

Yes Contr., Inc. v CLST Enters. LLC
2018 NY Slip Op 32044(U)
August 10, 2018
Supreme Court, New York County
Docket Number: 654078/2015
Judge: Gerald Lebovits
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**NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7**

YES CONTRACTING, INC.,

Index No.: 654078/2015

DECISION/ORDER

Motion Seq. 003

Plaintiff,

-against-

CLST ENTERPRISES LLC, CARL L. THOMSON JR.,
MARGARET MARY THOMSON, STERLING NATIONAL
FUNDING CORP., STERLING NATIONAL BANK and
JOHN DOE "1" through JOHN DOE "10", defendants being
unknown to plaintiff and having or claiming to have an interest
in or lien upon the improvement located at Borough of
Manhattan, Block 1390, Lot 14, more commonly known as 19
East 75th Street, New York, New York 10021,

Defendants.

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing defendants' motion for protective order and plaintiff's cross-motion to compel.

Papers

NYSCEF Documents Numbered

Defendants' Notice of Motion	74
Defendants' Affirmation in Support of Motion	75
Plaintiff's Affirmation in Opposition to Motion	79
Plaintiff's Notice of Cross-Motion	85
Plaintiff's Affirmation in Opposition to Motion and in Support of Cross-Motion	86

Welby, Brady & Greenblatt, LLP, White Plains, New York (Frank Gramarossa of counsel), for plaintiff.

Bukh Law Firm, PLLC, Brooklyn, New York (Farrukh Nuridinov of counsel), for defendants CLST Enterprises LLC, Carl. L Thomson Jr., and Margaret Mary Thomson.

Gerald Lebovits, J.

Background

Plaintiff served defendant Sterling National Bank (SNB) with a supplemental notice for discovery and inspection, demanding SNB to produce emails referenced in motion sequence I and identified as *in camera* Exhibits A, C," E, and H in support of defendants' (CLST Enterprises LLC, Margaret Mary Thomson, and Carl L. Thomson Jr.) former counsel's application for an order to withdraw as counsel.

Margaret Mary Thomson or Carl L. Thompson Jr. (collectively, the Thomsons) sent their former counsel and the former counsel's firm the emails containing allegations against the former counsel and the former counsel's firm, Klein Slowik, PLLC. (KSP). Specifically, *in camera* Exhibits A, "C," "E," and "H" include allegations that the former counsel mishandled this action, was grossly incompetent, and committed professional misconduct, legal malpractice, and so forth. All these emails were carbon copied to codefendant SNB. In addition, the emails in *in camera* Exhibit E and H were sent to other non-parties.

In response to plaintiff's request, defendants, CLST Enterprises LLC, Margaret Mary Thomson, and Carl L. Thomson Jr., move for a protective order, requesting this court to prohibit plaintiff from seeking the discovery/production of the same documents. Plaintiff cross-moved under CPLR 3124 to compel defendants and SNB to produce all communications between and among any named party to this action, including those emails and all other outstanding discoveries.

This court will address plaintiff's cross-motion before addressing defendants' motion. Plaintiff's cross-motion to compel is dispositive.

Plaintiff's Cross-Motion

The issue in this cross-motion is whether the email communications among the Thomsons, their former counsel, and counsel's firm can be protected under the attorney-client privilege, even though those emails were disclosed to third parties, including co-defendant SNB. Because defendants fail to prove that those emails are irrelevant and that the common-interest doctrine applies to this case, this court holds that defendants must produce those emails.

As a general rule, "the attorney-client privilege applies only to confidential communications with counsel, not to information obtained from or communicated to third parties, because [such communications] are not deemed confidential." (*Ambac Assurance Corp. v Country Wide Home Loans, Inc* 27 NY3d 616, 624 [2016] [internal citations and quotation marks omitted].) Thus, email communications that are carbon copied to a third party cannot be protected. (*Matter of Morgan v New York State Dept. of Environmental Conservation*, 9 AD3d 586, 587-588 [3d Dept 2004] ["[D]ocumentary communications are not confidential if copies thereof are sent to third parties."] [internal citations omitted]; *Netherby Ltd. v G.V. Trademark Invs.*, 261 AD2d 161, 161 [1st Dept 1999] [holding that documents disclosed to third parties not in relationship with defendant are not protected under the attorney-client privilege].)

The common-interest doctrine is an exception to these rules. Specifically, "where two or more clients separately retain counsel to advise them on matters of common legal interest, the common interest exception allows them to shield from disclosure certain attorney-client communications that are revealed to one another for the purpose of furthering a common legal interest." (*Ambac*, 27 NY3d at 625.) This doctrine applies only if (1) the third party shares a common legal interest with the client, (2) the communication is made in furtherance of that common legal interest, and (3) the communication relates to litigation, either pending or anticipated. (*See Ambac*, 27 NY3d at 628; *Kenyon & Kenyon v SightSound Tech.*, 151 AD3d 530, 531 [1st Dept 2017] ["[T]he common interest doctrine preserves the privileged status of an

attorney-client communication disclosed to a third party only if the communication was shared in furtherance of a common legal interest in pending or reasonably anticipated litigation.”] [internal citations and quotation marks omitted].) Also, this doctrine applies only to “codefendants, coplaintiffs or persons who reasonably anticipate that they will become colitigants.” (*Ambac*, 27 NY3d at 628.)

When plaintiff demanded that codefendant produce the emails, defendants moved for a protective order to prohibit any party to this action to produce the emails, arguing that (1) this court’s order dated March 19, 2018, has resolved the issue of discovery of the emails, (2) the email communications are irrelevant to plaintiff’s claim, and (3) the email communication among the Thompson, defendants’ former counsel, KSP, and third parties are protected by the attorney-client privilege under the common-interest doctrine.

Those arguments are without merit. As to defendants’ first argument, this court’s order dated March 19, 2018, did not decide whether defendants themselves must produce the emails; it decided only not to compel prior counsel to disclose possibly privileged information. Furthermore, the order was without prejudice to plaintiff’s seeking relief in some other manner. Thus, defendants’ first argument is without merit.

Also, these emails are relevant to this case. That the emails are primarily related to KSP’s legal advice and its professional capacity to address implies that those emails necessarily contain relevant information pertinent to legal issues in this case. Accordingly, these request for disclosure of the emails is “reasonably calculated to lead to the discovery of information bearing on the claims.” (CPLR 3101 [a].)

Finally, with respect to defendants’ common-interest doctrine argument, *in camera* exhibits A, C, E, and H are not protected either because defendants fail to meet the first and second elements of the common-interest doctrine. Specifically, defendants argue only that the common legal interest between them and the codefendant SNB is to dismiss this case. Further, defendants do not explain how the email communications are related to furthering their common legal interest. As plaintiff points out, codefendant SNB stated that it has not coordinated its strategy, exchanged privileged information, or mounted a common claim or defense with defendants and acknowledged that it does not regard itself as having a common interest with defendants in this action. (Affirmation of Tyler Kandel dated April 25, 2018, ¶4.) Because defendants fail to establish that the common-interest doctrine applies to this case, the emails cannot be protected as it was disclosed to third parties.

In addition, the common interest doctrine does not apply to *in camera* exhibits E and H because the documents were carbon copied to third parties other than codefendants SNB and Sterling National Funding Corp. Further, defendants do not explain whether these non-parties are related to this action; nor do defendants raise other exceptions to the general rule of the attorney-client privilege. Thus, *in camera* exhibits E and H are not protected under the attorney-client privilege.

Codefendant SNB already conceded that, in effect, the common-interest doctrine does not apply to this case and therefore that SNB should also be compelled to produce the documents.

This court also grants plaintiff's other requests to compel defendants to produce the remaining discovery items.

Defendants must produce the remaining discovery items: continuation and conclusion of the deposition of Carl L. Thomson Jr.; deposition of Margaret Mary Thomson; non-party deposition of an individual identified as "Mr. Fernandez" during the deposition of Carl L. Thomson Jr.; post-deposition demands for production (15 days after conclusion of each deposition to serve demands, and 30 days thereafter to provide responses); and inspection of the premises known as 19 East 75th Street, New York, New York. Depositions must be completed within 90 days from service of this decision and order. The parties have until December 14, 2018, to file the note of issue.

Defendants' Motion

For the foregoing reasons, defendants' motion for protective order is denied.

Accordingly, it is

ORDERED that defendant's motion is denied and plaintiff's cross-motion is granted to the extent that CLST Enterprises, LLC, Carl L. Thomson Jr., Margaret Mary Thomson, and Sterling National Bank must produce to plaintiff *in camera* exhibits A, C, E, and H in support of former counsel's application to withdraw as counsel within 15 days; and it is further

ORDERED that defendants must produce the remaining discovery items: continuation and conclusion of the deposition of Carl L. Thomson Jr.; deposition of Margaret Mary Thomson; non-party deposition of an individual identified as "Mr. Fernandez" during the deposition of Carl L. Thomson Jr.; post-deposition demands for production (15 days after conclusion of each deposition to serve demands, and 30 days thereafter to provide responses); and inspection of the premises known as 19 East 75th Street, New York, New York. Depositions must be completed within 90 days from service of this decision and order; the parties have until December 14, 2018, to file the note of issue; and it is further

ORDERED that the parties appear for a compliance conference on November 28, 2018, at 10:00 a.m., in Part 7, room 345, at 60 Centre Street.

Dated: August 10, 2018



J.S.C.

HON. GERALD LEBOVITS
J.S.C.