

Jones v Biloh

2017 NY Slip Op 32908(U)

April 5, 2017

Supreme Court, Erie County

Docket Number: 800130/2016

Judge: Henry J. Nowak

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**STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE**

**CLIFFORD L. JONES, as a member and on
behalf of VELOCITY DEVELOPMENT, LLC, and
CLIFFORD L. JONES, individually,**

Plaintiffs,

vs.

MEMORANDUM DECISION

INDEX NO.: 800130/2016

**JONATHAN R. BILOH, individually and as a
member of VELOCITY DEVELOPMENT, LLC,
and VELOCITY SERVERS, INC.,**

Defendants/Third-Party Plaintiffs,

vs.

CHARLES G. JONES, individually,

Third-Party Defendant.

**HON. HENRY J. NOWAK, J.S.C.
Justice Presiding**

Jonathan R. Biloh and Velocity Servers, Inc. (defendants), have moved for, inter alia, a protective order pursuant to CPLR 3103 requiring Clifford L. Jones, individually and as a member and on behalf of Velocity Development, LLC (plaintiffs), to return certain allegedly privileged documents that were inadvertently produced by defendants and precluding plaintiffs from using those documents in this and other proceedings. Plaintiffs oppose defendants' motion. So that plaintiffs could fully address the issues at hand, including discussing in detail and attaching the documents at issue, the opposing affirmation of plaintiffs' counsel and their memorandum of law were filed under seal (NYSCEF Docs. Nos. 77 and 78). This court

previously ruled on other parts of defendants' motion and reserved decision on the part of the motion seeking an order of protection (*see* this court's order entered as NYSCEF Doc. No. 82).

In conducting document discovery in this action, defendants assert that they produced approximately 666 documents. After producing those documents, defendants subsequently learned that ten of the documents provided to plaintiffs included, as asserted by defendants, privileged communications between Velocity Servers and Barclay Damon. The documents at issue are number stamped as "Biloh 00559-00568." Defendants contend that the documents at issue are protected by the attorney-client privilege, that their disclosure was inadvertent, and that counsel took prompt steps to request the return of the documents so as to demonstrate that there was no waiver of the privilege.

Plaintiffs do not dispute the defendants' assertion that the disclosure of these documents was inadvertent or that counsel acted promptly in requesting their return. Plaintiffs do, however, dispute defendants' contention, that the documents at issue are privileged or that they are not subject to disclosure even if they would otherwise be protected by the attorney-client privilege. Plaintiffs do, however, note that with respect to one of the documents at issue, they consent to a partial redaction of one email (Biloh00568) from the text beginning with "Concerns at my end . . ." up to the signature block. This court will therefore address whether plaintiffs must return or are entitled to retain the subject documents, with the exception of the aforementioned portion of Biloh00568.

Defendants have alleged in their answer to the amended complaint with counterclaims and third-party complaint (answer [*see* NYSCEF Doc. Nos. 12 and 63]) that Biloh signed the operating agreement for Velocity Development, LLC solely as a result of duress and coercion by

plaintiff Jones. Defendants have pleaded that “the alleged Operating Agreement is void and unenforceable in that . . . Biloh executed the Agreement under duress in that . . . Jones threatened to harm . . . Biloh and members of . . . Biloh's family if he refused to execute the Agreement” (Answer ¶108). Defendants further allege that Jones confronted Biloh at his office at 2:30 a.m. on July 6, 2014 and made threats (1) to disrupt the pending lease agreement for 325 Delaware Avenue, (2) to make false statements to re-open a claim against Velocity Servers, Inc. at the Equal Employment Opportunity Commission, and (3) to publicly share intimate photographs of Biloh's mother, with who Jones had previously had a personal relationship (Answer ¶109).

In demanding that Biloh execute the operating agreement, it is alleged that Jones also threatened to tear down Velocity Servers, Inc. (Answer ¶143). Biloh therefore alleges that he executed the operating agreement as a result of “Jones’ threats, and because of previous threats of physical harm made by” Jones (Answer ¶144).

Under New York law, “[a] contract or release, the execution of which is induced by duress, is voidable.” *DiRose v. PK Mgmt. Corp.*, 691 F.2d 628, 633 (2d Cir.1982), *cert. denied*, 461 U.S. 915 (1983); *see also Scientific Holding Co.*, 510 F.2d at 23. However, “the person claiming duress must act promptly to repudiate the contract or release or he will be deemed to have waived his right to do so.” *DiRose*, 691 F.2d at 633–34; *see also Scientific Holding Co.*, 510 F.2d at 23; *International Halliwell Mines, Ltd. v. Continental Copper and Steel Indus., Inc.*, 544 F.2d 105, 108 (2d Cir.1976). If the releasing party does not promptly repudiate the contract or release, [footnote omitted] he will be deemed to have ratified it. A party may ratify a contract or release entered into under duress by “intentionally accepting benefits under the contract,” by “remaining silent or acquiescing in the contract for a period of time after he has the opportunity to avoid it,” or by “acting upon it, performing under it, or affirmatively acknowledging it.” *In re Boston Shipyard Corp.*, 886 F.2d 451, 455

(1st Cir.1989) (internal quotation marks and citation omitted).

VKK Corp. v. National Football League, 244 F.3d 114, 122-123 (2d Cir. 2001).

In paragraph 145 of the answer, defendants allege:

Soon after executing the Operating Agreement, . . . Biloh sought legal advice regarding the enforceability of the Agreement he was coerced into signing. Using the advice he received, on or about August 5, 2014, . . . Biloh contacted . . . Jones by telephone and informed Jones that the Agreement was unenforceable and that Velocity Development, LLC was not an operational company.

In making this allegation, defendants have affirmatively placed the legal advice received by Biloh at issue with respect to the defense of duress (*see Deutsche Bank Trust Co. v. Tri-Links Investment Trust*, 43 A.D.3d 56, 63 [1st Dept. 2007]). “ ‘[A]t issue’ waiver occurs where the party asserting privilege performs an ‘affirmative act’ that ‘put(s) the protected information at issue by making it relevant to the case’ under circumstances where ‘application of the privilege would have denied the opposing party access to information vital to his defense’ ” (*id.* at 64). Defendants are entitled to know whether the legal advice received by Biloh supports or potentially undermines the defense of coercion in this action.

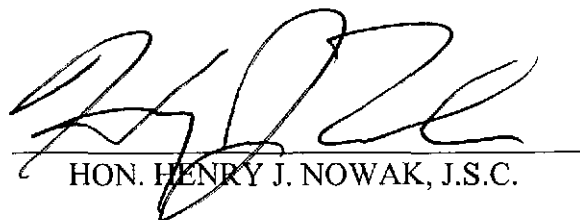
Even without the express allegations in paragraph 145 of the answer regarding legal advice, Biloh would still have to offer testimony and other evidence as to whether he acted promptly to repudiate the operating agreement otherwise he will be deemed to have ratified it. Any evidence that Biloh remained silent or acquiesced in the agreement for a period of time after he had the opportunity to repudiate it will undermine if not completely vitiate the defense of duress. Notably, at least one of the documents at issue would seem to be inconsistent with a

claim that defendants promptly repudiated the agreement.¹ What Biloh said and did, including who he spoke to, after he was allegedly coerced into signing the operating agreement, is highly relevant, if not essential to both defendants' ability to assert the defense of duress as well as plaintiffs' ability to counter that defense. This necessarily includes the nature and scope of the legal advice that Biloh requested and received with respect to the operating agreement. Thus, plaintiffs have established a substantial need for this information in order to contest defendants' claims of duress (*see Orco Bank v Proteinas Del Pacifico*, 179 A.D.2d 390, 391 [1st Dept. 1992]). With that said, if defendants withdrew the defense of duress, it seems likely that none of the documents at issue would be relevant to the issues remaining in this action.

For these reasons, defendants' motion for a protective order is denied with the exception of the partial redaction of Biloh00568 referenced above.

Submit order.

DATED: April 5, 2017



HON. HENRY J. NOWAK, J.S.C.

¹ The affirmation of plaintiffs' counsel and their memorandum of law were filed under seal and this filing included the documents at issue. Therefore, this court will not quote from or describe the document that is referred to.