

Matter of Peerenboom v Marvel Entertainment, LLC

2017 NY Slip Op 31716(U)

August 15, 2017

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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In the Matter of
HAROLD PEERENBOOM,

Petitioner

Index No. 162152/2105

v

DECISION AND ORDER

MARVEL ENTERTAINMENT, LLC

MOT SEQ 002, 003, 004

Respondent.

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NANCY M. BANNON, J.:

I. INTRODUCTION

This is a proceeding pursuant to CPLR 3119(e) in which the petitioner, Harold Peerenboom, seeks to enforce a subpoena served upon the respondent Marvel Entertainment, LLC (Marvel), in aid of a civil action that he commenced against nonparty Isaac Perlmutter in the Circuit Court of Palm Beach County, Florida. Upon remittal from the Appellate Division, First Department, this court concludes that numerous documents in Marvel's possession alleged to be protected from disclosure by the attorney work-product privilege are indeed privileged, while others are not and must be disclosed by Marvel in response to the subpoena.

II. BACKGROUND

Perlmutter, who is Marvel's CEO, had moved pursuant to CPLR

thousands of email messages that he sent or received on Marvel's private email server, and sought to assert numerous privileges as a basis for his motion. Peerenboom countered that Perlmutter, by sending and receiving email messages on a private corporate server that was subject to internal rules of usage that made those email messages the property of Marvel, and permitted Marvel access to the messages, had waived all of those privileges.

By order entered October 17, 2016, this court, inter alia, denied those branches of Perlmutter's motions which were for a protective order prohibiting Marvel from producing those documents in its possession that her alleged were protected from disclosure by virtue of the attorney work-product privilege.

By decision and order dated March 16, 2017, the Appellate Division modified this court's order, and, among other things, granted those branches of Perlmutter's motions which were for a protective order prohibiting disclosure of documents subject to the attorney work-product privilege. The Appellate Division remitted the matter to this court for an in camera inspection of those documents claimed to be subject to that privilege, and a determination as to which of those documents are indeed protected from disclosure. See Matter of Peerenboom v Marvel Entertainment, LLC, 148 AD3d 531 (1st Dept. 2017). Marvel submitted close to 1,000 documents to the court for its review. The court has now completed its in camera inspection of the documents.

III. DISCUSSION

Many of the documents submitted by Marvel are indeed protected by the attorney work-product privilege, which is codified at CPLR 3101(c). The United States Supreme Court has held that the phrase “‘work product’ embraces such items as ‘interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs’ conducted, prepared or held by the attorney.” Kenford Co. v County of Erie, 55 AD2d 466, 470 (4th Dept. 1977), quoting Hickman v Taylor, 329 US 495, 511 (1947); see Central Buffalo Project Corp. v Rainbow Salads, 140 AD2d 943 (4th Dept. 1988). However,

“[n]ot every manifestation of a lawyer’s labors enjoys the absolute immunity of work product. The exemption should be limited to those materials which are uniquely the product of a lawyer’s learning and professional skills, such as materials which reflect his [or her] legal research, analysis, conclusions, legal theory or strategy.”

Hoffman v Ro-San Manor, 73 AD2d 207, 211 (1st Dept. 1980). While the privilege

“extends to experts retained as consultants to assist in analyzing or preparing the case . . . that doctrine affords protection only to facts and observations disclosed by the attorney. Thus, it is the information and observations of the attorney that are conveyed to the expert which may thus be subject to trial exclusion. The work product doctrine does not operate to insulate other disclosed information from public exposure.”

Beach v Touradji Capital Mgt., L.P., 99 AD3d 167, 170 (1st Dept. 2012) (citations and internal quotation marks omitted).

Thus, "the mere fact that a narrative witness statement is transcribed by an attorney is not sufficient to render the statement work product," particularly where a lay person could have transcribed the statement. People v Kozlowski, 11 NY3d 223, 245 (2008); see People v Consolazio, 40 NY2d 446 (1976).

Similarly,

"an investigative report does not become privileged merely because it was sent to an attorney. Nor is such a report privileged merely because an investigation was conducted by an attorney; a lawyer's communication is not cloaked with privilege when the lawyer is hired for business or personal advice, or to do the work of a nonlawyer."

Spectrum Sys. Intl. Corp. v Chem. Bank, 78 NY2d 371, 379 (1991); see People v Belge, 59 AD2d 307 (4th Dept. 1977). Nor are an investigator's notes protected by the work-product privilege where there is no evidence that the investigator conducted any interviews with persons in anticipation of litigation. See CPLR 3101(d); State of N.Y. ex rel. Murray v Baumslag, 134 AD3d 451 (1st Dept. 2015). Although information received by an attorney from third persons may not itself be privileged,

"a lawyer's communication to a client that includes such information in its legal analysis and advice may stand on different footing. The critical inquiry is whether, viewing the lawyer's communication in its full content and context, it was made in order to render legal advice or services to the client."

Spectrum Sys. Intl. Corp. v Chem. Bank, supra, at 379.

Likewise, "[t]he discovery of witnesses, even though the result of the attorney's zeal and investigative efforts, does not

qualify as an attorney's work product." Hoffman v Ro-San Manor, supra, at 211. Even where an investigation is conducted by an attorney, and documents are generated in connection therewith, unless the documents sought to be protected from disclosure indicate that an attorney had conducted any legal research or analysis or rendered any legal opinion about the client's legal position, the work-product privilege is inapplicable. See Ford v Rector, 111 AD3d 572 (1st Dept. 2013); Matter of New York City Asbestos Litig., 109 AD3d 7 (1st Dept. 2013). Indeed, even if the privilege were applicable to certain documents generated in connection with an investigation initiated by an attorney, and the privilege were not waived, a litigant may still be entitled to the materials sought from an investigator if the litigant "has substantial need of [them] in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means." CPLR 3101(d)(2); see Drizin v Sprint Corp., 3 AD3d 388, 389-390 (1st Dept. 2004); Lamitie v Emerson Elec. Company-White Rodgers Div., 208 AD2d 1081 (3rd Dept. 1994).

Applying these well-settled rules, the court concludes that the documents bearing the following identification numbers in the privilege log submitted to the court by Perlmutter, and adopted by Marvel, are subject to the attorney work-product privilege, and are exempt from disclosure by Marvel to Peerenboom: 10-19,

21, 24, 26, 28, 31-32, 38-44, 53-54, 60-68, 71-75, 78-79, 83-85, 87-95, 99, 106-109, 111-113, 128, 130-132, 134-135, 143, 146-151, 155, 157-162, 164, 169-174, 176, 180-181, 191, 194-195, 202-204, 206-212, 221, 224, 227, 229-235, 237, 240-245, 250-252, 258-259, 263-264, 269, 275-278, 281, 289, 292-293, 296-297, 299-301, 313-314, 316, 320, 324-325, 327-329, 331, 338-339, 344-345, 347, 350-351, 353, 361-362A, 364, 367, 370, 372, 376-377, 381, 383-387, 392-393, 404, 407-408, 411-414, 417, 426, 429, 445-446, 449-450, 460-462, 464-466, 472, 483, 484-487, 489, 497, 534-535, 540-543, 583, 597, 614, 617, 625, 627, 717, 719, 817, 823, 880, and 895-896. All other documents claimed to be exempt from disclosure by virtue of the attorney work-product privilege are not exempt, and must be disclosed by Marvel to Peerenboom within 30 days of this order.

IV. CONCLUSION

Accordingly, it is

ORDERED that, upon remittal from the Appellate Division, First Department, those branches of the motions of nonparty Isaac Perlmutter which are for a protective order prohibiting the respondent from disclosing documents alleged to be exempt from disclosure by virtue of the attorney work-product privilege are granted to the extent that a protective order is granted

identification numbers 10-19, 21, 24, 26, 28, 31-32, 38-44, 53-54, 60-68, 71-75, 78-79, 83-85, 87-95, 99, 106-109, 111-113, 128, 130-132, 134-135, 143, 146-151, 155, 157-162, 164, 169-174, 176, 180-181, 191, 194-195, 202-204, 206-212, 221, 224, 227, 229-235, 237, 240-245, 250-252, 258-259, 263-264, 269, 275-278, 281, 289, 292-293, 296-297, 299-301, 313-314, 316, 320, 324-325, 327-329, 331, 338-339, 344-345, 347, 350-351, 353, 361-362A, 364, 367, 370, 372, 376-377, 381, 383-387, 392-393, 404, 407-408, 411-414, 417, 426, 429, 445-446, 449-450, 460-462, 464-466, 472, 483, 484-487, 489, 497, 534-535, 540-543, 583, 597, 614, 617, 625, 627, 717, 719, 817, 823, 880, and 895-896 in the privilege log of Isaac Perlmutter, and those branches of the motions are otherwise denied; and it is further,

ORDERED all other documents for which the attorney work-product privilege is claimed shall be produced and delivered by the respondent to the petitioner within 30 days of this order.

This constitutes the Decision and Order of the court.

Dated: 8/15/17

ENTER:


J.S.C.

HON. NANCY M. BANNON