210 WEST 91ST STREET OWNER,  
LLC AS NOMINAL DEFENDANT,

Defendants.

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HON. SALIANN SCARPULLA, J.:

**DECISION/ORDER**

Index No. 651847/2012  
Motion Seq. No. 004

In this action arising from the breach of an alleged joint venture agreement, plaintiff Toobian-Sani Enterprises, Inc. (“Toobian Sani”) moves to: (a) compel defendants Bronfman Fisher Real Estate Holdings, LLC (“Bronfman Fisher”) and Avi Dan to produce documents withheld on the basis of attorney-client privilege; (b) to strike the defendants’ answers; and (c) for attorney’s fees and expenses.

In 2007, Toobian-Sani allegedly discovered “an opportunity to purchase certain air rights (the ‘Air Rights’) over a shared community property and synagogue located at 210 West 91 Street, New York, New York.” Shortly thereafter, Toobian-Sani’s president – Pouya Toobian (“Toobian”) – developed a business relationship with Bronfman Fisher, and they later discussed pursuing a partnership together to develop the Air Rights.

In connection with their discussions, Toobian-Sani and Bronfman Fisher executed a confidentiality and non-circumvention agreement (“CNC Agreement”). The CNC Agreement contained a confidentiality clause, which stated that “[i]n no event shall Bronfman use any

Confidential Information in competition with or to the detriment of TSE [Toobian Sani] nor shall Bronfman disclose the Opportunity or any other Confidential Information to any person or entity except in strict conformity with the terms of this Agreement.”

Toobian Sani alleges that Toobian-Sani and Bronfman Fisher eventually formed a joint venture to develop the Air Rights. Thereafter, the entity 210 West 91<sup>st</sup> Street Owner, LLC (“Owner I”) was formed to complete the purchase of the Air Rights on behalf of the joint venture. On May 14, 2008, Owner I entered into a Purchase and Sale Agreement for the Air Rights (“the Purchase and Sale Agreement”), which Toobian signed on behalf of Owner I.

Despite the execution of the Purchase and Sale Agreement, Toobian-Sani alleges that the defendant Avi Dan ultimately purchased the Air Rights through a separate entity, 210 West 91<sup>st</sup> Street II (“210 West 91 II”), on October 31, 2010. Toobian-Sani explains that Dan acquired the ability to purchase the Air Rights because Bronfman Fisher transferred its interests in the entity Owner I to Dan, without Toobian-Sani’s knowledge and consent. Toobian-Sani claims that 210 West 91 II purchased the Air Rights for \$5 million dollars, which is the same purchase price negotiated by Toobian-Sani.

In 2012, Toobian-Sani commenced this action individually and derivatively on behalf of Owner I. Toobian-Sani asserts fourteen causes of action against the defendants sounding in breach of contract, breach of a joint venture agreement, breach of fiduciary duty, tortious interference with contract and prospective economic advantage, constructive trust, accounting, and a declaratory judgment.

During the course of discovery, the defendants asserted attorney-client privilege over two categories of documents: (1) communications between Bronfman Fisher’s attorneys Wachtel Masyr & Missry LLP (“Wachtel Missry”) and Bronfman Fisher’s purported agent Joseph Kranzler

(“Kranzler”) for the time period prior to January 1, 2008; and (2) communications between Dan’s attorneys Wachtel Missry and Kramer Levin and Dan’s purported agent Joseph Kranzler for the time period between May 1, 2008 and July 31, 2008.

During prior court conferences, the parties informed the Court that a dispute arose over the production of Joseph Kranzler’s email communications. The parties conferred with the Court to determine a procedure by which the parties could obtain access to Kranzler’s email communications while preserving the defendants’ assertion of attorney-client privilege. Upon gaining access to Kranzler’s relevant emails, Toobian-Sani asserts that it discovered communications not previously produced by the defendants.

In the current motion, Toobian-Sani moves to compel disclosure of the documents that the defendants withheld on the basis of attorney-client privilege.

### **Discussion**

The attorney-client privilege applies to confidential communications between attorneys and their clients made in the course of professional employment. CPLR §4503(a). For the privilege to apply, the attorney-client communication “must be made for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship.” *Rossi v. Blue Cross & Blue Shield of Greater New York*, 73 N.Y.2d 588, 593 (1989).

The attorney-client privilege may extend to a communication between a client’s attorney and a person acting as an agent of the client for the purpose of making the subject communication. *Gama Aviation Inc. v. Sandton Capital Partners, L.P.*, 99 A.D.3d 423, 424 (1st Dep’t 2012); *Bew Parking Corp. v. Aphorp Assocs. LLC*, 141 A.D.3d 425, 425 (1st Dep’t 2016).

## I. Privilege Asserted by Bronfman Fisher

Bronfman Fisher asserts attorney-client privilege over communications between its attorneys and its agent Joseph Kranzler for the time period prior to January 1, 2008. Bronfman Fisher argues that Kranzler represented it in connection with the Air Rights project prior to 2008, but not afterward, because its interest in the project ended.

In support of its privilege assertion, Bronfman Fisher submits an affidavit from its general counsel Almog Geva. He states that Kranzler represented Bronfman Fisher in connection with the Air Rights project until the end of 2007. Specifically, Geva states that “to the extent Kranzler communicated with BFREH [Bronfman Fisher] attorneys to obtain or receive legal advice regarding 210 West 91st Street prior to 2007 year end, those communications were properly designated as privileged. To the extent Kranzler did so after 2007 year end, however, those communications were not authorized or made at BFREH’s request, but directly contrary to management’s direction, and BFREH is not asserting privilege over such communications.”

Toobian-Sani contends that Bronfman Fisher may not assert privilege over communications prior to 2008 because it previously stated that it did not get involved in the Air Rights project until 2008. Toobian-Sani points out that Bronfman Fisher stated in its interrogatory responses that it “first became aware of a Project in or about March/April 2008 when some of the details were provided to defendant by Joseph Kranzler.”

Based on the parties’ submissions, I find that an issues of fact exist over whether Kranzler was an agent for Bronfman Fisher in connection with the Air Rights project, for the time period prior to January 1, 2008, and whether Kranzler ceased to be Bronfman Fisher’s agent for the project after that date. I order a hearing on these issues before a Special Referee. Accordingly, Toobian-

Sani's motion to compel production of communications between Kranzler and Bronfman Fisher's attorneys is held in abeyance.

## II. Privilege Asserted by Avi Dan

Dan asserts attorney-client privilege over communications between his attorneys and his agent Kranzler between May 1, 2008 to July 31, 2008. Toobian-Sani argues that Dan may not assert privilege because Kranzler was not Dan's agent for that time period, and no attorney-client relationship existed between Kranzler and Dan's attorneys.

In support of its motion to compel, Toobian-Sani submits deposition testimony from Kranzler. At his deposition, Kranzler testified that he was "[a]bsolutely not" communicating with Bronfman Fisher for the benefit of Dan during the time period before July 31, 2008. In addition, Toobian-Sani submits a July 31, 2008 email from Wachtel Missry attorney Eli Dweck to Kranzler, which purportedly shows that Wachtel Missry did not represent Dan from May 1, 2008 to July 31, 2008. In the email, Dweck writes "I said very clearly that even if everyone is honest and Avi has a buyer for \$1mm that wants to close quickly, Avi can sell without your consent and you get nothing . . . This Eli your friend, not your lawyer."

In opposition, Dan submits a July 31, 2008 letter agreement that he entered into with Kranzler, to demonstrate that Kranzler acted as his agent. Dan also submits an affidavit stating that he hired Wachtel Missry to provide legal services for the Air Rights project in May 2008.

Upon reviewing the evidence submitted, I find that an issue of fact exists over whether Kranzler was an agent for Dan in connection with the Air Rights project, for the time period May 1, 2008 to July 31, 2008.<sup>1</sup> I order a hearing on this issue before a Special Referee. Accordingly,

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<sup>1</sup> I note here that Toobian-Sani argued that the attorney-client privilege does not apply to the communications at issue because Bronfman Fisher and Dan's attorneys never represented Kranzler

Toobian-Sani's motion to compel production of communications between Kranzler and Dan's attorneys is held in abeyance.

**III. Privilege Exceptions and Motion to Strike Answers and for Attorneys' Fees**

Toobian-Sani argues that even if the defendants' documents are protected by attorney-client privilege, the defendants waived privilege by selectively producing communications from certain time periods, or the crime-fraud exception applies because the defendants' breached their fiduciary duties to Toobian-Sani, with their attorneys' assistance. In addition, Toobian-Sani seeks an *in camera* review of the documents listed on the defendants' privilege logs.

I will not address Toobian Sani's arguments regarding selective waiver and the crime-fraud exception until a determination is made on whether the documents are protected by attorney-client privilege. I will also wait to address Toobian-Sani's request to strike the defendants' answers and request for attorney's fees, until I receive a copy of the Referee's report.

In accordance with the foregoing, it is

ORDERED that a hearing is directed to be conducted before a Special Referee in order to determine: (i) whether Kranzler was an agent for Bronfman Fisher in connection with the Air Rights project, for the time period prior to January 1, 2008, and whether he ceased to be Bronfman Fisher's agent for the project after that date; and (ii) whether Kranzler was an agent for Dan in connection with the Air Rights project, for the time period May 1, 2008 to July 31, 2008. The Special Referee is to report to this Court with all convenient and deliberate speed, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR § 4317, the

\_\_\_\_\_ individually. However, I find this argument to be meritless because the attorney-client privilege is asserted here on the basis of Kranzler's role as an agent for Bronfman Fisher and Dan.

Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that plaintiff Toobian-Sani Enterprises, Inc.'s motion to compel, to strike the defendants' answers, and for attorney's fees and costs is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR § 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of the order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50R) for the earliest convenient date; and it is further

ORDERED that, upon receipt of the Special Referee's report, plaintiff Toobian-Sani Enterprises, Inc.'s motion to compel, to strike the defendants' answers, and for attorney's fees and costs shall be disposed of in accordance with the results of the Special Referee's report; and it is further

ORDERED that counsel are directed to appear for a compliance conference at 60 Centre Street, Room 208, on February 8, 2017 at 2:15pm, to discuss the defendants' pending summary judgment motion and status of discovery.

This constitutes the decision and order of this Court.

DATE:

1/20/17

  
SALIANN SCARPULLA, JSC